

*PHAA submission on the China-Australia Free Trade Agreement (ChAFTA)*



**Public Health Association**  
AUSTRALIA

## Public Health Association of Australia

### Submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the China-Australia Free Trade Agreement

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### Executive Summary

The Public Health Association of Australia welcomes the opportunity to provide this submission on the China-Australia Free Trade Agreement (ChAFTA) to the Senate Foreign Affairs, Defence and Trade Committee. Our submission focuses on point (d) of the Committee's Terms of Reference and particularly on the inclusion of an investor-state dispute settlement (ISDS) mechanism in ChAFTA, which we believe represents a threat to public health and the environment.

### PHAA

The Public Health Association of Australia Incorporated (PHAA) is recognised as the principal non-government organisation for public health in Australia and works to promote the health and well-being of all Australians. The Association seeks better population health outcomes based on prevention, the social determinants of health and equity principles. The PHAA has a vision for a healthy region, a healthy nation and healthy people living in a healthy society and a sustaining environment while improving and promoting health for all.

### PHAA's policy on trade agreements and health

PHAA has a policy on trade agreements and health which states that:

1. Trade agreements should not limit or override a nation's ability to foster and maintain systems and infrastructure that contribute to the health and well-being of its citizens by detracting from a nation's ability to legislate and regulate in the national interest;
2. Policy space needs to be preserved in trade agreements for national governments to regulate to protect public health; and
3. PHAA advocates a fairer regime of trade regulation which addresses sustainability issues as well as economic development and which prioritises equity within and between countries as a necessary condition for global population health improvement.

The policy also commits the association to 'advocate at the national and international levels to promote and protect public health within international trade agreements and limit adverse impacts of trade agreements on health and well-being, both within Australia and in other countries.'<sup>1</sup>

### Investor-state dispute settlement

We note that the Committee's Terms of Reference are to report on the proposed China-Australia Free Trade Agreement, with particular reference to the impact of the agreement on Australia's:

- a. economy and trade;
- b. domestic labour market testing obligations and laws regarding wages, conditions and entitlements of Australian workers and temporary work visa holders;
- c. investment; and
- d. social, cultural and environmental policies.

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Our submission focusses on point d: social, cultural and environmental policies.

PHAA is strongly opposed to the inclusion of investor-state dispute settlement in trade agreements. ISDS provides an avenue for foreign investors to sue governments (including state/territory and local governments) in international tribunals for monetary compensation over policies and laws that they perceive as harmful to their investments. In recent years there has been a dramatic increase in ISDS claims over health and environmental issues. Two examples are the case by Philip Morris Asia against Australia over tobacco plain packaging, and by Eli Lilly (a US-based pharmaceutical company) against Canada over decisions on medicine patents.

Strong criticism of ISDS has come from many quarters including Chief Justice French and the Productivity Commission.<sup>2 3</sup> There has been a dramatic increase in ISDS cases in recent years, with many cases related to health and the environment.

ISDS lacks the safeguards of domestic legal systems. There is no system of precedents or mechanisms for appeal. There is no independent judiciary. Arbitrators can have conflicts of interest. Individuals can serve as a legal representative in one ISDS case and an arbitrator in another.<sup>4</sup>

ISDS is also very costly. The OECD has estimated the average cost of defending an ISDS claim is \$8 million.<sup>5</sup> Awards often amount to hundreds of millions of dollars.<sup>6</sup>

‘Safeguards’ and exceptions that have been included in recent trade agreements to protect health and the environment, including safeguards similar to those included in the agreement between Australia and South Korea (KAFTA), have not prevented corporations from initiating ISDS cases.<sup>7</sup>

From a public health point of view, one of the biggest concerns is the chilling or deterrent effect that ISDS can have on public health policy. An example is the stalling of plans to introduce tobacco plain packaging in New Zealand, while the ISDS case against Australia by Philip Morris Asia is decided. Margaret Chan, the Director General of the World Health Organization, has noted that legal actions by tobacco companies have “deliberately designed to instil fear” in countries trying to reduce smoking.<sup>8</sup> The only way to truly safeguard health and the environment in the context of an investment chapter is to not include an ISDS mechanism at all.

### **ISDS in ChAFTA**

A concern is that the ISDS mechanism in ChAFTA leaves important elements to be negotiated at a later stage, after a review to be conducted ‘no later than three years after the date of entry into force of this Agreement’ (Article 9.9: Future work program). These elements include terms that define the circumstances in which a claim can be made, such as ‘expropriation’ of assets and the ‘minimum standard of treatment’ to which investors are entitled. The exact definition of these terms is critically important in determining the likelihood of governments being sued over legitimate health and environmental policy decisions.

### **Recommendation**

We urge the Foreign Affairs, Defence and Trade Committee to recommend against the ratification of ChAFTA by the Australian Government unless the ISDS mechanism can be removed.

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### Conclusion

ISDS represents a threat to public health and the environment and should not be included in Australia's trade agreements. The ISDS mechanism in ChAFTA is of particular concern given that the definition of key terms that determine the likelihood of ISDS being used to challenge legitimate health and environmental policy measures has been left to be determined at a later date.

The PHAA appreciates the opportunity to make this submission and the opportunity to contribute to this important discussion. Please do not hesitate to contact me should you require additional information or have any queries in relation to this submission.

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Public Health Association of Australia  
26 August 2015

### References

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- <sup>2</sup> Chief Justice RS French AC. Investor-State Dispute Settlement — A Cut Above the Courts? Supreme and Federal Courts Judges' Conference 9 July 2014. [cited 20 July 2015 ] Available: [www.hcourt.gov.au/assets/publications/speeches/.../frenchcj09jul14.pdf](http://www.hcourt.gov.au/assets/publications/speeches/.../frenchcj09jul14.pdf)
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- <sup>4</sup> Gleeson DH, Tienhaara KS, Faunce TA. Challenges to Australia's national health policy from trade and investment agreements. *Med J Aust* 2012; 196 (5): 354-356.
- <sup>5</sup> Gaukrodger D, Gordon K. Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community. OECD Working Papers on International Investment 2012/03. OECD Publishing. [cited 20 July 2015] Available: [http://www.oecd.org/daf/inv/investment-policy/WP-2012\\_3.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf)
- <sup>6</sup> Note 4
- <sup>7</sup> Tienhaara K. These TPP safeguards won't protect us from ISDS. *The Drum*. 26 March 2015. [cited 4 June 2015] Available: <http://www.abc.net.au/news/2015-03-26/tianhaara-these-tpa-safeguards-wont-protect-us-from-isds/6350358>
- <sup>8</sup> Chan M. The changed face of the tobacco industry. Keynote address at the 15th World Conference on Tobacco or Health Singapore 20 March 2012. [cited 15 June 2015] Available: [http://www.who.int/dg/speeches/2012/tobacco\\_20120320/en/](http://www.who.int/dg/speeches/2012/tobacco_20120320/en/)