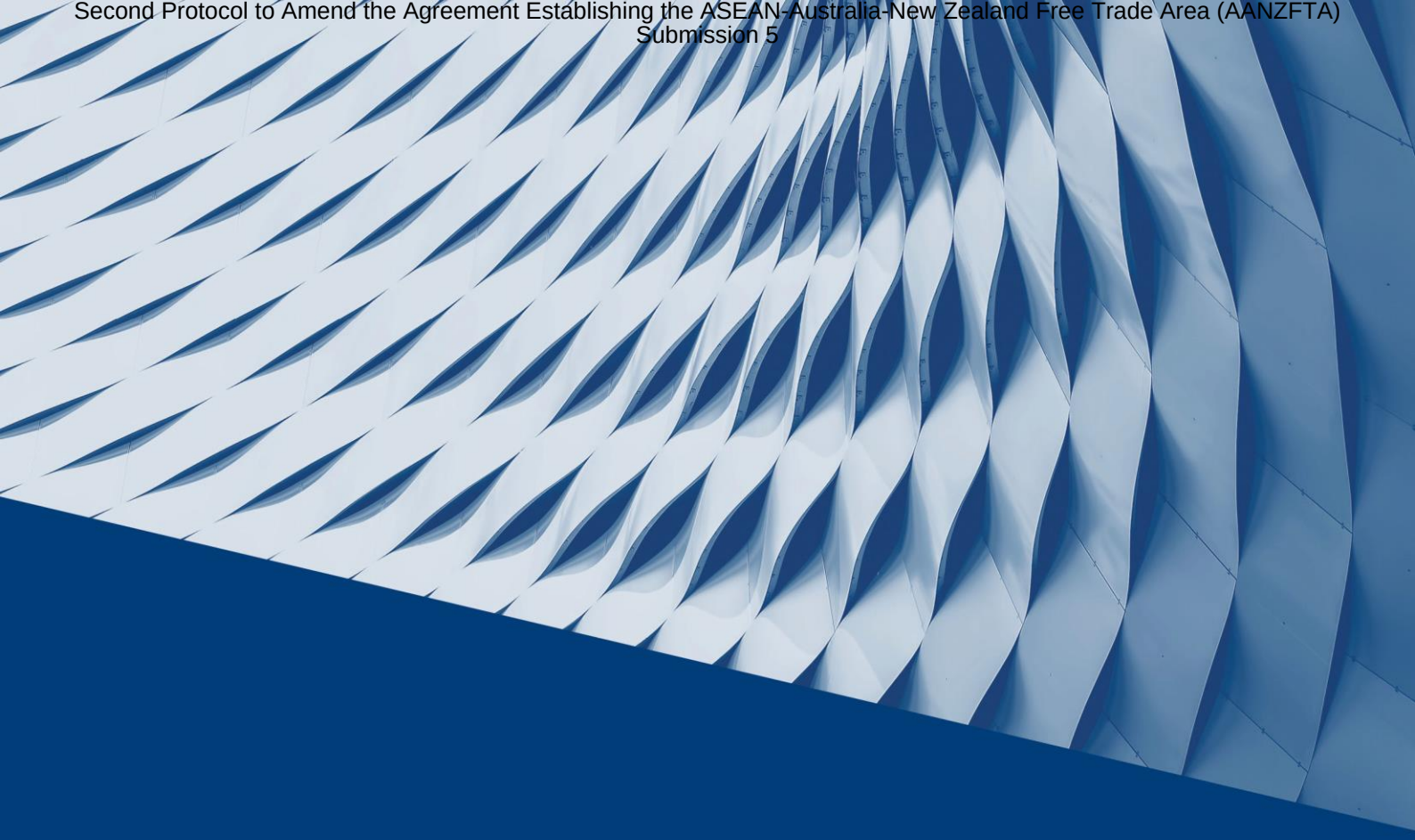

Second Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)

Submission by the Australian Council of Trade Unions to the Joint Standing Committee on Treaties (JSCOT)

ACTU Submission, 19 January 2024
ACTU D. No 02/2024

ACTU
australian council of trade unions

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Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

We need a new approach to trade

The ACTU supports fair trade as a vehicle for economic growth, job creation, tackling inequality and raising living standards. The most important objective of trade policy should be to deliver benefits to workers, the community and the economy by increasing opportunities for local businesses, creating quality local jobs, and protecting public services. The benefits of trade must be shared among our community and promote equitable development abroad. We have longstanding concerns, however, about a trade agenda which places the needs of business above all else - where businesses and investors enjoy significant rights with few responsibilities - jeopardising local jobs, undermining working conditions, and compromising the ability of current and future Australian Governments to regulate in the public interest.

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: they increasingly 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.

The *process* for negotiating trade agreements must be reformed: trade agreements must be subject to proper scrutiny and unions, civil society and business stakeholders should have the opportunity for genuine input into the negotiations on behalf of those they represent. Trade agreement negotiations are currently conducted behind closed doors, and Australia lags behind other likeminded countries when it comes to transparency and public scrutiny of agreements.

The *content* of our trade agreements must also be reformed: for too long Australia has put forward negotiating priorities that only benefit business and are detrimental to the interests of workers and our communities here in Australia, and abroad. Unions have long called for the Australian Government to not sign up to trade agreements that contain damaging provisions such as Investor-State Dispute Settlement (ISDS) - which enables private investors to sue the Government for changes to laws and regulation that may impinge on their profits - and to ensure that agreements they sign up to have enforceable labour standards to protect workers' rights, among other things.

It is clear Australia's approach to negotiating trade agreements has not served the community as a whole. We are calling for a reformed trade policy that puts the Australian community at the centre – workers and our communities must be genuinely consulted on trade agreements, and our Parliament must have democratic oversight.

A case in point is this upgrade to the AANZFTA being considered by the Joint Standing Committee on Treaties. This is the first opportunity for any public scrutiny of this agreement – indeed, it is only now that the union movement is being consulted on this proposed agreement. The ACTU has made a comprehensive submission to the Joint Standing Committee on Trade and Investment Growth inquiry that is currently underway into Australia's approach to negotiating trade and investment agreements. We make a number of recommendations for legislating reforms to the process and content of Australia's trade negotiations to improve democratic accountability and the quality of our trade agreements that we urge the Government to implement as a matter of priority before progressing the ratification of this (or any other) trade agreement.

AANZFTA

The Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) entered into force in January 2010 for Australia. It is a regional free trade agreement with the ten ASEAN Member States (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam), Australia and New Zealand. The Agreement has provisions for regular reviews, and upgrade negotiations were launched in 2020, with negotiation rounds starting from 2021 and concluding on 13 November 2022 at the 40th and 41st ASEAN Summit in Phnom Penh, Cambodia. Negotiations on the amendment were finalised in June 2023.

An objective of the upgrade negotiations was to bring the AANZFTA into parity with the RCEP (Regional Comprehensive Economic Partnership) as a base line. The fifteen RCEP member countries are Australia, Brunei Darussalam, Cambodia, China, Indonesia, Japan, Lao PDR, Malaysia, Myanmar, New Zealand, the Philippines, Republic of Korea, Singapore, Thailand and Vietnam The Australian union movement voiced its strong opposition to Australia ratifying RCEP due to a number of concerning provisions and the omission of labour standards, and because the Australian Government sought to ratify RCEP – of which Myanmar is a party - following the illegal military coup that took place on 1 February 2021.

The amended AANZFTA amends a number of chapters to be consistent with RCEP, however goes further than RCEP by retaining Investor State Dispute Settlement (ISDS) provisions. These provisions are currently being used to sue the Australian Government for over $400 billion, and it

is unacceptable that the Australian Government has failed to use this opportunity to immediately amend these provisions. In addition, the upgrade agreement contains provisions on services and the movement of natural persons that undermine the ability of the Government to regulate in the national interest.

Recommendation: Australia should not ratify the Second Protocol amending the *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area* (AANZFTA) in its current form.

Investor-State Dispute Settlement

The Australian Union movement has long opposed ISDS provisions, which give additional legal rights to corporations to enable them to sue governments for compensation if they can argue that a change in law or policy will impinge on their future profits. These provisions restrict the ability of governments to regulate in the public interest and impose an unnecessary cost burden on governments to defend themselves in ISDS cases.

Reviewing ISDS clauses in Australia's trade agreements is urgent, as demonstrated by Clive Palmer's current ISDS cases against the Australian Government: Singapore based Zeph Investments seeking $296bn for an alleged breach of the AANZFTA after he lost a high court appeal against Western Australia's decision to prevent Palmer from seeking compensation over his Pilbara iron ore project. His second case for $41.3bn alleges Australia breached the AANZFTA in relation to the refusal of coal exploration permits at his Waratah coal mine in Queensland, which were refused for environmental reasons. He has also launched a third case under the ISDS provisions in the Singapore-Australia FTA claiming a further $69 billion for the same Waratah coal mine issue, bringing his total claims against the Australian Government to over $410 billion.

Even if these cases are unsuccessful, the Australian Government will have to spend years and millions of dollars defending them, as was the case with the Philip Morris plain packaging tobacco case. Philip Morris Asia challenged the *Tobacco Plain Packaging Act 2011*, part of a range of measures designed to reduce the rate of smoking in Australia, under an obscure FTA: the *1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments* which contains ISDS provisions.

The arbitration was conducted by a tribunal composed of three arbitrators, who issued a unanimous decision in December 2015 agreeing with the Australian Government's position that the tribunal had no jurisdiction to hear Philip Morris Asia's claim. The tribunal found that Philip Morris Asia's claim was an abuse of process because Philip Morris Asia acquired an Australian

subsidiary, Philip Morris (Australia) Limited, for the purpose of initiating arbitration under the Hong Kong Agreement challenging Australia's tobacco plain packaging laws. In March 2017 the Tribunal issued the Award on Costs to the parties. It was revealed later through a freedom-of-information request that Australia's external legal fees and arbitration costs amounted to almost $24 million, with Philip Morris only having to pay half of Australia's legal costs, which shows that even when Governments win ISDS cases, the cases take years and cost millions in taxpayer dollars.[1]

We welcome Trade Minister Farrell's commitment that new agreements will not contain Investor State Dispute Settlement clauses and that the Government will review ISDS in existing agreements.[2] Scrapping ISDS is essential to enable Governments to regulate to protect the environment, public services, workers' rights, and public health. Given the dire impacts ISDS can have on the Government's ability to regulate, particularly in developing countries, and the chilling effect the threat of ISDS has on regulation - we urge the Australian Government to codify this commitment in legislation to ensure that future Australian Governments cannot include ISDS in agreements. The Australian Government should immediately review all ISDS commitments in existing agreements, seeking to remove them from bilateral agreements, and negotiate side letters for regional agreements to exclude Australia from ISDS provisions. This has already occurred between Australia and New Zealand in relation to the Comprehensive and Progressive Trans Pacific Partnership (CPTPP) agreement, where the Governments negotiated a side letter in 2018 excluding the use of CPTPP ISDS provisions between Australia and New Zealand.[3]

Given the ISDS cases already on foot against Australia under this agreement, it is unacceptable that ISDS was excluded from review in the amended AANZFTA. The National Interest Analysis notes that 'Australia could not unilaterally remove ISDS from AANZFTA', and notes that under the package of outcomes, Parties will review AANZFTA's existing ISDS mechanism through a work program that will commence 18 months after the entry into force of the upgraded AANZFTA, and will take a further 12 months to complete, leaving a lengthy period in which further claims could arise against Australia.

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[1] Philip Morris ISDS case information sourced from Attorney General's Department, 'Tobacco plain packaging – investor-state arbitration', https://www.ag.gov.au/international-relations/international-law/tobacco-plain-packaging-investor-state-arbitration

[2] Minister for Trade and Tourism, Senator the Hon Don Farrell, 'Trading our way to greater prosperity and security', 14 November 2022 https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security

[3] DFAT, 'Agreement between Australia and New Zealand regarding Investor State Dispute Settlement, Trade Remedies and Transport Services', 3 March 2018 https://www.dfat.gov.au/sites/default/files/sl15-australia-new-zealand-isds.pdf

Although the National Interest Analysis notes, under a consideration of benefits and costs of signing that 'some stakeholders held concerns on the Investor-State Dispute Settlement mechanism, which is still active in AANZFTA' there is no mention of Clive Palmer's two ISDS cases currently pending against Australia under the AANZFTA! This is a glaring omission - as we have seen from the Philip Morris example, even in ISDS cases decided in favour of the state, there are significant costs involved in defending a case. The Australian Government must expedite the review of ISDS in the AANZFTA to remove ISDS provisions as a matter of priority.

Labour rights

We welcome the inclusion of a new Trade and Sustainable Development chapter which will facilitate enhanced cooperation on labour rights, women's economic empowerment and environmental protection, which was absent from the original AANZFTA, as a step forward. The commitments in this chapter are, however, weak and unenforceable. The chapter makes no specific reference to ILO standards or UN agreements, and merely notes that Parties 'recall their commitment to the multilateral environmental and labour agreements to which they are individually a party'.

This falls far short of the Labor party's own policy in this area, which calls for enforceable commitments to International Labour Standards. It also falls short of the stronger labour rights provisions in the CPTPP, which includes four ASEAN members (Brunei, Malaysia, Singapore and Vietnam). The CPTPP includes reference to the ILO Declaration of Fundamental Rights at Work and has dispute process specific to the labour chapter.

The labour rights provisions in the AANZFTA are also weaker than those agreed to in the recently concluded Indo-Pacific Economic Framework (IPEF) Pillar 2 agreement on Supply Chains, which Australia is a party to along with ASEAN countries Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam. The Supply Chain agreement establishes a Labour Rights Advisory Board to support greater transparency of labour practices in supply chains in the region, and more broadly, the Australian Government committed $25 million in the 2023-24 budget for capacity building and technical assistance across all streams of the IPEF work agenda.[4]

[4] Minister Farrell, 'IPEF Supply Chains Agreement – more resilient supply chains for uncertain times', 28/05/23 https://www.trademinister.gov.au/minister/don-farrell/media-release/ipef-supply-chains-agreement-more-resilient-supply-chains-uncertain-times

Several parties to AANZFTA are routine violators of workers' rights, with Myanmar and the Philippines ranked among the 10 worst countries for workers in the International Trade Union Confederation's 2023 Global Rights Index.[5] Cambodia, Indonesia, Laos, Malaysia, Thailand are all ranked as among the worst countries for workers, with no guarantee of rights. Brunei is not ranked under the Global Rights Index as there are no independent unions operating in the country, and significant restrictions on freedom of association and collective bargaining.[6] Given the poor record of a significant number of AANZFTA members on labour rights, this commitment on labour rights must be strengthened, to ensure the provisions in this chapter are specific and enforceable, and the Australian Government should commit resources for capacity-building to assist partners in meeting those commitments.

Myanmar

Since the Myanmar military coup of 1 February 2021 against the democratically elected government, over 4300 people have been killed by the junta, over 25,000 arrested, 1.9 million internally displaced people, and 18 million in need of humanitarian assistance. Trade union members have been on the front lines of the civil disobedience movement since the start of the coup, and the junta has responded by declaring 16 labour organisations illegal; raiding trade union offices and homes of unionists; harassing and threatening trade unionists and their families; and arresting trade unionists, including General Secretary of the Myanmar Industries Craft & Services Trade Unions Federation (MICS-TUsF), Thet Hnin Aung. Since the coup, over 400 trade unionists have been arrested, and over 100 trade unionists killed.

Australian unions strongly opposed the Government entering into the Regional Comprehensive Economic Partnership agreement with Myanmar following the military coup in February 2021, on the basis that deepening economic ties with the military junta would serve to legitimise the regime.

Instead, we called for the Australian Government to impose sanctions against the Myanmar military junta and its business interests, as cutting off the flow of foreign revenue to the military is critical in order to stop them purchasing arms to use against the people of Myanmar. We congratulate the Albanese Government for announcing sanctions on Myanmar on the second anniversary of the coup, including against two key military-controlled entities (MEHL and MEC), and we call on the

[5] International Trade Union Confederation (ITUC), 'Global Rights Index 2023', https://www.globalrightsindex.org/en/2023/countries
[6] US Department of State, '2022 Country Reports on Human Rights Practices: Brunei', https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/brunei/

Government to go further and sanction other high-value targets including state owned enterprises in natural resources such as oil and gas, mining, gems and timber; the aviation fuel supply chain; and the banking sector.

Upgrading the AANZFTA, however, with Myanmar continuing to be a party to that agreement, is inconsistent with the Government's position on sanctioning the military junta. Continuing a preferential trade agreement with Myanmar serves to legitimise the brutal, illegal regime that is responsible for the death of thousands. The Australian Government must take a consistent position on Myanmar and refuse to ratify the amended AANZFTA while Myanmar is still a party, and enact further sanctions against the regime to support a return to democracy.

Services

We are concerned the upgraded AANZFTA will require parties to make use of negative listing for the first time for services market access, compared to the original 'positive list' approach utilised in the original AANZFTA. A negative list means that services not covered by the agreement must be specifically listed as exemptions. As the National Interest Analysis points out, this is an 'inherently more liberalising approach'. Negative lists are a highly risky approach, where governments must be careful to list all services for which they retain the right to regulate.

The upgraded AANZFTA also now includes a 'ratchet-mechanism' which locks in future liberalisation for selected sectors; as the National Interest Analysis notes, this 'means that countries cannot walk back on existing market access commitments'. This can prevent governments from addressing failures of privatisation or deregulation, unless a specific reservation is made retaining the right to regulate a particular service.

Aged care has not been specifically excluded, just as it was not excluded from the RCEP agreement, meaning the same ambiguity exists regarding whether the services chapter would prevent the Australian Government implementing the recommendations of the Royal Commission into Aged Care Quality and Safety, which tabled its report in Parliament in 2021 making almost 150 recommendations for extensive reform including increases in staffing numbers, increases in qualification requirements, and changes to the requirements for quality of care and licensing arrangements. The Albanese Government is now implementing these recommendations, including measures to increase staffing levels requiring a registered nurse to be on site in residential aged care at all times and mandated minimum care minutes per resident. Reforms to the sector are ongoing.

The right to regulate the aged care sector was not expressly reserved in the RCEP trade agreement negotiated by the previous Government, however, and many of the Recommendations of the Aged Care Royal Commission could be areas of regulation restricted in the RCEP clauses. Annex III of RCEP provides a list of services 'established or maintained for a public purpose' for which governments reserve the right to increase regulation and make new regulations. While childcare is listed, meaning the right to regulate the childcare sector is preserved, aged care has been omitted. This omission would mean that Government is restricted in its ability to improve qualified staff and staffing ratios (Recommendation 86 of the Royal Commission), for example, by Article 8.5 (Market Access) and 8.15 (Domestic Regulation).

DFAT argued at the JSCOT inquiry hearing that the ability for the Australian Government to regulate aged care and implement the recommendations of the Royal Commission would not be impacted by RCEP, however JSCOT noted there was ambiguity: 'It is understandable that such inconsistencies give rise to public concern, and it would be better if they were avoided'.[7]

The UK-Australia FTA, negotiated after RCEP, included clauses in the Annex to the trade in services chapter which clarified that governments have the right to regulate in relation to service standards and qualifications, however a similar clause has not been included in the amended AANZFTA services chapter, meaning there is ambiguity about whether the rules of the amended services chapter would inhibit additional regulation of aged care.

Temporary migrant workers

We are concerned that the amended AANZFTA includes provisions for the entry of unlimited numbers of temporary contractual service providers, who are vulnerable to exploitation. The exploitation of temporary migrant workers is widespread in Australia; temporary migrant workers are regularly facing issues of wage and superannuation theft, discrimination and bullying, job insecurity, and risks to their health and safety. We commend the measures outlined in the Albanese Government's Migration Strategy, released in December 2023, to prevent and address exploitation of migrant workers and the role proposed for Jobs and Skills Australia in identifying genuine labour market shortages, utilising advice from tripartite mechanisms. We remain concerned that the inclusion of provisions on temporary migrant workers in trade agreements is at odds with the reforms the Government is making in the areas of migration and skills, and in

[7] 4.25, JSCOT Report 196, p. 27

particular the establishment of Jobs and Skills Australia which will take an evidence-based approach to assessing labour market shortages, and how they are best addressed, which may include migration but should also consider other levers such as skills and training, and improving job quality. The Government should clarify that the commitments made on contractual service suppliers in the AANZFTA are consistent with its Migration Strategy, and will not lead to further exploitation of temporary migrant workers.

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