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Sent by Email
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Re- support for the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*

I support this bill to "protect Australian laws by banning Investor-State Dispute Settlement (ISDS) provisions and for related purposes"

The Bill in its entirety states:

The Commonwealth must not, on or after the commencement of this Act, enter into an agreement (however described) with one or more foreign countries that includes an investor-state dispute settlement provision.

Specifically, my concern is how the proposal for the 'Investor-State Dispute Settlement' or ISDS will impact on our current and future resource industry and to its effect on developing energy legislation reform.

The inclusion of this restrictive proposal would essentially give foreign corporations exceptional power to override our own legal system and sue any level of government without due regard to right and just processes.

Never should a Government trade our right to clean air, clean water and democratic process.

Currently, 87% of Gippsland in Victoria is under an exploration licence of which a substantial area already experiences a negative environmental legacy from past offshore oil & gas extraction and dewatering of open-cut coal mines in the Latrobe Valley.

Whilst we have limited legislation that can, at least, enforce compliance and liability it is extremely negligent for the Federal Government to weaken this ability to enforce compliance whilst introducing factors such as the ISDS that may lead to further economic cost burdens to the community let alone the taxpayer.

As our own legislative framework is evolving in relation to resource extraction, to include the ISDS proposal at a time when Australia is going through massive land use changes doesn't make sense. Furthermore, huge community opposition to expanding onshore gas and coal extraction is growing with chemical contamination and significant health and economic cost burdens becoming evident.

With considerable uncertainty and liability growing in our own legal environment, it is unrealistic to include the ISDS proposal and find at a later date the impacts of onshore gas resource extraction have been significantly underestimated. In this case the government may be sued by a foreign company just to protect our right to clean air and water.

Resource development has significant environmental, social, economic and legal implications. Environmental law under resource management needs to have clear guidelines confirming a person's right to access clean water and clean air. If resource management fails that, then it would be expected that the Australian Government obligation is to protect its citizens and should reform policy as appropriate. The inclusion of the ISDS would severely impact on our legislators to do this.

As such, the ISDS should not be included in a TPP because the exact meaning of some of the terms (seek, endeavour, where appropriate and except in rare circumstances) are not exactly clear. Words that are not legally binding are not acceptable in any legislative framework because they cannot be legally enforced due to interpretation. Additionally, unclear terminology in contracts can lead to loopholes that can, unfairly, be exploited by foreign companies.

The whole legal process to hear an ISDS dispute is in contradiction to our own legal system, processes and public expectations. Consequently, for any Local, State or our Federal government to legitimately challenge a foreign company will incur prohibited cost burdens without surety that the international court process can even deliver a just result. This is not acceptable given our State Governments are already approving resource extraction by foreign companies in an inadequate and evolving legislative framework.

- The proceedings are not made public unless both parties agree and even the results of proceedings can remain secret, unlike national legal systems, where proceedings and results are public
- The arbitrators can also be practising advocates, and so lack the independence of judges in national legal systems
- There is no system of precedents, and no appeal system, so decisions lack consistency
- third-party funding of cases, described by the OECD as "a new industry composed of institutional investors who invest in litigation by providing finance in return for a stake in a legal claim" has encouraged a growing industry of investment law firms which actively solicit business and encourage large claims. (UNCTAD, 2013b, p. 1, Gaukrodger and Gordon, OECD, 2012, p.36)

Moreover, recent "safeguards" in ISDS clauses to protect health, environment and other public interest legislation have not been effective.

There are claims that recent changes to the wording of ISDS clauses in trade and investment agreements like the Korea-Australia Free Trade Agreement (KAFTA) are "safeguards" which will prevent foreign investors from suing governments over health, environment or other public interest legislation.

But the first "safeguard" sentence in the KAFTA reads: "except in rare circumstances non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations"(KAFTA chapter 11, annex 2B).

Many legal experts have pointed out that the phrase "except in rare circumstances" leaves a very big loophole, which recent cases have used to advantage.

The second "safeguard" is a more limited definition of "fair and equitable treatment" for foreign investors (KAFTA chapter 11, clause 11.5.2 and Annex 2A). However tribunals have ignored these limitations and applied the previous higher standard. A third "safeguard" is a reference to the general protections for "human, animal or plant life" in article XX of the WTO General agreement on Tariffs and Trade (KAFTA Article 22.1). This article has only been successful in one out of 35 cases in the WTO which have attempted to use it to safeguard health and environmental legislation.

Countries around the world are withdrawing from ISDS so this would indicate that it has not been a success. Therefore, as the resource legislation is not fully defined it is dangerous to play with an industry which has inherent risks attached and not have proper protective legislation to ensure any liability is rightly obliged.

Why would our Federal Government even consider the ISDS proposal, in secret, if it has the potential to cost all levels of government significant cost burdens whilst not even protecting the environment and/or public health? So, it is apparent that this Federal Coalition Government chooses to inflict a double whammy on our communities to protect and prioritise foreign companies over the health and wellbeing its own communities.

The ISDS should be removed.

Yours sincerely

Tracey Anton