ACTU submission on a proposed Australia-EU Free Trade Agreement

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INTRODUCTION

The ACTU welcomes the opportunity to make this submission on a proposed Australia-EU Free Trade Agreement.

The ACTU is the peak body for Australian unions, made up of 46 affiliated unions. We represent more than 1.6 million working Australians and their families. 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 note the proposed agreement with the EU in its early stages, beginning with 'bilateral discussions on the next steps to launch negotiations'. Other concluded or soon to be concluded trade agreements such as the Trans-Pacific Partnership and the Australia-India Free Trade Agreement are of more immediate interest by comparison.

Without any details of the proposed agreement to respond to at this stage, we take the opportunity in this submission to set out broadly some of our key priorities and concerns with this proposed agreement and trade agreements more generally. These include the need for far greater transparency during negotiations and ratification, support for Australian jobs, strong labour chapters, and no Investor-State Dispute Settlement provisions.

We look forward to providing continued input if and when negotiations proceed further.

KEY POINTS AND RECOMMENDATIONS

Australian unions are not anti-trade. We recognise the value of lower tariffs, increased exports and freer access to overseas markets for Australian businesses. We welcome the opportunities for workers that come from participating in the 21st century global economy. International trade based on the principles of fair trade can be a tool for raising living standards through economic and employment growth, improved social protections, implementation of core labour rights and environmental standards, and adherence to human rights conventions and democratic values.

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

We should also expect that trade agreements are subject to proper scrutiny and that unions and others in civil society, as well as business, have the opportunity for genuine input into the negotiations on behalf of those they represent. The EU, in fact, has led the way in this regard.

Unions and others should not be expected to be 'cheerleaders' for the trade agenda. Where free trade agreements, or provisions of those agreements, are not in the national interest and the interests of our members and workers generally, we have a responsibility to make that case. Parliament also should not simply be a rubber-stamp for agreements already entered into and negotiated by the executive arm of Government.

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

This is not a 'protectionist, union view. For example:

- The Productivity Commission has found that predicted economic benefits from bilateral and regional agreements are often exaggerated and the actual economic benefits likely to be modest, while such preferential trading arrangements '*add to the cost and complexity of international trade… with an emerging and growing potential for trade preferences to impose net costs on the community*.' [1]

[1] See Productivity Commission, Bilateral and Regional Trade Agreements Final Report, Productivity Commission, Canberra, 2010; Productivity Commission, Trade and Assistance Review 2013-14, Productivity Commission, Canberra, 2015.

- World Bank modelling of the TPP shows it will increase Australia's GDP by just 0.7% by 2030 – less than one half of one tenth of 1 per cent each year over the next 15 years.[2]

- The Government was mistakenly claiming that the China FTA will create hundreds of thousands of jobs when its own modelling showed a net increase of just 5000 jobs over 20 years. [3]

- The FTA signed with the US 10 years ago actually resulted in a reduction of our total trade with the rest of the world by $53 billion. [4]

As negotiations are yet to begin in earnest for this proposed Australia-EU agreement, the opportunity is here to set a new, improved standard for free trade agreements, both in terms of how they are negotiated and entered into, and in terms of their content.

At this point, our key recommendations for a proposed Australia-EU Free Trade Agreement include:

1. A more democratic and open process for meaningful civil society engagement in trade negotiations than has previously been the case, including:

    - Prior to commencing negotiations, the Government should table a document in Parliament setting out its priorities and objectives, including independent assessments of the projected costs and benefits of the agreement.

    - Regular and substantive consultation during and between negotiating rounds.

    - The public release of draft text and proposals for review and comment.

    - Release of the final text and full and meaningful Parliamentary oversight and democratic approval before trade agreements are signed.

[2] http://www.smh.com.au/federal-politics/political-news/transpacific-partnership-will-barely-benefit-australia-says-world-bank-report-20160111-gm3g9w.html
[3] Menadue, J., Preferential trade deals – gigantic foundation stone or pebbles, 13 October 2015, http://johnmenadue.com.blog/?p=4749
[4] Ibid.

2. No removal or dilution of domestic labour market testing laws that support Australian jobs. The Australian Government should not be entering into any free trade agreements that trade away the right of the Australian Government – and the Australian community - to require that rigorous labour market testing occurs.

3. No ISDS provisions that enable foreign corporations to sue national governments when changes are made to domestic policy and regulations.

4. A specific labour rights chapter that provides for improved conditions of workers by requiring the parties to adopt and effectively enforce fundamental labour and human rights, including:

    - A commitment to implement labour rights in core ILO Conventions on rights at work.

    - Provisions for labour rights to be monitored and enforced, including a role for trade unions.

    - Procedures for alleged breaches of core labour rights and settling disputes.

The submission that follows expands on each of these matters.

TRANSPARENT AND INCLUSIVE TRADE NEGOTIATIONS AND AGREEMENT-MAKING

The proposed Australia-EU FTA is a major undertaking with profound implications for the economies and societies concerned. As the DFAT briefing material indicates, Australia would be signing up to an agreement covering trade, investment, services, and other regulatory measures, with a bloc of 28 member countries covering over 500 million people and a combined GDP of over US$18 trillion. Yet if it proceeds in the same way as trade agreements before it, there will be very little, if any, public scrutiny of the agreement before it is signed and entered into.

The current consultation process for trade agreements is severely limited by the secrecy and lack of transparency in negotiations. Certainly, stakeholders can make their views known to DFAT through processes such as this one, but thereafter they are given very little information on the detail of negotiations. General briefing meetings may be held, but without access to the details of any text being negotiated, such consultation has limited value.

In fact, the text of trade agreements is not released for any public or parliamentary scrutiny until after negotiations have concluded and/or the agreement has been signed. Only then does the public find out what the Australian Government has signed up to. The secrecy of the detail of trade negotiations, and the refusal to release the final text before it is signed, has meant the occasional unauthorised leaking of text documents has been the only way stakeholders have gained access to documents that should in fact be the subject of open debate in the parliament and in the community throughout negotiations.

Once agreements are signed and the text is finally released, the text cannot be changed by the subsequent review by the Joint Standing Committee on Treaties. Parliament only votes on the implementing legislation – those parts of the agreement that require legislative change, usually only the changes to tariffs – and not the whole text of the agreement.

The pressing case for reform of the treaty-making process was well-captured in the June 2015 report of the Foreign Affairs, Defence, and Trade References Committee, *Blind Agreement: reforming Australia's treaty-making process.* The Government recently made its public response to the report and regrettably did not see fit to adopt any of the modest and sensible recommendations for improving transparency and scrutiny of trade agreements.

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

The TPP negotiations, for example, had an agenda with chapters or topics dealing with regulatory transparency, food regulation, application of patents to living organisms, regulation of information technology, including electronic data privacy, and financial regulation. [5] Proposals for change in all of these areas would normally take place through democratic parliamentary processes.

There is no reason why the Government could not use the Australia-EU trade agreement to set a new standard, both for the conduct of negotiations and the process by which Australia enters into such agreements. The existing, flawed and inadequate, process does not have to be set in stone forever more.

In fact, our proposed negotiating partner in this instance, the EU, provides a model for how this could be done. The EU is currently negotiating a Transatlantic Trade and Investment Partnership (TTIP) with the US, which is frequently described as the Atlantic equivalent of the TPP. The EU has recognised legitimate community demand for the negotiating papers and final text to be exposed to public debate and announced it will release for public discussion its own proposals and discussion papers in the negotiations and will release the final text of the agreement for public and parliamentary discussion before it is signed. [6]

In summary, we submit the following recommendations should be adopted for all future trade agreement processes, including any Australia-EU agreement.

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

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

[5] Department of Foreign Affairs and Trade (2013a) Overview of the Trans-Pacific Partnership agreement, http://www.dfat.gov.au/fta/tpp/tpp-overview.pdf.

[6] European Union (2015) *EU negotiating texts in TTIP*, February, Brussels, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230

- 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, 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.

- There should be a separate subcommittee of JCSOT to deal with review of trade agreements. This subcommittee should review the text of a trade agreement which has been released before signing, along 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 the JSCOT review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should decide whether the Cabinet should approve the agreement for signing.

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

Further information on these issues can be found in the ACTU submission to the Senate Committee that reported on Australia's treaty making process, as referred to above.

LABOUR MOBILITY AND LABOUR MARKET TESTING

Free trade agreements that deal with the movement of temporary overseas workers into Australia are critical issues for Australian unions and our members.

Quite simply, this is because the fundamental issues at stake are about support for Australian jobs, support for Australian training opportunities, and support for fair treatment and decent wages and conditions for all workers. 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 free trade agreements, including in any proposed Australia-EU agreement.

Our clear preference is that the migration program operates 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.

However, 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 managing this.

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 around the 6% mark – the highest levels in a decade – and youth unemployment is more than double that.

That is why the labour market testing requirements currently in place under the 457 visa program are so important to ensure that employers have a legal obligation to employ Australians first. This obligation should not be undermined or removed by labour mobility provisions in free trade agreements.

In relation to free trade agreements and labour market testing our position is clear. Unions have advocated consistently since its introduction in 2013 that labour market testing should be applied to all positions under the temporary 457 visa program. We do not support existing exemptions from labour market testing on the basis of international trade obligations, or on the basis of skill level or occupation.

We have no objection to overseas workers from any country being employed in Australia, provided there is genuine, verifiable evidence through labour market testing that the employer has not been able to find a suitable, qualified Australian to do the job. However, we cannot support this fundamental obligation on employers to support Australian jobs first, simply being waived as part of the cost of pushing through free trade agreements.

Australia's migration policies should be a matter for immigration policy, determined by democratic parliamentary process, and should not be included in trade agreements.

Our position and recommendation therefore is that the Australian Government should not be entering into any free trade agreements that trade away the right of the Australian Government and the Australian community to require that rigorous labour market testing occurs before temporary visa workers are engaged. This is our position regardless of which country the free trade agreement is with.

Notwithstanding this position, we also say that where Australian Governments nevertheless continue to make commitments in free trade agreements on the 'movement of natural persons' that provide exemptions from domestic labour market testing laws, those commitments should not be extended to the category of 'contractual service suppliers', given the expansive meaning applied to that term across professional, technical and trade occupations. Any commitments on the 'movement of natural persons' should be limited to high-level executive positions.

As with the transparency issue, there is an opportunity to chart a different course on labour mobility with this proposed Australia-EU agreement.

The trade agreements concluded by this Government to this point have all given up the government's right to require labour market testing. For example, despite a great deal of obfuscation from the Government on this issue, it is beyond doubt that CHAFTA has removed labour market testing for a whole range of occupations, such as nurses, engineers, electricians, plumbers, carpenters, bricklayers, tilers, mechanics, and chefs, that were previously covered by it. This means Australian and Chinese companies can employ unlimited numbers of Chinese

nationals in these and many others occupations without any obligation to provide evidence of genuine efforts to first recruit Australian workers to fill those positions. The removal of labour market testing under CHAFTA was confirmed by the legislative instrument issued by the Government in late 2015. [7]

Similarly, the TPP agreement as it stands will also result in the removal of labour market testing, a point confirmed in evidence from DFAT before Senate estimates in October 2015. [8]

If the same approach was taken with an Australia-EU agreement and workers entering from EU countries were exempted from labour market testing requirements, this could have far-reaching implications. For example, it could mean that if French or German companies were successful in tendering for Australia's upcoming multi-billion dollar submarine construction project, the companies involved would have the legal right to hire overseas workers regardless of whether Australian workers are available – including managers, engineers, draftspersons, technicians, tradespersons and installers and servicers of equipment and machinery. A commitment to 'build' some or all of the submarines and related systems in Australia would therefore not mean that Australian workers would necessarily get the jobs. This scenario is already a live issue in the event of a successful Japanese tenderer because the Australia-Japan FTA has already removed labour market testing. [9]

It would be a refreshing change for Australia to negotiate a trade agreement that instead stands up for Australian jobs by insisting that labour market testing be retained.

INVESTOR-STATE DISPUTE SETTLEMENT PROVISIONS

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

[7] https://www.comlaw.gov.au/Details/F2015L01940

[8] see Kinnaird, B., Turnbull Government buries the FTA bad news, 28 January 2016, http://johnmenadue.com/blog/?p=5513

[9] Ibid.

the provision and regulation of essential services such as health, education, water, electricity, telecommunications and postal services, and the movement and employment of temporary migrant workers.

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

These are the type of provisions that allowed Veolia to sue the Egyptian Government for increasing its minimum wage, and Phillip Morris sue over Australia's plain cigarette packaging laws (under the terms of an old FTA with Hong Kong), among a host of other examples.

There is mounting evidence that ISDS tribunals lack the basic principles of fairness and consistency found in domestic legal systems. There is no independent judiciary, and no appeal mechanisms. 'Judges' can preside over one case while acting as a paid advocate in another, even if claimants and clients overlap between the two cases – a clear conflict of interest. By being restricted to foreign investors, these clauses also discriminate against local businesses which can only access our domestic court system for any claims for compensation. This could then have an impact on relative access to finance and certainly violates basic principles of national treatment and competitive neutrality.

The myriad problems identified with ISDS provisions were well set out again in the recent JSCOT report into the China Australia Free Trade Agreement. [10] For example, the JSCOT report cited a now oft-quoted speech where Australian High Court Chief Justice French expressed concerns about the impact of ISDS on domestic court systems

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

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

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

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

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

There is no immutable law that says ISDS provisions must be included in trade agreements. The Howard Coalition government did not agree to include ISDS in the AUSFTA in 2004, and the Productivity Commission advised against them in 2010. [11]

To reiterate, ISDS provisions restrict the ability of governments to regulate in the public interest and should not be included in trade agreements.

STRONG LABOUR STANDARDS

Unions support the principles of fair trade which include putting workers' rights and labour standards at the core of trade rules. We reject trade agreements based on low wages, dangerous working conditions, and the repression of collective organisation of working people. When trade agreements do not include strong and enforceable labour chapters, this opens the door to companies and countries gaining competitive advantage from labour exploitation.

[11] Op. cit.

As a matter of principle, we therefore call for the inclusion of enforceable labour rights in all bilateral and regional trade agreements that Australia enters into.

As with all trade agreements that Australia enters into, any future Australia-EU trade agreement should contain a specific labour rights chapter that provides for improved conditions of workers by requiring signatories to adopt and effectively enforce fundamental labour and human rights. These should include:

- A commitment to implement labour rights in core ILO Conventions on rights at work.
- A commitment not to weaken but to improve labour rights.
- Provisions for labour rights to be monitored and enforced, including a role for trade unions.
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