

# **Submission to the Senate inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Act 2014**

Submission  
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## About TAI

The Australia Institute is an independent public policy think tank based in Canberra. It is funded by donations from philanthropic trusts and individuals, memberships and commissioned research. Since its launch in 1994, the Institute has carried out highly influential research on a broad range of economic, social and environmental issues.

## Our philosophy

As we begin the 21st century, new dilemmas confront our society and our planet. Unprecedented levels of consumption co-exist with extreme poverty. Through new technology we are more connected than we have ever been, yet civic engagement is declining. Environmental neglect continues despite heightened ecological awareness. A better balance is urgently needed.

The Australia Institute's directors, staff and supporters represent a broad range of views and priorities. What unites us is a belief that through a combination of research and creativity we can promote new solutions and ways of thinking.

## Our purpose—'Research that matters'

The Institute aims to foster informed debate about our culture, our economy and our environment and bring greater accountability to the democratic process. Our goal is to gather, interpret and communicate evidence in order to both diagnose the problems we face and propose new solutions to tackle them.

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# The Australia Institute

Research that matters.

The Australia Institute welcomes the opportunity to make a submission to the Foreign Affairs, Defence and Trade Committee on the Trade and Foreign Investment (Protecting the Public Interest) Act 2014 which seeks to protect Australian laws by banning investor-state dispute settlement provisions.

The Australia Institute recently published a paper on the Trans-Pacific Partnership Agreement which included a survey<sup>1</sup> to determine community awareness about the negotiation of the Trans-Pacific Partnership Agreement (TPP), which potentially includes such an investor-state dispute settlement provision (ISDS). This survey included questions about both the process of negotiation and potential content of the TPP. The results show that:

- 11 per cent had definitely heard of the TPP
- 87 per cent thought the details of FTAs should be made public before being signed by governments
- 75 per cent thought ISDS is a bad idea
- 85 per cent thought there should be detailed research of potential impacts of FTAs on different sectors and industries before being signed
- 67 per cent did not trust government promises that costs of specific goods such as prescription medicines would not increase as a result of FTAs

There is an urgent need for a thorough investigation of how free trade agreements affect our democratic rights and freedoms.

This submission looks not only at ISDS but also other elements of trade agreements which impact on these rights including:

- the lack of information provided to citizens and their exclusion from the process of negotiation
- the limited role of parliament
- the sidelining of the courts by the establishment of an international investment dispute body which lacks transparency, does not act in the public interest, and does not provide appeal mechanisms.
- potential stifling of public debate and media through use of extreme trade secret laws

The current coalition government claims that it is strongly supportive of our system of democracy. The Prime Minister argued against the establishment of a Bill of Rights based on the strength of this system. He congratulated the Institute of Public Affairs for their campaign against the bill of rights, saying:

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<sup>1</sup> Tucker. K (2014) *A Democracy deficit* Policy Brief No 58 The Australia Institute February <http://www.tai.org.au/content/democracy-deficit>

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“...You campaigned against the bill of rights because you understood that a democratic parliament, an incorruptible judiciary and a free press — rather than mere law itself — were the best guarantors of human rights.”<sup>2</sup>

This confidence would be more reassuring if the Prime Minister and his cabinet acknowledged that our system of democracy is not without its vulnerabilities; and that the proper role of the government of the day is to identify potential threats and ensure the system is protected and strengthened. Such an approach would result in ongoing scrutiny and evaluation of the development of free trade agreements.

If as claimed by the Prime Minister ‘...a democratic parliament, an incorruptible judiciary and a free press’ are to be the guarantors of human rights, there are obvious concerns with the current negotiation of free trade agreements. Not only is the process itself incompatible with accepted standards of democratic practice, but the inclusion of an ISDS clause entrenches a right of foreign investors to claim damages against democratically elected governments. The creation of this powerful layer of international governance has the potential to influence governments’ willingness to legislate in the public interest now and into the future. If the Australian government wishes to entrench new global rules (primarily aimed at protecting profits of foreign investors) which can affect our capacity to govern ourselves, the process must be democratised.

## Participatory democracy

The claim that there is an extensive public consultation process<sup>3</sup> through community briefings and meetings is not credible given that The Australia Institute’s survey showed only 11 percent people even knew about the TPP. It is only when draft texts are leaked that there is meaningful community debate and a government response. The failure to provide information to the citizens strikes at the heart of both our democratic system and the pursuit of universal human rights. According to the US fact sheet on the TPP secrecy is needed so that negotiators can *communicate with each other with a high degree of candor, creativity, and mutual trust*<sup>4</sup>. However this approach is bound to create problems if there is not a reasonable level of that same *mutual trust* between governments and the people they represent. What is never clearly examined is what this means for our democracy and whether the citizens think it is worth the price, especially as according to the Productivity Commission<sup>5</sup> the benefits of free trade agreements are oversold. The implications for democracy are further complicated by the fact that some participating governments give multinational corporations access to draft texts but prevent their citizens from having the same access. This gives greater weight to the concern that corporate interests are the driving force of free trade agreements without proper consideration of the public interest. This is more important than ever because trade agreements increasingly intrude into the domestic regulatory environment thereby overriding the normal democratic processes.

<sup>2</sup>Knott, M (2013) Crikey April 5  
[http://www.crikey.com.au/2013/04/05/tony-abbott-talks-god-and-western-values-behind-closed-doors/?wpmw\\_switcher=mobile](http://www.crikey.com.au/2013/04/05/tony-abbott-talks-god-and-western-values-behind-closed-doors/?wpmw_switcher=mobile)

<sup>3</sup> Department of Foreign Affairs and Trade *About the TPP negotiations*  
<http://www.dfat.gov.au/fta/tpp>

<sup>4</sup> Office of the United States Trade Representative Fact Sheet Transparency and the Trans Pacific Partnership

<sup>5</sup> Productivity Commission (2010) Bilateral and Regional Trade Agreements

## Parliamentary democracy

The role of parliament is also limited in both time and function. It is only after agreement on the text by the negotiating parties and cabinet that the Agreement is made available to the Australian public and parliament and sent for review by the Joint Standing Committee on Treaties (JSCOT), usually tabled for 20 parliamentary joint sitting days.<sup>6</sup> The Parliament does not have the opportunity to debate and vote on the full text of trade agreements, only on the implementing legislation – that is only sections which require changes to existing legislation. The Agreement is signed by the Cabinet not the parliament and the text cannot be changed once signed.

There are large parts of the text which may not require changes to legislation immediately, but which could limit the ability of future governments to regulate.<sup>7</sup> This includes the ISDS clause and any changes to the Pharmaceutical Benefits Scheme. There is also concern that the 20 sitting days allowed for review of the text by the Senate is inadequate and that “the scale and complexity of the potential agreement means it should be properly scrutinised with the Australian public having a say in what is under negotiation.”<sup>8</sup>

Despite motions being put in the Senate that call for access to texts of free trade agreements,<sup>9</sup> the Minister for Finance Mathias Cormann has claimed public interest immunity, saying disclosure “would be prejudicial to Australia’s international relations”.<sup>10</sup> This approach is not consistent with principles of responsible government, which require the power to govern be shared between the Parliament and the Executive<sup>11</sup> and that the Executive be held accountable by parliament.

## ISDS

The potential for inclusion of ISDS in FTA’s raises particularly serious questions about how trade agreements can impact on our democratic rights as citizens. Comments from the current Minister Andrew Robb suggest that unlike the former Labor Government or the government led by John Howard, he would not oppose the US push for ISDS if the price was right.<sup>12</sup> The public debate on ISDS has been strong and informed and appears to have had an impact on the government. Mr Robb claims the recently signed Korea Australia Trade

<sup>6</sup> Department of Foreign Affairs and Trade (2014) Tabling of Treaty Actions in Parliament <http://www.dfat.gov.au/treaties/making/tabling-of-treaty-actions-in-parliament.html>

<sup>7</sup> Ranald, P (2013) *What matters more - corporations or people?* Working Life 2 Dec 2013 <http://workinglife.org.au/2013/12/02/what-matters-more-corporations-or-people/>

<sup>8</sup> Amon, I (2013) *How would the TPP agreement affect Australians?* SBS World News 24th Dec 2013

<sup>9</sup> Rimmer, M (2013) *Free Trade, Gangnam Style: The Korea-Australia Free Trade Agreement* infojustice.org 11<sup>th</sup> Dec 2013 <http://infojustice.org/archives/31701>

<sup>10</sup> Cormann Mathias 5<sup>th</sup> Dec 2013 <http://www.scribd.com/doc/190333917/Cormann-Letter-TPPA-05122013-1>

<sup>11</sup> *Australian Democracy :an overview* Principles Museum of Australian Democracy

<sup>12</sup> Martin, P (2013) Sydney Morning Herald Business Day 6<sup>th</sup> Dec 2013 <http://www.smh.com.au/business/korean-trade-deal-sorted-now-andrew-robb-faces-the-trans-pacific-partnership-challenge-20131205-2ytuk.html>

Agreement has exemptions which will protect Australia from being sued for actions relating to health and the environment. Whether such exemptions are effective is arguable. For example AFTINET points out that such exclusions or safeguards have not prevented claims of compensation in other free trade agreements.<sup>13</sup> The Central American Free Trade Agreement and the Peru-US Free Trade Agreement have similar clauses but the Government of El Salvador is still being sued by a mining company over a ban on mining which was aimed at protecting the nation's limited groundwater resources. Even if such exemptions were effective the fact that Mr Robb has decided at the last minute to include them in the Korea agreement for health and environment speaks of a crisis management response rather than considered public policy. If health and environment are at risk, why are all the other areas impacted by this agreement not similarly at risk? Mr Robb claims he would agree to ISDS if the price was right. But what is the cost to our democracy and is it worth it? What price do Mr Robb and his colleagues put on democracy? Concern that such a clause can have a chilling effect on government's willingness to legislate in the public interest is widespread. Joseph Stiglitz makes the point<sup>14</sup>

*"...the intended effect is to chill government's legitimate efforts to protect and advance citizens' interests by imposing regulations, taxation and other responsibilities on corporations."* And that

*Corporations are attempting to achieve by stealth – through secretly agreed trade agreements – what they could not attain in an open political process"*

Criticism of the international investment arbitration system which enforces trade agreements include that it lacks public accountability; standard judicial ethics rules; is biased towards investors; and focusses only on questions of claims of harm rather than public interest value.<sup>15</sup> There have been accusations of conflict of interest for the main decision makers, with claims that a small pool of lawyers dominate the sector, acting as lawyers in some instances and arbitrators in others. The fact that no appeal is possible adds to concern about the fairness of the process. The 2010 Productivity Commission report into Bilateral and Regional Trade Agreements was not supportive of ISDS, stating

*"experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions"*<sup>16</sup>

The United Nations Conference on Trade and Development (UNCTAD) recently released a report on ISDS which revealed that foreign investors are increasingly resorting to investor state arbitration. It concluded that while there was strong public discussion about "the usefulness and legitimacy of the ISDS mechanism" and there were many options for reform, "their systematic assessment, including with respect to their feasibility, expected effectiveness and implementation methods remains wanting".<sup>17</sup> It is important that such a

<sup>13</sup> Ranald P (2013) *Campaign Against Inclusion of ISDS in the Korea-Australia agreement* AFTINET <http://aftinet.org.au/cms/patricia-ranald-report-korea-australia-free-trade-agreement-12-1013>

<sup>14</sup> Stiglitz, J (2013) *South Africa Breaks Out* Nov 5 2013

<sup>15</sup> Rimmer, M (2013) *Free Trade, Gangnam Style: The Korea-Australia Free Trade Agreement* infojustice.org 11<sup>th</sup> Dec 2013 <http://infojustice.org/archives/31701>

<sup>16</sup> Productivity Commission Research Report 2010 *Bilateral and Regional Trade Agreements*

<sup>17</sup> *Recent Developments in Investor State Dispute Settlement (ISDS) Updated for the Multilateral Dialogue on Investment 28-29<sup>th</sup> May 2013* UNCTAD Issues Note No. 1 May 2013 Highlights

“systematic assessment” is undertaken in Australia and that it includes both an assessment of the impact of ISDS on our democracy, and the capacity of governments to act in the public interest of its citizens.

## The Courts

As Mr Abbott stated above, our system of democracy has at its heart the vital role of the courts in ensuring there is not a monopoly of power,<sup>18</sup> yet even after Australia’s tobacco plain packaging legislation was upheld by the High Court<sup>19</sup> the Philip Morris tobacco company continues to challenge Australia on this decision, using the ISDS clause from a 1993 Australia-Kong Kong trade agreement to sue the government for damages.<sup>20</sup>

The case of *Loewen v. United States* shows that the functioning of domestic courts can be deemed to be subject to ISDS rules. In this case the arbitral tribunal concluded that a jury decision in private contract litigation could be subject to NAFTA’s investor rules. Another example where an arbitral tribunal has created a conflict of law is the case brought by Chevron against Ecuador, where the government was ordered to suspend an appellate court ruling, a violation of constitutional separation of powers. There appears to also be potential for investment disputes to impede government attempts to deal with corruption, as shown in a case in 2012 in India. The Indian Supreme Court had ruled that 122 telecommunication licences should be cancelled because they were allocated on an “arbitrary and unconstitutional basis”. A Norwegian telecommunication company whose licence was one of those cancelled gave notice it would seek compensation for its share of the cancelled licences from the Indian government if the matter was not resolved in its favour.<sup>21</sup> For a detailed analysis of this and other instances where arbitral tribunals have created conflicts of law see “Investor-State” Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems<sup>22</sup>. These cases show clearly that ISDS presents legal risks for nation states.

## The role of media

According to the leaked Intellectual Property chapter of the TPP<sup>23</sup> the US has proposed that

*“Each Party shall provide for criminal procedures and penalties at least in cases in which a trade secret relating to a product in national or international commerce is misappropriated, or disclosed, willfully and without authority for purposes of commercial advantage or financial gain, and with the intent to injure the owner of such trade secret.”*

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<sup>18</sup> *Australian Democracy :an overview* Principles Separation of Powers Museum of Australian Democracy

<sup>19</sup> *High Court rejects plain packaging challenge* (2012) ABC News 15<sup>th</sup> August 2012

<sup>20</sup> *Philip Morris, Australia and the fate of Europe’s trade talks* (2014) AFTINET

<http://aftinet.org.au/cms/Philip-Morris-Australia-and-Europe-trade-talks-01-2014>

<sup>21</sup> Kelsey, J and Wallach , L (2012) *“Investor State” Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems* The University of Auckland and Public Citizen’s Global Trade Watch

<sup>22</sup> Report available here: <http://www.citizen.org/documents/isds-domestic-legal-process-background-brief.pdf>

<sup>23</sup> WikiLeaks release of Secret Trans Pacific Partnership Agreement (TPP)- Advanced Intellectual Property Chapter for All 12 Nations with Negotiating Positions (Aug 30 2013 consolidated bracketed negotiating text) [Article QQ.H.8 {Trade Secrets}](#)

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The power to invoke trade secrets to stifle criticism and public discussion about the activities of corporations has serious implications for our democracy. The leaked chapter does not include text about defences or exceptions which may apply in order to serve the public interest. According to Matthew Rimmer,<sup>24</sup> debate about matters important to the public interest can be stifled through the use of trade secrets against journalists, bloggers and public interest groups. US gas companies have tried to use trade secrets to prevent detail of their activities being made available to doctors concerned about the health impacts of fracking. There may also be implications for governments' capacity to access confidential information necessary for regulatory purposes. While the leaked text indicates that at the time, Australia opposed this paragraph ad referendum (subject to agreement by others and finalisation of the details) it is not known what the current position is. The Australian government has chosen not to initiate a public discussion about this matter, or any other matters, because it sees the TPP itself as a trade secret. This is so even though such a paragraph could impact on our democracy through limiting access to information and curtailing freedom of expression.

## Conclusion

As shown above, the process of negotiation of free trade agreements fails to meet basic standards of democratic practice. Neither the citizens nor the parliament of Australia are included in a meaningful way. Leaked texts indicate that there is a real risk that some of the rules may further undermine our democracy, as well as the capacity of governments now and into the future, to govern in the public interest. The approach to negotiation of free trade agreements is informed by the belief that the process is a trade secret and that therefore secrecy is justified. Whether this secrecy is justified or in the public interest is not put to the test. There are few attempts to provide any systematic assessment of impacts or cost/benefits analyses of existing or proposed free trade agreements. Where this has occurred, such as through the Productivity Commission, findings do not appear to be taken seriously. It is quite possible that international trade rules could be designed to meet long term public interest objectives and be compatible with high standards of transparency, accountability and democratic practice. Without a democratised process and commitment to these objectives from our governments, there is the distinct possibility they will do little more than protect the profits of foreign investors at the expense of Australian citizens.

## Recommendations

- 1) That the Parliamentary Joint Committee on Human Rights take ongoing responsibility for the examination of free trade agreements for their impact on democratic practice and compatibility with associated civil and political human rights.
- 2) That no trade agreement be signed until the above Inquiry has been completed and a government response tabled.
- 3) That the Trade and Foreign Investment (Protecting the Public Interest) Act 2014 which seeks to to protect Australian laws by banning investor-state dispute settlement provisions be supported

We include in this submission the policy brief *A Democracy Deficit? Community Attitudes to the Trans Pacific Partnership Agreement* (attached) which details the results of the survey and gives background information regarding the questions and further information regarding points raised in this statement.

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<sup>24</sup> Rimmer, M (2014) *The US' trade secrets demands and what they mean for journos* Crikey 24<sup>th</sup> Jan 2014

<http://www.crikey.com.au/2013/11/18/the-us-trade-secrets-demands-and-what-they-mean-for-journos/>