australian council of trade unions

Submission on the EU Framework Agreement

ACTU Submission to the Joint Standing Committee on Treaties on the trade aspects of the Framework Agreement between the European Union and its member states and Australia

ACTU Submission, 26 April 2018
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INTRODUCTION

The ACTU welcomes the opportunity to make a submission to this JSCOT inquiry into the EU Framework Agreement.

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.

We welcome the commitments in the framework agreement to implement democratic principles, labour and human rights, and inclusive and sustainable growth for human development in any future trade agreement.

Our submission is focused on Title IV, Cooperation on Economic and Trade Matters, and sets out principles which should guide the parties in the event that negotiations commence for an EU-Australia free trade agreement.

The ACTU believes that Australia's approach to trade is broken and needs to change. The single most important objective of trade policy should be to deliver benefits to the Australian economy, communities and working people by increasing opportunities for local businesses and creating local jobs, whilst allowing developing countries the right to develop.

Over recent decades, politics and policy making have been dominated by the neoliberal idea that what is best for big business is best for Australian communities and workers, based on its tenets of free markets without government intervention, private ownership of public services, individual but not shared responsibility, and maximization of company and shareholder wealth. Neoliberalism decrees that if we design policy to increase the profits of big business, the benefits will trickle down and improve wages and conditions for everyday working Australians. The Government's policies on trade are no exception.

The ACTU supports trade and multilateral negotiations over preferential bilateral and regional negotiations that discriminate against other trading partners. We are particularly concerned that the current agreement making process undermines our democracy and our government is not listening to the concerns of unions and the broader public.

This submission argues against the inclusion of labour mobility clauses, the ISDS mechanisms, opening Australian services to greater privatisation and the clauses stopping government from being able to support local business through local procurement.

1. Labour mobility

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. These are core issues for unions.

That is why unions will continue to campaign and advocate strongly in debates over the labour mobility provisions in trade agreements and the movement of temporary overseas workers.

Australian unions are long-standing supporters of strong, diverse and non-discriminatory immigration programs. Our clear preference is that the migration program occurs primarily through permanent migration where workers enter Australia independently. This gives migrants a greater stake in Australia's long-term future and it removes many of the 'bonded labour' type problems that can arise with temporary migration where a worker is dependent on their employer for their sponsorship and ongoing prospects of staying in Australia. As highlighted in the recent Senate Inquiry into the temporary work visa program and ongoing media coverage of cases such as at 7-Eleven, Caltex and the hospitality industry, exploitation of temporary overseas workers is rife.

We accept there is a role for some level of temporary migration to meet critical short-term skill needs, provided there is a proper, rigorous process for assessing and managing this.

However 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 high and youth unemployment is in double digits.

The ACTU does not support the inclusion of the temporary movement of worker provisions in trade agreements. For companies looking to bring in executives and senior management on a temporary basis our migration system should have suitable process and pathways. For lower skilled occupations evidence abounds that those brought in under temporary workers schemes are vulnerable to exploitation.

Violations of Australian minimum work standards included in the Senate Committee Inquiry report *A National Disgrace: The Exploitation of Temporary Work Visa Holders* range from wage theft, illegal hours of work and lack of health and safety through to sexual and psychological abuse, debt bondage and passport theft[1].

The expansion of temporary worker arrangements through trade agreements increases the numbers of temporary workers vulnerable to exploitation and should not be a feature of trade agreements.

Recommendation

[1] Education and Employment References Committee inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, 2016 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa

That Australia makes no commitments for the extension of temporary movement of workers in the Australia-EU free trade agreement.

2. Government Procurement

The ACTU believes that Australian procurement policy should have policies with more flexibility to consider broader definitions of value for money, which recognise the value of supporting local firms in government contracting decisions. This includes giving Australian companies preference in providing goods and services as a way of creating and sustaining local employment but also ensuring that Australia is not left bereft of important industries such as manufacturing. We should follow the example of trading partners like South Korea and the US.

Several Australian states have recently developed such policies, and the recent Joint Select Committee inquiry into changes to Commonwealth procurement guidelines recently recommended that the Australian government should not enter into any commitments in trade agreements that undermine its ability to support Australian businesses[2].

Recommendation

That the Australian government should not enter into any commitments on government procurement that undermines its ability, or the ability of state governments, to support local Australian businesses.

3. Investor-State Dispute Settlement Processes (ISDS)

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 special rights to foreign investors to sue governments for damages in an international tribunal.

These 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 "harmed" their investment.

Many experts including Australia's High Court Chief Justice French and the Productivity Commission have noted that ISDS is not independent or impartial and lacks the basic standards of national legal systems. ISDS has no independent judiciary. Arbitrators are chosen from a pool of investment law experts who can continue to practice as investment law

[2] Joint Select Committee Inquiry into the Commonwealth Government Procurement Framework, 2017 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Government_Procurement/completed_inquiries

advocates. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest[3].

Even if a government wins the case, defending it can take years and cost tens of millions of dollars The US Philip Morris tobacco company moved some assets to Hong Kong and used the Hong Kong-Australia investment agreement to sue the Australian government over its 2011 plain packaging legislation because there was no ISDS clause in the Australia-US Free Trade Agreement. It took over four years and reportedly cost $50 million in legal fees for the tribunal to decide the threshold issue that Philip Morris was not a Hong Kong company.

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.

There are growing numbers of cases against health, environment, Indigenous land rights and other public interest laws.

More recently, the European Court of Justice found that ISDS has an adverse effect on the autonomy of EU law, and is therefore 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[4]. This raises the question of whether the EU itself will be in a position to support the inclusion of ISDS in the Australia-EU trade agreement.

Recommendation

ISDS should not be included in the Australia-EU free trade agreement.

4. The agreement making process

The current Australian trade agreement process is secretive and undemocratic, with the text not made public until after the decision to sign it. The decision to sign agreements is made by Cabinet before they are tabled in Parliament and examined by the Joint Standing Committee on Treaties. The National Interest Analysis presented to the committee is not independent but is conducted by the same department which negotiated the agreement. Parliament has no ability to change the agreement and can only vote on the implementing legislation.

[3] French, R.F Chief Justice "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 Productivity Commission Trade and Assistance Review 2013-14, June 2015 http://www.pc.gov.au/research/recurring/trade-assistance/2013-14

[4] Court of Justice of the European Union, *The arbitration clause in the Agreement between the Netherlands and Slovakia on the protection of investments is not compatible with EU law*, March 6, 2018, Luxembourg https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180026en.pdf

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[5]. 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[6] (Senate Foreign Affairs and Trade Committee, 2015, EU, 2015).

Recommendations:

• 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 the draft legal text, 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 enquiry 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 before signing, and after a review of the text and the independent

[5] Productivity Commission, *Bilateral and Regional Trade Agreements Final Report*, Canberra, December 2010 https://www.pc.gov.au/inquiries/completed/trade-agreements/report

[6] Senate Standing Committee on Foreign Affairs Defence and Trade *Blind agreement: reforming Australia's treaty-making process*, May, 2015 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report

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.

5. Trade in services

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

To the extent that services are included in any trade agreement, a positive list rather than a negative list system should be used. A positive list allows governments and the community to know clearly what is included in the agreement, and therefore subject to the limitations on government regulation under trade law. It also avoids the problem of inadvertently including in the agreement future service areas, which are yet to be developed. This means that governments retain their right to develop new forms of regulation needed when circumstances change, as has occurred with the need for financial regulation following the Global Financial Crisis, and governments' responses to climate change and may be required after the current Royal Commission into financial services[7].

Regulation of services should not be treated as if it were a tariff, to be frozen at current levels and not to be increased in future. Governments should not be prevented from addressing market failures like the need to re-regulate the Australian TAFE system after the failure of deregulation and privatisation[8].

The inclusion of essential services, like health, water and education in trade agreements limits the ability of governments to regulate these services by granting full 'market access' and 'national treatment' to multinational service providers of those services. Governments should maintain the right to regulate to ensure equitable access to essential services, service standards and staffing levels, and to meet social and environmental goals.

Public services should be clearly excluded from trade agreements. This requires that public services are defined clearly. Even when essential services are not publicly provided, governments need clear rights to regulate them to ensure equitable access to them, and to meet other social and environmental goals.

Recommendations

- **The agreement should use a positive list to identify which services will be included in an Agreement.**

[7] Stiglitz J., *In 2016, let's hope for better trade agreements*, the Guardian, January 10, 2016 http://www.theguardian.com/business/2016/jan/10/in-2016-better-trade-agreements-trans-pacific-partnership

[8] Conifer, D., *Parliament passes bill to scrap troubled VET loans, overhaul vocational education sector,"* ABC News online, December 2, 2016 http://www.abc.net.au/news/2016-12-02/parliament-passes-bill-to-scrap-troubled-vet-loans/8085860

- **Public services should be clearly and unambiguously excluded, and there should be no restrictions on the right of governments to provide and regulate services in the public interest.**
- **Government should retain the right to regulate all services to meet service standards, health, environmental or other public interest objectives.**

6. Intellectual property

Intellectual property rights as expressed in patent and copyright law are monopolies granted by states to patent and copyright holders to reward innovation and creativity. However, intellectual property law should maintain a balance between the rights of patent and copyright holders and the rights of consumers to have access to products and created works at reasonable cost. This can be a matter of life or death in the case of affordable access to essential medicines**.** Trade agreements should not be the vehicle for extension of monopolies which contradict basic principles of competition and free trade[9].

The 2010 Productivity Commission Report on Bilateral and Regional Trade Agreements. concluded that, since Australia is a net importer of patented and copyrighted products, the extensions of patents and copyright imposes net costs on the Australian economy. The Commission also concluded that extension of patent and copyright can be very costly especially for developing countries in areas like access to medicines[10].

Based on this evidence, the Productivity Commission Report recommended that the Australian government should avoid the inclusion of intellectual property matters in trade agreements. This conclusion was reinforced by a second report in 2015.

More recently, there have been attempts to use trade agreements to extend another monopoly known as data protection. Data protection is a separate and additional type of monopoly, which applies to the clinical trial data submitted to regulatory agencies like the Therapeutic Goods Administration to demonstrate the safety and efficacy of medicines. During the period of data protection, the competitors who wish to manufacture cheaper versions of the medicine when the patent expires cannot use the clinical trial data from the original medicine to obtain marketing approval for their cheaper version. This effectively delays the availability of cheaper versions. The current legal standard for data protection in Australia is five years[11].

Pharmaceutical companies have argued for longer periods of data protection for biologic medicines, used to treat cancer and other serious diseases, which cost tens of thousands of dollars for a course of treatment. Clauses in the original Trans-Pacific Partnership Agreement (TPP-12) would have effectively increased data protection from five to eight years, resulting in delayed availability of cheaper versions of these medicines. Studies have shown that such

[9] Stiglitz J., *Don't trade away our health*, News York Times, January 15, 2015 http://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html?_r=0

[10] Productivity Commission 2010, op.cit

[11] Gleeson D., et al, *Proposals for extending data protection for biologics in the TPPA: potential consequences for Australia*. Submissions to the Department of Foreign Affairs and Trade, 15 December, 2015 http://dfat.gov.au/trade/agreements/tpp/negotiations/Documents/tpp_sub_gleeson_lopert_moir.pdf

delays could have cost the Pharmaceutical Benefits Scheme hundreds of millions of dollars a year[12].

Recommendation

There should be no extension of monopolies on patents, data protection or copyright in the Australia-EU free trade agreement.

7. Internationally-recognised labour rights

The Australian government should ensure that trade agreements include commitments by all parties to implement and enforce 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), and
- the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111).

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

Recommendation

The agreement should require the adoption and implementation of agreed international standards on labour rights, enforced through the government-to-government dispute processes contained in the agreement.

[12] Gleeson D., et al, op.cit

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