Report 186

IA-CEPA and A-HKFTA

Joint Standing Committee on Treaties
Executive summary

This Report contains the results of the Joint Standing Committee on Treaties’ review of two very different free trade agreements, the Comprehensive Economic Partnership Agreement between the Government of Australia and the Government of Indonesia (IA-CEPA), and the Free Trade Agreement between Australia and Hong Kong, China (A-HKFTA) and the Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China (the Hong Kong Investment Agreement).

Despite the size and proximity of the Indonesian market, trade between Australia and Indonesia is not as substantial as it could be. There are a number of reasons for this, including:

- popular support for protectionist trade policies in Indonesia;
- tariff barriers imposed by Indonesia;
- inconsistencies in the application of Indonesian customs and other rules relating to international trade;
- risks associated with foreign investment in Indonesia; and
- barriers to accessing services markets in Indonesia, including, for example, restrictions in the level of foreign ownership permitted in service sector businesses.

The IA-CEPA is intended to be a tool to improve the trade relationship between Australia and Indonesia by:

- establishing a time frame for the reduction in tariffs imposed by Indonesia;
- facilitating cooperation to address non-tariff barriers to trade;
- easing restrictions on Australian participation in the Indonesian services sector; and
- improving protections for Australian foreign investments in Indonesia.
On the other hand, Australia and Hong Kong have a well established and extensive trade relationship.

Hong Kong’s prosperity is based on international trade. As a consequence, Hong Kong imposes no tariffs on Australian goods, applies only limited non-tariff barriers, and has a liberal and open foreign investment environment.

Consequently, the A-HKFTA for the most part codifies existing trade arrangements, providing certainty for Australian businesses wishing to access the Hong Kong market.

The only significant change is the replacement of the 1993 Australia-Hong Kong Investment Agreement with the modern Hong Kong Investment Agreement. The new Hong Kong Investment Agreement reflects the evolution of foreign investment policy internationally, particular in relation to Investor-State Dispute Settlement (ISDS). The new ISDS provisions:

- improves protections for governments wishing to regulate in the public interest;
- make ISDS processes transparent; and
- in the event that a foreign investor is successful in an ISDS claim, limits the financial compensation the investor is entitled to.

In the Committee’s view, both the IA-CEPA, and the A-HKFTA and Hong Kong Investment Agreement, are in Australia’s national interest.

The Committee recommends binding treaty action in both cases.
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Abbreviations

AANZFTA  *Australia New Zealand Free Trade Agreement*

ACCI  Australian Chamber of Commerce and Industry

ACTU  Australian Council of Trade Unions

ADIC  Australian Dairy Industry Council

AEGIC  Australian Export Grains Innovation Centre

AFTINET  Australian Fair Trade and Investment Network

AHK-BIT  *Australia-Hong Kong bilateral investment treaty*

A-HKFTA  *Free Trade Agreement between Australia and Hong Kong, China*

AIBC  Australian Indonesia Business Council

Ai Group  Australian Industry Group

AIYA  Australia – Indonesia Youth Association

ARIA  Analysis of Regulatory Impact on Australia

ASEAN  Association of Southeast Asian Nations

BIT  Bilateral Investment Treaty

CBH Group  Co-operative Bulk Handling Limited

CCIWA  Chamber of Commerce and Industry of Western Australia

ChAFTA  China-Australia Free Trade Agreement

CIA  Central Intelligence Agency

CPTPP  *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*

CRC  Cold Rolled Coil
CSP  Comprehensive Strategic Partnership
DFAT  Department of Foreign Affairs and Trade
ECA  Export Council of Australia
ETU  Electrical Trades Union
FIRB  Foreign Investment Review Board
FTA  Free Trade Agreement
GDP  Gross Domestic Product
GIWA  Grain Industry Association of Western Australia
GPA  Agreement on Government Procurement
IA-BIT  Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the promotion and Protection of Investments
IA-CEPA  Comprehensive Economic Partnership Agreement between the Government of Australia and the Government of Indonesia
IMF  International Monetary Fund
Investment Agreement  Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China
ISDS  Investor-State Dispute Settlement
JSCOT  Joint Standing Committee on Treaties
KAFTA  Korea-Australia Free Trade Agreement
MCA  Mineral Council of Australia
METS  Mining Equipment and Technology Services
MST  Minimum Standard of Treatment
MFN  Most-Favoured-Nation
MOU  Memorandum of Understanding
NGO  Non-Governmental Organisation
NFF  National Farmers’ Federation
NIA  National Interest Analysis
NTEU  National Tertiary Education Union
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<td>NTM</td>
<td>Non-Tariff Measure</td>
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<td>RCEP</td>
<td>Regional Comprehensive Economic Partnership Agreement</td>
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<td>Vocational Education and Training</td>
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<td>Vocational Training Council</td>
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Members

Chair
Mr Dave Sharma MP

Deputy Chair
Mr Peter Khalil MP

Members

Senator Tim Ayres Hon Dr John McVeigh MP
Senator Catryna Bilyk Senator Gerard Rennick
Senator Andrew Bragg Senator Marielle Smith
Mr Russell Broadbent MP Senator Jordon Steele-John
Senator Slade Brockman Ms Kate Thwaites MP
Mr Jason Falinski MP Mr Tim Wilson MP
Ms Nicolle Flint MP Mr Josh Wilson MP
Committee Secretariat

Julia Morris, Committee Secretary
Narelle McGlusky, Inquiry Secretary
Emilia Schiavo, Inquiry Secretary
Kevin Bodel, Senior Researcher
Stephanie Lee, Research Officer
Cathy Rouland, Office Manager
Terms of Reference

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - either House of the Parliament, or
  - a Minister; and
- such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.
List of Recommendations

Recommendation 1

7.16 The Committee supports the Comprehensive Economic Partnership Agreement between the Government of Australia and the Government of Indonesia and recommends that binding treaty action be taken as soon as possible.

Recommendation 2

7.19 The Committee supports the Free Trade Agreement between Australia and Hong Kong, China and recommends that binding treaty action be taken as soon as possible.

Recommendation 3

7.21 The Committee supports the Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and recommends that binding treaty action be taken as soon as possible.

Recommendation 4

7.22 The Committee recommends that the Australian Government pursue the termination of the Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments, and seeks to terminate the ‘survival clause’ in this agreement.

Recommendation 5

7.23 The Committee recommends the Australian Government gives due consideration to implementing a process through which independent
modelling and analysis of a proposed trade agreement is undertaken in the future by the Productivity Commission, or equivalent organisation, and provided to the Committee alongside the National Interest Analysis (NIA) to improve assessment of the agreement.
1. Introduction

1.1 This report contains the Joint Standing Committee on Treaties’ review of the following treaty actions:

- Comprehensive Economic Partnership Agreement between the Government of Australia and the Government of Indonesia;
- Free Trade Agreement between Australia and Hong Kong, China; and

1.2 The Committee’s inquiry into each of these treaty actions lapsed at the dissolution of the 45th Parliament and the treaties were re-referred to the Committee by the Minister for Foreign Affairs at the beginning of the 46th Parliament on 29 July 2019.

1.3 The Committee’s resolution of appointment empowers it to inquire into any treaty to which Australia has become a signatory, on the treaty being tabled in the Parliament.

1.4 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australia will not arise.

1.5 Prior to tabling, major treaty actions are subject to a National Interest Analysis (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal, State and Territory agencies, and with industry or non-government organisations.

1.6 An Analysis of Regulatory Impact on Australia (ARIA) may accompany the NIA. The ARIA provides an account of the regulatory impact of the treaty
action where adoption of the treaty will involve a change in the regulatory environment for Australian business.

1.7 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.

1.8 Copies of the treaties considered in this report and the associated documentation may be obtained from the Committee Secretariat or accessed through the Committee’s website at:

- https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Indonesia-AustraliaCEPA/Treaty_being_considered; and

Conduct of the Committee’s review

1.9 The treaty actions reviewed in this report were advertised on the Committee’ website from the date of the re-referral. Submissions for the treaty actions were requested by 23 August 2019. Forty-eight submissions were received for the inquiry into the Indonesian trade agreement and 29 submissions for the Hong Kong trade agreement and Hong Kong investment agreement.

1.10 The Committee considered the treaty actions together and held four public hearings: in Sydney on 26 August 2019, Melbourne on 27 August 2019, Perth on 2 September 2019, and Canberra on 9 September 2019. The transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee’s website as listed above. The current Committee resolved to adopt the evidence received by the previous Committee for all the treaty actions under review.

1.11 A list of submissions received for the inquiries is at Appendix A. A list of witnesses who appeared at the public hearings is at Appendix B.
2. IA-CEPA Background

2.1 This chapter examines the Comprehensive Economic Partnership Agreement between the Government of Australia and the Government of Indonesia (IA-CEPA). The treaty action was signed in Jakarta on 4 March 2019. It was tabled in the Parliament on 21 March 2019. The Committee’s inquiry lapsed at the dissolution of the 45th Parliament and the treaty action was re-referred to the Committee by the Minister of Foreign Affairs on 29 July 2019.

2.2 Negotiations for IA-CEPA began in 2010 following a joint feasibility study conducted in 2007 by Australia and Indonesia. After a pause in negotiations, these were relaunched in 2016.\(^1\) Negotiations were substantially concluded in August 2018.\(^2\)

**Overview and national interest summary**

2.3 The National Interest Analysis (NIA) states that the IA-CEPA will bring both commercial and strategic benefits. It is intended to strengthen bilateral ties and provide a basis for deepening the trade and investment relationship with what Australia sees as an important strategic partner.\(^3\)

2.4 The NIA emphasises the strategic importance of the proposed Agreement as well as the commercial benefits. It is expected to significantly contribute to

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\(^1\) Indonesia-Australia Comprehensive Economic Partnership Agreement Analysis of Regulatory Impact on Australia, 5 December 2018, hereafter referred to as ARIA, para 3.

\(^2\) ARIA, para 5.

Australia’s bilateral relationship with Indonesia and position Australia to tap into that country’s economic potential as its population and economy grow.\(^4\)

2.5 The NIA points out that the IA-CEPA will also support Indonesia’s own economic growth agenda. It builds on Australia’s status as a partner of choice for Indonesia supported by long engagement, including through the development cooperation program, to help open up Indonesia’s economy and create a better business-enabling environment for both Indonesian and Australian businesses.\(^5\)

2.6 Australia and Indonesia have broadly complementary economies, but the NIA suggests that the trade and investment relationship is ‘underdone’. Indonesia has a large population in excess of 260 million people, a growing middle class, and strong economic growth in excess of 5 per cent that is forecast to continue until 2020. Indonesia is projected to become the fifth largest economy in the world by 2030 and fourth largest economy by 2050 (ranking by purchasing power parity equivalent Gross Domestic Product (GDP)).\(^6\)

2.7 According to the NIA, Australia has a strong position as an agribusiness supplier to Indonesia and has leading market positions in the provision of grains and meat. The NIA indicates that Australia’s capabilities in services, particularly education and training, healthcare, mining-related services, tourism services and in the development of infrastructure and resources, are highly relevant to the growth challenges facing Indonesia.\(^7\)

2.8 However, the NIA maintains that the bilateral trading and investment relationship is not reaching its potential. Indonesia is Australia’s thirteenth largest trading partner and fourth in Association of Southeast Asian Nations (ASEAN). Indonesia is only Australia’s 10th largest goods export destination (2.3 per cent of Australian exports) and 12th largest services export market (2.0 per cent of Australian exports).\(^8\)

2.9 The NIA states that the IA-CEPA is expected to build on and strengthen Australia’s existing arrangements with Indonesia, including filling gaps in

\(^4\) NIA, para 5.
\(^5\) NIA, para 6.
\(^6\) NIA, para 7.
\(^7\) NIA, para 8.
\(^8\) NIA, para 9.
areas that other trade agreements to which both countries are Parties do not cover. The NIA identifies a range of barriers that currently hamper the commercial relationship and that the IA-CEPA is expected to address, including:

- tariffs;
- restrictive regulatory practices (including restrictive import licencing);
- inconsistent customs processes; and
- non-tariff issues.\(^9\)

2.10 Additionally, the NIA advises that Indonesia has a relatively closed services sector and the investment environment is challenging.\(^10\)

2.11 The NIA expects the IA-CEPA to promote the development of a predictable, transparent and consistent business environment that will lead to the improvement of economic efficiency and the growth of trade and investment between the two countries. The NIA maintains that Australian exporters, investors and service providers will have significantly improved and more certain access to the growing Indonesian market.\(^11\)

### Reasons for Australia to take the proposed treaty action

2.12 The NIA concludes that not implementing the IA-CEPA would leave Australia’s exporters and investors at a competitive disadvantage in the largest ASEAN economy. Indonesia already has free trade in goods and services with other ASEAN economies and has just concluded negotiations with the European Free Trade Association. It is currently negotiating a free trade agreement with the European Union.\(^12\)

2.13 The following summary of sectoral outcomes is taken from the NIA and the ARIA.

### Goods

2.14 Australia and Indonesia are both Parties to the ASEAN Australia New Zealand Free Trade Agreement (AANZFTA). Under that Agreement,

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\(^9\) NIA, para 10; ARIA, paragraphs 18–26.

\(^10\) NIA, para 10; ARIA, paragraphs 23–24.

\(^11\) NIA, para 11.

\(^12\) NIA, para 14; ARIA, para 13.
98 per cent of Indonesian exports to Australia are duty free; however around 30 per cent of Australian exports to Indonesia are still affected by tariffs.13

2.15 Under IA-CEPA, 99.9 per cent of Australian goods exports to Indonesia will enter Indonesia duty free or under significantly improved and preferential arrangements.14

2.16 Indonesia will offer improved, and more certain, access for Australia on live cattle, feed grains and horticultural products such as citrus fruits and vegetables (carrots and potatoes). IA-CEPA will also offer better access for rolled steel coil, produced by BlueScope as a feedstock for its Indonesian manufacturing facilities.15

2.17 IA-CEPA contains a lower sugar tariff and Indonesia will progressively eliminate tariffs on most other products including frozen beef and sheep meat, dairy, and a range of manufactured steel, copper, plastic, automotive parts and machinery products.16

Services

2.18 Indonesia’s commitments represent a significant improvement on its services commitments in AANZFTA. These include commitments on technical and vocational education allowing Australian Vocational Education and Training (VET) providers to establish certain majority Australia-owned joint ventures in Indonesia.17

2.19 The NIA states that Indonesia has offered its best ever commitments overall on services in any Free Trade Agreement (FTA). These commitments guarantee that Australian suppliers can establish majority-owned businesses with no geographic limitations, in sectors including private hospitals, tourism, telecommunications, architecture, engineering, construction, infrastructure and a range of mining and energy-related services.18

13 NIA, para 16.
14 NIA, para 17.
15 NIA, para 18; ARIA, paragraphs 125–126.
16 NIA, para 19; ARIA, para 127; For further information on the effect of the Agreement on goods see the ARIA, paragraphs 158–178.
17 NIA, para 21; ARIA, para 129.
18 NIA, para 22; ARIA para 130; For further information on the effect of the Agreement on services see paragraphs 179–186.
Investment

2.20 The NIA suggests that IA-CEPA should serve to increase Australian investment in Indonesia, which is currently low.\textsuperscript{19} IA-CEPA will deliver both general protections and investor-state dispute settlement (ISDS) provisions. This should generate greater Australian business interest in investing in the growing Indonesian market.\textsuperscript{20}

2.21 According to the NIA, investor protections, including ISDS, are necessary in the challenging Indonesian investment environment. Indonesia presents risks for foreign investors, with an uncertain regulatory climate and increasing economic nationalism.\textsuperscript{21}

2.22 ISDS between Australia and Indonesia is already available under AANZFTA and under Australia’s bilateral investment treaty with Indonesia, which entered into force in 1993, but those agreements lack the important safeguards contained in Australia’s more recent FTAs. Indonesia has a strong interest in the higher level of safeguards offered by ISDS under IA-CEPA because they provide increased protection of the government’s right to regulate in the public interest.\textsuperscript{22}

2.23 The ISDS provisions in IA-CEPA include safeguards equivalent to the best Australia has agreed to date. The NIA maintains that these provisions provide a better balance between the protection of investors and ensuring the government’s right to regulate in the public interest.\textsuperscript{23}

2.24 According to the NIA, in IA-CEPA, an investor’s basis for challenging legitimate Australian regulatory measures is limited by carve-outs (non-conforming measures), exceptions and other protections for government policy setting. Modern procedural safeguards, such as provision for expedited preliminary objections and costs orders, are included to contain costs and deter frivolous claims. The agreement also carves out any public health measure, including those related to the regulation of tobacco, from the scope of ISDS.\textsuperscript{24}

\textsuperscript{19} NIA, para 23.
\textsuperscript{20} NIA, para 24.
\textsuperscript{21} NIA, para 25; ARIA, para 134.
\textsuperscript{22} NIA, para 26; ARIA, para 135.
\textsuperscript{23} NIA, para 27; ARIA, para 136.
\textsuperscript{24} NIA, para 28; ARIA, para 137.
Improving the business environment

2.25 Non-tariff issues, variable customs procedures, red tape and WTO (World Trade Organisation)-inconsistent import licensing arrangements are a major obstacle for many Australian businesses in the Indonesian market.25

2.26 According to the NIA, IA-CEPA includes a built-in agenda to include appropriate economic cooperation to facilitate trade and investment and secure support in the Indonesian system.26 Australia and Indonesia intend to use the IA-CEPA economic cooperation program in key areas of mutual interest, such as strengthening links between Australian exporters and Indonesian processors. The cooperation program is also expected to maximise the benefits of IA-CEPA’s outcomes in key services sectors such as education, health and tourism.27

2.27 IA-CEPA aims to improve conditions for Australian exporters in a number of ways. It guarantees import licences for a number of key products. In addition, IA-CEPA includes a chapter on non-tariff measures (Chapter 3). This will set up a cooperative mechanism to help deal with non-tariff measures in the Indonesian market. IA-CEPA also supports improvements to customs procedures and provides assistance linked to Indonesia’s implementation of the WTO Trade Facilitation Agreement.28

2.28 Australia and Indonesia have agreed to a comprehensive set of domestic regulation disciplines for trade in services to help address behind-the-border barriers such as delays in processing licences and permits. These build on the rules contained in AANZFTA. Australia and Indonesia have agreed to establish a mechanism to promote professional mutual recognition arrangements between relevant bodies and to improve licencing and certification processes for professionals.29

2.29 The Electronic Commerce Chapter (Chapter 13) reflects the increasing importance of the internet for business, including commitments to ensure service suppliers and investors can transfer information into and out of Indonesia. It will lock in Indonesia’s planned liberalisation of its current data localisation requirements. The Chapter builds on AANZFTA in several other

25 NIA, para 29; ARIA, para 138.
26 NIA, para 31.
27 NIA, para 30.
28 NIA, para 32; ARIA, para 141.
29 NIA, para 33; ARIA, para 142.
ways: it prohibits governments from requiring companies to release their software source code as a condition of importation, sale or distribution; and it contains enhanced commitments on paperless trading and electronic signatures.\textsuperscript{30}

2.30 The \textbf{Competition Policy Chapter (Chapter 16)} is designed to ensure that the trade and investment liberalisation achieved across IA-CEPA is not undermined by anti-competitive practices. The Chapter includes an obligation on Parties to adopt or maintain consumer protection laws to proscribe the use in trade of misleading practices, or false or misleading descriptions.\textsuperscript{31}

2.31 The \textbf{Transparency Chapter (Chapter 19)} promotes greater transparency in the making and implementation of laws, regulations and government decisions to facilitate predictability and ease of doing business. It requires Parties to establish or maintain impartial and independent tribunals or procedures for the review of final administrative actions. Australia already complies with the Chapter’s requirements.\textsuperscript{32}

\section*{Supporting the strategic partnership}

2.32 The NIA states that Indonesia is one of Australia’s most important bilateral relationships. Cooperation spans political, economic, security, development, education and people-to-people ties.\textsuperscript{33}

2.33 In recognition of the close relationship, Australia and Indonesia signed the Comprehensive Strategic Partnership (CSP) on 31 August 2018. The CSP has five pillars:

1. Enhancing Economic and Development Partnership;
2. Connecting People;
3. Securing Our and the Region’s Shared Interests;
4. Maritime Cooperation; and
5. Contributing to Indo-Pacific Stability and Prosperity.\textsuperscript{34}

\textsuperscript{30} NIA, para 34; ARIA, para 143.
\textsuperscript{31} NIA, para 35; ARIA, para 144.
\textsuperscript{32} NIA, para 36; ARIA, para 145.
\textsuperscript{33} NIA, para 37; ARIA, para 149.
\textsuperscript{34} NIA, para 38; ARIA, para 150.
2.34 According to the NIA, IA-CEPA aims to play a direct role in supporting the first pillar of the CSP, but will also make important contributions to the other four.\(^{35}\)

2.35 The NIA also notes that IA-CEPA has been designed to contribute to the three Objectives of Australia’s Aid Investment Plan:

- Effective Economic Institutions and Infrastructure;
- Human Development for a Productive Society; and
- An Inclusive Society through Effective Governance.\(^{36}\)

2.36 Additionally, the NIA points out that several important telecommunications cables connecting Australia to the rest of the world pass through Indonesian waters. The IA-CEPA **Telecommunications Chapter (Chapter 11)** includes specific obligations designed to improve the transparency and predictability of Indonesia’s regulation of the installation, maintenance and repair of submarine telecommunications cables in its waters, protecting Australia’s important strategic interests in this area.\(^{37}\)

### Obligations

2.37 The following summary is taken from the NIA and is provided in some detail for the benefit of members.

2.38 IA-CEPA consists of 21 Chapters with associated Annexes. IA-CEPA is consistent with Australia’s other international agreements, including the WTO. **Chapter 1 (Initial Provisions and General Definitions)** provides that the IA-CEPA will coexist with Parties’ rights and obligations in other agreements to which they are also a Party. The obligations in IA-CEPA align with those made by Australia to other FTA partners.\(^{38}\)

### Goods

2.39 Upon entry into force of IA-CEPA, Australia is required to eliminate all tariffs on imports of goods from Indonesia.\(^{39}\)

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\(^{35}\) NIA, para 38.

\(^{36}\) NIA, para 39; ARIA, para 151.

\(^{37}\) NIA, para 40; ARIA, para 152.

\(^{38}\) NIA, para 41.

\(^{39}\) NIA, para 42.
2.40 The provisions contained in IA-CEPA’s goods related chapters (Chapters 2-8) reaffirm existing rights and obligations under the relevant WTO Agreements. These chapters maintain the Parties’ rights and obligations under the WTO Agreements with regard to the application of safeguards, anti-dumping and countervailing measures. They include commitments on import and export restrictions and other non-tariff barriers that may otherwise present hurdles to Australian goods entering Indonesia.40

2.41 IA-CEPA establishes a mechanism for the review of non-tariff measures raised by either Party. It also provides for dialogue on trade remedies to enhance transparency and understanding.41

2.42 The Chapter on Rules of Origin (Chapter 4) specifies the ways in which a good imported from a Party is eligible for the preferential tariff of the Agreement. Product Specific Rules of Origin for IA-CEPA taken as a whole are more trade facilitative than those in AANZFTA, provide for choice of method to establish origin, and build on Australia’s best practice to date so as to enable regional value chains. The origin procedures provide for use of familiar AANZFTA-style certificates of origin, but allow for Parties to also permit declarations by exporters.

2.43 The Chapter on Sanitary and Phytosanitary (SPS) measures (Chapter 7) reaffirms the Parties’ commitments in the WTO SPS Agreement. It establishes a sub-committee to promote cooperation on SPS issues. It does not alter the SPS controls on products entering Australia.42

2.44 The Chapter on Technical Barriers to Trade (Chapter 8) reaffirms the Parties’ WTO TBT Agreement obligations and extends the level of commitment on cooperation in international standards, guidelines and recommendations. The chapter establishes a sub-committee to promote cooperation on TBT issues. It does not alter Australia’s standards and conformance regime.43

40 NIA, para 43.
41 NIA, para 44.
42 NIA, para 46.
43 NIA, para 47.
Services

2.45 The Trade in Services, Financial Services and Telecommunications Chapters (Chapters 9-11) build on existing WTO and AANZFTA services commitments giving Australian service suppliers better access to the Indonesian market and greater certainty about the rules that will apply to them in Indonesia.44

2.46 The Trade in Services Chapter (Chapter 9) contains a comprehensive section on domestic regulation, which sets out a common framework for the regulation of service suppliers in the territory of each Party. These rules help address behind-the-border barriers such as delays in processing licenses or other permits required to supply a service.45

2.47 There is also a Recognition Article, based on existing WTO language, which gives each Party the right to recognise qualifications obtained in another country should they wish to do so, but does not oblige Australian professional bodies to recognise Indonesian qualifications. There is also a specific Annex on Professional Services to facilitate cooperation, including with non-government professional bodies, on recognition of professional qualifications, licensing and registration requirements.46

2.48 The Financial Services Chapter (Chapter 10) will help to ease some of the regulatory burdens Australian financial services firms face when operating in Indonesia. For example, the Chapter includes provisions that promote transparency in the application procedures necessary to supply financial services and improves access to self-regulatory organisations, where access is necessary to supply a financial service in Indonesia. Australia and Indonesia will also seek to permit financial institutions to supply new financial services in each other’s territory.47

2.49 The Telecommunications Chapter (Chapter 11) commits Australia and Indonesia to transparent and pro-competitive telecommunications regulation, including ensuring that incumbent telecommunications companies provide other suppliers with access to services and key infrastructure on reasonable terms and conditions. The Chapter also includes specific obligations designed to improve the transparency and

44 NIA, para 48.
45 NIA, para 49.
46 NIA, para 50.
47 NIA, para 51.
predictability of Indonesia’s regulation of the installation, maintenance and repair of submarine telecommunications cables in its waters. Several telecommunications cables connecting Australia to the rest of the world pass through Indonesian waters.48

2.50 Services and investment market access commitments are subject to a range of carve-outs in which the Parties preserve their right to regulate in the national interest. Australia has retained the right to introduce new regulations for sensitive issues and sectors, including preferences for indigenous peoples; public services including education (noting the right to preserve full policy flexibility on primary education services); health and social services; cultural industries; and audio-visual services. Australia has also reserved the right for governments to impose conditions should they choose to privatise government assets or contract out services.49

Movement of Natural Persons

2.51 The Movement of Natural Persons Chapter (Chapter 12) applies to measures regulating the temporary movement between Australia and Indonesia of skilled professionals, including those engaged in trade in goods, the supply of services or the conduct of investment.50

2.52 The Chapter requires each party to:

a. promptly process completed applications for visas or other immigration formalities from the other Party;

b. provide information, upon request, about the status of applications;

c. ensure that fees for the processing of an application for a visa or other immigration formality are reasonable;

d. provide information on types of visas available, the documentation and other conditions that must be met and the appropriate method for submitting an application for a visa; and

e. establish or maintain appropriate mechanisms for responding to enquiries about measures relating to temporary entry for business persons of the other Party.51

48 NIA, para 52.

49 NIA, para 53.

50 NIA, para 54.

51 NIA, para 55.
2.53 Under the Chapter, each Party makes specific commitments guaranteeing access for specific categories of business persons who, provided they fulfil visa eligibility requirements, will be permitted to enter and temporarily stay in the other country. Those categories cover business persons undertaking activities such as attending meetings, conferences and trade fairs, setting up a business or an investment, or working in an overseas branch of their office.  

2.54 Australia has undertaken to waive labour market testing for Indonesian business visitors, intra-corporate transferees and independent executives. These are the same categories on which Australia has existing commitments not to impose labour market testing for Indonesians under the WTO and AANZFTA. Australia has not made any commitments on Indonesian contractual service suppliers (skilled workers employed by a company in either Australia or Indonesia to work temporarily in Australia to fulfil a contract).

2.55 The Chapter does not create any obligations in relation to citizenship, nationality, residence or employment on a permanent basis. The Chapter recognises the right of Australia and Indonesia to regulate the entry of natural persons into their territories and to require foreign workers to meet all relevant skill, qualification or experience requirements in force in the country where they are working temporarily.

**Electronic Commerce**

2.56 The Electronic Commerce Chapter (Chapter 13) commits Australia and Indonesia to ensure service suppliers and investors can transfer information across borders by electronic means. The Chapter also contains commitments to not make existing measures that require data to be stored locally any more restrictive, and automatically include improvements to these measures into the Agreement.

2.57 The Chapter retains the right of a Party to impose conditions or restrictions on the cross-border transfer of information and data storage in order to achieve public policy objectives, provided that such restrictions are not arbitrary or unjustifiable discrimination or a disguised restriction on trade.

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52 NIA, para 56.
53 NIA, para 57.
54 NIA, para 58.
55 NIA, para 59.
These obligations do not prevent a Party from adopting or maintaining any measures that it considers necessary for the protection of its essential security interests and do not apply to information held or processed on behalf of a Party.56

2.58 The Chapter prohibits Parties from requiring the transfer of (or access to) source code of software owned by a person of another Party as a condition of importation, sale or distribution of such software. This obligation does not affect requirements relating to patent applications or prevent a Party from adopting or maintaining any measures that it considers necessary for the protection of its essential security interests.57

2.59 Under the Chapter, Australia and Indonesia have made commitments to not deny the legal validity of electronic signatures and accept the electronic versions of trade documents as the legal equivalent of paper documents. These obligations allow Parties to have contrary requirements where provided for under law.58

2.60 The Chapter contains commitments to promote confidence in the online environment. These include for Australia and Indonesia to adopt or maintain a legal framework for privacy protection, and consumer protection laws that proscribe fraudulent and deceptive commercial activities that are harmful to online consumers. The Parties have also made commitments on addressing unsolicited commercial electronic, or ‘spam’, messages.59

2.61 Under the Chapter, Australia and Indonesia have also agreed to cooperate to support electronic commerce, including on cyber security and on assisting micro, small and medium-sized enterprises to use electronic commerce. The Chapter also contains transparency commitments, including that Parties will publish information on the rights and protections provided to electronic commerce users and how businesses can comply with legal requirements.60

56 NIA, para 60.
57 NIA, para 61.
58 NIA, para 62.
59 NIA, para 63.
60 NIA, para 64.
Investment

2.62 The Investment Chapter (Chapter 14) enhances market access and protections for investors from both Parties. The key obligations in this Chapter include:

   a. non-discrimination through national treatment and most-favoured-nation (MFN) provisions: national treatment obliges a Party to afford equal treatment to foreign investors and local producers where there are like circumstances and MFN obliges a Party to afford no less favourable treatment to foreign investors of the other Party than investors from non-Parties in like circumstances;

   b. minimum standard of treatment (MST): the foreign investor/investment to be treated in accordance with customary international law standards of fair and equitable treatment and full protection and security;

   c. expropriation and compensation: the obligation not to expropriate a covered investment unless expropriation is undertaken in a non-discriminatory manner, for a public purpose and upon payment of prompt, adequate, and effective compensation;

   d. transfers: obligation to allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory;

   e. performance requirements: lists the types of requirements, for example to purchase, use or accord a preference to goods produced in a Party’s own territory, which a Party agrees not to impose as a condition of establishing or operating an investment in the other Party; and

   f. senior management and board of directors: limitations on requiring the appointment of particular nationalities to senior management positions in businesses that are covered investments.61

2.63 Australia has reserved the right to maintain its existing foreign investment review process. IA-CEPA does not increase the thresholds for screening of Indonesian investments above the current levels. Australia has also reserved the right to strengthen its regulations for investments above the current levels.

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61 NIA, para 65.
screening thresholds in sensitive sectors such as agricultural land and agribusiness.\textsuperscript{62}

2.64 The agreement includes modern ISDS provisions, with appropriate procedural and substantive safeguards that build on the existing ISDS mechanism between Australia and Indonesia in AANZFTA.\textsuperscript{63}

2.65 The inclusion of ISDS means that where an investor from one Party alleges loss or damage as a consequence of the other Party breaching a commitment in the Investment Chapter, the investor can commence arbitration against that Party in a tribunal. An investor’s basis for challenging legitimate Australian regulatory measures is limited by carve-outs, exceptions and other protections for Australian policy settings.\textsuperscript{64}

2.66 An ISDS claim concerning IA-CEPA may only be brought in relation to commitments in the Investment Chapter. ISDS cannot be used to enforce other provisions of the agreement.\textsuperscript{65}

2.67 IA-CEPA preserves each Government’s right to regulate in the public interest:

a. there is a public health carve out ensuring that public health measures are outside the scope of ISDS, including for Australia those relating to tobacco, the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator;

b. Australia’s foreign investment framework, including decisions of the Foreign Investment Review Board, cannot be challenged under ISDS;

c. Australia reserves the right to maintain existing and introduce new measures in key policy areas, including:

i. social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities; and

ii. measures with respect to creative arts, Indigenous traditional cultural expressions and other cultural heritage; and

\textsuperscript{62} NIA, para 66.

\textsuperscript{63} NIA, para 67.

\textsuperscript{64} NIA, para 68.

\textsuperscript{65} NIA, para 69.
d. general exceptions also apply to the Investment Chapter.\textsuperscript{66}

2.68 The ISDS mechanism in IA-CEPA also includes procedural safeguards to enhance the arbitration process, including:

a. expedited review of claims that are frivolous or manifestly without legal merit;

b. mechanisms to deter unmeritorious claims, including through the award of costs against a claimant;

c. the ability of the Parties to issue interpretations of the Agreement, which must be followed by ISDS tribunals;

d. time limits on bringing a claim; and

e. a requirement for arbitrators to comply with rules on independence and impartiality, including on conflicts of interests.\textsuperscript{67}

\textbf{Economic cooperation}

2.69 Cooperation will be important for implementing IA-CEPA and maximising its ongoing benefits. The \textbf{Economic Cooperation Chapter (Chapter 15)} seeks to build on the existing Australia-Indonesia development partnership and establishes a Committee on Economic Cooperation. The Committee’s activities will include:

a. developing medium term priorities for economic cooperation for consideration and approval by the Joint Committee;

b. developing an Annual Work Program for consideration and approval by the Joint Committee, including coordinating and prioritising proposals for economic cooperation from the other committees established under the Agreement; and

c. overseeing and reviewing the implementation of the Annual Work Program to assess its overall effectiveness and contribution to the implementation of this Agreement.\textsuperscript{68}

\textbf{Competition and transparency}

2.70 The \textbf{Competition Policy Chapter (Chapter 16)} seeks to ensure that the trade and investment liberalisation achieved across IA-CEPA is not undermined

\textsuperscript{66} NIA, para 70.

\textsuperscript{67} NIA, para 71.

\textsuperscript{68} NIA, para 72.
by anti-competitive practices. The Chapter includes an obligation on Parties to adopt or maintain consumer protection laws to proscribe the use in trade of misleading practices, or false or misleading descriptions. The Chapter recognises the importance of consumer protection policy and enforcement to the creation of efficient and competitive markets and to enhancing consumer welfare. The Chapter recognises the value of the Parties making their competition enforcement policies as transparent as possible.69

2.71 The Transparency Chapter (Chapter 19) promotes greater transparency in the making and implementation of laws, regulations and government decisions to facilitate predictability and ease of doing business. It requires Parties to establish or maintain impartial and independent tribunals or procedures for the review of final administrative actions. Australia already complies with the Chapter’s requirements.70

General exceptions

2.72 IA-CEPA includes a number of exceptions to ensure the Parties preserve their ability to take measures they consider necessary for their essential security. An FTA-wide exception allows Australia and Indonesia to take any action they consider necessary for the protection of their essential security interests relating to a number of issues. There are also specific exceptions in the e-commerce chapter (to allow restrictions on data transfers and data localisation requirements). Australia’s schedule of services and investment commitments also includes a broad carve-out from the key Investment and Services Chapter obligations to allow any action Australia considers necessary for the protection of its essential security.71

2.73 The General Provisions and Exceptions Chapter (Chapter 17) includes a series of public policy exceptions to allow Parties to adopt or enforce measures otherwise inconsistent with the Agreement in certain circumstances (such as to protect human, animal or plant life or health). The Chapter also permits the Parties to impose temporary safeguard measures in the event (or threat) of serious balance of payments and external financial difficulties. Taxation measures are also exempt from the Agreement, with some limited exceptions.72

69 NIA, para 73.
70 NIA, para 74.
71 NIA, para 75.
72 NIA, para 76.
Institutional provisions

2.74 The Institutional Provisions Chapter (Chapter 18) establishes the administrative provisions necessary for the operation and review of the Agreement, including the processes by which the Agreement will enter into force, may be subsequently amended or terminated, and how the Agreement will co-exist with existing treaties between the Parties. This Chapter also establishes a binding State-to-State dispute settlement mechanism, drawing on previous FTAs and the WTO system, and a committee structure to manage the ongoing implementation of the Agreement.73

Side Letters and Memoranda of Understanding

2.75 Alongside IA-CEPA, Australia negotiated two treaty-level side letters:

- **Side Letter between Australia and Indonesia on Economic Cooperation under IA-CEPA**: This side letter and its attachment set out the medium term objectives for cooperation between Indonesia and Australia under IA-CEPA.
- **Technical and Vocational Education and Training (TVET) side letter**: This letter provides that Indonesia and Australia will use the provisions of IA-CEPA to undertake mutually agreed economic cooperation in the TVET sector in order to help Indonesia build a highly-skilled, industry-ready workforce.74

2.76 There are three other associated side letters and two Memoranda of Understanding (MOU), all of less than treaty status:

- **Skills Exchange MOU**: This MOU sets out the details of the reciprocal skills exchange between Australia and Indonesia.
- **Workplace-based training MOU**: This MOU commits Australia to granting annually up to 200 visas to Indonesian nationals allowing temporary stays for a period of up to six months for the purpose of undertaking workplace-based training in specified sectors.
- **Indonesia Working Holiday Visa letter**: This letter outlines Australia’s offer to increase the current annual cap of Work and Holiday visas for Indonesian Nationals to 4,100 on the first day of the month after IA-CEPA enters into force, and to increase the cap to 5,000 over the following five years.

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73 NIA, para 77.
74 NIA, para 78.
- **Side letter on Mutual Recognition Arrangements in Engineering**: This letter outlines Australia and Indonesia’s mutual commitment to facilitate cooperation between their relevant bodies on assisting Indonesia to reach internationally benchmarked standards for engineering education, with a view to facilitating mutual recognition of the qualifications of professional mining engineers in the future.

- **Health side letter**: This letter outlines Australia and Indonesia’s mutual commitment to undertake actions that strengthen their economic partnership in the health sector, undertaking work on strengthening Health Professional standards and competitiveness in the Indonesian health sector and encouraging Australian investment in the Indonesian health sector.  

2.77 Each of these will take effect on the date that IA-CEPA enters into force for both Australia and Indonesia.  

### Implementation

2.78 According to the NIA the following legislative changes will be required before IA-CEPA can enter into force:

- the *Customs Act 1901* and the *Customs Tariff Act 1995* and relevant customs regulations will need to be amended to incorporate the preferential tariff rates that will apply to goods imported from Indonesia under IA-CEPA;

- either new legislation or changes to the *Export Control Act 1982* will be required to provide authority to administer a tariff rate quota on steel; and

- a Ministerial determination will need to be made under section 140GBA of the *Migration Act 1958* to implement the IA-CEPA exemptions from labour market testing for Indonesian intra-corporate transferees and independent executives (these commitments re-affirm those made by Australia at the WTO).  

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75 NIA, para 79.
76 NIA, para 80.
77 NIA, para 81.
Costs

2.79 The NIA states that there are no costs or losses of tariff revenue for Australia associated with the entry into force of IA-CEPA because Australia will have already eliminated all tariffs under AANZFTA by the time IA-CEPA enters into force.78

2.80 Australia will provide Indonesia with economic cooperation to support its implementation of IA-CEPA and to support further liberalisation efforts in Indonesia. According to the NIA, this will be drawn from the existing bilateral development cooperation program.79

2.81 The NIA expects the IA-CEPA to enable Australian exporters to increase the value of their sales to Indonesia and contribute to economic growth in both countries.80

78 NIA, para 82.
79 NIA, para 83.
80 NIA, para 84.
3. IA-CEPA Benefits

Introduction

3.1 This chapter examines the benefits that are expected to flow from the implementation of the Comprehensive Economic Partnership Agreement between the Government of Australia and the Government of Indonesia (IA-CEPA).

3.2 It looks first at the support for the Agreement before considering access to the Indonesian market including the benefits for individual sectors. It also examines the important role IA-CEPA is expected to play in developing the broader Australian-Indonesian relationship. The chapter reviews some of the specific provisions that are expected to promote trade facilitation and concludes by looking at the timing of ratification and implementation.

Support for treaty action

3.3 There is overwhelming support for the ratification and implementation of the IA-CEPA. In particular it enjoys strong support among agricultural producers and the education sector.

Access to the Indonesian market

3.4 The Indonesian market is seen as providing exceptional potential for Australian businesses. Indonesia is currently the world’s 10th largest economy and is expected to become the world’s fourth largest by 2050. A large population, rapid urbanisation, and emerging middle class are feeding this economic growth. Indonesia currently has a population of 260 million

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1 Perth USAsia Centre, *Supplementary Submission 6.1*, p. 2.
people, half of whom are aged between 18 and 34 years of age.\textsuperscript{2} These conditions have encouraged ongoing economic growth:

Trade liberalisation and macroeconomic reforms have been underlying factors for Indonesia being one of the fastest-growing economies in the Indo-Pacific since the turn of the century. Indonesia has maintained a stable economic growth, which consistently remained within a narrow range of 4.9 to 5.3 per cent for the last 14 quarters. Moreover, trade and international investment has been a strong contributor to Indonesia’s economic growth since the Asian Financial Crisis in the late 1990s. Its GDP [Gross Domestic Product] per capita has risen from US$807 in 2000 to US$3,877 in 2018 – and has more than halved the percentage of the population living in poverty in 1999, to 9.8 per cent in 2019.\textsuperscript{3}

3.5 The Department of Foreign Affairs and Trade (DFAT) explained that IA-CEPA would provide improved access for Australian businesses to the Indonesian market including:

… the opening of new markets through tariff reductions or eliminations; the institution of tariff rate quotas with automatic licencing without seasonality; non-discriminatory access for service providers and investors to opportunities within the domestic economy as regulated.\textsuperscript{4}

Underutilised potential

3.6 Submitters stressed Indonesia’s proximity to Australia and its potential, noting the current low volumes of trade and investment.\textsuperscript{5} Indonesia is Australia’s 14th largest trading partner, worth $17.6 billion in 2018, and accounts for only two percent of Australia’s exports.\textsuperscript{6} This underperformance contradicts the norms of international trade which assumes that close geographic neighbours with similar economies will develop close trading relationships:

One of the closest things to an economic law is the theory of gravity in international trade. This theory says that, the bigger the two economies are and the closer they are, the greater their trade will be. But Australia and

\textsuperscript{2} Australia-Indonesia Youth Association (AIYA), Submission 33, p. 3.

\textsuperscript{3} Minerals Council of Australia (MCA), Submission 26, p. 7.

\textsuperscript{4} Department of Foreign Affairs and Trade (DFAT), Supplementary Submission 48.1, p. 2.

\textsuperscript{5} Mr Kyle Springer, Senior Analyst, Perth USAsia Centre, Committee Hansard, Perth, 2 September 2019, p. 12.

\textsuperscript{6} MCA, Submission 26, p. 2; Business Council of Australia (BCA), Submission 22, p. 1.
Indonesia defy gravity. Despite being G20 countries on each other’s doorsteps, the countries barely make it into each other’s top 10 either for destinations of goods and services exports or for the sources of their imports. A lot of things are required to address this missed opportunity, and a free trade agreement is one of them.\(^7\)

### Sector benefits

3.7 In light of the unrealised potential in the Indonesian market for Australian businesses, the IA-CEPA has been welcomed. Individual sectors provided examples of the improved access they expect to receive from the Agreement.

#### Mining

3.8 The Minerals Council of Australia (MCA) advised that as Indonesia continues to industrialise, its demand for Australian processed minerals and metals will continue to grow. Overall in 2018 these were worth around $1.9 billion. Crude petroleum was Australia’s largest export to Indonesia, worth over $827 million, followed by coal at $747 million. Other significant exports included iron ore at $190 million, aluminium at $156 million and zinc at $128 million.\(^8\)

3.9 Tariffs on mineral and energy exports, where they still exist, will be further reduced under IA-CEPA, including steel which is mentioned below. However, the MCA indicate that the most significant benefits from the Agreement will flow to the Mining Equipment and Technology Services (METS) sector. The sector is currently estimated to contribute some $90 billion in revenue to the Australian economy annually and plays a significant role in trade with Indonesia:

> It is estimated that at least 140 Australian-based METS companies export equipment, product or technology to the Indonesian market, including at least 40 ASX-listed companies. For many firms, through a number of industry surveys, Indonesia consistently rates as the top or second top priority market.\(^9\)

3.10 The METS sector is expected to benefit substantially from Indonesia’s commitments on mining services, particularly as Australian companies will

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7 Mr Heath Baker, Acting Chief Executive Officer, Export Council of Australia (ECA), *Committee Hansard*, Sydney, 26 August 2019, p. 26. See also Dr Jeffrey Wilson, Research Director, Perth USAsia Centre, *Committee Hansard*, Perth, 2 September 2019, p. 18.


now be able to own up to 67 per cent of mining service companies based in Indonesia, up from 49 per cent.\textsuperscript{10}

\section*{Steel}

3.11 BlueScope Steel is currently one of the largest Australian direct investors in Indonesia and the largest manufacturer of coated steel products in the country. Despite its position, the company faces difficulties sourcing feedstock, the semi-finished steel raw material feedstock, Cold Rolled Coil (CRC), from its Australian mills for the operation in Indonesia. As well as the current 15 per cent tariff imposed by Indonesia, the Indonesian permit system is difficult to navigate.\textsuperscript{11}

3.12 The existing tariff will be reduced to zero from the date of entry into force of IA-CEPA and Indonesia will immediately guarantee import permits for 250,000 tonnes of steel per year, increasing by 5 per cent per annum thereafter.\textsuperscript{12}

3.13 BlueScope Steel sees this as a win-win situation with steel exports increasing from the Australian steelworks and their operations in Indonesia acquiring competitive supplies of feedstock.\textsuperscript{13}

\section*{Grain}

3.14 The grain industry is strongly supportive of IA-CEPA. Indonesia is currently Australia’s largest wheat export market with approximately one-fifth market share.\textsuperscript{14} From 2013 to 2018 wheat exports to Indonesia averaged 4.2 million tonnes per year, accounting for around 17 per cent of total Australian wheat production.\textsuperscript{15} Currently, the majority of this product is exported from Western Australian and is destined for the Indonesian noodle market.\textsuperscript{16}

3.15 A new quota of half a million tonnes of Australian feed grain has been agreed under IA-CEPA. The Indonesian government has not been issuing import permits for the Indonesian feedstock market since 2015 and the

\textsuperscript{10} MCA, \textit{Submission 26}, pp. 3 and 12.

\textsuperscript{11} BlueScope Steel Limited, \textit{Submission 7}, pp. 1–2.

\textsuperscript{12} BlueScope Steel Limited, \textit{Submission 7}, p. 2.

\textsuperscript{13} BlueScope Steel Limited, \textit{Submission 7}, p. 3.

\textsuperscript{14} Grain Growers, \textit{Submission 8}, p. [1].

\textsuperscript{15} Australian Export Grains Innovation Centre (AEGIC), \textit{Submission 16}, p. [1].

\textsuperscript{16} Grain Industry Association of Western Australia (GIWA), \textit{Submission 38}, p. 2.
commitment in IA-CEPA means Australia will be the only supplier with access to the Indonesian market. This will open up Indonesia’s extensive feed grain market to Australian producers and the grain industry expects grain growers to benefit significantly:

IA-CEPA secured new access for Australian feed grains and represents dollars in farmers’ pockets. Under IA-CEPA, Australian farmers are set to gain 500,000 tonnes of new feed grain market access to Indonesia, making Australia the only country in the world with such market access. This new market, equivalent to 12,000 trucks worth of barley, sorghum and wheat, is worth $125 million in farmgate value to the Australian grain industry.

**Meat and livestock**

3.16 Indonesia is seen as ‘critical and vital’ to the success of the northern Australian cattle industry:

> It’s one of our largest meat markets in Asia, with over 200 million people who cannot eat one of the world’s major proteins due to religious beliefs, which is surely making them more dependent on beef and on us as a beef-producing nation and neighbour than most other neighbours.

3.17 Trade in red meat in 2018 amounted to around $1 billion, made up of 65 per cent live and 35 per cent boxed. Beef consumption in Indonesia is expected to grow 9 per cent by 2020, with some estimates up to 1,300 per cent by 2050.

3.18 The meat and livestock sector representatives strongly endorsed IA-CEPA.

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17 Mr Luke Mathews, General Manager, Policy and Research, Grain Growers Ltd., *Committee Hansard*, Sydney, 26 August 2019, p. 32.

18 Grain Growers, *Submission 8*, p. [2].

19 Mr David Foote, Chair, Indonesia Red Meat and Livestock Market Access Taskforce, Meat and Livestock Australian (MLA), *Committee Hansard*, Sydney, 26 August 2019, p. 34.

20 Ms Anna Campbell, Chief Executive Officer, Red Meat Advisory Council, *Committee Hansard*, Sydney, 26 August 2019, p. 35; Mr Foote, MLA, *Committee Hansard*, Sydney, 26 August 2019, p. 35.

**Dairy**

3.19 Indonesia is Australia’s third largest dairy export market and in 2018–19 Australia exported over 56,000 tonnes of dairy product to that market valued at over $192 million.\(^{22}\)

3.20 IA-CEPA will eliminate existing tariffs on dairy products that have not already been eliminated under the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA). The Australian Dairy Industry Council (ADIC) estimates that the annual value chain savings through dairy tariff elimination will be in excess of $6 million per annum, which the dairy industry translated into 15–20 direct jobs.\(^{23}\)

3.21 A dairy farmer from New South Wales (NSW) described Indonesia as ‘a massive market for Australia in the future. It’s so close to us and it’s growing’.\(^{24}\)

**Citrus**

3.22 Citrus growers currently export approximately 12,000 tonnes of fruit, mostly oranges and mandarins, to Indonesia annually. However, this dropped off to only 6,000 tonnes in 2018 due to uncertainty in the market. The difficulties lie with the current Indonesian quota system as the quotas are not issued in line with Australian growers’ seasons.\(^{25}\)

3.23 Citrus Australia are confident that the provisions in IA-CEPA will provide certainty and increased opportunities:

> [The Indonesians] were issuing quotas on a six-monthly basis and so we never had any forward notification of what those quotas were, so there couldn’t be any possible forward planning. If on face value we can accept the agreement as it is, we’ve actually got some regulatory transparency, because we at least know we can get 10,000 tonnes of oranges and 7,500 thousand tonnes of mandarins in and so people can actually put some planning in place to service that market.\(^{26}\)

\(^{22}\) Australian Dairy Industry Council (ADIC), *Submission 34*, p. 2.

\(^{23}\) ADIC, *Submission 34*, p. 3


\(^{25}\) Mr David Daniels, General Manager, Market Development, Citrus Australia, *Committee Hansard*, Sydney, 26 August 2019, p. 23.

\(^{26}\) Mr Daniels, Citrus Australia, *Committee Hansard*, Sydney, 26 August 2019, p. 24.
3.24 Citrus Australia noted it was conceivable that in the next decade the Indonesian market would reach 20,000 tonnes of fruit, worth approximately $40 million. The citrus industry expressed the hope that the agreement would enter into force by early 2020, to coincide with harvesting times.

**Education**

3.25 The Australian Technical and Vocational Education Training (TVET) sector is particularly enthusiastic about the opportunities opened up by IA-CEPA. Currently the courses being delivered in Indonesia do not meet the needs of the workforce. The Australian TVET sector has already established strong relationships with its Indonesian counterparts and sees IA-CEPA as a means to build on those existing relationships.

3.26 TAFE Directors Australia noted the favourable conditions in the Indonesian market and the benefits expected to flow from the Agreement:

The inclusion of skills development as one of the five high-level outcomes of the agreement is particularly welcome and provides much-needed profile and potential for growth to the Australia-Indonesia skills relationship. The focus also complements the significant TVET reform that the Indonesian government is now implementing. The greater certainty provided to TAFEs to offer qualifications in country and to bring training into Indonesia is appreciated.

3.27 Sustainable Skills provided one example of the significant potential that the Indonesian policy shift could deliver for the Australian TVET sector:

If you look at the energy sector, we met with PLN, the state owned enterprise that runs electricity there. They stated that they need a million people skilled to be able to help build the power plants and the transmission lines and operate them, and they don’t have the training capacity to be able to have Indonesians work in that space.

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27 Mr Daniels, Citrus Australia, *Committee Hansard*, Sydney, 26 August 2019, p. 21.
29 Ms Mary Faraone, Chair, TAFE Directors Australia, *Committee Hansard*, Melbourne, 27 August 2019, pp. 1–2.
31 Mr Nigel Carpenter, Chief Executive Officer, Sustainable Skills, *Committee Hansard*, 2 September 2019, p. 2.
3.28 The tertiary education sector also advised that IA-CEPA would open up opportunities in the Indonesian market:

... given Indonesia’s scale and its dramatic growth projections, we’ve tracked that very closely and see a lot of opportunity. Our hope is that the agreements that are being structured will allow us not only to pursue those in greater fashion but to explore new service offerings into the country and work more closely with our colleagues there.32

Competitive advantage

3.29 The improved access to the Indonesian market provided by IA-CEPA is expected to provide a competitive advantage for Australian businesses. Witnesses explained that the size, scope and future potential of the Indonesian market is attracting interest from across the world, making it imperative for Australia to take advantage of its international trade reputation and its proximity to Indonesia. Mr Phil Turtle, National President of the Australia Indonesia Business Council (AIBC), provided the example of his own experience:

If you look at our respective economies, we’re both around the trillion-dollar economy side and pretty close in global GDP rankings. There are projections of Indonesia tracking towards maybe the top four or five economies over time. Last year when I was in Jakarta with the Prime Minister, when he was announcing the conclusion of this agreement, in the hotel I was staying there were delegations from Russia, Europe, Japan and Korea, all having the same sorts of conversations with our Indonesian friends ... There’s a real opportunity for Australia to put its foot on this very important relationship, and there’s an opportunity now which we would not want to miss.33

3.30 Various sectors warned that they are already facing significant competition. The National Farmers’ Federation (NFF) emphasised the ongoing risks to Australia’s market share and warned that markets producing similar goods continue to compete with Australia in the Indonesian market, pointing to the effect of recent events:

With the US-China trade war we know that product that is being diverted into our markets from the US in particular is seriously challenging our market

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32 Professor Abid Khan, Deputy Vice-Chancellor and Vice-President (Global Engagement), Monash University, Committee Hansard, Melbourne, 27 August 2019, p. 39.

33 Mr Phil Turtle, National President, Australian Indonesia Business Council (AIBC), Committee Hansard, Perth, 2 September 2019, p. 11.
share. We simply can’t rest on our laurels when it comes to accessing markets. So this preferential access is incredibly important.\textsuperscript{34}

\textbf{3.31} The meat and livestock industry identified low cost beef from India and Brazil as major concerns. Indian beef is approximately a third of the price of Australian beef and Brazilian beef about half the price of Australian beef.\textsuperscript{35} The Grain Industry Association of Western Australia (GIWA) noted that Australia’s drought condition had combined with increased international competition to cause a significant loss of market share:

Recently the combined forces of additional global wheat supply, competitively priced logistics, and high domestic grain prices due to the east coast drought mean Western Australian origin wheat is facing stiff competition (up to $40 a tonne difference) from Black Sea (Ukrainian and Russian) and Argentinian wheat delivered into Southeast Asian mills. This year our industry expects food wheat imports into Indonesia from Australia to be one quarter to one fifth of our most recent 5 year average of 4.2m tonnes, a sobering statistic.\textsuperscript{36}

\textbf{3.32} Although the Australian Export Grains Innovation Centre (AEGIC) expects this situation to continue in 2020 ‘due to the continuing drought conditions on the east coast’, they stress the need to be in a position to recover market share in Indonesia quickly when Australia’s stocks improve. IA-CEPA is crucial in this regard in AEGIC’s opinion:

It has never been more important for Australia to reach a trade agreement that includes grain and grain products with Indonesia.\textsuperscript{37}

\section*{Relationships}

\textbf{3.33} The importance of strengthening Australia’s relationship with Indonesia was repeatedly stressed to the Committee. IA-CEPA is seen as providing a significant platform for increased business-to-business and person-to-person relationships. The Indonesia Institute explained that at a certain level the overall relationship between the two countries is very good:

… if you look at the current relationship between Australia and Indonesia, whether it be political, government, policing, terrorism, defence, NGOs [Non-
Governmental Organisations, community or education, it’s actually in a very good place. It’s a very solid relationship, and over the years, as our two nations have gone through the various bumps, we have seen on every single occasion that business-to-business links just shrug it off, and business carries on.  

3.34 However, the Institute notes that, at a more general level, the relationship is not as strong, quoting a recent report from the Lowy Institute which found that 46 per cent of all Australians ‘including future business leaders’ perceive Indonesian people very poorly or ‘with a great deal of suspicion’. The Institute considers that the ‘real value’ of IA-CEPA is as a ‘catalyst for really addressing these closer links that we need between our countries’.

3.35 IA-CEPA is expected to both strengthen existing relationships and develop new ones. Drawing on the current relationship with Indonesia, the grain industry is developing the Australian-Indonesian Grains Partnership under the auspices of IA-CEPA:

This partnership will provide the required technical, economic and social programs to allow the grains and related industries in both countries to thrive. This partnership will bring together decision-makers from both countries, foster relationships and maximise the opportunities for development and collaboration among the food, grains and livestock sectors. The partnership will ensure that Indonesian stockfeed and livestock sectors have the right technical support when using Australian feed grains, such as barley. That will mean that Indonesian livestock sectors maximise their productivity when using our grains, ensuring that the relationship is no longer transactional but one of genuine partnership.

3.36 Likewise, ADIC has developed strong relationships with Indonesia which IA-CEPA is expected to strengthen and support:

Dairy Australia runs both inbound and in market programs to strengthen relationships with key trading partners including Indonesia. Since 2015, dairy leaders from Indonesia have participated in the annual Dairy Australia South East Asia Scholarship program which educates participants on dairy food safety systems and associated regulatory frameworks. This strengthens personal links and helps spread knowledge and understanding of Australia’s

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38 Mr Ross Taylor, President, Indonesia Institute, Committee Hansard, Perth, 2 September 2019, p. 35.
39 Mr Taylor, Indonesia Institute, Committee Hansard, Perth, 2 September 2019, p. 35.
40 Mr Taylor, Indonesia Institute, Committee Hansard, Perth, 2 September 2019, p. 35.
41 Mr Mathews, Grain Growers Ltd., Committee Hansard, Sydney, 26 August 2019, pp. 31–32.
incredible value proposition. The alumni from this program provide invaluable contacts within the Indonesian market.  

3.37 The opportunities provided in skills development are particularly relevant to relationship building. The Export Council of Australia (ECA) said that the connection between skills development and strengthening people-to-people ties is ‘essential for longer term economic partnership’. TAFE Directors Australia provided examples of their extensive existing relationships and described the types of partnerships that the sector engage in:

There are typically three types of partners for TAFE in Indonesia. It would be institutes; … government partners, particularly regional governments who are seeking to improve the capabilities of their local TVET systems; and industry. We work with all of those three in quite different ways and often assess their needs and provide a type of program based on the needs of that individual client or client group.

3.38 Sustainable Skills explained that IA-CEPA will enhance those existing opportunities and allow a deepening of the engagement:

There need to be ways of taking it beyond those things and helping to create a real difference. With the President there now, who’s really focused on reform … and clearly wants a strong relationship with Australia, there is an opportunity for Australia to make a difference, particularly in vocational education, where our strengths are, and to build those closer ties. We’ve got the expertise to be able to do that systematically.

3.39 Curtin University highlighted the importance of education links, telling the Committee that they have close to 10,000 alumni in Indonesia, many of them holding important positions in the Indonesian university system. The University has an important economic relationship with Indonesia but considers that IA-CEPA is critical to expanding relationships outside the economic area:

42 ADIC, Submission 34, p. 3.
44 Ms Jennifer Bahen, Director, International Engagement, TAFE Directors Australia, Committee Hansard, Melbourne, 27 August 2019, p. 3.
45 Mr Carpenter, Sustainable Skills, Committee Hansard, Perth, 2 September 2019, p. 3.
46 Associate Professor Simon Leunig, Associate Deputy Vic Chancellor International and Dean ASEAN, Curtin University, and Co-chair, Western Australia East Java University Consortium, Committee Hansard, Perth, 2 September 2019, p. 36.
We also have significant ongoing relationships in research, in teaching and also in executive development, and these are growing at all times. So it’s very important for Curtin University that IA-CEPA works. It affords the opportunity for us to further develop our relationships there. There are also some areas around the relationship between our two countries that I believe could be further enhanced …

Trade facilitation

3.40 The inclusion of mechanisms designed to break down non-tariff barriers and provide opportunities for continuing improvement in the trade environment, was identified as a major benefit of IA-CEPA. Historically, Indonesia has been adverse to market liberalisation and tending towards protectionist. Many of the ongoing issues facing Australians doing business in Indonesia involve administrative and technical barriers, as will be discussed in the next chapter of this report. Therefore, the emphasis in IA-CEPA on building Indonesia’s capability and capacity to open up to trade and investment by enabling it to undertake reforms was welcomed.

3.41 The Australian Industry Group (Ai Group) pointed out that these provisions benefit both Australian and Indonesian businesses:

… it doesn’t just benefit Australian companies; it also benefits Indonesian companies and makes them more competitive and also supports Australian investors who are in Indonesia and want to export from Indonesia and use Indonesia’s FTA [Free Trade Agreement]. The challenge with trade facilitation is that it’s a hidden cost and it adds no value. You can argue a tariff does provide income to your government — it is a tax and so reducing it reduces income to the government and the cost of products at the border — but no-one benefits from higher trade facilitation costs. No-one benefits from 150 hours being spent on producing documents, or government employees inspecting those documents, so any improvement we can make will benefit the economies on both sides.

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47 Associate Professor Leunig, Curtin University, Committee Hansard, Perth, 2 September 2019, p. 36.
48 Mr Matthew Busch, Submission 30, p. 2.
49 Australia Indonesia Business Council (AIBC), Submission 14, p. 8. See also MLA, Submission 10, p. [2]; Mr Busch, Submission 30, p. 1; Australian Chamber of Commerce and Industry, Submission 32, p. 4;
50 Ms Louise McGrath, National Manager, Australian Industry Group (Ai Group), Committee Hansard, Perth, 2 September 2019, p. 29.
3.42 The provisions include specific chapters on economic cooperation and trade facilitation as well as on non-tariff barriers and technical barriers to trade. Additionally, the nine committees that will be established under Chapter 18 (Institutional Provisions) will facilitate an ongoing process to ensure that IA-CEPA continues to meet Australia and Indonesia’s changing trade environment:

The Joint Committee [established under Chapter 18] and others provide the Australian Government a method to table new ideas and update IA-CEPA’s provisions. As liberalisation increases the volume of bilateral economic ties, the sectoral composition of trade and investment flows will necessarily evolve. This will create new priorities for regulatory cooperation, and thus requires a ‘future-proofing’ of the standards and processes in IA-CEPA. The use of these committees will ensure that regulatory cooperation can adjust to meet the changing character of Australia-Indonesia economic relations.51

3.43 The committees will be established after the Agreement enters into force.52 The committee on economic cooperation is considered vital to the successful future development of IA-CEPA:

I encourage all Australian officials and elected representatives to utilise their relationships and bilateral exchanges to work vigorously towards the institutionalisation of the agreement’s envisioned—and novel—committee on economic cooperation. If this can be turned into a credible and vibrant forum for problem solving and the cooperative identification of areas of future liberalisation, this will help strengthen the agreement and the ties between the two countries. Although most existing non-tariff barriers and technical barriers to trade are left untouched under the agreement, the use in coming years of constructive diplomacy to institute a productive working partnership on resolving such issues will be decisive for IA-CEPA’s eventual legacy with respect to the future of the bilateral economic relationship.53

3.44 Witnesses advised the Committee that the Australian Government had set up the Non-Tariff Barrier (NTB) Action Plan in December 2018, providing a single point of contact for businesses to report NTB concerns. The Department of Foreign Affairs and Trade (DFAT) advised that the information being collected is being used to progress NTB concerns reported by Industry and provided a successful example regarding the China-Australia Free Trade Agreement (ChAFTA):

51 Perth USAsia Centre, Supplementary Submission 6.1, pp. 4–5.
52 DFAT, Supplementary Submission 48.1, p. 9.
53 Mr Busch, Submission 30, p. 1.
... despite expanding export market access opportunities provided by the China-Australia Free Trade Agreement, a Tasmanian-based seafood processing and packing business was unable to export one of its products—Gould’s Squid—as it was not on China’s list of approved exports from Australia.

The company lodged this query through the NTB Gateway in December 2018. In January 2019, following long-term efforts by the Department of Agriculture, the company was advised that new seafood species, including Gould’s Squid, had been added to the list of approved exports.54

Entry into force and implementation

3.45 There were repeated calls for a speedy entry into force and implementation of IA-CEPA. Agricultural producers, in particularly, were eager to see the Agreement ratified, noting that it was a year since it had been signed:

... NFF (National Farmers’ Federation) would like to emphasise that we would love to see rapid action here. We’re really looking to our parliamentarians to ensure the benefits that we have secured under these agreements are accessed or are able to be accessed by Australian farmers as soon as possible.55

3.46 Several sectors are ready to take immediate advantage of the opportunities presented by IA-CEPA. For example, Citrus Australia has growers prepared who could gain the benefits of IA-CEPA for their next season so would like to see it come into effect by early 2020.56 Likewise the grains industry encourages immediate ratification to allow their growers’ access to the Indonesian market for their next crop, due in November-December 2019.57

3.47 The TVET sector is well prepared to take immediate advantage of the opportunities presented by IA-CEPA:

We have known for decades what we need to do in Indonesia. We have the resources. The curriculum is ready. It has been trialled and tested. The geographical location of Indonesia, especially to somewhere like WA, is well advanced. We might not have a very strong relationship, which people believe

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54 DFAT, Supplementary Submission 48.1, p. 6.
55 Dr Gordon, NFF, Committee Hansard, Sydney, 26 August 2019, pp. 8–9.
56 Mr Daniels, Citrus Australia, Committee Hansard, Sydney, 26 August 2019, p. 24.
57 Mr Jason Craig, General Manager, Marketing and Trading, Co-operative Bulk Handling Limited (CBH Group), Committee Hansard, Perth, 2 September 2019, p. 25.
we have, with Indonesia, but at an educational level we are in and out of Indonesia multiple times a year. We have strong partnerships; we have discussed what is in the agreement several times over decades and I think we’re just ready to go in gung-ho and build those relationships, create that infrastructure and deliver the programs, which have already been delivered in multiple ways but without such a formalised agreement around it.\(^{58}\)

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\(^{58}\) Mr Pankaj Pathak, Chief Executive Officer and Managing Director, Phoenix Academy, *Committee Hansard*, Perth, 2 September 2019, p. 33.
4. IA-CEPA Issues

Introduction

4.1 This chapter examines some of the issues that have been raised with the Committee concerning the Comprehensive Economic Partnership Agreement between the Government of Australia and the Government of Indonesia (IA-CEPA).

4.2 The chapter looks at the following issues which were raised with the Committee that directly relate to IA-CEPA:

- implementation;
- business environment and technical and non-tariff barriers;
- investment: bilateral investment treaty (BIT) and investor-state dispute settlement (ISDS);
- proliferation of trade agreements with a single partner;
- e-commerce;
- temporary workers; and
- human and labour rights and environmental standards;

4.3 The chapter then turns to two general issues:

- independent economic modelling of Free Trade Agreements (FTAs); and
- consultation.

Implementation

4.4 Witnesses urged that the Agreement be ratified without delay, but also noted that full implementation would require attention. Australia’s Ambassador to Indonesia, Mr Quinlan, advised that IA-CEPA will require further ongoing work by both government and business:
Both [Australia and Indonesia], of course, need and want to diversify our economic relationships. IA-CEPA ratified and in force can be a catalyst for this—a catalyst, not a magic bullet—and an objective which will require a lot of advocacy by government and business, and a change in mindset among Australian business to start thinking about the opportunities that IA-CEPA will present in Indonesia, in many instances for the first time. Of course, it’s going to need demonstrated success stories by business in order to encourage other businesses to follow suit. But the openings are there.1

4.5 The Committee was warned that the conditions on the ground in Indonesia can prove difficult to navigate and that considerable groundwork will be required to ensure success:

… post the agreement, a lot of work is going to be needed to actually make it a reality. Agreements can specify things at very high structural levels. What we find in Indonesia—and I say this as somebody who goes there every few months—is that the machinery that then down-translates that into practice is sorely lacking. It’s more a sense of where the Indonesian system is up to. So they can’t readily engage with us on certain things.2

4.6 Implementation will require Indonesia to follow through on commitments to change laws and regulations, something that may meet with some resistance and will require the ongoing attention of Australia:

… Australian officials will need to not only press Indonesia to deliver on its IA-CEPA commitments, but also maintain a constructive approach to ensuring that Indonesia continues to see the benefits of investing in and extending the agreement.3

4.7 In this regard full support for the provisions set out in the chapter on economic cooperation is considered important for effective implementation of the Agreement.4

4.8 The Department of Foreign Affairs and Trade (DFAT) assured the Committee that it will continue to work with the Government of Indonesia

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1 Mr Gary Quinlan, Ambassador to Indonesia, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Canberra, 9 September 2019, p. 15.
2 Professor Abid Khan, Deputy Vice-Chancellor and Vice-President (Global Engagement), Monash University, Committee Hansard, Melbourne, 27 August 2019, p. 40.
3 Mr Matthew Busch, Submission 30, p. 3.
4 Meat and Livestock Australia (MLA), Submission 10, p. [2].
‘to ensure that once IA-CEPA enters into force, the market access outcomes agreed are implemented’.5

4.9 The AIBC, among others, also stressed the need to ensure that Australian businesses are aware of the opportunities provided by IA-CEPA and have the ongoing support to take advantages of those opportunities:

... AIBC recommends that the committee note the potential for market failure—despite the IA-CEPA—leading to ongoing underperformance of trade and investment relative to potential, and the consequent need for active mechanisms beyond ‘business as usual’ to facilitate trade investment by Australian and Indonesian firms. Despite enormous economic potential and the comprehensive provisions of IA-CEPA, AIBC is concerned that Australian and Indonesian business will fail to engage at the scale necessary to achieve the goals of IA-CEPA. There is a need for active promotion and facilitation of trade and investment beyond the worthy ‘business as usual’ activities of the Australian Trade Commission and the Indonesian Ministry of Trade.6

4.10 These sentiments were echoed by industry support groups including the Australian Industry Group (Ai Group), the Australian Chamber of Commerce and Industry (ACCI) and the Chamber of Commerce and Industry Western Australia (CCIWA).7

4.11 The Department of Foreign Affairs and Trade (DFAT) told the Committee that they are actively promoting the Agreement and will continue to do so as it is implemented:

Since signing the Agreement the Australian Government has continued to work with the Indonesian Government to ensure the IA-CEPA is implemented as intended. Closer to the time of entry into force of IA-CEPA, the Free Trade Agreement portal will be expanded to include IA-CEPA outcomes and DFAT will publish a guide for businesses seeking to obtain tariff reductions under IA-CEPA. The Government will continue to raise awareness and use of IA-CEPA.8

5 Department of Foreign Affairs and Trade (DFAT), Supplementary Submission 48.1, p. 7.
6 Mr Phil Turtle, National President, Australian Indonesian Business Council (AIBC), Committee Hansard, Perth, 2 September 2019, p. 6.
7 Australian Industry Group (Ai Group), Submission 39, p. 4; Australian Chamber of Commerce and Industry (ACCI), Submission 32, p. 4; Mr Christopher Rodwell, Chief Executive Officer, Chamber of Commerce and Industry Western Australia (CCIWA), Committee Hansard, Perth, 2 September 2019, p. 43.
8 DFAT, Supplementary Submission 48.1, p. 7.
Business environment and technical and non-tariff barriers

Business environment

4.12 As noted in the previous chapter, the business environment in Indonesia can be challenging for Australian businesses. The National Interest Analysis (NIA) notes that, in addition to tariffs, non-tariff issues, variable customs procedures, red tape and World Trade Organisation (WTO)-inconsistent import licensing arrangements are major obstacles for many Australian businesses in the Indonesian market.9

4.13 The Export Council of Australia (ECA) told the Committee that Indonesia ‘is not an easy country in which to do business’.10 The Minerals Council of Australia (MCA) observed that, despite the gains in the removal of tariffs, the overall environment remains difficult:

Generally, by contrast with the position for mining commodities, barriers to Australia’s exports [of] including mining and construction services to Indonesia, including non-tariff measures (NTMs), are consistently considerable. Indonesia is rated the second most restrictive country in the OECD in relation to barriers to services trade.11

4.14 The Technical and Vocational Education and Training (TVET) sector highlighted barriers that will inhibit their ability to make full use of the concessions in IA-CEPA:

There are barriers to greater VET [Vocational Education and Training] collaboration between Australia and Indonesia, including difficulties in finding a partner who can enter into a commercial arrangement; lack of national TVET policy coordination in Indonesia spread across multiple ministries; low levels of literacy and numeracy in Indonesian regions, making

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11 Minerals Council of Australia (MCA), Submission 26, p. 11.
access to further education challenging; and well-coordinated competitor activity.12

4.15 The Australian dairy industry identified the difficulties encountered for cold chain distribution in Indonesia, including the absence of refrigeration required to get dairy products to consumers, as well as the lack of facilities and distribution networks.13

4.16 DFAT acknowledged the difficulties faced by Australian businesses in the Indonesian market but emphasised that many Australian businesses had successfully navigated those challenges:

… the regulatory environment for imports—especially finished goods—can be complex, ambiguous and changing. Several sectors remain fully or partially closed to foreign investment. Rules can also constrain foreign professionals from working in Indonesia. Despite these challenges, there is a diverse range of Australian companies doing business profitably in Indonesia, from start-ups right through to some of our largest companies.14

4.17 DFAT explained that to succeed in the Indonesian market, Australian businesses required tenacity and an understanding of the business environment:

To succeed, Australian firms have had to exercise patience, build local partnerships and have a product or service keenly sought by Indonesian consumers. Australian companies have found success providing support services to Indonesia’s domestic players. Many Australian businesses find it easier to work through long-term contractual arrangements with local partners.15

4.18 DFAT considers that the architecture delivered by IA-CEPA will provide ‘an important mechanism through which to engage the Government of Indonesia to redress market barriers and blockages’.16 Additional DFAT stressed that the provisions in IA-CEPA will directly address the challenges presented by the business environment in Indonesia:

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12 Ms Mary Faraone, Chair, TAFE Directors Australia, Committee Hansard, Melbourne, 27 August 2019, p. 1.
14 DFAT, Supplementary Submission 48.1, p. 3.
15 DFAT, Supplementary Submission 48.1, pp. 3–4.
16 DFAT, Supplementary Submission 48.1, p. 4.
Collaborative mechanisms in the various chapters of the Agreement provide scope for regular outreach on goods, services, investment and economic cooperation, as well as ad hoc problem solving including on non-tariff measures.17

Technical and non-tariff barriers

4.19 The inclusion in IA-CEPA of separate chapters on technical barriers to trade and NTMs was widely welcomed. The inclusion of a specific chapter on non-tariff barriers, a first for Australia, is considered particularly significant, ECA calling it ‘probably … one of the most important parts of the agreement’.18 The Department of Foreign Affairs and Trade (DFAT) noted the importance of the chapter in light of the increase of non-tariff barriers:

We see increasingly now as tariff barriers are reducing around the world the non-tariff measures increasing. It provides an opportunity really for us to have a formal mechanism through which to trigger reviews of barriers that we face in the Indonesian economy.19

4.20 As in former inquiries into trade agreements, the Committee repeatedly heard that the removal of non-tariff barriers is as important as, if not more important than, the removal of tariffs:

What we see, probably, as the most gain is the process around non-tariff barriers that are enshrined in agreements. That’s where we see the biggest bang for the buck.20

4.21 The meat and livestock industry equated the removal of non-tariff barriers with the removal of tariffs:

Importantly, this economic partnership will also establish better mechanisms for Australia to address current and future technical market issues and non-tariff barriers—which is just as necessary as the removal of tariff barriers.21

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17 DFAT, *Supplementary Submission 48.1*, p. 4.
20 Mr Craig Hough, Director, Strategy and Policy, Australian Dairy Farmers, *Committee Hansard*, Melbourne, 27 August, 2019, p. 17.
4.22 However, despite the inclusion of these provisions, Australian businesses still face a range of ‘behind the borders’ barriers to accessing the Indonesian market. The National Farmers’ Federation (NFF) warned that non-tariff barriers are not static and that continued vigilance is required to address new barriers as they arise:

Non-tariff barriers are a little bit whack-a-mole: as soon as we deal with one, often another will stick its head up. That doesn’t mean we shouldn’t continue to try to address them as they arise, but FTAs often can only go so far in trying to address these barriers … all these FTAs include provisions, to some extent, that try to address the existing non-tariff barriers that we know about, but it’s a never-ending task.

4.23 The non-tariff issues brought to the Committee’s attention included:

- administrative difficulties;
- implementation of quotas; and
- movement of people, particularly staff and students.

Administrative difficulties

4.24 Ai Group raised concerns regarding the potential administrative burden placed on Australian business, particularly small and medium enterprises (SMEs), in order to take full advantage of the agreement.

Implementation of quotas

4.25 Several sectors have welcomed the provision of quotas by Indonesia, providing certainty around access to the Indonesian market. Citrus Australia explained that under the previous arrangements, Indonesia issued quotas on a six-monthly basis which did not coincide with the Australian season and hindered forward planning. The new quota will enable the industry to take full advantage of the Indonesian market:

If on face value we can accept the agreement as it is, we’ve actually got some regulatory transparency, because we at least know we can get 10,000 tonnes of oranges and 7,500 thousand tonnes of mandarins in and so people can actually put some planning in place to service that market. What’s happened over the last five or so years is demand for citrus has been good, so by the time the

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22 Australia Indonesia Business Council (AIBC), Submission 14, p. 7.
23 Dr Prudence Gordon, General Manager, Trade and Economics, National Farmers’ Federation (NFF), Committee Hansard, Sydney, 26 August 2019, p. 10.
24 Ai Group, Submission 39, p. 5.
Indonesians get their quota allocation the fruit is already sold and there’s nothing to give them.25

4.26 However ECA, while acknowledging the benefits of quotas as providing a significant improvement in access, advised that they can create difficulties:

… the problem is that there have been cases in the past where the quotas, for various reasons, have proven to be very low compared to what the demand for Australian produce is.26

4.27 The ECA referred to the example of the Korea-Australia Free Trade Agreement (KAFTA) in which a quota was set for what had previously been the peak in Australian beef exports to Korea:

But, a few years down the track, for various reasons, that quota was met in November, then it was met in October, then September and … it’s now being met around midyear. Above that quota, you need to pay higher tariffs. Ideally, we would love to see no quotas involved in any of the free trade agreements, but we understand that there are negotiating factors that require them to be put in place.27

4.28 The ECA suggested that, in order to avoid similar problems with the quota provisions in the IA-CEPA, the arrangements ‘will need to be monitored and continue to be negotiated as the agreement gets older’.28

4.29 DFAT explained that, learning from previous experience, the quotas were negotiated to provide greater market access certainty for Australian businesses:

… Indonesia had locked in tariffs at zero under the ASEAN-Australia-New Zealand Free Trade Area, but still the trade wasn’t flowing. So we have locked in this agreement some tariff rate quotas with the notion, and backing it up, that we would require automatic licences—which has really been the thing that has stopped the trade flowing—without seasonality for live cattle, for grains, for feed.29

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25 Mr David Daniels, General Manager, Market Development, Citrus Australia, Committee Hansard, Sydney, 26 August 2019, p. 24.
26 Mr Baker, ECA, Committee Hansard, Sydney, 26 August 2019, p. 27.
27 Mr Baker, ECA, Committee Hansard, Sydney, 26 August 2019, pp. 27–28.
28 Mr Baker, ECA, Committee Hansard, Sydney, 26 August 2019, p. 28.
29 Ms Ward, DFAT, Committee Hansard, Canberra, 9 September 2019, p. 20.
Movement of people

4.30 As discussed in the previous chapter, IA-CEPA is seen as providing a significant platform for increased business-to-business and person-to-person relationships. However, facilitating the movement of people required to encourage those relationships remains an issue. In particular the need to streamline visa applications processes to enable young Indonesians and Australians to visit each other’s countries for work and leisure. Research by the Australia-Indonesia Youth Association (AIYA) indicate that ‘there are practical barriers that prevent uptake in the work and holiday visa scheme by both Australians and Indonesians’.

4.31 Anecdotal evidence from the Indonesia Institute confirmed AIYA’s findings:

… two young Indonesian Chinese directors for a company that runs a partnership with Indonesia were speaking to me the other week in Surabaya, and I asked both of them—one is 30; the other is 31—how often they come to Australia … Both looked and said, ‘Oh.’ Yet the partnership is based here in Perth. Apart from work, they don’t ever come here. So I asked them why, and they said: ‘You know what our generation is like. We don’t even make our mind up until Thursday, when we realise it’s a long weekend, that we want to go somewhere. Like all of us, we just discount Australia, because it takes two weeks to get a visa, it’s $140 each and it’s 16 pages. We just jump on a plane. We can go to Tokyo, Delhi and any of the ASEAN countries overnight, so we don’t really worry about it.’

Investment: BIT and ISDS

4.32 There are two issues that were brought to the Committee’s attention regarding the investment provisions in IA-CEPA:

- the risks surrounding the decision not to terminate the existing bilateral investment agreement with Indonesia; and
- the inclusion of an ISDS clause in IA-CEPA.

Bilateral Investment Treaty

4.33 The existing Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the promotion and Protection of Investments (IA-BIT) was signed in 1992 and entered into force in July 1993.

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30 Australian-Indonesian Youth Association (AIYA), Submission 33, p. 17.
31 Mr Ross Taylor, AM, President, Indonesia Institute, Committee Hansard, Perth, 2 September 2019, p. 37.
The usual process has been for these older types of bilateral investment treaties to be terminated when Australia enters into newer agreements, including trade agreements that contain investment chapters.\(^{32}\)

4.34 The existing IA-BIT contains both investment provisions and ISDS provisions. If the IA-CEPA is ratified and enters into force without the IA-BIT being terminated ‘there will be two sets of bilateral rules covering investment flows between’ Indonesia and Australia.\(^{33}\) The Committee was advised that consideration should be given to terminating the existing IA-BIT in order to prevent future complications:

> The existence of overlapping investment treaties complicates Australia’s compliance with these treaties and makes it harder to understand the nature and scope of Australia’s investment obligations and harder to predict the outcomes of an ISDS claim alleging breach of these obligations.\(^{34}\)

4.35 Further complications could arise as both countries are parties to the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) which includes ISDS provisions.\(^{35}\)

4.36 As will be discussed below, the updated and modernised ISDS provisions in IA-CEPA are considered stronger and safer than previous iterations of these types of provisions. It is suggested that terminating the current IA-BIT will remove any ambiguity with regard to the updated provisions in IA-CEPA and remove the uncertainty caused by the IA-BIT remaining operative:

> The continued operation of the Australia-Indonesia BIT increases the risk of an ISDS claim against Australia and the risk of such a claim succeeding.\(^{36}\)

4.37 Asked if an applicant could take advantage of the provisions in both the IA-BIT and IA-CEPA if the former remains in force when the latter comes into force, DFAT explained that which provision was chosen would depend on when the breach occurred. The provisions in IA-CEPA will only apply from the date it comes into force, breaches committed prior to that would be

\(^{32}\) Professor Andrew D Mitchell and Professor Tania Voon, *Submission 2*, p. 4.

\(^{33}\) Perth USAsia Centre, *Submission 6*, p. 1.


\(^{35}\) Professor Mitchell and Professor Voon, *Submission 2*, pp. 6–7.

\(^{36}\) Professor Mitchell and Professor Voon, *Submission 2*, p. 5.
covered by the IA-BIT.\textsuperscript{37} However, the Department added that an applicant could not use both provisions at the same time:

One of the provisions in the investment chapter in IA-CEPA provides for a written waiver. So, in order to bring a claim under IA-CEPA the claimant has to waive their right to bring any action domestically or under another agreement. If there were a case where an investor was seeking to use IA-CEPA on the basis of article 14.26, they would need to waive their right to bring an action under the bilateral investment treaty.\textsuperscript{38}

4.38 Several possible reasons were given for why termination of the IA-BIT has not been pursued with the implementation of IA-CEPA. Evidence to the Committee suggests that the current IA-BIT is more pro-host state. While Indonesia has a sophisticated, large economy and is keen to attract foreign investment, it is still a developing state and recognises that its ‘domestic legal system and administrative capacity is far from perfect’.\textsuperscript{39} It has negotiated investment treaties with other countries accordingly:

... so it’s obviously negotiated with the Australian government, as it has done with other counterparties, particularly from developed countries, to build into the treaty a few more provisions that favour its interest as primarily a host state for foreign investment.\textsuperscript{40}

4.39 DFAT explained that the IA-BIT is a separate treaty action and its termination can be negotiated separately to the IA-CEPA negotiations. The DFAT assured the Committee that the Australian Government recognises the benefits of terminating the IA-BIT. However, DFAT states that a decision had to be made whether to prolong the IA-CEPA negotiations to this end or conclude those negotiations and treat the termination of the IA-BIT separately:

As to the question about why we didn’t move to terminate the BIT, it was more to do with the fact that we needed to take a decision at the end of the negotiation on whether we just keep the negotiation going for the purpose of terminating a separate treaty, which we didn’t need to do because we can deal

\textsuperscript{37} Ms Caroline McCarthy, Assistant Secretary, Free Trade Agreement Investment, Digital Trade and Other Issues Branch, Regional Trade Agreements Division, DFAT, Committee Hansard, Canberra, 9 September 2019, p. 17

\textsuperscript{38} Mr Paul Schofield, Acting Assistant Secretary, Trade and Investment Law Branch, Office of Trade Negotiations, DFAT, Committee Hansard, Canberra, 9 September 2019, p. 17.

\textsuperscript{39} Dr Nottage, Committee Hansard, Sydney, 26 August 2019, p. 13.

\textsuperscript{40} Dr Nottage, Committee Hansard, Sydney, 26 August 2019, p. 13.
with the separate treaty on its own terms. That was the conclusion at the end of the day: we can deal with the separate treaty on its own terms and enter into a discussion with the Indonesian government on its own terms on this treaty.\footnote{Ms Ward, DFAT, \textit{Committee Hansard}, Canberra, 9 September 2019, p. 16.}

\textit{Survival clause}

4.40 The Committee was also alerted to potential issues presented by the ‘survival clause’ in the IA-CEPA. This states:

In respect of investment made prior to the date of termination of this Agreement, the provisions of the Agreement shall continue to be effective for a further period of fifteen years from the date of termination of the Agreement.\footnote{Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the promotion and Protection of Investments (AI-BIT), art XV:2.}

4.41 If this clause remained in force it could leave Australia open to an ISDS claim being brought for up to fifteen years after the IA-BIT had been terminated. To avoid this risk ‘Australia and Indonesia would need to clarify their intention regarding the survival clause in terminating the agreement’.\footnote{Professor Mitchell and Professor Voon, \textit{Submission 2}, pp. 7–8.}

\textit{Investor-state dispute settlement provisions}

4.42 While there is support for the inclusion of an ISDS provision in the IA-CEPA, some concerns were raised. The inclusion of ISDS provisions in FTAs is seen as an important protection for Australian investors operating in foreign markets, particularly those with less developed legal systems:

While it may be observed that Australia has a well-developed and transparent legal environment that can meet the needs of foreign investors here, the same observation does not always apply to the legal environments of other countries in which Australian companies might seek to invest. ISDS provides an additional and useful mechanism for remediating problems in these overseas environments when or if issues arise. The existence of ISDS as a possible fall back mechanism can help assuage potential investors, and encourage more Australian business activity overseas.\footnote{Business Council of Australia (BCA), \textit{Submission 22}, pp. 2–3.}

4.43 Ai Group note that while Australia faces a slight risk of facing ISDS claims, it considers ISDS provisions essential to encourage Australian businesses to invest overseas:
Ai Group believes that an important factor in encouraging Australian firms to invest overseas is to assist them in protecting their assets by signing up to an [ISDS] agreement. As a liberal democracy with transparent laws and procedures, Australia has little to fear from an ISDS … however as Australian companies are encouraged to invest in markets with less certain political systems, they have much to gain from a system that prohibits their host government from appropriating their assets, restricting their ability to send capital back to Australia, or deny equal treatment as local firms.45

4.44 The Indonesian market is recognised as a challenging investment environment, presenting risks for Australian investors because of its ‘uncertain regulatory climate and increasing economic nationalism’.46 The Australian mining industry which is particularly exposed to the Indonesian market, indicated that in these circumstances, ISDS provisions provide certainty and confidence for Australian investors:

[ISDS provisions] will allow investors to seek mediation and arbitration where they claim that a government has breached the investment commitments it has made under the agreement. An ISDS mechanism provides greater comfort and investor certainty for both Indonesian and Australian investors alike. It also reduces sovereign and political risk—and, for the mining sector, provides greater certainty for what can be millions or billions of dollars of capital.47

4.45 The ECA recognised the contested nature of ISDS provisions but pointed out that there was little debate about the need to protect Australian investors, rather the ‘argument is about the mechanism itself’:

I think there are probably ways to make it a bit more palatable to people, but I don’t see any inherent problems with the working of the mechanism that should prohibit its inclusion.48

**Concerns**

*Risk to Australian government*

4.46 There is some concern that the ISDS system exposes the Australian government to the risk of costly and time-consuming litigation. These concerns were illustrated by the Philip Morris case against Australia

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46 NIA, para 25.
claiming compensation for Australia’s 2011 plain packaging legislation, even though Philip Morris lost the case. The Australian Fair Trade and Investment Network Ltd (AFTINET) articulated general concerns over the ISDS system:

... 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.49

4.47 However, it was repeatedly pointed out to the Committee that Australia has been a party to ISDS provisions for a considerable time and has not been subject to successful litigation:

In the 30 years Australia has been subject to these provisions, no Australian law, regulation or public policy has had to be changed due to ISDS. In fact, in all that time under all those agreements, there have only been two ISDS claims against Australia.50

4.48 As the MCA highlighted, neither of the claims against Australia was successful. Philip Morris lost their case and costs were awarded against the company.51

4.49 AFTINET also suggested that there were alternative processes available to investors to protect themselves from the risks of doing business in foreign countries. They indicated the state-to-state dispute processes included in FTAs, risk insurance and the use of specific contracts with government for major projects.52 However, with regard to risk insurance the Australia Indonesia Business Council (AIBC) considered that premiums would be too high to make the proposal viable.53

4.50 Asked if businesses would be prepared to take out risk insurance to cover their operations, Ai Group put it quite bluntly:

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49 Australian Fair Trade and Investment Network Ltd (AFTINET), Submission 17, p. 6. See also Mr Damian Kyloh, Economic and Social Policy Adviser, Australian Council of Trade Unions (ACTU), Committee Hansard, Melbourne, 27 August 2019, p. 28.

50 MCA, Submission 26, p. 19.


52 Dr Patricia Ranald, Convener, AFTINET, Committee Hansard, Sydney, 26 August 2019, p. 4.

53 Mr Ian Satchwell, Trade and Investment Adviser, AIBC, Committee Hansard, Perth, 2 September 2019, p. 9.
... when there is no ISDS and the environment seems risky, companies simply don’t invest in that market.54

4.51 Dr Nottage noted that empirical evidence suggested that ISDS provisions increased bilateral investment flows.55

Updated provisions

4.52 The NIA claims that the ISDS provisions in IA-CEPA have been updated with higher level safeguards that will provide a ‘better balance between the protection of investors and maintaining the government’s right to regulate in the public interest’.56 The safeguards include ‘carve-outs, exceptions and other protection for government policy setting’.57 These claims have been contested by some.

4.53 AFTINET considers that the safeguards in AI-CEPA are not strong enough to prevent claims against the Australian government:

Other more general safeguards in IA-CEPA will not actually prevent ISDS cases against changes in other public interest regulation, like environmental laws to address climate change or new industrial laws.58

4.54 The Electrical Trades Union of Australia (ETU) acknowledged that the provisions had been upgraded but still considered that they were deficient.59 The Australian Council of Trade Unions (ACTU) argued that the inclusion of safeguards for specific sectors indicated that there was an overall problem:

... the fact that safeguards have been provided in the legal text only for certain sectors highlights that there is an actual problem here - because they have left other sectors completely without safeguards at all. Industrial relations and environment are key examples where there are no safeguards ... What we are saying is that there are huge sectors and parts of policy that aren’t safeguarded.60

54 Ms Louise McGrath, National Manager, Ai Group, Committee Hansard, Perth, 2 September 2019, p. 31.
55 Dr Nottage, Committee Hansard, Sydney, 26 August 2019, p. 16.
56 NIA, paragraphs 26–27.
57 NIA, para 28.
58 AFTINET, Submission 17, p. 8.
59 Mr Trevor Gauld, National Policy Officer, Electrical Trades Union of Australia (ETU), Committee Hansard, Melbourne, 27 August 2019, p. 34.
60 Mr Kyloh, ACTU, Committee Hansard, Melbourne, 27 August 2019, p. 34.
4.55 However, Professor Voon told the Committee that, in her view, the carve-outs in the IA-CEPA are sufficient and that broader exemptions are preferable to product specific ones, providing better coverage of an area of concern:

... but in my view in general I would say that it’s preferable not to have product-specific carve-outs such as the tobacco carve-out we have in the CPTPP [Comprehensive and Progressive Agreement for Trans-Pacific Partnership] and in some of the other treaties and ... specific reference to particular programs such as the PBS. Sometimes those references also say ‘and any successor program’, which is valuable. I think the difficulty is that, if you refer only to specific programs or products, you don’t cover other things that could be challenged or other programs that haven’t been created yet; therefore, it’s preferable to have wider exceptions that refer, for example, to policy objectives such as health or the environment in a general way.\(^{61}\)

4.56 DFAT offered assurance that the carve-outs were considered strong enough to prevent claims against Australia in any area of public health:

With Indonesia, we had discussions, both internally and we consulted closely with the Attorney-General’s Department Office of International Law, on which approach to take. It was felt that the broader carve out for public health protected us not only in the case of, say, the tobacco situation but also more broadly for public health, and, as a consequence, we felt that that broader exception was preferable.\(^{62}\)

**Composition of tribunals**

4.57 Concerns remain over the consequences of allowing the arbitrators for the ISDS system to be drawn from a pool of practicing investment lawyers and the implication that this may impinge on their independence and impartiality. Dr Nottage termed this practice ‘double hatting’:

I notice that there is no express provision ... here that prevents double-hatting. This phenomenon that’s attracted a lot of public and also academic discussion of the highest ISDS arbitrators in acting to judge disputes and give rulings in ISDS disputes. They also act as counsel in other cases where, in particular, the problem arises where, as we see in these treaties, there are quite similar provisions. Of course, you might be tempted, even unconsciously, as an arbitrator to give a decision—and most of these awards are not public and therefore can be used as persuasive precedents in other cases—for an award or

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\(^{61}\) Professor Voon, *Committee Hansard*, Melbourne, 27 August 2019, pp. 8 and 11.

\(^{62}\) Ms Nadia Krivetz, Director, Free Trade Agreement Services Branch, Regional Trade Agreements Division, DFAT, *Committee Hansard*, Canberra, 9 September 2019, p. 19.
some line of reasoning that might favour your argument in a different case, even under a different treaty, where you’re the counsel. It at least gives a bad impression. It’s an appearance, perhaps, of bias or lack of independence and impartiality of the arbitrator.63

4.58 Dr Nottage was, however, very supportive of the inclusion of the pre-arbitration mediation stage featured in IA-CEPA:

… the host state can require the foreign investor to go through a mediation process. The investor and the host state—most likely Indonesia since we invest more in them than vice versa—need to appoint an independent third-party neutral as a mediator who will try to get the disputing parties to come to an agreed settlement. If that’s requested and it doesn’t work then the foreign investor can go to arbitration.64

Proliferation of trade agreements with a single partner

4.59 ACCI raised the issue of multiple trade agreements with a single partner, the so-called ‘noodle bowl effect’, and the difficulties this can cause for Australian businesses, particularly SMEs.65 As noted above, in addition to IA-CEPA, Australia and Indonesia are both parties to AANZFTA.

4.60 ACCI argues that the multiplication of treaties with the same partner makes it difficult for businesses to navigate the provisions of trade agreements, leading to underutilisation.66 ACCI maintains that this complexity defeats the purpose of these agreements to make trade freer and easier.67 ACCI again called on the Australian Government to streamline overlapping agreements:

We urge government to rationalise agreements where they overlap, in order to remove the red tape associated with both duplication, and different terms, in multiple agreements covering the same market.68

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63 Dr Nottage, Committee Hansard, Sydney, 26 August 2019, p. 14.
64 Dr Nottage, Committee Hansard, Sydney, 26 August 2019, p. 14.
65 ACCI, Submission 32, p. 3.
66 ACCI, Submission 32, p. 3.
67 Mr Bryan Clark, Director, International Chamber of Commerce Australia, ACCI, Committee Hansard, Melbourne, 27 August 2019, p. 14.
68 ACCI, Submission 32, p. 3.
4.61 However, other stakeholders considered that the multiplication of trade agreements with a single partner provide options for businesses:

… the noodle bowl of FTAs … I put on the record that this is not an argument the Export Council buys into, for the simple reason that businesses opt into FTAs. They choose whether to take these complexities on and they do so because they see the benefits. From a personal perspective I have never heard a member of ours complain about too much market access; it’s only the other way round.⁶⁹

4.62 This point was reiterated by the Ai Group:

The benefits of FTAs do not apply automatically, companies must opt in to realise them. This means that if there is one FTA with a country, or five, an Australian company must look at the relevant FTA to determine if there is an advantage for their business and what they must do to comply with the rules.⁷⁰

4.63 What all stakeholders agree on is the need to provide support to ensure that Australian businesses have sufficient assistance to take full advantage of the opportunities provided by trade agreements. Ai Group provide this type of support and drew attention to the assistance available through the DFAT:

Fortunately for Australian companies, this information [on FTAs] is freely and readily available from organisations such as Ai Group as well as DFAT’s FTA Portal. Unlike similar databases produced by other governments, this portal searches by market, not agreement, and automatically compares the different agreements for an importer and exporter’s individual product.⁷¹

**E-commerce**

4.64 The separate chapter on e-commerce contained in IA-CEPA is considered significant by stakeholders:

This agreement puts in place important commitments to facilitate trade as the distinctions between online and offline become increasingly meaningless. It also strengthens the global norms around protecting source code.⁷²

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4.65 Ai Group explained some of the difficulties currently hampering the development of e-commerce in the Indonesian trade environment:

… the data localisation laws are quite insidious when they do occur, and before this agreement was quite locked into Indonesia’s data localisation laws, some in the Indonesian business community were worried about the data until we talked through the issues, particularly from the manufacturing sector, and they understood that it’s a higher risk to enforce data localisation rather than to guarantee the sharing of information. I’d liken data localisation to putting chains across the port. You wouldn’t put chains across the port so ships couldn’t come and go, but that is what a data localisation law would be.73

4.66 ECA elaborated on the extent of e-commerce in today’s trading environment:

In terms of electronic commerce … this agreement will allow the electronic transmission of data unrestricted within each country’s privacy requirements. That is important, because when people think of the transfer of data and information they think of Google and Facebook and those sorts of companies, but if you’ve got a hotel and you’re selling your hotel rooms online that’s electronic commerce. If you’re selling hats and your hats are available for purchase online, you’re doing the same sort of e-commerce and have the same sorts of requirements as the major businesses have. So anything you can do to simplify the requirements there will be of great assistance.74

4.67 Ai Group stressed the need to facilitate the free flow of information in today’s business environment in order to support and encourage cooperation:

When we think about cybersecurity laws or data laws, we forget that really what it’s about is information, and companies need their corporate information to flow freely between all their sites, whether in Australia, Indonesia or across the region. By protecting Australian companies’ ability to send data, whether it’s machine-to-machine data or financial systems, ordering, stock suppliers—all the bits of data and information you can think of in a modern company—that’s only going to add to the relationship, foster greater cooperation between the two countries and encourage corporations in Australia and Indonesia to collaborate more or invest in each other’s countries.75

73 Ms McGrath, Ai Group, Committee Hansard, Perth, 2 September 2019, pp. 28–29.
74 Mr Baker, ECA, Committee Hansard, Sydney, 26 August 2019, p. 28.
75 Ms McGrath, Ai Group, Committee Hansard, Perth, 2 September 2019, p. 28.
However, enabling this free flow of information may impinge on the current and a future Australian government’s ‘ability to properly regulate domestic markets, support small businesses to grow and protect consumers’. AFTINET expressed concern that there has been little analysis undertaken of the impact of these provisions on human rights or Australia’s ability to govern the digital economy.

Temporary workers

Questions were raised with regard to chapter 12 of the agreement on the movement of natural persons. The issue of the movement of contractual service suppliers in particular raised some concern as the chapter indicates that a final decision on the details has not yet been made:

**Article 12.9: Future Work Program on Contractual Service Suppliers**

Unless the Parties otherwise agree, the Parties may decide to commence negotiations within three years of entry into force of the Agreement with a view to making mutually advantageous commitments on contractual service suppliers. The Parties shall make their best endeavours to complete the negotiations within two years of initiating them.

The union movement is concerned that this may open the way for an influx of workers from Indonesia without due consideration of Australian workers filling those positions.

When questioned, the DFAT explained that it is at the discretion of the Parties whether or not to open negotiations on contractual workers. Further, any negotiations are likely to include changes to the status of Australia’s regulatory settings and therefore would require a treaty-level commitment. This would entail meeting the standard treaty requirements, including scrutiny by the Joint Standing Committee on Treaties (JSCOT).

Further, under IA-CEPA Australia will accept an additional 4,000 temporary working holiday visa applications, increasing to 5,000 workers over several

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76 Australian Manufacturing Workers’ Union (AMWU), submission 35, p. [2].
77 AFTINET, Submission 17, p. 14.
79 Mr Kyloh, ACTU, Committee Hansard, 27 August 2019, p. 27.
80 Ms Ward, DFAT, Committee Hansard, Canberra, 9 September 2019, pp. 17–18
years, as well as 200 training visas per year. There have been public incidents of exploitation of workers entering the country under such arrangements in recent years and the union movement is concerned that Indonesian workers taking advantage of these provisions will not be protected.81

4.73 In 2017-18 a total of 210,456 working holiday visas were issued.82 Indonesia accounted for just 0.5 per cent of the working holiday visa program. The increase in working holiday visas—up to 5,000 12-month visas for 18–30 year old Indonesians—would mean if all 5,000 work and holiday visa holders are taken up by Indonesians, it will be 2.3 per cent of all this category of visas. In contrast in 2017–18 there were almost 38,000 visas holders in this category from the United Kingdom (UK). This is why it is critical to have domestic industrial relations laws that seek to protect all workers from exploitation regardless of their country of origin.

Skills assessment

4.74 On a related issue, the union movement expressed concern that the side letter on technical vocational training could lead to a situation where a tradesperson who qualified in Indonesian, could potentially practice in Australia but may not meet Australian standards. DFAT told the Committee this was unable to happen as any Indonesian tradesperson wishing to work in Australia would have to acquire the requisite licence and meet all of the standards set out by the Australian government.83 DFAT stressed that the purpose of the side letter ‘was to find a mechanism to allow Australian providers of vocational training to train Indonesians for the Indonesian market’.84

Human and labour rights and environmental standards

4.75 The absence of commitments to human and labour rights and environmental standards in the Agreement was raised with the Committee by the union

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81 Mr Kyloh, ACTU, Committee Hansard, Melbourne, 27 August 2019, pp. 27 and 37; Dr Ranald, AFTINET, Committee Hansard, Sydney, 26 August 2019, p. 3.


83 Ms Ward, DFAT, Committee Hansard, Canberra, 9 September 2019, p. 18.

84 Ms Ward, DFAT, Committee Hansard, Canberra, 9 September 2019, p. 18.
movement and AFTINET. AFTINET stressed that such provisions provide insurance that standards will be improved, not compromised when an agreement is implemented:

Without such commitments, the removal of trade barriers can increase pressure to reduce labour rights and environmental standards to gain trade advantage—in effect, a race to the bottom on these standards. 85

4.76 With regard to environmental standards, the Committee was advised that there are safeguards in the investment chapter to protect decisions on the environment. 86

**General issues**

4.77 General issues related to trade agreements more broadly were raised during the course of the inquiry. These issues have all been raised with the Committee during previous inquiries.

**Independent economic modelling**

4.78 ACCI again recommended that independent economic modelling of trade agreements be undertaken to assess if the expected outcomes are being realised. 87 The union movement reiterated its call for such modelling to ensure that the full impact of any agreement on the Australian economy and society is established and understood:

We feel that for good policymaking it’s very important that we conduct independent cost-benefit analysis, and not just of the economic effects—we’d also say environmental and, for us particularly, looking at the labour market. We want to understand what the effects on the labour market are in these agreements. We know that in the past some industries have benefitted but some others have not and there have been job losses as a result. Without an independent economic assessment no-one knows what the effects are. 88

4.79 However, the response from industry was less enthusiastic. Ai Group suggested that they would be more interested in economic analysis of

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85 Dr Ranald, *Committee Hansard*, Sydney, 26 August 2019, p. 3; Mr Kyloh, ACTU, *Committee Hansard*, Melbourne, 27 August 2019, p. 28.


prospective markets to assess what opportunities may be available.\textsuperscript{89} Ai Group were hesitant to endorse the need for such analysis, considering it difficult to project possible outcomes:

It’s very difficult to predict behaviour … It sounds like a very simple commercial decision, but particularly amongst SMEs it’s extraordinary how rare it seems to be at just the simple commercial position. There are all sorts of reasons why companies choose to export to a particular market. Sometimes some of those barriers are addressed under an FTA and sometimes they’re not. Market acceptance is far more important, as is finding customers and customers who are willing to adopt the product without too much adaptation and at the price that you want, and those elements can’t be covered by an FTA.\textsuperscript{90}

4.80 The NFF is also cautious about attempting to assess the overall effect of FTAs, suggesting that the data isn’t available, and highlighting the complexity of the market:

… I don’t think a lot of the studies are capable of taking into account the dynamic impact FTAs have … going back to the US FTA, a number of the increases in exports to the US were in products that did not secure any new additional preferential access. There was this thing called the head-turning effect: people thought, ‘Oh, yes, we’ve got an FTA; let’s see if we can trade here.’ You can do as many studies as you like, but they’re not going to be able to factor in the head-turning effect that an FTA might have.\textsuperscript{91}

4.81 Citrus Australia, too, were hesitant about the benefits of economic modelling of the benefits of FTAs, telling the Committee that their growers were more concerned about the immediate benefits of an FTA:

… in our sector our growers/packers would be looking at the immediate benefits and they would want to look at the benefits per container. So, looking at a container of citrus at the moment, if you send a container to Indonesia it’s valued at around the $40,000 mark. The tariff on that at the moment is $10,000. They just want to see the $10,000 come off. I suppose the question … is rather academic.\textsuperscript{92}

\textsuperscript{89} Ms McGrath, Ai Group, \textit{Committee Hansard}, Perth, 2 September 2019, p. 28.

\textsuperscript{90} Ms McGrath, Ai Group, \textit{Committee Hansard}, Perth, 2 September 2019, p. 28.

\textsuperscript{91} Dr Gordon, NFF, \textit{Committee Hansard}, Sydney, 26 August 2019, pp. 9–10.

\textsuperscript{92} Mr Daniels, Citrus Australia, \textit{Committee Hansard}, Sydney, 26 August 2019, p. 22.
Consultation

4.82 As with previous inquiries into trade agreements, there was some disquiet over a perceived lack of consultation with civil society and union stakeholders. While industry groups told the Committee that they were satisfied with the level of consultation from DFAT and other relevant government agencies, the ETU considered that the union movement had been ‘locked out’ of the negotiation process. The NIA notes, however, a number of unions consulted during the negotiation process.

4.83 Questioned on the issue, DFAT informed that Committee that, in their view, their consultation is extensive and thorough. The Department holds stakeholder events a couple of times a year and are contacted regularly by civil society groups wishing to discuss issues of concern. DFAT expressed concern that their attempts to reach these groups was seen as less than optimal:

I would say that we have most regular contact with AFTINET who, over the years, have been extremely active. They will acknowledge that many of their members are trade unions ... and so our working assumption for a long time has been that whenever we speak to AFTINET, which is very regularly, it means that that information is well known, because AFTINET obviously does an excellent job with its members. We were concerned to read those comments. We believe that we do a good job in reaching out to civil society, and we will always work to try and improve how we do our work.

4.84 The Committee resolves to give further consideration to consultation mechanisms in the context of trade treaties during the 46th Parliament.

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93 Mr Gauld, ETU, Committee Hansard, Melbourne, 27 August 2019, p. 29.
95 Ms Ward, DFAT, Committee Hansard, Canberra, 9 September 2019, p. 19.
96 Ms Ward, DFAT, Committee Hansard, Canberra, 9 September 2019, p. 19.
5. A-HKFTA

5.1 This chapter examines the Free Trade Agreement between Australia and Hong Kong, China (A-HKFTA) and the Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China (Investment Agreement) signed on 26 March 2019 in Sydney. The two Agreements were tabled in the Parliament on 2 April 2019. The Committee’s inquiry lapsed at the dissolution of the 45th Parliament and the treaty action was re-referred to the Committee by the Minister of Foreign Affairs on 29 July 2019.

5.2 The Investment Agreement contains the investment rules linked to A-HKFTA. The Investment Agreement will replace the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Production of Investments (the 1993 Investment Agreement).¹

Overview and national interest summary

Understanding Hong Kong

5.3 Hong Kong has an unusual status in international law. It is a Special Economic Region of the People’s Republic of China. It has a constitutional

framework called the ‘Basic Law.’ It is a limited democracy, with an elected Legislative Council.2

5.4 The Basic Law was negotiated as part of the return of jurisdiction over Hong Kong from Britain to China. The Basic Law came into effect at the handover in 1997. The Basic Law will expire in 2047.3

5.5 In economic matters, the Basic Law entitles Hong Kong to act like a nation state. It is a member of the World Trade Organization (WTO) and the International Monetary Fund. It has its own currency, the Hong Kong Dollar, which is linked to the value of the United States Dollar.4

5.6 Hong Kong has the authority to negotiate its own trade agreements, with the exception of matters relating to foreign investment, over which China has some legal jurisdiction. The investment exception means that the Investment Agreement under consideration here is a separate treaty.5

5.7 Hong Kong’s success is based on international trade. As a single economy, Hong Kong is the seventh largest importer in the world and the eighth largest exporter in the world.6

5.8 This economic strength has resulted in Hong Kong having the eighteenth highest per capita Gross Domestic Profit in the world.7 By way of comparison, Australia is ranked 29th.8

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5.9 Because the Hong Kong economy is based on international trade, Hong Kong does not in general impose barriers to trade. Trade in goods is tariff free for Australian exports⁹ and the services and investment environment is liberal and open.¹⁰

The A-HKFTA

5.10 According to the National Interest Analysis (NIA) Hong Kong is one of Australia’s most significant trading partners. Australia’s exports to Hong Kong in goods and services were valued at $14.5 billion in 2017–18, approximately 3.6 per cent of Australia’s total goods and services exports. Hong Kong is Australia’s fifth largest source of foreign investment ($116.6 billion in 2017) and the tenth largest destination for Australian foreign investment abroad ($47.4 billion in 2017).¹¹

5.11 The NIA suggests that A-HKFTA and the Investment Agreement will strengthen this economic relationship. Together the Agreements are intended to address the contemporary needs of Australian businesses and investors operating in Hong Kong, and set up a framework for future engagement.¹²

5.12 Australia’s largest commercial presence in Asia is in Hong Kong—across a wide range of industry sectors including banking and finance, construction and engineering, food and beverage, education, consumer and retail, transport and professional services. The NIA expects that further integrating Australia into the region and using Hong Kong as a launch pad into Chinese and regional markets will improve Australian businesses’ competitive advantage.¹³

5.13 Australia already has Free Trade Agreements (FTAs) with China, Japan and the Republic of Korea, and is one of a small number of countries to have an FTA with both mainland China and Hong Kong.¹⁴

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⁹ ARIA, para 33.
¹¹ NIA, para 6.
¹² NIA, para 7.
¹³ NIA, para 8.
¹⁴ NIA, para 9.
Reasons for Australia to take the proposed treaty action

5.14 The NIA advises that the multilateral negotiations underway in the World Trade Organization (WTO) to liberalise trade rules and market access have stalled. In addition, at present, there are no regional FTA negotiations to which both Australia and Hong Kong are party.\(^{15}\)

5.15 Because Hong Kong maintains an open economy, the Australian Government’s stated reasons for entering into the A-HKFTA are based, with some exceptions, on guaranteeing present levels of openness into the future.\(^{16}\)

5.16 Consequently, the Analysis of Regulatory Impact on Australia (ARIA) prepared by the Australian Government focusses on mitigating future risk:

- Australian goods exporters cannot be legally guaranteed zero-tariff treatment on their goods entering Hong Kong;
- Australian services exporters and investors remain exposed to risk, should any policy settings currently applied in Hong Kong be changed in the future, and with no opportunity to secure better access;
- Australian businesses are not best placed to take advantage of Hong Kong’s status as a key e-commerce hub into mainland China and the wider Asia region for consumer goods and services;
- Australia’s investment relationship is governed by outdated international investment protection rules, increasing the risk of further investor-state dispute settlement (ISDS) claims against the Commonwealth; and
- Australia is deprived of an opportunity to bolster existing FTA networks across the region to deepen liberalisation and economic integration over the long term.\(^{17}\)

5.17 The summary of sectoral outcomes below is taken from the NIA and ARIA.

Goods

5.18 Hong Kong was Australia’s sixth largest goods export market in 2017-18, with goods exports totalling $11.39 billion. The NIA maintains that there is strong demand for traditional Australian exports to Hong Kong, in sectors

\(^{15}\) NIA, para 10.
\(^{16}\) NIA, para 10.
\(^{17}\) ARIA, para 11.
such as food and beverages.\textsuperscript{18} The ARIA states that Hong Kong’s demand for Australian goods increased by 5.8 per cent in the last five years.\textsuperscript{19}

5.19 Hong Kong does not currently apply tariffs on imported Australian goods. However, under WTO rules, Hong Kong has left unbound 52.3 per cent of tariff lines. This means that Hong Kong could potentially apply a tariff of any rate on these goods, which include key Australian exports such as coal, gold, zinc ores and liquefied natural gas. In A-HKFTA, Australia and Hong Kong have agreed to bind all tariffs at zero from entry into force.\textsuperscript{20} The ARIA considers that the A-HKFTA will provide certainty to Australian exporters by binding all tariffs at zero upon entry into force.\textsuperscript{21}

5.20 The ARIA indicates that Australia has made a reciprocal commitment to immediately eliminate all remaining tariffs on goods produced in Hong Kong upon entry into force.\textsuperscript{22}

5.21 Australian goods exporters have been positive about the benefits of the A-HKFTA. According to the Australian Chamber of Commerce and Industry:

\begin{quote}
In the case of the agreement with Hong Kong, in terms of goods, the agreement locks in current operating arrangements...
\end{quote}\textsuperscript{23}

5.22 Australia’s resources exports to Hong Kong have been dominated by gold. According to the Minerals Council of Australia, total gold exports to Hong Kong are worth approximately $7 billion in 2018. Hong Kong is expected to remain the principal market for Australian gold exports into the future.\textsuperscript{24}

5.23 Gold aside, there are also sizeable resources exports to Hong Kong. Australia exports iron ore and concentrates ($66.9 million in 2018), refined petroleum ($62.7 million in 2018), coal ($17.6 million in 2018) and non-ferrous waste and scrap ($11.9 million in 2018).\textsuperscript{25}

\begin{footnotes}
\item[18] NIA, para 14.
\item[19] ARIA, para 32. For further details see ARIA, para 32, Table 6.
\item[20] NIA, para 15. For further details see ARIA, para 12, Table 3.
\item[21] ARIA, para 33.
\item[22] ARIA, para 34. For further details see ARIA, para 34, Table 7.
\item[25] MCA, \textit{Submission 15}, p. 3.
\end{footnotes}
5.24 The Committee heard from a number of agriculture exporters as part of the inquiry. The most important factor for agricultural exports to Hong Kong is the demand for quality in the Hong Kong market.

5.25 Australia’s dairy exports to Hong Kong ranged between 25,000 tonnes and 30,000 tonnes over the past ten years, making Hong Kong one of the top ten export markets by volume.26

5.26 On average just under 4 per cent of total Australian dairy exports are destined for the Hong Kong market. In value terms, dairy exports to Hong Kong have ranged between $100 million and $150 million per annum in recent years.27 Craig Hough, Director, Strategy and Policy at Australian Dairy Farmers, advised the Committee that:

Hong Kong’s … more of a high-end high-value play. That’s because of the higher per capita income ratio.28

5.27 Meat and Livestock Australia also emphasised that Hong Kong was a market for quality Australian produce. In relation meat:

Last year… we sent just over 7,000 tonnes of beef to Hong Kong. That was worth $96 million. It is an exceptionally high-level product that we are sending over there. We send about $30 million worth of mutton there as well.29

5.28 Australian wine is also a significant export to Hong Kong. Australian Grape and Wine states that Australia is the second largest exporter of wine behind France. Total wine imports to Hong Kong amounted to 60.88 million litres in 2017. Up to 20 per cent of that imported wine is transhipped from Hong Kong to other destinations.30

5.29 In relation to technical barriers to trade, the A-HKFTA provides for more transparent and efficient customs procedures, making it easier for Australian companies to export and do business in Hong Kong.31

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26 Dairy Australia, Submission 18, p. 3.
27 Dairy Australia, Submission 18, p. 3.
28 Craig Hough, Director, Strategy and Policy, Australian Dairy Farmers, Committee Hansard, Melbourne, 27 August 2019, p. 16.
29 Patrick Hutchinson, Chief Executive Officer, Australian Meat Industry Council, Committee Hansard, Sydney, 26 August 2019, p. 37. See also Australian Pork Limited, Submission 11, p. 1.
30 Australian Grape and Wine, Submission 1, p. 2.
31 NIA, para 16.
5.30 Hong Kong has also committed to harmonised rules and technical requirements for food products and wine, which is expected to help facilitate trade in areas of Australia’s export strengths. The Wine Annex (Annex 5-A) provides guidance on labelling, including harmonised minimum requirements for wine labels. The NIA states that this will reduce uncertainty and minimise compliance costs for traders. The Wine Annex includes an exemption for certain legitimate objectives, such as the protection of human health and safety, consistent with Australia’s approach in other FTAs.32

5.31 The Wine Annex has been welcomed by Australian Grape and Wine:

Annex 5-A Wine of the ‘Technical Barriers to Trade’ chapter, will assist to address harmonisation of practices and technical requirements across the two parties and provides a template for future agreements. The annex will help remove any uncertainty around classification, certification and labelling of wine.33

5.32 However, the Australian Fair Trade and Investment Network (AFTINET) points out that the Wine Annex:

...provides for a standard labelling regime allowing a manufacturer to use the same main label in both countries. Any additional mandatory labelling requirements by individual governments must be on a supplementary label, not on the main label. These rules reduce the flexibility of governments in the future to design labelling requirements based on new public health research.34

5.33 The Food Products Annex (Annex 5-B) includes specific commitments to facilitate trade in food products. Recognising the perishable nature of many food products, the Annex includes commitments for each Party to process perishable goods as quickly as possible and initiate discussions to resolve any non-tariff barriers as they arise. This is expected to help prevent and address trade barriers related to food products and promote Australia’s export interests.35

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32 NIA, para 17.
33 Australian Grape and Wine, Submission 1, p. 3.
34 Australian Fair Trade and Investment Network (AFTINET), Submission 3, p. 14.
35 NIA, para 18. For further details see ARIA paragraphs 37–42.
5.34 The Dairy Industry Council and Australian Red Meat and Livestock Industries both commented favourably on the Food Products Annex.36

5.35 The Department of Foreign Affairs and Trade (DFAT) explained that the Annex was designed to address existing problems that Australian exporters are facing:

Delays in processing goods at the border can add to the costs for exporters, particularly in the case of perishable goods. The quick release of perishable goods reduces wait times for the clearance of agricultural exports in foreign ports.

Non-tariff barriers can be any kind of ‘red tape’ or trade rules that unjustifiably restrict the flow of goods and services. Australia commonly establishes mechanisms in FTAs to discuss and resolve non-tariff barriers as they arise.37

Services

5.36 Hong Kong was Australia’s eighth largest services export market in 2017–18, with services exports totalling $3.1 billion. According to the NIA, Australia’s services trade with Hong Kong is relatively unhindered.38

5.37 The NIA maintains that commitments in A-HKFTA safeguard Australian service providers against future changes to Hong Kong’s open policy settings.39

5.38 While the NIA states that the A-HKFTA includes Hong Kong’s most ambitious and comprehensive set of services commitments to date, it is worth noting that the A-HKFTA for the most part only preserves existing access, including in:

- financial services;
- education services;
- professional services;
- legal services;
- telecommunication services;
- transport services; and

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36 Dairy Industry Council, Submission 18, p. 3; and Australian Red Meat and Livestock Industries, Submission 2, p. 1.

37 Department of Foreign Affairs and Trade (DFAT), Supplementary Submission 29.1, p. [4].

38 NIA, para 19.

39 NIA, para 19.
• the movement of natural people.40

5.39 The Business Council of Australia argues that the A-HKFTA will:

…help encourage trade with Hong Kong in new areas of services and digital trade. The proposed agreement contains new commitments that will expand opportunities for Australia companies to provide services in Hong Kong, including guaranteeing the ability of legal service providers to practice both Australian and international law in Hong Kong; assisting Australian banks to incorporate in Hong Kong; and providing new outcomes for a range of other professional service providers.41

5.40 Hong Kong represents the ninth largest source for international, onshore higher education enrolments at sector level, so education institutions were particularly welcoming of the services provisions in the A-HKFTA.42

5.41 According to Vanessa Bourne, Chief of Staff at the University of Wollongong College Hong Kong, there are four central benefits from the A-HKFTA for education institutions:

• the development of collaborative training, research and development initiatives, including technology transfer and collaboration between education institutions within Australia and Hong Kong;
• the development of programs which can be jointly delivered by education institutions in Australia and in Hong Kong;
• the exchange of teaching staff, administrators, researchers and students between the two jurisdiction; and
• the proposal for academic credit transfer and mutual recognition of academic and vocational education and training qualifications between educational institutions.43

5.42 In relation to vocational education:

The [A-HKFTA]… solidifies existing arrangements. Some individual TAFEs have partnerships in Hong Kong. There is one main training provider in Hong

40 For more information on the benefits for each of these service sectors see NIA, para 20.
41 Business Council of Australia (BCA), Submission 9, p. 2.
42 Group of Eight, Submission 5, p. 2.
43 Vanessa Bourne, Chief of Staff, University of Wollongong College Hong Kong, UOW [University of Wollongong] Global Enterprises, Committee Hansard, Melbourne, 27 August 2019, p. 46.
Kong, called the Vocational Training Council [VTC], which has a number of campuses. We have TAFEs that have good relationships with the VTC.44

**Government procurement**

5.43 Hong Kong’s commitments on government procurement are equivalent to those it has made in the WTO Agreement on Government Procurement (GPA). Australia is acceding to, but not yet a party to, the GPA. Hong Kong entities bound by the Government Procurement Chapter of the A-HKFTA include 62 government departments and agencies and five non-government public bodies. The NIA explains that the non-government public bodies account for the majority of Hong Kong’s government procurement, and previously Hong Kong has only offered access to these entities to WTO GPA Members.45

5.44 Under A-HKFTA, Australian businesses will have the right to bid for government procurement in all categories of goods and construction services, and many services categories, including: computer and related services; business services; transport services; rental/leasing of ships, aircraft and other transport equipment; telecommunications and related services; and environmental services.46

5.45 A side letter provides a mechanism through which Australia and Hong Kong can work together to facilitate industry capability to engage in each other’s government procurement markets, including conditions for participation and the related assessment process.47

**Investment**

5.46 The investment provisions in the A-HKFTA and the Investment Agreement contain the most significant change to the trade relationship between Australia and Hong Kong being considered here. In particular, the new Investment Agreement contains a new Investor State Dispute Settlement (ISDS) process.

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45 NIA, para 21.

46 NIA, para 22.

47 NIA, para 22.
5.47 The ARIA states that the investment provisions in A-HKFTA and the Investment Agreement are expected to provide a modern regulatory regime to support the investment relationship between Australia and Hong Kong.\textsuperscript{48}

5.48 Levels of Hong Kong investment in Australia have grown significantly over the past decade, and in 2017, Hong Kong was the second largest source of new foreign direct investment in Australia of any single economy worldwide ($13.8bn). The NIA claims that A-HKFTA will promote further Hong Kong investment into Australia and the diversification of these investments.\textsuperscript{49}

5.49 The NIA states that the Investment Agreement will update the investment rules in force between Australia and Hong Kong to reflect contemporary investment policy on the treatment of investors and investments in each other’s economies. The Investment Agreement includes modern rules which:

- protect against discriminatory treatment;
- require payment of compensation in certain circumstances where an investment is expropriated;
- require that investment-related capital transfers can occur freely and without delay; and
- guarantee that investors and their investments will be accorded a minimum standard of treatment.\textsuperscript{50}

5.50 The A-HKFTA will increase the level at which private foreign investments in non-sensitive sectors will need to be considered by the Foreign Investment Review Board (FIRB) from $266 million to $1,154 million. The ARIA offers assurance that Australia has reserved the right to maintain its existing foreign investment review process, including the ability to screen investments in sensitive sectors. Lower screening thresholds of $15 million and $58 million will continue to apply to investments in agricultural land and agribusiness respectively, and investments in other land will continue to be subject to FIRB screening.\textsuperscript{51}

5.51 The Investment Agreement contains an ISDS mechanism, allowing investors to directly enforce obligations in the Agreement. The NIA states that the

\textsuperscript{48} ARIA, para 43.

\textsuperscript{49} NIA, para 24.

\textsuperscript{50} NIA, para 25. For further details see ARIA, para 44.

\textsuperscript{51} ARIA, para 45.
ISDS mechanism includes important safeguards to preserve the Government’s ability to regulate in the public interest:

- there are specific carve-outs ensuring that certain measures are outside the scope of ISDS, including tobacco control measures and, for Australia, those relating to the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator;
- Australia reserves the right to maintain existing and introduce new measures in key policy areas, including social security services, measures with respect to creative arts and cultural heritage and Australia’s Foreign Investment Framework;
- it includes provisions to prevent forum shopping, mechanisms to discourage frivolous and unmeritorious claims and robust transparency requirements; and
- general and security exceptions also apply to the Investment Agreement.\(^{52}\)

5.52 The ISDS provisions also include a novel provision relating to ISDS cases that may impact prudential regulation and stability in the financial sector. If the dispute has the potential to impact on prudential regulation and financial sector stability, the ISDS process contains an additional step to assess this risk before the ISDS process can proceed.\(^{53}\)

5.53 DFAT explained that this provision allows the Australian Government to legislate on prudential and banking matters, ‘including for example to implement the Banking Royal Commission recommendations’:

The prudential exceptions and related exceptions are among the features commonly included in Australia’s modern FTAs, providing clarity that nothing in the agreements prevent the Parties form adopting or maintaining ‘reasonable measure for prudential reasons’.\(^{54}\)

5.54 The NIA confirms that the 1993 Investment Agreement will terminate on the date of entry into force of the Investment Agreement. This includes

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\(^{52}\) NIA, para 26.


\(^{54}\) DFAT, Supplementary Submission 29.1, p. [5].
termination of the provisions for extended protection of existing investments.55

5.55 The improved ISDS provisions in the Investment Agreement have been well received in Australia. The Minerals Council of Australia:

… welcomes commitments in A-HKFTA outlined in a new investment agreement … [which] provide greater certainty for both Australian and Hong Kong investors. These are improvements to the existing bilateral investment treaty, the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments.

The new Investment Agreement contains protections for investments in Australia and Hong Kong. The agreement protects investors by providing for a minimum standard of treatment, a requirement to pay compensation in certain circumstances where an investment is expropriated, and protection against discrimination.56

5.56 AFTINET states:

The Hong Kong Investment Agreement includes some clear limitations of the scope for ISDS cases against public interest legislation, particularly in relation to public health. We welcome the clear exclusion of claims relating to the Pharmaceutical Benefits Scheme, Medicare, the Therapeutic Goods Administration and the Office of the Gene Technology regulator, and of public health control measures on tobacco products.57

5.57 However:

… the need to specifically exclude claims relating to these bodies brings into question the effectiveness of broader ISDS ‘safeguards’ for health, environment and other public welfare measures that are included in the Investment Agreement. These broad exclusions do not prevent ISDS cases from being launched.58

5.58 DFAT advised the Committee that:

…Explicit safeguards included in the ISDS provisions of the investment agreement protect the government’s right to regulate on national security

55 NIA, para 27.
56 MCA, Submission 15, p. 15.
57 AFTINET, Submission 3, p. 8.
58 AFTINET, Submission 3, p. 8.
grounds and for legitimate public policy objectives, including on privacy, public health, safety and the environment.\textsuperscript{59}

**E-commerce**

5.59 According to the NIA, A-HKFTA contains high-quality commitments on e-commerce. For the first time in any FTA, Hong Kong has agreed to include rules that provide businesses with certainty about their ability to move information across borders and make investment decisions about data storage facilities. These data rules will also apply to financial services. The NIA claims that Australia’s ability to take measures for public policy reasons, including for essential security or privacy protection, will not be affected.\textsuperscript{60}

5.60 DFAT stressed that both countries are conscious of the need to ensure strong security provisions in today’s cyber environment:

> Hong Kong and Australia have recognised through the cooperation article of the e-commerce chapter the importance of building the capabilities of their entities responsible for computer security incident response and using existing collaboration mechanisms to cooperatively identify and mitigate malicious intrusions or dissemination of malicious code that affect electronic networks.\textsuperscript{61}

**Other rules to improve the business environment**

5.61 The ARIA notes that the A-HKFTA also includes a number of provisions which help to improve transparency and provide certainty, in order to support the competitiveness of Australian exports and businesses. Highlights include:

- rules on customs procedures and trade facilitation;
- intellectual property rules;
- a commitment for Hong Kong to maintain legal regimes that target anti-competitive business practices and enforce consumer protection;
- undertakings to support Small and Medium Enterprises (SMEs); and
- rules encouraging regulatory coherence between the two Parties.\textsuperscript{62}

\textsuperscript{59} Elizabeth Ward, Chief Negotiator, Regional Trade Agreements Division, Department of Foreign Affairs and Trade (DFAT), *Committee Hansard*, Canberra, 9 September 2019, p. 2.

\textsuperscript{60} NIA, para 28. For further details see ARIA, para 48.

\textsuperscript{61} DFAT, *Supplementary Submission 29.1*, p. [3].

\textsuperscript{62} ARIA, para 52.
Implementation

5.62 The NIA states that the following legislative changes will be required to implement the A-HKFTA:

- the *Customs Act 1901*, the *Customs Tariff Act 1995* and relevant customs regulations will need to be amended to incorporate the preferential tariff rates and rules of origin that will apply to goods imported from Hong Kong under A-HKFTA;
- the *Foreign Acquisitions and Takeovers Regulations 2015* will also require amendment to incorporate the new thresholds for screening investment proposals by investors from Hong Kong; and
- to implement Australia’s obligations to Hong Kong with respect to Labour Market Testing for intra-corporate transferees and independent executives, *Migration (LIN 18/183: Determination of International Trade Obligations relating to Labour Market Testing) Instrument 2018* will need to be amended through a Ministerial Determination under section 140GBA(2) of the *Migration Act 1958*.63

Costs

5.63 The NIA estimates that loss of tariff revenue for Australia from A-HKFTA is approximately $5 million in 2019–2020 and $25 million over the forward estimates period until 2022, as a result of revenue foregone from the elimination of all Australian duties, other than excise, on goods imported from Hong Kong. This estimate assumes A-HKFTA will enter into force in January 2020.64

5.64 However, the ARIA admits that there is as yet no method for measuring the positive impact on revenue of continued regulatory certainty for Australian service exporters and that it is not feasible to attempt to quantify the benefits of an FTA in this sense.65 Despite this, overall, given the benefits delivered from the A-HKFTA and the Investment Agreement, the NIA claims that these Agreements are expected to generate a net gain for the Australian economy.66

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63 NIA, para 45.
64 NIA, para 46.
65 ARIA, para 60.
66 NIA, para 46.
6. A-HKFTA Issues

6.1 As noted in the previous Chapter, the A-HKFTA and related Investment Agreement are intended to enshrine existing trade arrangements. As a consequence, most of the issues raised during the Committee’s inquiry do not relate directly to the provisions in the agreements.

6.2 This Chapter will examine the following issues:

- the risk of protectionism in global trade;
- international trade architecture;
- the civil disturbances under way in Hong Kong at the time this Report is being drafted;
- consultation; and
- the income tax arrangements applying to residents of Hong Kong and Australia working for a period in the other party.

Protectionism

6.3 The Committee has in past reports noted with concern the trend towards protectionism in the international community.\(^1\)

6.4 The Australian Government has also acknowledged protectionism as a risk to Australia’s economy in its 2017 Foreign Policy White Paper.\(^2\)

6.5 Protectionism is also an increasing concern for many Australian exporters. Several inquiry participants focussed on the symbolic importance of the

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A-HKFTA as an agreement between two parties with economies strongly reliant on an international rules-based global trading system.

6.6 Heath Baker, Acting Chief Executive Officer of the Export Council of Australia, advised the Committee that:

…the agreement binds the two governments to openness, which is increasingly important in the current geopolitical environment.³

6.7 The Group of Eight, a body representing eight research focussed Australian universities, believes the A-HKFTA is particularly important in challenging times because it provides a clear and high level symbol of Australia’s commitment to our regional partners.⁴

6.8 The Minerals Council of Australia argues that:

…in the current global environment of rising protectionism—and where the rules-based global trading system is coming under ever increasing pressure—trade and trade agreements become fundamental to constructive engagement, regional stability, development and economic growth across our region. Trade is a force for stability, and the ratification of A-HKFTA is an important step to help promote continued trade liberalisation and cooperation in the Indo-Pacific region.⁵

6.9 The Committee concurs with these views. As protectionism rises, the original intent of an international rules-based global trading system, devised following the Second World War to minimise the risk of international conflict by promoting links between countries and furthering prosperity, is at risk of being forgotten.

**International trade architecture**

6.10 As noted in the previous Chapter, multilateral negotiations underway in the World Trade Organization (WTO) to liberalise trade rules and market access have been stalled for some time.⁶ In the absence of progress in the WTO,

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⁴ Group of Eight, *Submission 5*, p. 2.

⁵ Minerals Council of Australia (MCA), *Submission 15*, p. 4.

⁶ National Interest Analysis [2019] ATNIA 10 with attachments, *Free Trade Agreement between Australia and Hong Kong, China* and associated side letters and *Investment Agreement between the Government of Australia and the Government of Hong Kong Special Administrative Region of the*
countries wishing to progress free trade agendas have used a mix of three alternatives:

- unilateral reductions in tariffs and other trade barriers;
- bi-lateral free trade agreements with other individual countries;
- plurilateral free trade agreements involving more than one other country.\(^7\)

6.11 The negotiation of bi-lateral free trade agreements has increased significantly in recent decades, particularly in the Asia Pacific region.\(^8\)

6.12 The proliferation of bi-lateral free trade agreements, of which the A-HKFTA is an example, has resulted in the fragmentation of the international trade architecture. This is colloquially referred to as the ‘noodle bowl effect’ because of the number of bilateral agreements criss-crossing the region.\(^9\)

6.13 While bi-lateral free trade agreements are a useful response to the breakdown of negotiations in the WTO, the fragmentation of the international free trade architecture is not without its problems.

6.14 The Australian Industry Group (Ai Group) points out that when there are multiple relevant agreements, exporters must determine if there is an advantage to be gained in opting in to a particular agreement, and what they must do to comply with the rules of that agreement.\(^10\)

6.15 The Ai Group provides evidence that indicates that the resulting administrative burden prevents exporters, particularly small and medium businesses, from accessing the benefits of free trade agreements.\(^11\) Ai Group’s research found that:

- 13 per cent of large businesses and 24 per cent of small and medium businesses found comparing free trade agreements time consuming;
- 30 per cent of large businesses and 29 per cent of small and medium businesses found the rules of origin documentation process time consuming;

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\(^8\) JSCOT, *Report 165*, Canberra, November 2016, p. 27.


• 30 per cent of large businesses and 34 per cent of small and medium businesses had difficulty accessing information about free trade agreements;
• 29 per cent of large businesses and 26 per cent of small and medium businesses found considerable differences between the apparent requirements of a free trade agreement and the actual requirements by the officials in charge;
• 16 per cent of large businesses and 28 per cent of small and medium businesses had insufficient human or financial resources to utilise free trade agreements; and
• 31 per cent of large businesses and 29 per cent of small and medium businesses had difficulty understanding rules of origin.\(^{12}\)

Civil disturbances in Hong Kong

6.16 On 9 February 2019, the Hong Kong Government indicated that it would introduce legislation permitting extradition from Hong Kong to a number of countries including the Peoples Republic of China.\(^{13}\) The proposed extradition legislation has sparked a significant protest movement, and has resulted in large protests and some violence.\(^{14}\)

6.17 On 4 September 2019, the Hong Kong Government announced it was withdrawing the proposed extradition legislation. However, at the time of writing, civil disturbances continue in Hong Kong.\(^{15}\) A number of submissions addressed this issue. Several, in supporting the protest movement, recommended that ratification of the A-HKFTA be delayed.\(^{16}\)

6.18 Hong Kong Watch points out the link between the civil rights of Hong Kong citizens with the success of the Hong Kong economy:

Hong Kong’s freedoms and autonomy play a central role in allowing the city to function as East Asia’s financial hub. Safeguarding the rule of law, the

\(^{12}\) Ai Group, Submission 39, p. 4.


\(^{16}\) Including Australian Fair Trade and Investment Network (AFTINET), Submission 3, p. 13; the Canberra Hong Kong Concern Group, Submission 4, p. 1; and Demosisto, Submission 26, p. 1.
fundamental freedoms and the city’s autonomy is not only in the interests of the people of Hong Kong, but it is in the interests of foreign businesses and international governments which consider it their Asian hub.\(^\text{17}\)

6.19 The National Tertiary Education Union’s (NTEU) submission emphasises the fact that the A-HKFTA does not require any commitments to human or labour rights. For the NTEU, this omission is particularly troubling, especially given recent reports in relation to the treatment of citizens, including trade union members, exercising their basic human right to peacefully protest against proposed extradition laws and in support of universal suffrage.\(^\text{18}\)

6.20 The Australian Council of Trade Unions (ACTU) argues that:

> Given the escalating events taking place in Hong Kong at the moment, the ACTU calls on the government to wait until the situation is resolved before proceeding with the enabling legislation of the Australia-Hong Kong Free Trade Agreement. We feel it’s important that we show solidarity with the protesters, and our support for human rights, civil society and the rule of law in Hong Kong, before we decide on how to proceed with a free trade agreement.\(^\text{19}\)

6.21 The Minerals Council of Australia (MCA) believes that the protests that have affected Hong Kong since the beginning of June have had impacts on Hong Kong’s economy and on tourism and financial institutions, but the MCA expects the impact will be short lived. The MCA believes Hong Kong will remain an important source of investment into Australia in the medium and long term.\(^\text{20}\)

6.22 Elizabeth Ward from the Department of Foreign Affairs and Trade (DFAT) indicated that:

> With a substantial stake in the success of Hong Kong, the Australian government continues to monitor the situation closely. The Prime Minister and foreign minister have welcomed the Hong Kong government’s recent decision to formally withdraw the extradition bill as a positive step towards responding to the concerns of the Hong Kong people and have continued to urge further efforts to de-escalate, establish dialogue and commit to

\(^\text{17}\) Hong Kong Watch, Submission 16, p. 1.

\(^\text{18}\) National Tertiary Education Union (NTEU), Submission 7, p. 1.

\(^\text{19}\) Damian Kyloh, Economic and Social Policy Adviser, Australian Council of Trade Unions (ACTU), Committee Hansard, Melbourne, 27 August 2019, p. 28.

\(^\text{20}\) MCA, Submission 15, p. 8.
negotiation as a basis for lasting resolution. Despite the protests, the purpose and import of the agreements negotiated here remain unchanged: to deliver architecture between the Australian and Hong Kong governments to build certainty around our strong economic relationship. It is because the Australian Government supports a stable, prosperous Hong Kong, with a high degree of autonomy, under the ‘one country, two systems’ framework, that the government intends to proceed to ratify the agreements which deliver the next milestone in this important relationship.21

6.23 Hong Kong’s unique status is enshrined within the Basic Law, which provides it a high measure of autonomy and some of the attributes of a nation-state, whilst reaffirming the ultimate sovereignty of China. It is the Committee’s view that the maintenance of Hong Kong’s unique status is in Australia’s national interests.

6.24 The Committee heard evidence from the DFAT and the Australian Consul-General in Hong Kong that ratification of the Agreement would reaffirm and strengthen Hong Kong’s autonomous status within ‘one country, two systems’ and help to buttress Hong Kong’s unique constitutional arrangements.22

6.25 The Committee notes with concern the ongoing civil disturbances and political instability in Hong Kong and urges a peaceful resolution of these issues and preservation of Hong Kong’s unique status.

Consultation

6.26 The extent to which the Australian Government consults with stakeholders during the process of negotiating free trade agreements continues to be an issue for a number of inquiry participants. Trevor Gauld from the Electrical Trades Union of Australia advised the Committee that:

...The union movement was not engaged in any meaningful way throughout these processes. Periodically, there might be a webpage somewhere that calls for submissions. Meanwhile, the business community gets a seat at the table, gets regularly briefed and gets regularly involved in details of the negotiations. Civil society, unions included, is effectively locked out of the negotiation process, and we think that that’s reflected in the lack of emphasis

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21 Elizabeth Ward, Chief Negotiator, Regional Trade Agreements Division, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Canberra, 9 September 2019, p. 2.

22 Elizabeth Ward, DFAT, Committee Hansard, Canberra, 9 September 2019, p. 2; and Michaela Browning, Consul-General, Australian Consulate-General, Hong Kong, Committee Hansard, Canberra, 9 September 2019, p. 5.
on important societal issues that trade agreements bring up, such as what
impacts on labour rights, what impacts on workers’ rights and the lack of
detail that often comes through in the agreements.23

6.27 Elizabeth Ward responded to the concerns about consultation:

I would say that we have most regular contact with AFTINET who, over the
years, have been extremely active. They will acknowledge that many of their
members are trade unions, and we know, because it’s all over their website,
that ACTU is one of their members, and so our working assumption for a long
time has been that whenever we speak to AFTINET, which is very regularly, it
means that that information is well known, because AFTINET obviously does
an excellent job with its members.24

Double taxation

6.28 According to Vanessa Bourne, Chief of Staff at the University of Wollongong
College Hong Kong:

…I would like to highlight… that, while we do support the robustness of
Australia’s current tax regime, and the tax regime in Hong Kong as well, we
do currently have some difficulty in the exchange of our staff between
Australia and Hong Kong. Currently we have staff undertaking an exchange
or secondment for periods of less than two years, which gives rise to a
potential double income-taxation liability for those staff. It works as a
disincentive for our Australian staff to undertake those engagements that may
exceed the 60 days where they would also be captured under the Hong Kong
income tax laws.25

6.29 This issue is also raised by CPA Australia:

We note that Australia and Hong Kong have not entered into a double
taxation agreement … As a consequence, we expect the anticipated economic
benefits of the free trade agreement may not fully materialise.26

23 Trevor Gauld, National Policy Officer, Electrical Trades Union of Australia (ETU), *Committee
Hansard*, Melbourne, 27 August 2019, p. 29.


25 Vanessa Bourne, Chief of Staff, University of Wollongong College Hong Kong, UOW [University

7. Conclusion

Introduction

7.1 The treaty actions considered in this Report represent substantial gains for Australian industry, agriculture and business and therefore for the Australian economy. Although Indonesia is currently only Australia’s 14th largest trading partner, its market provides exceptional potential for Australian businesses into the future. With its large population, rapid urbanisation, and emerging middle class it is expected to become the world’s fourth largest economy by 2050. Indonesia’s proximity to Australia and the already extensive existing relationship between the two countries, give Australia a distinct advantage in this growing market.

7.2 Hong Kong is one of Australia’s most significant trading partners. Australia’s exports to Hong Kong in goods and services were valued at $14.5 billion in 2017–18, approximately 3.6 per cent of Australia’s total goods and services exports. Hong Kong is Australia’s fifth largest source of foreign investment ($116.6 billion, 2017) and the tenth largest destination for Australian foreign investment abroad ($47.4 billion, 2017).

7.3 The Committee is aware that the recent rise of protectionism and economic nationalism pose a risk to Australia as a trade-dependent nation. As the Committee has acknowledged previously, in theory, inclusive multilateral trade agreements are the preferred route to trade liberalisation and economic growth. However, with the difficulties currently facing the system, bilateral, plurilateral and regional trade agreements are often a more practical means to provide access for Australian businesses and to support the goal of trade liberalisation.
7.4 Despite a range of issues being raised with the Committee, there was overwhelming support for these two trade agreements and the investment agreement with Hong Kong, which the Committee considered concurrently.

7.5 The Indonesian agreement in particularly has been enthusiastically supported by industry, agricultural and business sectors. Access to the enormous potential presented by the Indonesian market has been pursued by Australian businesses for some time and the commitments in the IA-CEPA are expected to deliver considerable gains across a wide range of sectors.

7.6 The timing of the agreement with Hong Kong has coincided with an uncertain political situation in Hong Kong. However, the advantages of the agreement have not been questioned. Hong Kong is already an open market but the A-HKFTA will lock in existing zero tariffs and address some non-tariff barriers. The Australia-Hong Kong investment treaty will replace an outdated bilateral investment treaty and provide certainty.

**Investment: ISDS and BIT**

**Investor-state dispute settlement mechanisms**

7.7 The Committee has previously examined investor-state dispute settlement (ISDS) mechanisms in some detail and is currently conducting an inquiry into the United Nations Convention on Transparency in Treaty based Investor-State Arbitration (Mauritius Convention) which will provide a platform for a more extensive examination of the ISDS system.

7.8 The Committee recognises that improvements to ISDS mechanisms have been made in recent years, providing greater scope for public policy discretion and limiting vexatious or litigious claims, but acknowledges that concerns remain in some areas about the potential operation of such mechanisms.

**Bilateral investment treaties**

7.9 The Committee notes that the Australia-Hong Kong bilateral investment treaty (AHK-BIT) will terminate with the introduction of the new investment treaty, while there is no proposal to terminate the Australia-Indonesia bilateral investment treaty (IA-BIT). This has raised concerns over the overlap between the existing IA-BIT and the ISDS provisions in the IA-CEPA.
7.10 The Committee acknowledges the uncertainty that may result if the two treaties remain in force and notes that accepted practice has been to terminate existing older bilateral investment treaties when updated provisions come into effect.

7.11 The Committee is also aware of the uncertainty posed by the ‘survival clause’ in the IA-BIT which could enable claims to be brought against the Australian Government for up to fifteen years after the treaty action has been terminated. The Committee notes that on previous occasions the Australian Government has terminated the ‘survival clause’ in similar BITs.

Ratification and implementation

7.12 The Committee notes the calls for rapid ratification of the IA-CEPA and strong support for early ratification from industry sectors.

7.13 The Committee acknowledges the challenge of fully realising and implementing IA-CEPA and urges the Australian Government to continue to work with Indonesian authorities to ensure that the current momentum is maintained and that roadblocks are identified and dealt with swiftly.

7.14 In this regard, the Committee also acknowledges the ongoing need to educate and support Australian businesses to take advantage of the opportunities presented by these trade agreements and commends the efforts being made by both government and non-government agencies to assist in this area.

IA-CEPA

7.15 The Committee supports the ratification of IA-CEPA and recommends that binding treaty action be taken as soon as possible to realise the benefits of this agreement.

Recommendation 1

7.16 The Committee supports the Comprehensive Economic Partnership Agreement between the Government of Australia and the Government of Indonesia and recommends that binding treaty action be taken as soon as possible.
A-HKFTA

7.17 The Committee acknowledges concerns over the current political situation in Hong Kong but takes the view that ratification of the Agreement will strengthen Hong Kong’s unique status under ‘one country, two systems’ and reaffirm and buttress the high measure of autonomy this provides Hong Kong over its own affairs.

7.18 The Committee supports ratification of the A-HKFTA and recommends that binding treaty action be taken as soon as possible to realise the benefits of this agreement.

Recommendation 2

7.19 The Committee supports the Free Trade Agreement between Australia and Hong Kong, China and recommends that binding treaty action be taken as soon as possible.

7.20 The Committee supports the ratification of the Australia-Hong Kong investment treaty and recommends that binding treaty action be taken as soon as possible to realise the benefits of this agreement.

Recommendation 3

7.21 The Committee supports the Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and recommends that binding treaty action be taken as soon as possible.

Recommendation 4

7.22 The Committee recommends that the Australian Government pursue the termination of the Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments, and seeks to terminate the ‘survival clause’ in this agreement.

Recommendation 5

7.23 The Committee recommends the Australian Government gives due consideration to implementing a process through which independent modelling and analysis of a proposed trade agreement is undertaken in
the future by the Productivity Commission, or equivalent organisation, and provided to the Committee alongside the National Interest Analysis (NIA) to improve assessment of the agreement.

Mr Dave Sharma MP
Chair
3 October 2019
A. Submissions

IA-CEPA

1 Sustainable Skills
2 Professor Andrew D Mitchell and Professor Tania Voon
   ▪ 2.1 Supplementary to submission 2
3 Australian Grape and Wine Incorporated
4 Mr Mason Littlejohn
5 Central Queensland University
6 Perth USAsia Centre
   ▪ 6.1 Supplementary to submission 6
7 BlueScope Steel Limited
8 Grain Growers Limited
9 The West Australian Technical and Vocational Education Training (TVET) Consortium (WATVC)
10 Australian red meat and livestock industry
11 Mr Duncan Graham
12 Mr Brett Elliott
13 Consolidated Pastoral Company Pty Ltd
14 Australia Indonesia Business Council
15 University of Adelaide
16 Australian Export Grains Innovation Centre
17. Australian Fair Trade and Investment Network (AFTINET)
   ▪ 17.1 Supplementary to submission 17
18. The Group of Eight
19. Mr James McMillan
20. Indonesia Diaspora Business Council (with the Indonesian Diaspora Network - United)
21. Canegrowers
22. Business Council of Australia
23. ITS Global
24. Dr Luke Nottage
25. Standards Australia
26. Minerals Council of Australia
27. Electrical Trades Union
   ▪ 27.1 Supplementary to submission 27
28. Australian Pork Limited
29. Bis
30. Mr Matthew Busch
31. Universities Australia
32. Australian Chamber of Commerce and Industry
33. Australia - Indonesia Youth Association (AIYA)
34. Australian Dairy Industry Council
35. Australian Manufacturing Workers' Union
36. AUSVEG
37. Ms Anna George
38. Grain Industry Association of Western Australia
39. Ai Group
40. Australian Forest Products Association
41. Mr Terry Mills MLA
42. Curtin University
Western Australia East Java University Consortium (WAEJUC)
Export Council of Australia
Government of WA
Australian Council of Trade Unions (ACTU)
TAFE Directors Australia
Department of Foreign Affairs and Trade
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A-HKFTA

Australian Grape and Wine Incorporated
Australian red meat and livestock industry
Australian Fair Trade and Investment Network (AFTINET)
The Canberra Hong Kong Concern Group
The Group of Eight
Dr Luke Nottage
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ITS Global
Business Council of Australia
Electrical Trades Union
  10.1 Supplementary to submission 10
Australian Pork Limited
University of Wollongong
Universities Australia
Australian Chamber of Commerce and Industry
Minerals Council of Australia
Hong Kong Watch
Australia-Hong Kong Link
Australian Dairy Industry Council
CPA Australia
Australian Manufacturing Workers' Union
21 AUSVEG
22 Ms Anna George
23 Asialink Business
24 Export Council of Australia
25 Hong Kong Higher Institutions International Affairs Delegation
26 Demosisto
27 Mr Simon Henderson
28 Australian Council of Trade Unions (ACTU)
29 Department of Foreign Affairs and Trade
   • 29.1 Supplementary to submission 29
B. Witnesses

**IA-CEPA and A-HKFTA**

**Monday, 26 August 2019**

**SYDNEY**

*Australian Fair Trade and Investment Network (AFTINET)*

*National Farmers’ Federation (NFF)*

*Professor Luke Nottage, private capacity*

*Citrus Australia*

*Export Council of Australia (ECA)*

*Grain Growers Limited*

*Meat and Livestock Australia*

*Adjunct Professor Anna George, private capacity*
Tuesday, 27 August 2019

MELBOURNE

TAFE Directors Australia

Professor Tania Voon, private capacity

Australian Chamber of Commerce and Industry (ACCI)

Australian Dairy Industry Council

Australian Council of Trade Unions (ACTU)

Australian Manufacturing Workers’ Union and Electrical Trade Union (ETU)

Professor Abid Khan, Deputy Vice-Chancellor and Vice-President (Global Engagement), Monash University

Minerals Council of Australia (MCA)

University of Wollongong Global Enterprises
Monday, 2 September 2019

PERTH

Sustainable Skills

Australia Indonesia Business Council

Perth USAsia Centre

Australian Export Grains Innovation Centre

Grain Industry Association of WA

CBH Group

AiGroup

Phoenix Academy

Indonesia Institute

Professor Simon Leunig, Associate Deputy Vice Chancellor International and Dean ASEAN, Curtin University; and Co-chair, Western Australia East Java University Consortium.

WA Chamber of Commerce and Industry
Monday, 9 September 2019

CANBERRA

IA-CEPA

Department of Foreign Affairs and Trade

Mr Gary Quinlan, Ambassador to Indonesia

Ms Elizabeth Ward, Special Negotiator

Ms Caroline McCarthy, Assistant Secretary, FTA Investment Digital Trade & Other Issues Branch, Regional Trade Agreements Division

Mr Paul Schofield, A/g Assistant Secretary, Trade and Investment Law Branch, Office of Trade Negotiations

Ms Nadia Krivetz, Director, FTA Services Branch, Regional Trade Agreements Division

A-HKFTA

Australian Consulate-General

Ms Michaela Browning, Consul-General

Department of Foreign Affairs and Trade

Ms Elizabeth Ward, Special Negotiator

Mr Paul Schofield, A/g Assistant Secretary, Trade and Investment Law Branch, Office of Trade Negotiations

Attorney-General’s Department

Ms Anne Sheehan, Assistant Secretary, Office of International Law
Additional comments – Report 186: IA-CEPA and A-HKFTA

Peter Khalil MP, Deputy Chair; Senator Tim Ayres; Senator Catryna Bilyk; Senator Marielle Smith; Kate Thwaites MP; Josh Wilson MP

1.1 A-HKFTA and IA-CEPA reaffirm Australia’s existing 1995 WTO commitments to waive labour market testing for Intra-Corporate Transferees and Independent Executives. However there is no waiver of labour market testing for Contractual Service Suppliers in either the A-HKFTA or the IA-CEPA agreements and under A-HKFTA and IA-CEPA Australia has not made any commitments in relation to labour market testing on Contractual Service Suppliers, as Australia has not yet entered into negotiations on an agreement.

1.2 For this reason, during the JSCOT review process the Labor members of the Committee argued that any future agreement that Australia may negotiate with Indonesia for the entry of temporary foreign workers as Contractual Services Suppliers should:

1 Be negotiated as a treaty-level agreement

2 Include a commitment to labour market testing to preference Australian jobs and also skills tests to ensure that any temporary foreign workers meet the same standards as Australian workers.
1.3 The Labor members of the Committee believe that Report 186 should include a recommendation with the language as follows:

**Recommendation 1**

1.4 The Committee recommends that the future resolution of an agreement with Indonesia on the movement of natural persons, as referenced in Chapter 12 of IA-CEPA, only occur on the basis that any temporary foreign labour arrangements include the application of labour market testing and actual skills testing in relevant areas like electrical trades, and notes that this should in any case be a treaty-level agreement.

1.5 The Labor members of the Committee moved to have this included as an additional recommendation in Report 186 however it did not receive support from the Committee as a whole.

Peter Khalil MP

Senator Tim Ayres

Senator Catryna Bilyk

Senator Marielle Smith
Kate Thwaites MP

Josh Wilson MP
Dissenting Report by the Australian Greens

Summary

1.1 The Australian Greens are supportive of trade agreements which promote and protect environmental sustainability, human rights, labour rights, and broader principles of fair trade.

1.2 We note that the conclusion of the majority report states “overwhelming support” for binding action on both IA-CEPA and A-HKFTA, however, it is our view that this support is limited to the interests of specific sectors of our economy, and does not reflect the significant and genuine concerns of the civil society, unions and human rights groups who made submissions.¹

1.3 We have serious concerns about provisions within both IA-CEPA and A-HKFTA relating to Investor-State Dispute Settlement (ISDS), e-commerce, temporary work visa programs, and limiting the regulatory capacity of the government.

1.4 Additionally, we are deeply concerned by the lack of provisions which ensure compliance with human rights, labour rights, and environmental protections, and we are broadly concerned with the lack of transparency and risk analysis occurring in the making of trade agreements.

1.5 The Greens note the thorough analysis of the majority committee report, however, we do not support the conclusions and recommendations which emerge from the interpretations of evidence given during the inquiry. We therefore disagree with the majority committee report recommendation that

¹ Majority Committee Report, p. 88.
the agreements be implemented expeditiously, and we recommend that no binding action be taken for either of the agreements.

**Issues relating to ISDS**

1.6 The Greens disagree with the inclusion and use of ISDS clauses in trade agreements. ISDS clauses expand the legal rights of multinational corporations and offer advantages not afforded to domestic investors. They also create a chilling effect where governments either delay or reconsider regulations to avoid the risk of arbitration. Particular policy areas such as labour protections, environmental protections, and health and safety protections can be affected by this chilling effect.

1.7 The Greens note that the Productivity Commission has recommended that the Australian Government avoid the inclusion of ISDS provisions in any trade agreements that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.2

1.8 Further, we note that there has been a shift away from including ISDS clauses in trade agreements by the EU and the U.S, and we note ongoing reviews being undertaken by the United Nations Commission on International Trade Law and the World Bank International Centre for Settlement of Investment Disputes in light of serious issues relating to transparency, impartiality, accountability, and consistency of decision-making of the ISDS system.3

**IA-CEPA**

1.9 The Greens reject the contention of the National Interest Analysis (NIA) that ISDS provisions are a necessary inclusion within the IA-CEPA.4 We agree with the extensive analysis of ISDS provided by AFTINET in their submission and we contend that the demonstrated risks associated with ISDS clauses, that they are costly, incompatible with human rights,

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4 NIA, para 25.
procedurally opaque and lacking in impartiality provide a strong case for their exclusion from IA-CEPA.5

1.10 As outlined in the submission by the ACTU, the inclusion of ISDS provisions “are a restriction on national sovereignty and ability of governments to regulate in the public interest.”6 The Greens agree with this position and do not believe that the proposed provisions sufficiently protect the public interest.

1.11 Whilst DFAT’s NIA promotes a ‘modernised’ ISDS mechanism through the inclusion of carve outs for the PBS, Medicare, TGA, and Gene Technology Regulator, it does not prevent other ISDS claims being made where broader areas of public interest are implemented, such as environmental and industrial laws.7

1.12 Additionally, we note the inconsistency of ISDS exclusions in the IA-CEPA relative to the A-HKFTA. Article 14.21b) (footnote 21) of IA-CEPA does not include a specific exclusion for tobacco regulation which contrasts with the A-HKFTA which contains detailed exclusions for tobacco products. Given the Philip Morris ISDS case brought against Australia, Indonesia’s involvement in the WTO dispute against Australia’s plain packaging laws, and Indonesia’s prominent tobacco industry, we are concerned that this places Australia at risk of arbitration should any regulations be made to tobacco products (such as e-cigarettes) in the future.8 We do not accept the assertion of the NIA which makes the assumption that general public health exceptions to ISDS sufficiently cover this.9

1.13 Finally, we welcome the recommendation made by the majority committee report which requests that the Australian Government terminate the Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments, and the survival clause within this agreement.10

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5 AFTINET, Submission 17, p. 2–8.
6 ACTU, Submission 46, p. 8.
7 NIA, para 67; NIA, para 70.
8 AFTINET, Submission 17, p. 8; AFTINET, Supplementary Submission 17.1, p. 2.
9 NIA, para 27.
10 Majority Committee Report, p. xvii.
A-HKFTA

1.14 Whilst we welcome the inclusion of explicit limitations in the scope of ISDS provisions through the exclusion of the PBS, Medicare, TGA, Gene Technology Regulator, and tobacco within the A-HKFTA, we do not believe that there are sufficient protections for future government measures which seek to address health, environmental, essential services, industrial relations and other public interest issues.

Restrictions on regulating

1.15 Contained within both IA-CEPA and A-HKFTA are chapters which, in effect, restrict the ability of government to regulate in the public interest. Of particular concern are the negative list and ratchet structure of the chapters which substantially reduce the capacity of the government to impose new regulations and respond to changing contextual factors within different policy areas such as energy, public service provision, and climate change.

1.16 We are also persuaded by concerns raised in evidence which indicate that whilst both IA-CEPA and A-HKFTA contain Annexes of non-conforming measures which outline exclusions for particular public interest regulatory areas, there is still the possibility that foreign investors could pursue ISDS cases against the government where provisions in the Investment Agreements vary to that within the Annexes.11 We view this as an unacceptable risk which limits the ability of the government to exercise its responsibility to respond to changing social, economic, and environmental circumstances which require policy change.

Issues relating to e-commerce

1.17 We are deeply concerned by efforts to reduce the regulatory capacity of the government in electronic commerce trade. It has been made very clear by the ACCC in their recent Digital Platforms Inquiry12, and indeed through an extensive and growing body of evidence13, that big tech companies and

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11 AFTINET, Submission 3, p. 11; AFTINET, Submission 17, p. 13.


multinational corporations can engage in anti-competitive practices, breach privacy, avoid tax, and exploit workers.

1.18 Both IA-CEPA and A-HKFTA contain chapters outlining frameworks for e-commerce which permit the free-flow of data, including financial data, across borders. The Greens are firmly committed to ensuring that digital rights and data privacy are strongly protected and we do not believe that either of these agreements provides tangible or sufficient provisions to achieve this. The intention of the e-commerce chapters in these agreements is to reduce regulation of data-flows and this is at odds with the responsibility that the government has to adapt to the future needs of data privacy protections.

Issues relating to temporary workers

1.19 The Greens recognise the significant benefits Australia has reaped from contributions made by temporary migrant workers. However, we note considerable evidence which highlights the exploitative nature of the temporary migrant working visa system in its facilitation of wage theft and creation of an extremely vulnerable group of workers who have inadequate job security and workplace protections. We contend that without labour market testing provisions, this trade agreement will weaken our domestic labour market and allow for the exploitation of temporary migrant workers.

1.20 The Greens reject provisions of the IA-CEPA within the Movement of Natural Persons Chapter (Chapter 12) which waive labour market testing requirements and we disagree with provisions which allow for an additional

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4000-5000 temporary Working Holiday Maker visas per year.\textsuperscript{16} This position is shared by unions and civil society groups including AFTINET, the ACTU, and the ETU as evidenced in their submissions to the inquiry.\textsuperscript{17}

**Issues relating to compliance with human rights, labour rights, and environmental standards**

1.21 Neither the IA-CEPA nor A-HKFTA contains commitments which seek compliance with international laws and standards on human rights, labour rights and environmental protections. Further, there is no explicit evaluation of these rights-based standards in the NIA of these agreements.

1.22 The Greens are deeply troubled by these omissions and strongly believe that any trade agreements Australia agrees to participate in must contain enforceable and comprehensive provisions to protect economic, social, and environmental rights both in Australia and abroad with those we trade with.

1.23 The Greens are disappointed that the majority report glosses over the significant human rights abuses and repression currently occurring in Hong Kong. It fails to mention entirely the human rights abuses that are being committed by the Indonesian Government in West Papua.

1.24 In relation to the A-HKFTA, it is the Greens’ firm view that the Australian Government should not consider any Free Trade Agreement with Hong Kong while peaceful, pro-democracy protesters are being violently suppressed. In the last week alone we have seen the Hong Kong police employ excessive use of force, shooting a teenager at point blank range and blinding a journalist in one eye with a rubber bullet, amongst other human rights violations.

1.25 As Hong Kong Watch notes in its submission: “In light of the erosion of freedoms and the rule of law in Hong Kong which are important pillars for Australian businesses, it is therefore imperative for the Australian government to take action to ensure adequate consideration of human rights issues during future trade agreement negotiations and to include human rights protection clauses in the Australia-Hong Kong Free Trade Agreement, including suspension clauses to suspend an agreement if core human rights


standards are not met and backed by an effective enforcement mechanism through Parliamentary scrutiny and monitoring of human rights compliance by both parties to the trade agreement.”¹⁸

1.26 As the majority report notes, the Australian Council of Trade Unions (ACTU) further argues that: “Given the escalating events taking place in Hong Kong at the moment, the ACTU calls on the government to wait until the situation is resolved before proceeding with the enabling legislation of the Australia-Hong Kong Free Trade Agreement. We feel it’s important that we show solidarity with the protesters, and our support for human rights, civil society and the rule of law in Hong Kong, before we decide on how to proceed with a free trade agreement.”¹⁹

1.27 The Greens disagree with the majority report view that ratification of the Agreement will “strengthen Hong Kong’s unique status under ‘one country, two systems’ and reaffirm and buttress the high measure of autonomy this provides Hong Kong over its own affairs”.²⁰ Rather, this is an opportunity for the Australian Government to back up its words of concern with action, and demonstrate to the Chinese Government and Hong Kong authorities that repression will not stand.

1.28 In relation to IA-CEPA, the Australian Greens note with deep concern the recent violence and human rights abuses in West Papua, in particular the protestors and students killed by Indonesian security forces in late September 2019. Aside from the other concerns we have outlined in relation to the agreement, the Greens believe that the Australian Government should not proceed with ratification of the IA-CEPA while human rights abuses are ongoing in West Papua.

Issues relating to transparency and independence

1.29 The Greens continue to express deep concern about the lack of transparency and public scrutiny involved with the current procedure for making trade agreements. It is essential that any proposed agreement be tabled in Parliament and open for wide public consultation prior to signing, in order

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¹⁸ Hong Kong Watch, Submission 16, p. 3.

¹⁹ Damian Kyloh, Economic and Social Policy Adviser, Australian Council of Trade Unions, Committee Hansard, Melbourne, 27 August 2019, p. 28.

²⁰ Elizabeth Ward, DFAT, Committee Hansard, Canberra, 9 September 2019, p. 2; and Michaela Browning, Consul-General, Australian Consulate-General, Hong Kong, Committee Hansard, Canberra, 9 September 2019, p. 5, as referenced in the Majority Committee Report, p. 84.
to ensure consistency with domestic democratic policy-making principles and practice.

1.30 We maintain that the social, environmental, and economic impacts of trade agreements must be independently examined and presented to the Parliament prior to the commencement of negotiations and final agreement.

1.31 The Greens support the committee’s recommendation that a process of independent modelling and analysis of trade agreements be undertaken by the Productivity Commission or an equivalent organisation and we welcome the suggestion that this modelling and analysis be submitted alongside the NIA to the committee. We believe this is a positive step towards a more independent and transparent analysis of the multifaceted implications of trade agreements.

**Recommendation 1**

1.32 The Australian Greens recommend that no binding treaty action be taken for either IA-CEPA or A-HKFTA.

**Recommendation 2**

1.33 The Australian Greens recommend that the current process for negotiating trade agreements be amended to increase transparency around the negotiations and final text of agreements, that independent national interest assessments be made, that ISDS provisions be excluded from all trade agreements, and that human rights, labour, and environmental protection provisions are included in all trade agreements.

Senator Steele-John