Senate Foreign Affairs Defence and Trade References Committee Trans Pacific Partnership (TPP) Inquiry

ACTU Submission

28 October 2016

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INTRODUCTION

The ACTU welcomes the opportunity to make a submission to this Senate Foreign Affairs Defence and Trade References Committee inquiry into the Trans-Pacific Partnership (TPP) agreement.

The ACTU is the peak body for Australian unions, made up of 46 affiliated unions. We represent more than 1.6 million working Australians and their families. The ACTU and affiliated unions have had a long and significant interest in the trade agenda on behalf of our members and workers generally.

The TPP is a major undertaking with profound implications for the economies and societies concerned. If it enters into force, the TPP would become the largest trade deal in history, covering 12 countries, 792 million people and 40 per cent of global trade. The agreement itself contains 30 chapters, 6 annexures and 27 more associated documents. It deals with a wide range of matters that are traditionally the preserve of national governments to determine through their own domestic, democratic parliamentary processes.

Yet, as appears to be the way with all trade agreements Australia is involved in, the TPP has been negotiated and entered into with very little, if any, public and parliamentary scrutiny up to this point. Only once the TPP was signed by the government was there an opportunity to scrutinise an agreement that has been more than five years in the making.

We should expect that trade agreements are subject to proper scrutiny and that unions and others in civil society, as well as business, have the opportunity for genuine input into the negotiations on behalf of those they represent. To date trade agreements are conducted behind closed doors and Australia lags behind other countries and institutions when it comes to public scrutiny. This whole process in Australia contrasts with the experience in the European Union, for example. The EU has recognised legitimate community demand for the negotiating papers and final text to be exposed to public debate.

Unions have concerns with a number of elements of the TPP but in this submission, we will focus on five key problems.

One, the lack of transparency in this and other trade negotiations[1].

Two, the impact of the TPP on Australia's domestic labour market testing rules and the failure to protect Australian jobs[2].

Three, a labour chapter that fails to provide strong, enforceable labour rights.[3]

Four, the inclusion of anti-democratic investor-state dispute settlement provisions that enable foreign corporations to sue the Australian Government for changing domestic policy and regulations.

Five, there is economic evidence that suggests Australia will face the loss of 39,000 jobs to 2025 and an increase in inequality[4].

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[1] See Productivity Commission, Bilateral and Regional Trade Agreements Final Report, Productivity Commission, Canberra, 2010, p. xx; Productivity Commission, Trade and Assistance Review 2013-14, Productivity Commission, Canberra, 2015, p. 2.

[2] Menadue, J., Preferential trade deals – gigantic foundation stone or pebbles, 13 October 2015, http://johnmenadue.com.blog/?p=4749

[3] Armstrong, S., The Impact of the Australia-US Free Trade Agreement, AJRC Working Paper 01/2015, Australian National University, January 2015. https://crawford.anu.edu.au/pdf/ajrc/wpapers/2015/201501.pdf?06d09

[4] Capaldo J, Izurieta A, Sundaram J K, 'Trading Down: Unemployment, Inequality and Other Risks of the Trans PACFIC Partnership Agreement', Tufts University, USA, January 2016

Again, this is not an exhaustive list. We share the concerns expressed about the impact of the TPP in a range of other areas, including the impact on access to medicines, and the impact on public services and education.

We endorse and refer the inquiry to the submissions of our affiliated unions, as well as AFTINET, for further treatment of these and other matters.

KEY POINTS AND RECOMMENDATIONS

Australian unions are not anti-trade. We recognise the value of increased exports and greater access to overseas markets for Australian businesses. We welcome the opportunities for workers that come from participating in the 21st century global economy. The ACTU is a supporter of trade as a vehicle for economic growth, job creation and rising living standards. Having a strong export sector is imperative for Australia's prosperity.

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

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

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

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

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

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

- Professors Peter Dixon and Maureen Rimmer at Victoria University found that the Centre for International Economics estimated that the gain in economic welfare from the three FTAs with Japan, China and Korea, will be only 0.4% of GDP. The CIE study also found that as a result of the three FTAs, Australian jobs would increase by 5,434 by 2035. Yet the government has claimed the China FTA and others will create hundreds and thousands of jobs

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

In the case of the agreement now before this inquiry, World Bank modelling of the TPP shows that it will increase Australia's GDP by just 0.7% by 2030 – less than one half of one tenth of 1 per cent each year over the next 15 years[5]. Similar results came from the Peterson Institute for International Economics – a supporter of the TPP – which forecast a total boost to Australia's GDP of 0.5% over the next decade to 2025[6].

Against those meagre projected benefits, there are major flaws with the TPP in the key areas that this submission focuses on.

1. The TPP was conducted with a lack of transparency throughout the negotiations and was entered into and signed without genuine public input from the Australian community. While this Senate Foreign Affairs Defence and Trade References Committee inquiry provides the chance for welcome, if belated, parliamentary scrutiny of the agreement as a whole, in the end Parliament will only have the chance to vote on the implementing legislation and not the whole agreement. We urge this Senate enquiry to continue to push for reform in the treaty-making process, including a more democratic and open process for meaningful civil society engagement and parliamentary scrutiny throughout trade negotiations. The TPP and all other finalised trade agreements should be subject to independent assessment of their costs and benefits before parliament is asked to ratify them.

2. The Australian Government has yet again entered into a free trade agreement where it appears to have removed the obligation on employers to conduct labour market testing before temporary overseas workers fill Australian jobs. If that is the case, Australian and overseas companies will be able to employ unlimited numbers of workers from TPP member countries in hundreds of occupations across nursing, engineering and the trades without any obligation to provide evidence of genuine efforts to first recruit Australian workers. In doing so, Australia has agreed to the worst deal of any TPP country in terms of what it has given up in relation to migration safeguards. Unions cannot support an agreement that removes this basic protection in support of Australian jobs.

3. The TPP has a labour chapter, but the labour rights are weaker than promised and it fails to provide for effective enforcement of those provisions.

4. The TPP contains an investor-state dispute settlement (ISDS) clause that will allow foreign investors from TPP member countries to sue the Australian Government if changes to domestic law and regulations harm their investment. The ISDS clause in the TPP provides a safeguard in regard to tobacco regulation to avoid a repeat of the Phillip Morris ISDS saga, but this still leaves a wide range of policy areas open to challenge. ISDS clauses are a restriction on national sovereignty and the ability of governments to regulate in the public interest. The ACTU has a consistent position that ISDS clauses should not be included in any trade agreement that Australia enters into, including in this case, the TPP.

[5] http://www.smh.com.au/federal-politics/political-news/transpacific-partnership-will-barely-benefit-australia-says-world-bank-report-20160111-gm3g9w.html

[6] http://www.petermartin.com.au/2015/10/trans-pacific-partnership-were-selling.html

The submission that follows expands on each of these matters.

The matters identified above are serious deficiencies with the TPP. The ACTU recommends that Australia not ratify the TPP unless and until these matters have been adequately addressed through necessary changes to the text of the agreement and the implementing legislation.

CHARTING A NEW COURSE FOR TRANSPARENT AND INCLUSIVE TRADE NEGOTIATIONS AND AGREEMENT-MAKING

The TPP is a major undertaking with profound implications for the economies and societies concerned. If it enters into force, the TPP would become the largest trade deal in history, covering 12 countries, 792 million people and 40 per cent of global trade. The agreement itself contains 30 chapters, with 6 annexures and 27 more associated documents. It deals with a wide range of matters that are traditionally the preserve of national governments to determine through their own domestic, democratic parliamentary processes.

Yet the process to get to this point with a signed agreement being presented to the Australian Parliament for ratification leaves a lot to be desired. As appears to be the way with all trade agreements Australia is involved in, the TPP has been negotiated and finalised largely in secret and signed with very little, if any, public and parliamentary scrutiny up to this point.

Negotiations for the TPP began in 2010 and general DFAT briefings for Australian stakeholders were held twice a year with briefings held on particular topics by request. Stakeholders were permitted to attend negotiations to present papers to negotiators on particular issues. However, the draft negotiating text was never made public and without access to the details of the text being negotiated, such consultation had limited value.

After September 2014, there were no more arrangements for stakeholder presentations at negotiations and the dates and location of negotiating meetings were kept secret.
The secrecy of the detail of TPP negotiations has meant that the occasional unauthorised leaking of text documents has been the only way stakeholders have gained access to documents that should have been the subject of open debate in the parliament and in the community throughout negotiations.

Only now, after the agreement has been signed, does this Senate inquiry provide an opportunity for Parliament to properly scrutinise an agreement that has been more than five years in the making.

If the experience of past trade agreements is any guide, the scope from here on for meaningful changes to be made to deficiencies with this agreement is limited. In the end, Parliament only votes on the implementing legislation, not the whole text. Essentially, it becomes an all or nothing proposition at that point in terms of ratification of the agreement.

This whole process contrasts with the experience in the European Union, for example. The EU has been negotiating a Trans-Atlantic Trade and Investment Partnership (TTIP) with the US which is frequently described as the Atlantic equivalent of the TPP. The EU has recognised legitimate community demand for the negotiating papers and final text to be exposed to public debate. It committed to releasing for public discussion its own proposals and discussion papers in the negotiations and to release the final text of the agreement for public and parliamentary discussion before it is signed[7].

The negotiating process for an agreement that Australia has already signed up to cannot be undone of course. What is done in that sense is done. However, the fact the TPP has been put together without a proper transparent and inclusive process for public input into negotiations should give this Inquiry and Parliament even greater cause to ensure the agreement is now subject to comprehensive scrutiny before Australia goes ahead with ratification.

To this end, we call for an independent, external inquiry into the costs and benefits of the TPP, in addition to this Senate Inquiry and any other parliamentary inquiries. This Committee should also take a lead role in advocating for reforms to the treaty-making process and future trade agreement negotiations; to set a new standard both for the conduct of negotiations and for the process by which Australia enters into such agreements. The existing, flawed and inadequate process that we have seen with the TPP and other agreements does not have to be set in stone forever more.

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

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

The TPP, for example, covers subject matter as diverse as regulatory transparency, food regulation, application of patents to living organisms, regulation of information technology and electronic commerce, including electronic data privacy, and financial regulation[8]. Proposals for change in all of these areas would normally take place through democratic parliamentary processes.

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

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

In summary, we submit the following recommendations should be made for all future trade agreement processes:

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

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

- The Australian government should follow the example of the European Union and release the final text of agreements for public and parliamentary debate, and parliamentary approval before they are authorised for signing by Cabinet.

- After the text is completed but before it is signed, comprehensive, independent assessments of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation and review by parliamentary committees.

- An enquiry should review the text of a trade agreement which has been released before signing with the independent assessment of its costs and benefits, and make a recommendation to Parliament.

- Legal experts agree that the Executive power to enter into treaties is a prerogative power which can be abrogated or controlled by legislation. There is no constitutional barrier to Parliament playing a greater role in the treaty decision-making process. After release of the text before signing, and after a review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should decide whether the Cabinet should approve the agreement for signing.

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

LABOUR MOBILITY AND LABOUR MARKET TESTING

In this section of the submission, we first provide the Committee with some context for this part of the TPP debate. This includes an overview of our broad position on labour mobility provisions in trade agreements and the importance of labour market testing to support Australian jobs.

We then take the Committee through the key provisions of the TPP that give rise to our genuine and well-founded concerns about the removal of labour market testing and the lack of protection in it for Australian jobs.

ACTU position on labour market testing and the movement of temporary overseas workers under free trade agreements

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

Quite simply, this is because the fundamental issues at stake are about support for Australian jobs, support for Australian training opportunities, and support for fair treatment and decent wages and conditions for all workers. These are core issues for unions.

That is why unions will continue to campaign and advocate strongly in debates over the labour mobility provisions in free trade agreements and the movement of temporary overseas workers.

Australian unions are long-standing supporters of strong, diverse and non-discriminatory immigration program. Our clear preference is that the migration program operates occurs primarily through permanent migration where workers enter Australia independently. This gives migrants a greater stake in Australia's long-term future and it removes many of the 'bonded labour' type problems that can arise with temporary migration where a worker is dependent on their employer for their sponsorship and ongoing prospects of staying in Australia. As highlighted in our submission to the recent Senate Inquiry into the temporary work visa program [9] and ongoing media coverage of cases such as at 7-Eleven, exploitation of temporary overseas workers is rife.

We accept there is a role for some level of temporary migration to meet critical short-term skill needs, provided there is a proper, rigorous process for managing this.

The priority must always be on maximising jobs and training opportunities for Australians – that is, citizens and permanent residents, regardless of their background or country of origin. Whether it is young Australians looking for their first job or older Australians looking to get back into the workforce or change careers, they deserve an assurance that they will have first access to Australian jobs. This is more important than ever at a time when unemployment remains stubbornly around the 6% mark – the highest levels in a decade – and youth unemployment is in double digits.

That is why the labour market testing requirements currently in place under the 457 visa program and enshrined in the Migration Act 1958 are so important in ensuring that employers have a legal obligation to employ Australians first. This obligation should not be undermined or removed by labour mobility provisions in free trade agreements.

We have no objection to overseas workers from any country being employed in Australia, provided there is genuine, verifiable evidence through labour market testing that the employer

[9] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa (see ACTU submission no. 48.)

has not been able to find a suitable, qualified Australian to do the job, and those workers are treated well and receive their full entitlements. However, we cannot support this fundamental obligation on employers to support Australian jobs first, simply being waived as part of the cost of pushing through free trade agreements.

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

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

Analysis of chapter 12 of TPP – labour mobility

Our analysis of the text of the labour mobility provisions in Chapter 12 and related annexures indicates that, once again, the Australian Government has made a free trade agreement that opens up temporary visa entry to a wide range of skilled workers ('contractual service suppliers') from overseas countries, without the right to insist on labour market testing before employers fill those positions. This means both Australian companies and overseas companies operating in Australia will be able to employ workers from the TPP countries, without first having to check if there was an Australian who could do the job.

The text of the TPP also indicates that Australia has agreed to provide preferential access to work in a broader range of occupations than it has been able to secure in terms of reciprocal access for Australian workers travelling to the other TPP countries. We outline below some of the provisions that lead us to these conclusions about the impact of the TPP on labour market testing and Australian jobs.

Labour market testing

The critical question in assessing chapter 12 of the TPP is what it means for Australia's right to impose labour market testing in support of Australian jobs.

Labour market testing under the Migration Act 1958 currently applies to a wide range of occupations in the trades, nursing and engineering professions. It is vital that this requirement for labour market testing is not removed as a result of the TPP, as it has been already under a number of other free trade agreements Australia has entered into, including, most recently, CHAFTA[10].

On our reading of the TPP, Australia does appear to have committed to removing labour market testing.

In chapter 12 of the TPP, article 12.4, 'Grant of Temporary Entry' states that

"*Each Party shall set out in Annex 12-A the commitments it makes with regard to temporary entry of business persons, which shall specify the conditions and limitations for entry and temporary stay, including length of stay, for each category of business persons specified by that Party*'.

While the TPP does not have a catch-all, CHAFTA-style provision that expressly prohibits countries from imposing labour market testing, one of the main causes for concern is that Australia's commitments to other TPP countries on temporary entry, as outlined in annex 12-A of the TPP, do not specify labour market testing as a condition or limitation on temporary entry in Australia.

By contrast, other countries such as New Zealand and Brunei have specified that an economic needs test could or will be applied to the entry of overseas workers into their respective countries. Similarly, Peru reserves its right to impose labour market testing if another country is doing so. Australia has made no such provision in its TPP commitments.

At the other end of the spectrum, Canada has specified that it will not impose 'labour certification tests'. Significantly, Canada will only extend its commitments on temporary entry to those TPP countries that do not reserve their right to impose any type of economic needs test, labour certification tests or numerical restrictions. The fact then that Australia has extended its temporary entry commitments to Canada and is getting reciprocal access from Canada indicates that Australia will not be imposing labour market testing, at least for employers taking on Canadian nationals, and potentially for nationals from other parties to the TPP.

Finally, the explanatory materials from DFAT do not provide any certainty or comfort on these issues. For example, the DFAT materials confirm that Australia's commitments will be implemented through the 457 visa program. It sets out a number of requirements that this entails – the requirement for employers to sponsor the workers, meet market salary rates, and offer conditions required under Australian workplace law and meet minimum qualification requirements – but the requirement for labour market testing is a notable omission[11].

The DFAT materials also emphasised that Australia will be getting the benefits of reduced barriers and temporary access to other countries without being subject to quotas or economic needs tests. However, it does not make clear what Australia has offered in return. This begs the question of what exactly are the commitments Australia has made to other countries in terms of reduced barriers to labour mobility' and 'preferential temporary access', if not the removal of labour market testing.

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[10] As confirmed by the legislative instrument issued on 4 December 2015, https://www.comlaw.gov.au/Details/F2015L01940

[11] http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-temporary-entry-of-business-persons.aspx

The scope of Australia's TPP labour mobility commitments

We also have concerns about the scope of Australia's labour mobility commitments and what categories of workers they apply to.

As noted above, article 12.4 in chapter 12 of the TPP provides for each party to set out the commitments it makes with regard to temporary entry of 'business persons' and to specify the conditions and limitations for entry and temporary stay for each category of business person it specifies. (It is worth noting that the US and Singapore make no commitments at all on labour mobility under this chapter).

However, despite the title of the chapter having the seemingly benign appearance of dealing simply with the movements of 'business persons', the commitments made under the TPP will in fact cover the temporary entry of skilled workers in traditional employment relationships.

In the case of Australia, its commitments to grant temporary entry extend beyond business visitors and high-level independent executives and include the category of 'contractual service suppliers'. This category is defined expansively to include all 'business persons' with trade, technical and professional skills. Essentially, this commitment would appear to cover temporary entry for all skilled occupations under the 457 visa program, such as nurses, engineers, electricians, plumbers, carpenters, bricklayers, tilers, mechanics and chefs. The DFAT explanatory materials confirm these commitments will be implemented though the 457 visa program.

Australia has offered these temporary entry commitments to the TPP countries that make offers under similarly titled categories.

However, it appears that Australia has been more accommodating than other countries in terms of who these commitments extend to i.e. it opens up temporary entry to the Australian labour market in a range of occupations for workers from TPP countries that do not provide equivalent access for Australian workers. Other TPP countries have limited their commitments to cover highly specialised roles in particular sectors.

For example, while Australia's commitments on contractual service suppliers cover all trade, technical and professional occupations, most other countries that make commitments under this category define contractual service suppliers much more narrowly. For example, Chile defines it as a business person engaged in a 'specialised occupation'; Japan specifies the contractual service supplier must be employed by an overseas company or be in advanced, research positions; Malaysia defines it as a specialist/expert who possesses knowledge at an advanced level and confine it to professional services, education and financial services; Vietnam only includes employees of a company with a service contract in Vietnam.

In the case of New Zealand and Canada, those two countries only offer temporary entry to professionals, or professionals and technicians, but Australia has deemed these categories to be equivalent to the category of contractual service suppliers that it has offered. Appendix 1 provides a table with further comparative information on the various commitments made by TPP countries.

In practical terms, this means, for example, that Australia is offering preferential temporary entry arrangements for tradespersons from across the TPP countries, but Australian tradespersons are not being given similar, reciprocal access to work in the TPP countries.

In summary, the net result of the TPP from our analysis is that hundreds of occupations across nursing, engineering and the trades that are currently covered by domestic labour market testing requirements will no longer be covered under the terms of the TPP. Meanwhile, other TPP

countries have reserved their right to retain some form of labour market testing and they have not extended their commitments on labour mobility to as wide a group of occupations as Australia has.

Government response on labour market testing under the TPP

These are matters of critical importance for our members and for Australian workers. Australian workers deserve a guarantee that they will have first access to Australian jobs, through a labour market testing obligation on employers to provide evidence they have made all genuine efforts to find a suitable Australian worker before they employ a temporary overseas worker. This is particularly important in light of persistently high levels of unemployment and ongoing job losses across the country.

When Australia signs onto agreements such as the TPP, the onus must be on the Government to be up-front and explain clearly to the community exactly what it has signed Australia up to in terms of labour mobility. They must confirm the status of current labour market testing requirements and what this means for Australian jobs. The Government has failed singularly to do this.

For this reason, the ACTU wrote to Minister Robb in November 2015 to seek clarification of the impact of the TPP on current labour market testing requirements under the Migration Act 1958. More specifically, we sought a guarantee that all workers and all occupations that are currently covered by labour market testing will remain subject to labour market testing once the TPP comes into force.

The response we received from the Minister's Chief of Staff failed to provide any such guarantee and did not address the direct questions we had put to Minister Robb.

However, in the absence of the Minister being unable to answer these questions directly, we do have the evidence extracted from his Department in Senate Estimates in October 2015. As was the case during the CHAFTA debate[12], it was the departmental officials who were able to confirm what the Minister or any other member of the Government has been unable or unwilling to state directly – that Australia has agreed to give up labour market testing – as this exchange shows:

Ms Ward (First Assistant Secretary, Office of Trade Negotiation, DFAT):

"*In this particular agreement what we have done is provide MNP on a category-by-category reciprocity basis. If parties offered to us, then we offered to them. Many of them already have had LMT waived as a result of previous FTAs.* ***The additional LMT waivers, as a result of the TPP, are intra-corporate transferees for Canada, Peru and Mexico and contractual service suppliers for Canada, Peru, Mexico, Malaysia, Brunei and Vietnam.*** *(emphasis added)*

Senator Wong: *We reserved policy space for LMT in the Malaysia free trade agreement. Has that been removed by the TPP?*

Ms Ward: *That has*[13].

We also now have the National Interest Assessment for the TPP which effectively concedes that there will be labour market testing exemptions created as a result of Australia's commitments. Paragraph 62 of the NIA states:

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[12] see evidence of Mr David Wilden, Department of Immigration and Border Protection, JSCOT hearing, Canberra, 7 September 2015, Hansard transcript, p. 30.

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

> *"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"*

Together, these two admissions indicate again that no labour market testing will be required before Australian jobs can be filled by temporary overseas workers from a TPP country. Under the TPP, Australia has signed away labour market testing for an additional six countries: Canada, Mexico, Malaysia, Peru, Brunei and Vietnam. For most other TPP countries, such as Japan, Australia had already waived the labour market testing requirement as a result of earlier trade deals.

The Government needs to clarify this urgently if it has a different interpretation of what it has signed up to. We note that in the event Australia has protected labour market testing under the TPP, this would be virtually the only free trade agreement where it has done so; a welcome, albeit surprising, result if that was the case. Our experience with CHAFTA was that the Government flatly denied that labour market testing would be removed for months on end, and accused unions of playing the race card for even suggesting that would be the case. Then after the agreement was ratified, the Minister quietly issued the required legislative instrument confirming that in fact labour market testing obligations would not apply under CHAFTA.

The ACTU recommends that the relevant provisions be renegotiated in order to provide proper support for Australian jobs through labour market testing.

ECONOMIC EVIDENCE

In this section of the submission we will turn to the empirical economic evidence that is available; there have not been specific independent Australian based economic studies. However we do have studies from the World Bank and other institutions that look at the macroeconomic affects across countries.

It is clear that from the World Bank study the economic benefits for Australia are very modest. The World Bank model predicts a 0.7% increase in GDP to 2030. This amounts to only 0.07% increase in GDP per annum - which is nothing more than a minor blip. That is exactly why Peter Martin the economics editor of The Age wrote an article entitled 'The TPP barely benefits Australia'.

Similar results came from the Peterson Institute for International Economics – a supporter of the TPP – which forecast a total boost to Australia's GDP of 0.5% over the next decade to 2025.

On the direct effect on workers the economic evidence is that Australia will lose 39,000 jobs[14]. The empirical evidence comes from the Tuffs University paper using the United Nations Global Policy Model. Allowing for changes in employment and income distribution the model shows that in some countries there will be significant job losses and a rise in inequality.

[14] Capaldo J, Izurieta A, Sundaram J K, 'Trading Down: Unemployment, Inequality and Other Risks of the Trans PACFIC Partnership Agreement', Tufts University, USA, January 2016

Under this model Australia is not the most affected TPP country in terms of job losses. In TPP countries the largest effect will occur in the US with approximately 450,000 jobs lost by 2025, Japan and Canada follow with a proximately 75,000 and 58, 000 jobs lost respectively[15]. The smallest job loss – approximately 5,000 jobs is projected to occur in New Zealand where the increase in net exports is projected to be the largest. Overall, projected job losses in TPP amount to 771,000 jobs[16].

The results from United Nations Global Policy Model for exports, GDP growth, employment and the real exchange rate are recoded below.

Table 5: TPP scenario (changes compared to baseline projections, 2015-2025)

	Net Exports	GDP Growth		Employment	Real Exchange Rate
	10-year Change	Av. Annual Change	10-year Change	10-year Change	Av. Annual Change
Units	% of GDP	%	%	Thousands	%
TPP, developed economies		-0.04	-0.34	-625	-0.83
United States	0.20	-0.06	-0.54	-448	-0.65
Canada	-0.58	0.03	0.28	-58	-1.09
Japan	1.54	-0.01	-0.12	-74	-1.28
Australia	0.71	0.10	0.87	-39	-1.44
New Zealand	2.13	0.09	0.77	-6	-1.23
TPP, developing economies		0.22	2.03	-147	-1.22
East Asia: Brunei, Malaysia, Singapore and Vietnam	1.69	0.24	2.18	-55	-1.08
Latin America: Chile and Peru	1.18	0.31	2.84	-14	-1.55
Mexico	0.20	0.11	0.98	-78	-1.14
Total TPP				-771	
Non-TPP, Developed economies		-0.43	-3.77	-879	0.55
Non-TPP, Developing		-0.60	-5.24	-4,450	0.44

Under this model income distribution will be more unequal in Australia. The paper actually puts figures on this showing that 0.72% of GDP will be transferred from labour incomes into profits and rents by 2025[17].

[15] Ibid
[16] Ibid
[17] Ibid page 15 Table 4

Table 4: Changes in labor share of total income over baseline (% of GDP) by 2025

Units	*%*
USA	-1.31
Canada	-0.86
Japan	-2.32
Australia	-0.72
New Zealand	-1.45
Brunei, Malaysia, Singapore, Vietnam and other EA	-0.99
Mexico	-0.70
Chile, Peru and other LA	-0.54

All TPP countries are projected to undergo a reduction in the share income (% of GDP) accruing to labour, with the largest reduction occurring in Japan (here 2.3% of GDP will transfer from labor incomes into profits and rent) New Zealand (1.4 percent of GDP and the US (1.3 percent of GDP by 2025). Income distribution will be more unequal in all TPP countries.

It also makes clear that most other models in the economic literature assume full employment and constant income distribution in all TPP countries. These are clearly 'heroic assumption' on which to base economic modelling and not realistic.

The Tuffs University paper should be taken extremely seriously. One of the authors is Jomo Kwame Sundaram, a former United Nations Assistant Secretary-General for Economic Development and in 2007; he was awarded the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought - an extremely prestigious award within the economics discipline.

Furthermore Joseph Stiglitz, Noble Laureate in Economics and Professor at Columbia University has said in relation to the TPP:

> "*the TPP is an agreement to manage its members' trade and investment and to do so on behalf of each county's most powerful business lobbies. Make no mistake. It is not about free trade*"

It is clear that the TPP and all other finalised trade agreements should be subject to independent assessment of their costs and benefits before parliament is asked to ratify them. We share this view with Business groups including Australian Chamber of Commerce and Industry which recently recommended the following:

> *'An independent Government body that is arms-length from negotiations – such as the Productivity Commission – should prepare the trade treaty National Interest Analysis (NIA) and Regulatory Impact Statement (RIS) documents that are provided to the Joint Standing Committee on Treaties and tabled in Parliament. Such a body should be tasked with objectively preparing both documents, on the basis of optimal, likely and minimum outcomes of concluding and implementing a given trade treaty. A body so tasked must be able to give frank and fearless advice to both the Joint Standing Committee on*

Treaties and the Parliament, with regard to the real economic benefits and costs of concluding a given trade treaty.[18]'

INVESTOR-STATE DISPUTE SETTLEMENT PROVISIONS

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

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

These are the type of provisions that allowed Veolia to sue the Egyptian Government for increasing its minimum wage, and Phillip Morris sue over Australia's plain cigarette packaging laws (under the terms of an old FTA with Hong Kong), among a host of other examples. By 2015, there had been almost 700 ISDS cases reported[19].

There is mounting evidence and alarm from many experts, including Australia's High Court Chief Justice French[20], that ISDS tribunals lack the basic principles of fairness and consistency found in domestic legal systems. There is no independent judiciary, and no appeal mechanisms or system of precedent. 'Judges' can preside over one case while acting as a paid advocate in another, even if claimants and clients overlap between the two cases – a clear conflict of interest. In Australia, as in most national legal systems, judges cannot continue to be practising lawyers because of the obvious conflict of interest.

The fact ISDS provisions are restricted to foreign investors only means these clauses also discriminate against local businesses which can only access our domestic court system for any claims for compensation. This could then have an impact on relative access to finance and certainly violates basic principles of national treatment and competitive neutrality.

The myriad problems identified with ISDS provisions were well set out again in the recent JSCOT report into the China Australia Free Trade Agreement[21]. For example, the JSCOT report cited a now oft-quoted speech where Australian High Court Chief Justice French expressed concerns about the impact of ISDS on domestic court systems.

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[18] ACCIC Submission 'Senate Foreign Affairs Defence and Trade Reference Committee TPP Inquiry' October 6th 2016

[19] United Nations Conference on Trade and Development, "Record Number of Investor-State Arbitrations Filed in 2015," Geneva, 2 February 2016. http://investmentpolicyhub.unctad.org/News/Hub/Home/458

[20] French, R.F Chief Justice (2014), "Investor-State Dispute Settlement-a cut above the courts?" Paper delivered at the Supreme and Federal Courts Judges conference, July 9, 2014, Darwin http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf

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

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

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

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

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

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

> '*In relation specifically to investor-state dispute settlement provisions, the government should seek to avoid accepting provisions in trade agreements that confer additional substantive or procedural rights on foreign investors over and above those already provided by the Australian legal system. Nor is it advisable in trade negotiations for Australia to expend bargaining coin to seek such rights over foreign governments, as a means of managing investment risks inherent in investing in foreign countries. Other options are available to investors*[22].'

Similarly, in 2015 the Productivity Commission found that:

> *"The possible inclusion of an ISDS mechanism in the TPP could similarly allow investors to bring claims for private arbitration directly against governments and potentially undermine the role of domestic courts and freedom of governments to regulate in the public interest*.'

Again, the Productivity Commission emphasised its previous recommendation in 2010 that the Australian Government seek to avoid the inclusion of ISDS provisions that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors. It concluded once more that there was an absence of an identifiable, underlying economic problem on market failure grounds that necessitates the inclusion of ISDS provisions.

Many other countries have begun to question the use of ISDS provisions, including Germany, France, Brazil, India, South Africa and Indonesia. Both Germany and France are known to oppose the inclusion of such provisions in the TTIP, and Germany indicated it would not ratify the recently signed European Union-Canada agreement which contains ISDS clauses reportedly on the grounds that:

[22] Op. cit, pp. xxxii,, xxxxviii, 271.

> *"It must not be that international investors have rights and influence before arbitration tribunals which national enterprises don't have in their own country"* [23]

Against all this evidence, the TPP contains an investor-state dispute settlement (ISDS) clause that will allow foreign investors from TPP member countries to sue the Australian Government if changes to domestic law and regulations harm their investment. The ISDS clause in the TPP does provide a specific safeguard in regard to tobacco regulation to avoid a repeat of the Phillip Morris ISDS saga, but this still leaves a wide range of policy areas open to challenge. The fact tobacco regulation had to be specifically excluded indicates that general safeguards for other health, environment, labour rights and public interest regulation are ineffective. They have not prevented past ISDS cases and are unlikely to do so in future[24]. Neither do claimed procedural improvements (article 9.21.6 and 9.23) address the fundamental flaws that ISDS tribunals have no independent judiciary and no precedents or appeals.

Canada is an excellent comparator to Australia due to significant political, social and economic parallels between the two countries. Under NAFTA, Canada has been hit with 39 ISDS claims – all from American corporations and investors. A massive 69% of those cases have been initiated since 2006[25]. This is in line with global trends noting that ISDS disputes are becoming increasingly the norm. Canada has paid out at least $216.7 million Canadian dollars (CAD) in damages and settlements[26].

The ACTU has a consistent position that ISDS clauses are a restriction on national sovereignty and the ability of governments to regulate to regulate in the public interest. They should not be included in any trade agreement that Australia enters into, including in this case, the TPP.

LABOUR STANDARDS

The ACTU supports the inclusion of labour chapters in free trade agreements, which put workers' rights and labour standards at the core of trade rules. We reject trade agreements based on low wages, dangerous working conditions, and the repression of collective organisation of working people. When trade agreements do not include strong and enforceable labour chapters, this opens the door to companies and countries gaining competitive advantage from labour exploitation. As a matter of principle, we therefore call for the inclusion of enforceable labour rights in all bilateral and regional trade agreements that Australia enters into.

Unfortunately, this is an area where Australia has lagged behind in its trade agreements, agreeing to inclusion of labour chapters only if the other negotiating party insists on them as the US does.

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[23] See Productivity Commission, Trade and Assistance Review 2013-14, Productivity Commission, Canberra, 2015, p. 80

[24] For more on this, see (http://www.abc.net.au/news/2015-11-06/tienhaara-ttp-investment/6918810), and the AFTINET submission.

[25] GetUp 'Canary in the Coalmine: A cautionary tale of trade: Canada's experience of ISDS under NAFTA' October 2016

[26] Ibid page 4. This value is based on information provided in Sinclair, S. 2015. "NAFTA Chapter 11 Investor-State Disputes to January1,2015",available:https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2015/01/NAFTA_Chapter11_Investor_State_Disputes_2015.pdf and the Government of Canada's summaries of NAFTA disputes on their website: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng

The fact the TPP has a labour chapter at all can be seen therefore as a step forward. However, while the TPP labour chapter includes reference to the ILO Declaration on Fundamental Principles and Rights at Work and ostensibly urges respect for core labour standards, it fails to include the effective enforcement provisions, remedies and capacity building for signatory states which unions in TPP countries have called for. The labour rights are weaker than promised and difficult to enforce.
Key shortcomings include:

- The chapter refers only to the general principles in the ILO Declaration and does not refer explicitly to the 8 core ILO labour conventions on which the Declaration is based (articles 19.3.1).

- Complaints about labour rights require evidence that there is a 'sustained and recurring course of action' against labour rights, before action can be taken (article 19.5.1).

- Public sector workers' rights and entitlements are excluded by virtue of the fact that complaints require evidence of violation of labour rights 'in a manner affecting trade or investment' between TPP governments (article 19.5.1).

- Instead of banning the products of forced labour, including compulsory child labour, governments only recognise 'the goal' of eliminating forced labour (article 19.6).

- There are special exceptions and phase-in periods for implementation of labour rights in several TPP countries where there are documented labour rights violations, including human trafficking, forced labour and child labour (side letters on labour rights)

- The complaints and enforcement procedure requires lengthy consultations between governments before a formal complaint can be lodged (article 19.15). This process has not proved effective in agreements with similar clauses, like NAFTA, none of which have resulted in any successful enforcement.

For further detail, we refer the Committee to the assessment and analysis of the TPP labour chapter by the International Trade Union Confederation (ITUC). The ITUC has concluded that the TPP labour chapter will not prove to be an effective mechanism to guarantee the full enjoyment of fundamental labour rights and workplace standards. Despite minor improvements achieved under the chapter, it has failed to address the collective concerns raised by unions in each of the participating TPP countries[27].

EXTENSION OF DATA PROTECTION MONOPOLIES ON BIOLOGIC MEDICINES

In this section of the submission we will briefly turn to the extension of data protection monopolies on biologic medicines. The TPP will provide stronger monopoly rights for the costly biologic medicines used to treat cancer and other serious diseases. Australian law on biologic monopolies will not change immediately, but the text requires "other measures" which would "deliver a comparable market outcome," and requires a future review which could result in up to three extra years of monopoly. Each year of delay in the availability of cheaper biologic medicines would cost the Australian government hundreds of millions of dollars, creating pressure for higher prices at the chemist. Medicins sans Frontieres (MSF) has described the TPP as "a bad deal for medicine: it's bad for humanitarian medical treatment providers such as MSF, and it's bad for people who need access to affordable medicines around the world" (MSF, 2015).

[27] http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf

CONCLUSIONS

The TPP puts globalisation before Australian workers, threatens the fundamentals of our democracy and drives up health costs. By destroying thousands of Australian jobs and driving down wages we believe the TPP will lead to higher levels of inequality. The TPP is a toxic combination of more power to multinationals ahead of democracy and globalisation ahead of Australian workers.

APPENDIX

Country commitments for Contractual Service Suppliers and related categories under the Trans-Pacific Partnership Agreement

Country	Occupations	Type of employer	Conditions
Australia	Professional, Trade or Technical (1)	Any employer in Australia or of the other Party	Granted to all parties making any commitments
Brunei	Professional	Not specified	No additional ones specified
Canada	Professional and Technical (2)	Any Canadian client or employer	Granted to other parties removing Labour Market Testing
Chile	Professional and Technical	Self-employed or employer outside country	Granted to parties committing to same occupations
Japan	Professional (3)	Self-employed or employer outside country	No additional ones specified
Malaysia	Professional or specialist (4)	Self-employed or employer outside country	Limited to provision of certain business services
Mexico	Professional or Technical-Professional (5)	Not specified	Granted to parties committing to same occupations, & removing LMT (8)
New Zealand	Professional (6)	Self employed	Subject to an economic needs test
Peru	Professional, Technician and Trades (7)	Self-employed or employer outside country	Reserve right to apply Labour Market Testing if the other party does
Singapore	No commitments made	n/a	n/a
United States	No commitments made	n/a	n/a

(1) Includes all 651 occupations under the 457 visa program
(2) Must have with 2 and 4 years work experience respectively, with a range of occupations excluded
(3) Limited to natural or human sciences, research services, or legal, accounting or tax professionals
(4) Limited to business, computer, research & development, environment, education, and construction services.
(5) Some limitations apply
(6) Must have at least 6 years work experience and limited to sectors committed in "GATS" plus business, educational or environmental services.
(7) Excluding health, education, social and community services, as well as judges, lawyers and notaries except foreign legal consultants.
(8) Labour Market Testing must be removed at least for dependents

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