# Electrical Trades Union of Australia

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SUBMISSION

STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

Examination of the Trans Pacific Partnership Agreement

September 2016

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## Executive Summary

The Electrical Trades Union (ETU) is the Electrical, Energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The ETU represents approximately 65,000 workers electrical and electronics workers around the country and the CEPU as a whole represents approximately 100,000 workers nationally, making us one of the largest trade unions in Australia.

The ETU welcomes the opportunity to submit to the Committee in relation to its examination of the Trans Pacific Partnership Agreement (TPP).

Trade agreements require close scrutiny and the Committee has a responsibility to ensure that Free Trade Agreements are in the interests of all Australians regardless of with whom the agreements are struck.

We submit that the TPP is not in Australia's national interest and cannot be supported by the Committee in its current form.

The TPP will lock Australians out of job opportunities, erode industrial and public safety standards, and expose Australia to unfunded legal action that costs millions.

In 2015 the Productivity Commission voiced significant concerns over Free Trade Agreements[1] and, like unions, continue to argue that these agreements don't deliver measurable economy wide benefits as claimed, impose significant costs, and are oversold by governments.

These criticisms are applicable to the TPP and in our view should not be supported on that basis alone. However, the TPP is an agreement that includes provisions and

[1] Productivity Commission, Trade and Assistance Review 2013-14, June 2015.

arrangements negotiated by current federal government that make it much worse than previous agreements.

The absence or removal of Labour Market Testing for broad classes of employees, particularly those that fall within the 'Contractual Service Supplier' category means all 457 visa sponsoring companies can import unlimited numbers workers under the standard 457 visa program without first having to provide evidence that these workers meet a skill shortage and domestic workers are not available. This sets the stage for Australian workers to be robbed of opportunities, and undercut by a new class of immigrant working poor.

Electrical work is inherently dangerous, that's why there are stringent electrical training and safety standards in Australia that have been developed over decades. Removing the requirement for overseas trades workers to be assessed to see if their skills meet our standards is dangerous for the workers, their colleagues and for the public.

To allow foreign companies to bypass the Australian labour market and bring in a workforce comprised of people untrained and unfamiliar in Australian practices (including an electrical wiring standard that differs substantially from most countries'), and entirely dependent on their employer for residence in Australia, is unsafe and unfair for all parties and economically unsound.

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**Recommendations**

We submit the following recommendations to the Committee:

Recommendation 1

The Committee makes a finding that the TPP is not in the Australian national interest and should not be ratified in its current form.

Recommendation 2

Investor State Dispute Settlement clauses, or any similar arrangements, undermine Australian legal sovereignty. These arrangements and clauses should be immediately removed from the TPP, and any future trade agreement or treaty that Australia enters into.

Recommendation 3

Labour Market Testing is a critical tool for ensuing the interests of the Australian domestic workforce are protected. The TPP provisions which remove, exempt or water down Labor Market Testing requirements in Australia should be immediately stripped from the TPP and its accompanying documents.

Recommendation 4

The TPP should require mandatory skills assessment and labour market testing for licenced trades and occupations.

Recommendation 5

The TPP should be referred to the full Parliament for an open debate, including aspects that do not require implementing legislation.

Recommendation 6

That a full, public study of the environmental impacts of the TPP be carried out urgently, with the findings to inform the inclusion of a new chapter in the agreement that deals with environmental standards that includes commitments by governments to implement agreed international environmental standards which should be enforced by the government-to-government disputes process of the agreement.

Recommendation 8

The TPP should include commitments by governments to implement agreed international labour rights and enforced labour exclusion which should be enforced by the government-to-government disputes process of the agreement.

Recommendation 9

Prior to the final ratification of the TPP the conducting and release of detailed social and economic impacts assessments of the TPP text and its accompanying documents, followed by immediate commencement of detailed stakeholder consultation (including industry, unions and civil society groups).

**Labour Mobility Provisions**

We support a diverse, non-discriminatory labour migration arrangements and we recognise there may be a role for some level of temporary labour migration to meet critical skill needs.

However, there needs to be a proper, rigorous process for managing this and ensuring there are genuine skill shortages and Australian workers are not missing out.

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We support and endorse AFTINET's submission with respect to the TPPs labour mobility provisions. The submission states:

Chapter 12 of the TPP is entitled "Temporary Entry for Business Persons". In fact the chapter covers temporary entry arrangements for a much wider range of occupations other than what is commonly understood by "business persons" that is, managers or senior executives.

The category which includes the widest number of occupations is that of "contractual service providers" which includes trade, professional and technical skills (Chapter 12, Australia's Schedule of Commitments:3).

The NIA states that:

> "Australia's TPP commitments are consistent with Australia's existing immigration framework and the approach taken in other FTAs" (NIA 2016:13).

Under the heading of Implementation, the NIA also states:

> "A Ministerial determination will need to be made under section 140GBA of the *Migration Act 1958* to exempt from labour market testing the intra-corporate transferees, independent executives and/or contractual service suppliers of those TPP parties to which Australia extended temporary entry commitments" (NIA 2016:18).

This makes it clear that under the TPP temporary entry includes contractual service suppliers without labour market testing to establish whether there are Australian workers available.

This is confirmed by the DFAT summary of the outcomes of Chapter 12, which states that Australia's TPP commitments will be implemented through the 457 Visa program (DFAT 2015:1).

Academic studies comparing various recent trade agreements have demonstrated that temporary work visas without local labour market testing are increasingly being used by a range of governments as a means of deregulating labour markets. Such arrangements create groups of workers with less bargaining power who are more vulnerable to exploitation because loss of their employment can lead to deportation.

Recent studies have provided evidence of the exploitation of temporary workers. A Fair Work Ombudsman investigation revealed that that up to 20% of 457 Visa workers were being underpaid or incorrectly employed. The Fair Work Ombudsman reported that temporary visa holders accounted for one in 10 complaints to the agency in 2015. In the three years from 2012, the agency dealt with 6000 complaints and recovered more than $4 million in outstanding wages.

The evidence of violations of Australian minimum work standards included failure to pay even minimum wages, long hours of work, and lack of health and safety training leading to workplace injuries.

There have also been many reports of individual cases. The *Sydney Morning Herald* reported on July 18, 2015, that a court had ordered a restaurant owner to pay $125,431 for wages, superannuation and annual leave for 16 months to a Visa 457 worker with no English language skills who was met at the airport by the employer, had his passport confiscated and was forced to live and work on the premises without payment. The worker's legal representative claimed that his firm had handled dozens of similar cases.

Lopsided commitments

The US has not made any offers to any other countries in this chapter because US law precludes any inclusion of migration arrangements in trade agreements.

In relation to other TPP countries, the NIA states:

> "Australia offered commitments to businesspersons from those TPP countries that will bind similar levels of access for Australian businesspersons in equivalent categories" (NIA 2015:13 para 47)

This is not accurate. In fact, Australia's commitments for entry of contractual service providers are far more extensive than those made by other TPP countries.

Australia's commitments on contractual service suppliers cover a wide range of trade technical and professional occupations. Other TPP countries' commitments for contractual service providers are far more limited.

For example, Chile's commitments relate to business persons engaged in specialised occupations; Japan's commitments specify that the persons must be employed by an overseas company or be in advanced research positions; Malaysia's commitments are confined to professional education and financial services at an advanced level; and Vietnam only includes employees of the company with a service contract in Vietnam (TPP Chapter 12, annexes of Chile, Japan, Malaysia and Vietnam).

In summary, the TPP commits Australia to accepting unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam as contractual service providers in a wide range of professional, technical and skilled trades occupations, without labour market testing to establish whether there are local workers available. Recent studies have shown that the temporary nature of the work and possibility of deportation means that these workers are vulnerable to exploitation. Australia has made far more extensive commitments for entry of contractual service providers than have other TPP countries.

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**Investor State Dispute Settlement (ISDS)**

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS provisions grant additional special rights to foreign investors to sue governments for damages in an international tribunal if they can claim that a change in domestic legislation has 'harmed' their investment.

ISDS was originally designed to compensate for nationalisation or expropriation of property by governments in developing countries and to provide protection against political instability and legislation and tax changes with no recourse against the state. However, ISDS has developed concepts like "indirect" expropriation which do not exist in national legal systems. These enable foreign investors to sue governments for millions and even billions of dollars of damages or compensation if they can argue that a change in law or policy has "harmed" their investment.

ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider and appeal mechanisms to ensure consistency of decisions.

ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. Even if a government wins the case, a 2012 OECD study[2] found ISDS cases last for 3 to 5 years and the average cost is US$8 million per case, with some cases costing up to US$30 million.

The ISDS landscape has been transformed in recent years by new participants. An arbitration industry has emerged, led by entrepreneurial layers advising potential

[2] http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf

clients about options for resolving investment disputes through international arbitration that would not have been considered only a few years ago. In 2011, the German Government settled an ISDS case with Swedish energy company Vattenfall, which launched a €1.4 billion claim against the government for strict restrictions that were imposed on a coal-fired power plant it was planning to build on the banks of the River Elbe.[3] To settle the case, the German government had to agree to withdraw the restrictions. Now Germany is facing another ISDS claim from the same energy company, this time against the decision to wind back nuclear power after the Fukushima nuclear disaster.

In 2007 TCW Group, a US investment management corporation that jointly owned with the government one of the Dominican Republic's three electricity distribution firms, claimed that the government violated Dominican Republic–Central America Free Trade Agreement (CAFTA) by failing to raise electricity rates and failing to prevent electricity theft by poor residents.[4] Société Générale (SG), the French multinational that owns TCW Group, filed a parallel claim under the France-Dominican Republic agreement.

TCW launched its claim two weeks after CAFTA's enactment, arguing that decisions taken before the treaty's implementation violated the treaty.[5] TCW took issue with the government's unwillingness to raise electricity rates, a decision undertaken in response to a nationwide energy crisis. TCW also protested that the government did not subsidise the electricity rates, which would have diminished electricity theft by poor residents. TWC alleged expropriation and violation of CAFTA's guarantee of fair and

[3] See Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. The Federal Republic of Germany, ICSID, Request for Arbitration (20 September 2009); id., Award (11 March 2011).
[4] TCW Group, Inc., et. al v. the Dominican Republic, Notice of Violations of Chapter 10 of the Central AmericaDominican Republic-United States Free Trade Agreement, Ad hoc—UNCITRAL Arbitration Rules (2007)
[5] Letter from Paul Hastings Attorneys to the Dominican Republic Direccion de Comercio Exterior, "Notice of Violations of Chapter 10 of the Central America - Dominican Republic – United States Free Trade Agreement," March 15, 2007.

equitable treatment. TCW demanded US $606 million from the government. The tribunal in this matter ruled in favour of SG, the government decided to settle with SG and TCW. The Dominican government paid the out US $26.5 million to bring the arbitration claim to a close.[6]

Veolia Proprété, a French multinational corporation, launched an investor-state claim against Egypt in 2012, demanding at least US $110 million under the France-Egypt BIT over disputes relating to a 15 year contract for providing waste management services in the city of Alexandria.[7] The corporation claims that having to comply with charges to Egyptian laws of general application violated the government's contractual commitments to keep payments to Veolia aligned with cost increases.

Among its claims, Veolia argues that changes to Egypt's labour laws- included increases to minimum wages- have negatively affected the company's investment and that Egypt has violated its contract and the BIT's investor protections by not helping the corporation offset such costs. Additionally, no public documentation of this challenge has been released.

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico in the North American Free Trade Agreement, the Coalition Howard government did not include ISDS in the US-Australia free trade agreement in 2004. That is why the US Philip Morris tobacco company[8] had to move some assets to Hong Kong and claim to be a Hong Kong company so that it could use ISDS in a Hong Kong-Australia investment agreement to sue for billions of dollars. This case has been ongoing for 4 years and has already delayed the New Zealand government from proceeding with similar legislation.

[6] http://peterson.live.subhub.com/articles/20091008_12
[7] *Veolia Propreté v. Arab Republic of Egypt,* ICSID Case No. ARB/12/15 http://www.italaw.com/cases/2101
[8] http://www.mccabecentre.org/focus-areas/tobacco/philip-morris-asia-challenge

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The Australian Government continued defence of its tobacco plain packaging laws in a case brought by Philip Morris Asia in the Permanent Court of Arbitration and a number of countries in the WTO dispute settlement body. This case highlights the potential (and unprovisioned) contingent liability of ISDS provisions in trade and investment agreements that confer procedural rights to foreign investors not available to domestic residents. The final outcome of the case is not expected to be known for some time. The ongoing costs to Australian taxpayers of funding the preparation and defence of the tobacco plain packaging legislation, and the ultimate ruling, are unknown, unfunded and likely to be substantial.

The main reason the Australian government has not experienced more ISDS cases is that Australia's agreements containing ISDS are with smaller developing countries, which do not have the giant corporations with the resources to launch cases. The inclusion of ISDS in recent agreements with South Korea and China are likely to lead to more ISDS cases because South Korea and China now have international corporations capable of launching cases.

An examination of foreign investment trends with Australia's main foreign investment partners suggests that ISDS provisions are unlikely to have been relevant considerations in the investment decisions of Australian firms investing abroad or foreign firms investing in Australia.

**Australia's major foreign investment relationships – Inward and Outward Investment**

| | *Inward stock (%)* | | | *Outward stock (%)* | |
|---|---|---|---|---|---|
| Country | *2003* | *2013* | *Country* | *2003* | *2013* |
| United States | 27.5 | 26.7 | United States | 38.1 | 28.9 |
| United Kingdom | 24.9 | 22.9 | United Kingdom | 15.7 | 15.7 |
| Japan | 4.4 | 5.3 | New Zealand | 6.7 | 5.0 |
| Singapore* | 2.1 | 2.5 | Germany | 1.7 | 3.5 |
| Hong Kong* | 2.7 | 2.1 | Canada | 1.0 | 3.3 |
| Switzerland | 2.0 | 1.9 | Japan | 3.6 | 3.1 |
| Netherlands | 2.1 | 1.5 | Switzerland | 1.1 | 2.3 |
| China* | 0.3 | 1.3 | Singapore* | 2.2 | 2.2 |
| New Zealand | 1.2 | 1.2 | France | 1.9 | 2.1 |
| Canada | 1.1 | 1.1 | Netherlands | 2.6 | 2.1 |
| Other ISDS* | 0.2 | 0.5 | Other ISDS* | 3.4 | 6.4 |
| Other countries | 30.8 | 33.0 | Other countries | 22.1 | 25.5 |
| Total | 100.0 | 100.0 | Total | 100.0 | 100.0 |

**a** Refers to total foreign investment. * Signifies agreement in force prior to 2003 which contains ISDS provisions.

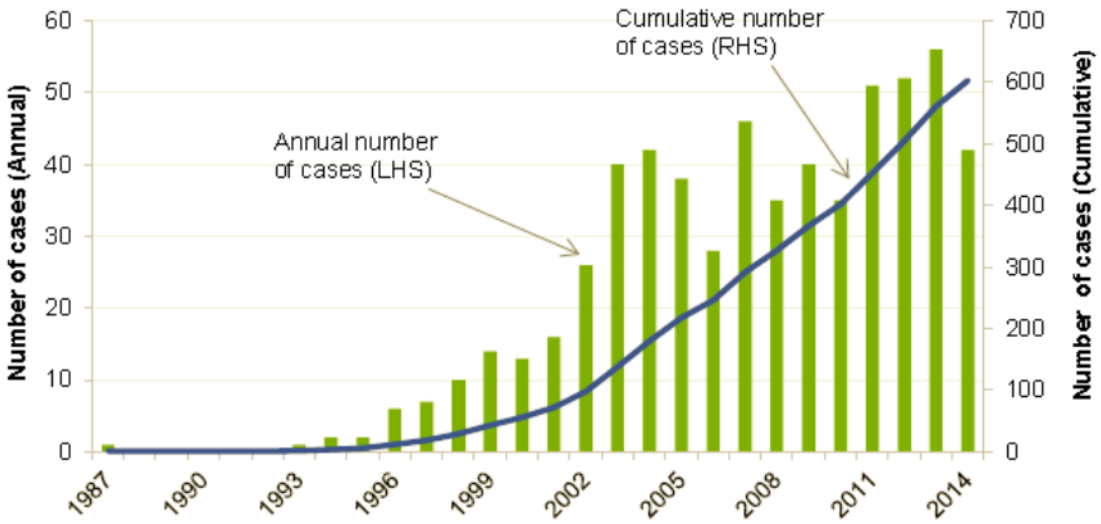
(Source – DFAT 2014)

Many ISDS cases are conducted in secret, but the most comprehensive figures on known cases from the United Nations Committee on Trade and Development[9] show that there has been an explosion of known ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 and 608 in 2014, of which 80% come from global corporations based in the US and Europe. US-based companies are by far the most frequent users, with twice as many cases as the country of the next largest users. The Most recent UNCTAD figures show most cases are won by investors. There are increasing numbers of cases against health, environment and other public interest legislation. Tobacco companies are systematically using ISDS cases against Australia and Uruguay to undermine public health regulation of tobacco advertising.

[9] http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

There has been a growing number of ISDS cases in recent years with 42 new claims in 2014. A broad range of government measures have been challenged in recent years including changes related to investment incentive schemes, cancellation or alleged breaches of contracts, revocation or denial of licenses and alleged direct or de facto expropriation (in part, the issue at the heart of Philip Morris Asia's claim against the Australian Government). While information on the amount of compensation sought by applicant investors is scarce, the amounts claimed ranged from US$8 million to US$2.5 billion for cases where this information was reported. However, a combined award of US$50 billion to investors in three closely related cases in 2014 was the highest known award on record[10].

**Known ISDS cases, 1987 to 2014**




(Source – Productivity Commission 2015)

[10] Productivity Commission, Trade and Assistance Review 2013-14, June 2015, p77.

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ISDS provisions in the TPP

Article 29.5 provides an exemption for Tobacco control measures to not be taken to arbitrations as a result of the Philp Morris Case, as mentioned previous. It is unclear why the Australian Government has negotiated to exemption just one aspect as oppose to understanding that the ISDS creature/mechanism is the issue. There are no safeguards for other areas such as health, environment and labour rights.

The Productivity Commission and the ACCC have stated that the TPP gives foreign investors special privileges to sue the Australian government over Australian domestic laws. In addition to this, they have also said that it will strengthen monopoly rights on medicines and copyright at the cost of the consumers. The Howard Government excluded the ISDS clause from the Australia- US Free Trade Agreement in 2004 which was of great controversy and public debate. The ISDS was excluded in the final agreement, making it the only bilateral US agreement which does not include the ISDS.

The ISDS incorporates a definition of 'investment' which confers extra-legal power on transnational owners of stocks, bonds, speculative financial instruments such as derivatives, licenses, franchises, permits and intellectual property.

We support the analysis and submissions made by AFTINET in relation to the TPP, which states:

The NIA claims on page 9, para 33 in that "specific policy areas are carved out or excluded from certain ISDS claims". These are claimed to include "social services established or maintained for a public purpose, such as social welfare, public

education, health and public utilities: measures with respect to creative arts, indigenous cultural expressions and other cultural heritage."

In fact, this is not accurate. These exclusions or carveouts are listed in Annex 2 to the Investment chapter 9, but they only apply to specific articles in the investment chapter. They do not apply to any of the ISDS provisions.

Page 1 of Annex II to the Investment chapter makes this clear by listing the specific Articles in the investment chapter which cannot be applied to the list of excluded services. They are Article 9.4 (national treatment), Article 9.5 (most-favoured-nation treatment), Article 9.9 (performance requirements), Article 9.10 (Senior Management and Board of Directors). They do not include any of the Articles dealing with ISDS in chapter 9.

The claimed "safeguards" which actually apply to the ISDS section of Investment chapter 9. cannot be described as clear carveouts or exclusions.

The only clear carveout or exception is that governments have the option of excluding future tobacco control laws from ISDS cases (Article 29.5). This is actually in Chapter 29, which deals with exceptions to the whole agreement. This is welcome, and should prevent future cases like the Phillip Morris tobacco company case against Australia's plain packaging law.

But this begs the question of why other public interest laws are not clearly excluded, and means that the tobacco carveout can be described as the exception that proves the rule.

The "safeguard" Articles in the investment chapter which do apply to key ISDS definitions have the same pitfalls as in previous FTAs, which have not prevented foreign investors from bringing cases against government in areas of health and environmental regulation.

One claimed safeguard in Chapter 9 refers to laws or policies which can be seen by investors as "indirect expropriation". This has the same wording as Articles in other recent agreements. The Article reads:

> "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances" (Annex 9-B 3b).

This has large legal loopholes, as it does not prevent companies from launching cases in which they can argue that the measures are not legitimate, and that the circumstances are rare.

Another claimed safeguard reads:

> "Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental health or other regulatory objectives" (Article 9.16).

Associate Professor Amokura Kawharu of Auckland University has commented that this is circular language which "appears to provide no additional protection, and only affirms the right to regulate in a manner consistent with the other terms of the investment chapter" (Kawharu 2015:9). This view is shared by George Kahale, an internationally recognised investment law practitioner (quoted in Hill, 2015).

A third claim safeguard relates to the fact that governments are required to treat international investments in accordance with Customary International Law, which includes "fair and equitable treatment" and "full protection and security" (Article 9.6.1).

There have been controversial cases where tribunals have found in favour of corporations on the basis that government action has interfered with their expectation

of treatment. A recent example is *Bilcon vs Canada*, in which a tribunal found in March 2015 in favour of a company claiming damages because its application for a quarry development was refused by a local government authority for environmental reasons. The reasons for the decision included that the decision was contrary to the company's expectations of treatment (Dundas 2015).

An additional protection for governments in such cases is claimed to be provided by Article 9.6.4 which says that "actions by governments inconsistent with investor expectations alone do not breach the requirement to give fair and equitable treatment to investors." However, this is qualified by Annex 9-B which says that one of the criteria for the determination of indirect expropriation is government action which interferes with "distinct reasonable investment-backed expectations."

Again, experts question the efficacy of the claimed protection about expectations in Article 9.6.4. Luke Peterson, respected editor of the *Investment Arbitration Reporter,* says that the detailed language about investment-backed expectations in Annex 9-B could mean that Article 9.6.4 only gives protection against "subjective" expectations (Peterson 2015). Kawharu comments that governments, including the United States, have defended cases by suggesting that investor expectations should not form the basis of customary law fair and equitable treatment claims at all, and concludes that the TPP text "could have been more emphatic about the issue" (2015:11-12).

It has also been claimed that the TPP contains obligations on corporations to behave in ways consistent with corporate social responsibility. This is not accurate. International corporations are only "encouraged" to voluntarily adopt socially responsible standards of behaviour (which are not defined) with no legal obligation or enforcement. Article 9.17 reads:

> "The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines

and principles of corporate social responsibility that have been endorsed or are supported by that party."

This vague encouragement contrasts with the many legally binding obligations on governments and international investor rights to sue governments.

Most Favoured Nation Clause

The TPP contains a 'Super ISDS' clause called Most Favoured Nations clause which enables foreign corporations from TPP states to make a claim against Australia based on the ISDS provisions in any other trade deal Australia has signed, no matter which country it was signed with.

That means it does not matter how carefully the TPP is drafted: foreign investors can cherry-pick another treaty Australia has signed, and sue the Australian government based on the provisions included in that treaty.

Mr George Kahale III is Chairman of the world's leading legal arbitration firm – Curtis, Mallet-Prevost, Colt & Mosle LLP – whose core business is to defend governments being sued by foreign investors under ISDS. Some of their clients are included in the TPP.

Mr Kahale has described MFN as "a dangerous provision to be avoided by treaty drafters whenever possible" because it can turn one bad treaty into protections "never imagined for virtually an entire world of investors"[11].

In short, ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which

[11] http://www.theguardian.com/business/2015/nov/10/tpps-clauses-that-let-australia-be-sued-are-weapons-of-legal-destruction-says-lawyer

already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors.

There is no need to give international investors additional general powers to sue governments which are not available to domestic investors.

**Labour Rights**

The ETU believes that skilled migrants make a valuable and substantial positive contribution to Australia's economic, social and cultural fabric and must treated with equity and respect -particularly with reference to wages and industrial conditions - as compared to Australian citizens.

Trade agreements should include commitments by governments to implement agreed international labour rights which should be enforced by the government-to-government disputes process of the agreement. The ChAFTA labour chapter has relatively low standards and weak commitments, and they are not enforceable through the government-to- government dispute process which applies to other chapters in the agreement.

All overseas workers should have the right to join and be represented by a trade union and also have the right to be treated fairly and equitably. Unfortunately there are still many employers who seek to exploit overseas workers or not uphold their responsibilities to Australian workers. The nature of the instances include:

- workers being engaged where skilled and qualified Australian workers were available to do the work;
- Breaches of employer sponsorship obligations;

- Under-payment of workers;
- Excessive working hours;
- Workplace bullying;
- Debt bondage;
- 457 visa workers nominated to work in skilled occupations and then being required by their employer to perform unskilled work on a regular or permanent basis;
- Employers offering to sponsor workers for permanent residency for a fee up to $50 000
- Exorbitant charges and interest payments on loans for 457 visa holders to be placed in jobs;
- Salary deductions to pay for migrant agent fees on the promise of getting permanent residency
- Threats from employers to not join a union, including contracts that 457 visa workers are forced to sign stipulating they can be sacked for talking to a trade union;
- Attempts by employers to recover costs such as accommodation and food;
- A number of cases where overseas workers have uprooted themselves to come to Australia only to find after a short time (or immediately in some cases) the job is no longer there.

We also support and endorse submissions from AFITNET in relation to labour rights:

The NIA states that the TPP Chapter 19 on Labour contains:

> "Recognition and emphasis by TPP parties on the importance of internationally-recognised labour rights. Each party is required to adopt and maintain in its legislation and practices the rights contained in the International Labour Organisation Declaration such as elimination of forced labour, abolition of child

> labour, freedom of association and the right to collective bargaining. The TPP would also enhance cooperation and consultation on labour issues, and affective enforcement of labour laws in TPP parties" (NIA, page 11)

The inclusion of a chapter which refers to labour rights is welcome. However, the NIA description paints a rosier picture than is revealed by the details in the text. Labour law experts have criticised the chapter because much of it is aspirational rather than legally binding and the enforcement process for those few provisions which are legally binding is more qualified, lengthy and convoluted than in other chapters of the agreement. These processes have not proven effective in other agreements (International Trade Union Confederation 2015).

**Labour Standards**

The chapter does not refer to detailed International Labour Organisation Conventions, but only to the shorter and more general principles in the ILO Declaration listed in the NIA quote above (Article 19.3.1).

Governments are meant to adopt and maintain these general rights, but the lack of reference to the detailed ILO Conventions means that it is not clear how they will be implemented.

There is also an obligation for each government to adopt and maintain their own standards governing minimum wages, hours of work and occupational safety and health, as determined by each government (Article 19.3.2).

This means the standards can be varied by national governments, but are meant to remain consistent with basic labour rights (Article 19.4 (a)).

Article 19.4 (b) is more specific about obligations not to weaken or reduce adherence to rights or conditions of work, but only in a special trade or customs area, such as an export processing zone.

The reference to Corporate Social Responsibility is particularly weak and unenforceable, stating only that that "each Party shall endeavour to encourage enterprises to voluntarily adopt corporate social responsibility initiatives on labour issues that have been endorsed or are supported by that Party" (Article 19.7).

Weak Enforcement Provisions

The most egregious omission in the enforcement provisions is that there is no enforcement for violations of the obligations on forced labour, including compulsory child labour. Instead, Governments only "recognise the goal" of eliminating forced labour, and "discourage" through "initiatives they consider appropriate" the importation of goods produced in whole or in part by forced or compulsory labour (Article 19.6).

ILO studies have revealed that 21 million people, mostly women and children, are forced labourers, including in TPP countries (ILO 2012). The US Congress in February 2016 passed an amendment to the US *Tariff Act 1930* which will ensure that all imported products of forced labour are banned (Larson 2016).

This is the only effective way to eliminate forced labour. The TPP is a missed opportunity to progress this trend.

The enforcement provisions which do apply in some areas are more qualified and complicated in this chapter than in other chapters.

Complaints about labour rights require evidence that there is a "sustained or recurring course of action or inaction" which violates the legal obligations in the chapter (Article 19.5.1).

Complaints also require evidence of violation of labour rights "in a manner affecting trade or investment" between TPP governments, which means that public sector workers and others in non-traded sectors are not covered (Article .19 .5 .1).

These two qualifications make it much more difficult to gather evidence to support a complaint, and mean that large parts of the workforce are exempted from enforcement of the obligations in the chapter.

The complaint and enforcement procedure requires lengthy consultations before the state-to-state dispute process can be invoked (Article 19.15). Similar provisions have not been effective in previous agreements.

The US has negotiated separate bilateral side letters with Vietnam, Malaysia, and Brunei, which set out detailed plans for implementation of specific labour reforms (USTR 2015). It is not clear how these relate to the rest of the Labour chapter and its enforcement provisions.

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**Environmental Standards**

Trade agreements should include commitments by governments to implement agreed international environmental standards which should be enforced by the government-to-government disputes process of the agreement.

The TPP environment chapter has relatively low standards and weak commitments, and they are not enforceable through the government-to-government dispute process which applies to other chapters in the agreement.

The NIA states that the TPP Environment Chapter 20**:**

> "promotes high levels of environmental protection, including by liberalising trade environmental goods and services, and ensuring that TPP parties effectively enforce their domestic environmental laws. TPP parties must also take measures in relation to a number of important environmental challenges" (NIA p.11).

However, environmental law experts have criticised the chapter for weak environmental standards, which are not enforceable in the same way as obligations in other chapters (Sierra Club 2015, Terry 2015).

Despite promises that the TPP would include enforceable commitments by governments to at least seven international environment agreements, the text mentions only four, and only one - on trade in endangered species - has clearly enforceable commitments (Article 20.17 .2).

The text does not refer to climate change, but only to voluntary measures for lower emissions economies with no benchmarks or timeframes (Article 20.15).

Each Government commits only to "strive to ensure that its environmental law and policy provide for and encourage high levels of environmental protection" and not to

"fail to enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties" (Articles 20.3.3 and 20.3.4).

Like the labour chapter, the requirement to prove sustained or recurring violations creates an additional barrier for enforcement provisions. There are also requirements for lengthy consultations before resort to the dispute process (Article 20.23).

The non-binding nature of commitments and weak enforceability in the environment chapter contrasts sharply with the legal rights of corporations to sue governments over domestic laws, including environmental laws, under the provisions for ISDS described above.

**Economic Modelling**

The Government stated that the TPP will significantly boost Australia's economic relationship throughout the region by:

- Creating seamless preferential supply chains with the TPP parties
- Bolstering relations with those whom we already have existing Free Trade Agreements; and
- In the case of Canada, Mexico and Peru, by becoming preferential trading partners for the first time.

It has been stated that the TPP will give Australian exporters significantly improved market access in goods and services to a free trade area accounting for 40% of global GDP. This will be by removing or reducing tariffs on Australian goods exports.

However, these claims are undermined by two independent reports.

A 2015 World Bank study[12] on the TPP, which we are sure the Committee is aware of, has estimated that it will result in a miniscule 0.7% growth in the Australian economy by the year 2030.[13]

This is concurred by a 2015 Tufts University also conducted an economic analysis[14] of the impact of the TPP. It concluded that the TPP would only marginally, at best, change competitiveness among participating countries with most gains obtained at the expense of non-TPP countries.

For Australia, Tufts concluded that over the 10 years to 2025 the will cost 39, 000 jobs and result in a potential increase of just 0.71% of GDP. A paltry amount at a great cost.

Globally, the TPP favours competition on labour costs and remuneration of capital and will accelerate the global race to the bottom, increasing downward pressure on wages in a quest for ever more elusive trade gains. It is not worth risking our nation's sovereignty and public interests for such as small economic benefit.

**Public Hearings**

The ETU would welcome the opportunity to appear before the Committee at one of its public hearings.

[12] http://www.worldbank.org/en/publication/global-economic-prospects/GEP-Jan-2016-Implications-Trans-Pacific-Partnership
[13] http://www.worldbank.org/content/dam/Worldbank/GEP/GEP2016a/Global-Economic-Prospects-January-2016-Implications-Trans-Pacific-Partnership-Agreement.pdf
[14] http://www.ase.tufts.edu/gdae/policy_research/tpp_simulations.html

## Conclusion

The Blind Agreement Senate Inquiry Report[15] into the Australian trade agreement process criticised the current secret and undemocratic process and called for the text of trade agreements to be released for public and parliamentary scrutiny before they are signed. These demands have grown because trade agreements now deal with issues like medicines, copyright, food regulation, labour rights and other public interest issues which should be decided through the democratic parliamentary process, not secretly signed away in trade deals.

The complexity of bilateral and regional trade agreements and the potential for provisions to impose net costs on the community presents a compelling case for the negotiated text of an agreement to be comprehensively analysed before signing.

Current processes fail to adequately assess the impacts of prospective agreements. They do not systematically quantify the costs and benefits of agreement provisions, fail to consider the opportunity costs of pursuing preferential arrangements compared to unilateral reform, ignore the extent to which agreements actually liberalise existing markets and are silent on the need for post-agreement evaluations of actual impacts.

Agreements like the TPP also give corporations the ability to sue governments for loss of profits if they perceive that a policy has damaged their interests. Would an attempt to protect Australian workers, or require decent redundancies or retraining for sacked workers be grounds for a challenge under these provisions? It's more than likely.

[15] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report

We are not blind to the idea that the labour market can grow, but we are rightly concerned about how this happens, and what it means for the very real people it affects. That this agreement was kept secret through a decade of negotiations is testament to how unpopular these provisions would have been if subjected to any serious scrutiny.

It will take more than vague assurances of job creation and some misapplied economic theory to convince our union that the TPP can do anything but harm the working people we represent.