



# REFORMING TRADE AGREEMENTS

## Stop the TPP and the insidious ISDS

Trade for good, not for corporate interests

Trade agreements are undermining our democratic processes and rule of law. Investor-State Dispute Settlement clauses threaten the ability of sovereign states to legislate in the public interest. The scope of trade agreements is now such that they act as a de facto level of government.

International trade can be a force for good. Open and transparent trade relations help breed trust between nations, which can help bring about a more peaceful and prosperous world. Multilateral trade deals can also be used to promote environmental sustainability, improve human rights and provide a decent standard of living for all.

Unfortunately, recent trade deals have not supported these aims and are instead giving corporate interests priority. The Turnbull Government is trumpeting the fact that they have managed to finalise a batch of trade deals. But ceding power to multinationals is not something to be proud of.

The Greens approach to trade involves:

- Parliament approval of trade agreements before they are signed.
- Banning investor state dispute settlement (ISDS) and seeking to remove ISDS from existing trade deals.
- Voting against the Trans-Pacific Partnership (TPP).
- Protecting in law Australia's ability to undertake labour market testing.
- Requiring the Productivity Commission to conduct an economic analysis of trade deals.
- Initiating a senate committee inquiry into government compensation for those left stranded by trade deals.

### > REFORM THE TREATY MAKING PROCESS

Australia's treaty-making process is broken. Trade deals are negotiated in secret without the parliament or the public having a clear understanding of what governments are trying to achieve or whose interests are being represented. This is less of an issue when tariffs and quotas were all that were on the table. But the reach of recent trade deals has expanded into matters of domestic policy and public interest such that they now function as a de facto level of government. These are matters that should be subject to scrutiny by the nation's parliament and the public. Australia's treaty-making process should be founded on the same principles of accountability and transparency that apply to the making of legislation.

The Greens would require parliamentary oversight of trade agreements during negotiations and parliamentary approval of trade agreements before they are signed. Negotiations should not be undertaken in secret. Texts of trade agreements must be tabled in parliament before they are signed.

### > BAN ISDS

The most troubling aspect of modern trade deals are the insidious ISDS clauses that allow foreign corporations to sue governments for the impact that public policy has on their profits. The number of ISDS cases worldwide has increased four-fold since the start of the century.<sup>1</sup> Corporates bringing these cases are winning or settling in more than half of these disputes.<sup>2</sup>

The threat of 'indirect expropriation' creates a 'regulatory chill' that puts a freeze on government's ability to regulate in the public interest. This is backed up by the Chief Justice of the High Court, Robert French, who states that:

There is ample data to demonstrate that investors in countries which are parties to [trade agreements] use arbitral processes to challenge regulatory change affecting their interests...<sup>3</sup>

The governance of ISDS compounds the problem. The tribunals that adjudicate do not follow basic principles of law. Conflicts of interest do not preclude arbitrators. Lawyers can revolve between representing and adjudicating. And there is no system of precedence.

ISDS is creating a private dispute resolution system that is overriding our existing legal system. It is an attack on the democratic principles of government and the rule of law. The Greens do not support the inclusion of ISDS in trade deals. The Greens would not sign any trade deals that include ISDS. And the Greens would seek to have ISDS removed from existing trade deals.

<sup>1</sup> UNCTAD, IIA Issues Note: ISDS Settlement: Review of Developments in 2015, June 2016.

<sup>2</sup> Ibid.

<sup>3</sup> Investor-State Dispute Settlement — A Cut Above the Courts? Chief Justice Robert French AC, 9 July 2014.

---

## > STOP THE TPP

The TPP is the nadir in Australia's trade relations. A twelve-nation trade agreement, led by the United States, negotiated in secret, which threatens to undermine domestic laws, including on intellectual property, competition policy and labour rights.

And it includes ISDS. John Howard did not include ISDS in the US-Australia Free Trade Agreement. But the US has got their way through the TPP. Corporations based in the United States are twice as likely to use ISDS as those from any other countries.

The Turnbull Government claims to have safeguarded against the use of ISDS in the TPP to sue governments for regulating in the public interest. But one of the world's leading arbitration lawyers has pointed out the flaw in the so-called 'safeguards'.<sup>4</sup> The one success of the Turnbull Government—the specific carve-out for tobacco—also highlights the inadequacy of the regular 'safeguards': if the investor chapter was protection enough, specific exceptions for tobacco would not be needed.

The TPP contains many other problematic elements, including:

- Loosening Australia's current five year limit on monopoly rights for expensive biologic medicines.
- Preventing federal and state governments from giving preference to local suppliers under procurement contracts.
- A weak environment chapter that does not mention climate change.

The Greens will vote against the implementing legislation of the TPP. We will vote against it because it contains the undemocratic ISDS. And we will vote against it because it undermines the functioning of our democracy.

The Labor Party have a policy not to support ISDS. However, they voted to support for the Korea and China free trade agreements, both of which contained ISDS. If their policy is to mean anything they must vote against the TPP.

## > UPHOLD AUSTRALIA'S LABOR RIGHTS

The China-Australia Free Trade Agreement (ChAFTA) and the TPP both contain provisions to allow foreign companies to bring in foreign workers without having to undertake labour market testing to determine local capacity. This includes for the wide-reaching class of 'contractual service providers'. Recent news reports revealed that Chinese companies have imported a labour force, obtained skills certification using deception, and paid wages well below Australian awards.<sup>5</sup>

Modern trade deals are creating a 'parallel industrial system' that threatens to undermine the wages and conditions of Australian workers. The Greens would legislate to ensure that trade deals do not diminish Australia's requirements for labour market testing, or as a means of circumventing safety requirements or taxation laws.

---

<sup>4</sup> The Guardian, TPP's clauses that let Australia be sued are weapons of legal destruction, says lawyer, 10 November 2015.

<sup>5</sup> Fairfax Media, ChAFTA has opened door to unqualified workers, 4 June 2015.

## > INDEPENDENT ECONOMIC ASSESSMENT

The Turnbull Government is spruiking trade deals as if our future depends on them. But what are the benefits? The World Bank predicts that the TPP would boost Australia's economy by just 0.7% by the year 2030.<sup>6</sup> An analysis of the US Free Trade Agreement found that trade with the rest of the world fell as a result of the agreement.<sup>7</sup>

Treasury advised the incoming government in 2010 that "the potential benefits of the FTAs under negotiation have been oversold and the negatives largely ignored."<sup>8</sup> This was evident during the sales pitch for the ChAFTA. The Turnbull Government compound-counted the job creation potential, and exaggerated the benefits thirty-fold.

The Productivity Commission provides a searing critique of the economic scrutiny given to trade deals, and states that "current processes fail to adequately assess the impacts of prospective agreements."<sup>9</sup> The Harper Competition Policy Review supported the need for an "independent and transparent analysis of the costs and benefits" of trade deals in relation to intellectual property.<sup>10</sup>

The Productivity Commission has outlined a detailed process for it to properly evaluate the costs and benefits of trade agreements. The Greens would mandate this process in legislation to ensure that the parliament is properly informed of the impact of trade deals before signing off on them.

## > NOT EVERYTHING TRICKLES DOWN

A fundamental problem with trade deals is that the benefits are not distributed equally. Trickle-down economics doesn't work for everyone. Winners don't compensate losers. Unless the government intervenes, globalisation is a rough deal for some.

An independent economic evaluation process should be used to inform the government of any disproportionate impacts, particularly geographic impacts. As large-scale manufacturing moves off-shore, some towns are losing their lifeblood. This can result in a structural decline in the value of real-estate, and compound the impact of job losses.

The Greens support government compensation for those stranded as a result of trade liberalisation. The Greens will initiate a senate committee inquiry into this issue. This would examine how to determine when a community has been permanently impacted, and how to structure an assistance package so that it targets the right recipients and so that it does not create perverse incentives.

---

<sup>6</sup> World Bank, Potential Macroeconomic Implications of the Trans-Pacific Partnership, January 2016.

<sup>7</sup> ANU Australia – Japan Research Centre, The economic impact of the Australia–United States free trade agreement, 2015.

<sup>8</sup> [http://archive.treasury.gov.au/documents/1875/PDF/03\\_Other\\_Significant\\_Policy\\_Issues.pdf](http://archive.treasury.gov.au/documents/1875/PDF/03_Other_Significant_Policy_Issues.pdf)

<sup>9</sup> Productivity Commission, Trade & Assistance Review 2013-14.

<sup>10</sup> Competition Policy Review: Final Report, 2015