The New 'Comprehensive Progressive' Trans Pacific Partnership Agreement

Putting Profit Before People

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Introduction

The ACTU welcomes the opportunity to make a submission to this JSCOT inquiry into the Comprehensive Progressive Trans-Pacific Partnership (TPP 11) agreement.

The ACTU is the peak body for Australian unions. 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 11 countries, 495 million people and 15 per cent of global trade. The agreement itself contains 30 chapters, and over 6000 pages. 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 public scrutiny up to this point.

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 agreement negotiations 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 impact of the TPP on Australia's domestic labour market testing rules and the failure to protect Australian jobs[1]. Australian and overseas companies will be able to employ unlimited numbers of temporary workers from 6 TPP member countries in

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

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. Furthermore, temporary visa holders under a guest worker scheme are at greater risk of exploitation. There also appears to be inconsistency by the Government in this policy area. The Government did choose to restore labour market testing for contractual service providers in the Peru-Australia FTA, which was negotiated over the same period. It is not immediately obvious why the Government would not include labour market testing in the TPP 11 but would argue for this protection for Australian workers in other free trade agreements.

- Two - the lack of transparency in this and other trade negotiations[2].

- Three - 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.

- Four - there is economic evidence that suggests Australia could face the thousands of job losses and an increase in inequality[3] as a result of labour's declining share of income while any benefits would go to the profits of mainly large companies.

- Five - Trade agreements should not undermine the ability of Governments to regulate in the public interest, particularly in regard to essential services like health, education, social services, water and energy.

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 labour standards and the environment.

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.

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[2] 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

[3] 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

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 trade agreements, and at the same time have a rock-solid commitment to ensuring that other provisions of 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 citizens and their representative bodies such as 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. Unions are only in favour of trade agreements if there are overall benefits for all Australians.

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

For example:

- The Productivity Commission has found that predicted economic benefits from bilateral and regional agreements are often exaggerated and the actual economic benefits are 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 have referred to work by the Centre for International Economics which 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 of 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.

These concerns cannot and should not be misrepresented or dismissed as a 'protectionist' view.

World Bank modelling of the original Trans Pacific Partnership (TPP 12) 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[4]. 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 a mere 0.5% over the next decade to 2025-6[5]. The low growth rates for TPP11 are likely to be similar to that of TPP12 modelling and potentially less.

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

1. The Australian Government has yet again entered into a free trade agreement where it has removed the obligation on employers to conduct labour market testing before temporary overseas workers fill Australian jobs. 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.

[4] http://www.smh.com.au/federal-politics/political-news/transpacific-partnership-will-barely-benefit-australia-says-world-bank-report-20160111-gm3g9w.html
[5] http://www.petermartin.com.au/2015/10/trans-pacific-partnership-were-selling.html

2. 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 JSCOT 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 JSCOT 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.

3. 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.

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.

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 inquiry 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 for Australian jobs.

Labour market testing and the movement of temporary overseas workers under free trade agreements

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 trade agreements and the movement of temporary overseas workers.

Australian unions are long-standing supporters of strong, diverse and non-discriminatory immigration programs. Our clear preference is that the migration program 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 the recent Senate Inquiry into the temporary work visa program and ongoing media coverage of cases such as at 7-Eleven, Caltex and the hospitality industry, 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 assessing and 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 high and youth unemployment is in double digits.

That is why the labour market testing requirements currently in place under the TSS (old 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.

The engagement of temporary overseas workers may be necessary in circumstances of short term bona fide skills shortages provided there is genuine, verifiable evidence through labour market testing that there are no suitably qualified Australian citizens or permanent residents to do the job, and those temporary workers are treated well and receive their full entitlements. However, we cannot support the 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 labour mobility chapter

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.

The TPP will remove 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[6].

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

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

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

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 TSS (old 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.

The DFAT materials also emphasise 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.

Australia's has opened up its labour market more than any other TPP country

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

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.

However, despite the title of the chapter having the seemingly benign appearance of dealing 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 categories. 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 TSS (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 TSS (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. We provide a table below 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.

'The TPP-11 has provisions for companies to bring in unlimited numbers of temporary migrant workers from Vietnam, Malaysia, Japan, Canada, Mexico and Chile without having to advertise the jobs locally to see if there are any Australian workers available to do the work'

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.

Country Contractual service Provider Commitments and related categories

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 but certain industries and occupations are restricted including health, education, sports and telecommunications services (3)
Chile	Professional and Technical	self-employed or employer outside country	Granted to parties committing to same occupations
Japan	Professional (4)	self-employed employer outside country	No additional ones specified
Malaysia	Professional or specialist (5)	self-employed or employer outside country	Limited to provisions of certain business services
Mexico	Professional or technical - Professional (6)	not specified	Granted to parties committing to same occupations and removing LMT (9)
New Zealand	Professional (7)	self employed	Subject to an economics needs test

Country	Occupations	Type of employer	Conditions
Peru	Professional, Technician and Trades (8)	self-employed or employer outside country	Reserve right to apply Labour market testing if the other part does
Singapore	No commitments	n/a	n/a
Vietnam	Professional	self employed	Limited to provisions of certain business services (10)

(1) Includes all 435 occupations under the TSS visa program.

(2) Must have 2 and 4 years' experience respectively, with a range of services excluded.

(3) The following services are restricted: all health, education, and social services occupations and related occupations. All professional occupations related to Cultural Industries, Recreation, Sports and Fitness Program and Service Directors ,Managers in Telecommunications Carriers, Managers in Postal and Courier Services, Judges and Notaries.

(4) Limited to natural or human services, research services, or legal, accounting or tax professionals.

(5) Limited to business, computer, research and development, environment, education and constructive services.

(6) Some limitations apply.

(7) Must have at least 6 years' experience and limited to sectors committed in "GATS" plus business, educational and environmental services.

(8) Excluding health, education, social and community services, as well as judges, lawyers and notaries expect foreign legal consultants.

(9) Labour Market Testing must be removed at least for dependents.

(10) Listed as computer, engineering, legal accounting, mining, telecommunication, distributing, construction, educational, environmental, financial, sport, road and air.

Policy inconsistency in regards to labour market testing on contractual service providers

Interestingly the Australian Government did choose to restore labour market testing for contractual service providers in the Peru-Australia FTA, which was negotiated over the same period as TPP 11. Unions do not understand why labour market testing would be carved out and negotiated for by DFAT officials (presumably the Government agrees with the basic arguments in favour of labour market testing for them to do this) in the Peru-Australia FTA and not the TPP 11.

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 one the largest trade deals in history, covering 11 countries, 495 million people and 15 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.

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 Inquiry provide an opportunity for Parliament to properly scrutinise an agreement that has been 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. 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.

To this end, we call for an independent, external inquiry into the costs and benefits of the TPP, in addition to the forthcoming Senate Inquiry and any other parliamentary inquiries. JSCOT 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 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. Proposals for change in all of these areas would normally take place through democratic parliamentary processes.

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

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

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 and 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.

We Need a Comprehensive Analysis of the Economic Evidence

There is a lack of economic modeling and analysis concerning the impacts of TPP11 on Australia's economy. The Government has clearly not conducted a full independent empirical assessment of the economic impacts. Unions are concerned that the appropriate cost benefit analysis and impacts are just not being done. Furthermore the empirical evidence for TPP12 was concerning. We discuss this in more detail below.

The empirical evidence for TPP12 was that Australia would lose 39,000 jobs and inequality would rise

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 of TPP12 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. 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.

Under this model Australia is not the most affected TPP country in terms of job losses in TPP12. 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.

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 TPP12 amount to 771,000 jobs[8].

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

Table One: Australia would lose 39,000 Jobs [9]

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

[8] 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

[9] Source: 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, 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.

Table Two: Australia's labour share of income would fall[10]

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 of income (% of GDP) accruing to labour, with the largest reduction occurring in Japan (here 2.3% of GDP will transfer from labour 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.

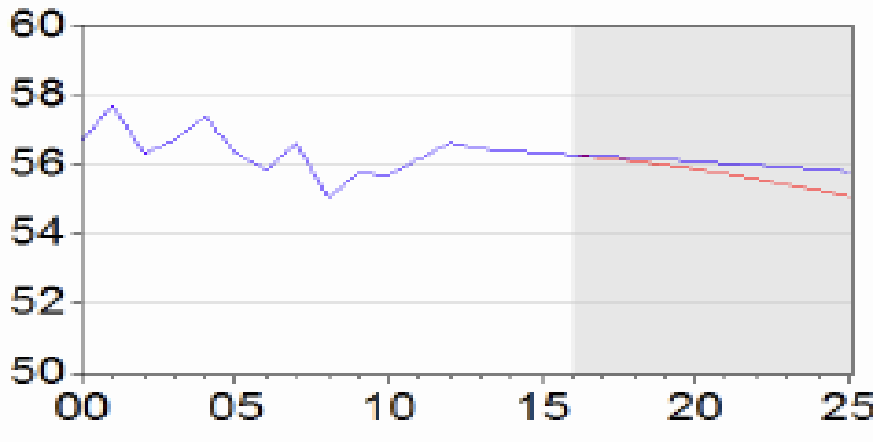
It also makes clear that most other models in the economic literature assume full employment and constant income distribution in all TPP countries. These are clearly 'heroic assumptions' on which to base economic modelling and not realistic.

[10] Source: 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

'Given there is empirical evidence that TPP 12 would cause thousands of job losses and increase inequality, it is imperative that there is a new independent comprehensive analysis of the economic effects of the TPP11'

We can see below Australia's fall in income from the loss of employment as a percentage of GDP from the Tufts University paper.

Graph one: Australia's fall in income from employment as a percentage of GDP (labour shares) – baseline (blue line) and TPP (red line)[11]



The Tufts 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:

[11] Source: 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

"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 general 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.[12]'

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, telecommunications and postal services, and the movement and employment of temporary migrant workers.

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

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 and has increased significantly since the 1990's[13].

There is mounting evidence and alarm from many experts, including Australia's former High Court Chief Justice French[14], 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 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 JSCOT report into the China Australia Free Trade Agreement[15]. For example, the JSCOT report cited a now oft-quoted speech where former Australian High Court Chief Justice French expressed concerns about the impact of ISDS on domestic court systems.

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[13] 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
[14] 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
[15] 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 for TPP12 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.[16]'

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

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:

"*It must not be that international investors have rights and influence before arbitration tribunals which national enterprises don't have in their own country*[17]"

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[18]. 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.

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

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

Canada is an excellent comparator to Australia due to significant political, social and economic parallels between the two countries. A report published by the Canadian Centre for Policy Alternatives (CCPA) last week has revealed that Canada has paid out nearly $220 million in losses under the NAFTA investor-state dispute settlement mechanism (ISDS), and $95 million in legal fees defending against ISDS claims[19].

There have been 41 ISDS claims made against Canada, 23 ISDS claims made against Mexico and 21 made against the US. Canada has been sued 15 times since 2010. In the report, CCPA suggests that the Canadian Government's commitment to ISDS and compliance with the scheme 'encourages' investor-state claims against itself[20].

Furthermore in November last year an international investment tribunal has compensated a mining company that ignored Indigenous land rights in a case heard under the Investor-State Dispute Settlement provisions of the Canada-Peru Free Trade Agreement[21].

The tribunal ordered the government of Peru to pay Bear Creek Canadian mining company $18.2 million in compensation and $6 million in legal costs because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous land owners about the mine, leading to mass protests. A dissenting minority judgement about the costs noted that Bear Creek had failed to implement provisions of the ILO Convention on Indigenous Peoples to which Peru is a party, and which it had implemented through national laws.

This is a very dangerous precedent which may encourage other mining companies to use ISDS provisions in agreements like the rebadged TPP (CPTPP) in the Australian context. Although there are some exemptions in parts of the CPTPP for laws relating to Aboriginal and Torres Strait Islander communities, there is no general exemption which would totally exclude a similar ISDS case. The only total exclusion is for tobacco regulation. The reference to the importance of indigenous rights inserted by Canada into the preamble is not legally binding, unlike the rest of the agreement.

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[19] https://www.policyalternatives.ca/nafta2018
[20] http://aftinet.org.au/cms/node/1528
[21] http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf

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.

Trade agreements should not undermine the ability of Governments to regulate in the public interest

Trade agreements should not undermine the ability of Governments to regulate in the public interest, particularly in regard to essential services like health, education, social services, water and energy.

The TPP-11 Trade in Services Chapter is unchanged from the TPP-12. Its aim is to increase trade in services and treat them on a commercial basis, open them to international investment, and to minimise barriers to such trade. Considerations about the ability of governments to regulate access to essential services in the public interest are secondary to this aim.

The negative list and ratchet structure are specifically intended to prevent governments from introducing new forms of regulation, which are seen as potential barriers to trade.

But this structure ignores the need for democratic governments to respond to changed circumstances. For example new financial regulation as a result of GFC would have been at risk and the ability of the government to roll back the privatization of the TAFE system with new regulation could be problematic under TPP11.

Conclusions

The TPP puts globalisation before Australian workers and threatens the fundamentals of our democracy. 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 globalization and more power to multinationals ahead of democracy for Australian workers.

Australia must turn away from trade that puts profit before people. We need a forge a new trade agenda based on the principles outlined below.

Forging a new trade agenda

A good trade deal will put shared prosperity and sustainable social and economic development at the centre of the agreement.

The primary measure of the success of our trade policies should be measured through quality job creation, rising wages and more engaged and competitive businesses; all measures of broadly shared benefits. It should not be based on higher corporate profits, increased offshoring of Australian jobs or through weakening labour market protections, wages, rules of law and democratic decision-making.

This contrasts to the approach to current trade policy which operates on the basis that liberalising trade and investment is an end unto itself, rather than a means of creating a fair trade playing field between countries that creates mutual benefits based on respect for worker's rights, protection of the environment and increased opportunities for businesses regardless of their size or power.

Principles for trade deals

Trade deals should be based on a set of fundamental principles which themselves draw on core values of human dignity, egalitarianism, fairness and equality of opportunity.

In order to guarantee that potential benefits of increased trade will be realised and result in tangible benefits for workers, businesses and communities, and that these benefits will be evenly distributed, we recommend the following principles:

Protecting Sovereignty - State to State dispute processes which recognise the fact that trade agreements are made between sovereign nations which have the right to make choices about policies that benefit their citizens. This means opposing deals with ISDS provisions as they currently stand.

Domestic Laws - Recognition of the right of sovereign governments and parliaments to implement rules that preserve and protect the place of domestic political, legal and judicial systems including collective bargaining. Trade agreements should not allow foreign corporations to bypass national courts and sue governments in unfair international tribunals over domestic laws, known as Investor-State Dispute Settlement (ISDS).

Core Labour Standards - the incorporation of the eight labour standards contained in ILO Core Conventions with agreed, enforceable arbitration processes through binding trade or economic sanctions in cases of abuse.

Minimum Worker Protections - commitments to protect worker's rights, raise wages and thereby improve living standards and provide economic stimulus in all signatory countries by defining 'acceptable conditions of work' to include a living wage, social protection and occupational health and safety standards.

Labour Mobility - trade agreements should not provide mechanisms that undermine or avoid our domestic immigration regulatory system. These policies and regulations should not be determined by trade agreements, but through domestic processes which include broader considerations of justice and national interest. This includes maximising local job opportunities and protecting workers from exploitation.

Democratising Negotiations - Trade negotiations are currently conducted in secret, and the text is not made public until after agreements are signed, which weakens democracy. These processes would be greatly improved by transparency, accountability, public discussion, broad participation and use of economic and scientific evidence. Such a process would include the participation of trade unions, civil society and industry (including SME representatives) early in the drafting of mandates and positions for trade negotiations.

Transparency: Beginning with a clear outline of the intent and aims of entering trade negotiations before they have begun, offers and draft texts of trade negotiations should be made public throughout the process, with the final text to be made public and debated by Parliament before signing.

Evaluation: detailed public cost benefit evaluation of the probable impacts of any prospective trade deal by independent experts to be undertaken and made public prior to signing. This evaluation must include economic, employment, health, social and environmental assessments.

Monitoring and Renegotiation: the introduction of time-limited provisions within agreements so they are subject to renegotiation and renewal to ensure, like with business contracts and much of our existing laws, that they provide an opportunity for review and balanced outcomes as circumstances change.

Public Services – Ensuring that agreements do not provide ways to undermine (e.g. privatisation) the provision of reliable and affordable services that are provided for essential public services such as water, electricity, health and education to Australian communities.

Health and Medicines - Trade must not impact on the decisions of domestic health regulators such as the PBS or decrease timely access to affordable medicines, including generic medicines. Market rights of pharmaceutical companies should never over-ride an individual's right to life and health, nor a sovereign government's right to implement policies to protect and promote the health rights of citizens through initiatives such as food and beverage or product labelling (i.e. tobacco, alcohol, sugar, salt, country of origin).

Public Services - recognition of the right of sovereign governments to implement rules that preserve rights for national and local choices about the provision of public services.

Domestic Procurement - preserving the ability of governments at all levels favour domestic producers in government or government-funded procurement.

Upholding Australian Standards - ensuring compliance of imported goods or overseas service provers with Australian safety, quality and licensing standards.

Privacy - Recognition of the right of governments to implement regulations that are based on protecting privacy.

Safety of Financial Systems - preserving the right of sovereign governments and parliaments to implement rules which ensure that countries are free to take necessary action to protect their financial systems.

Environment and Climate Change - Ensuring governments have the sovereign right to implement rules and policies designed to deal with the environment, climate change and the transition to a low-carbon future, particularly within the context of action required by signatories to meet global climate targets.

Indigenous Culture – Ensure that agreements protect and enhance Indigenous knowledge systems and culture.

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