SUBMISSION TO THE DEPARTMENT OF FOREIGN AFFAIRS, DEFENCE AND TRADE ON THE REVIEW OF THE SERVICES AND INVESTMENT CHAPTERS OF THE CHINA-AUSTRALIA FREE TRADE AGREEMENT (CHAFTA) AND THE ASSOCIATED INVESTMENT FACILITATION ARRANGEMENT MEMORANDUM OF UNDERSTANDING

19TH SEPTEMBER 2017

INTRODUCTION

The ACTU is the peak body for Australian unions, made up of 38 affiliated unions. We represent over 1.8 million working Australians and their families.

The Australian Council of Trade Unions (ACTU) welcomes the opportunity to make a submission on the reviews of the services and investment chapters of China Australian Free Trade Agreement (ChAFTA) and the associated Investment Facilitation Arrangement Memorandum of Understanding (IFA MOU) to this review of ChAFTA.

Workers sit at the heart of business and trade. The ACTU believes that a good free trade deal puts shared prosperity and sustainable social and economic development at the centre of the agreement. It seeks to create a fair trade playing field between countries, based on respect for worker's rights, protection of the environment and increased opportunities for business, regardless of their size or power. 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, not higher corporate profits, increased offshoring of local jobs, weakening labour market protections, wages and the undermining of our domestic rule of law and democratic decision-making.

Labour mobility should not be used as a bargaining chip as part of trade agreements to allow exemptions to domestic immigration laws and policies – this regulatory environment should be set by immigration agencies and Ministers in light of broader questions of justice and national interest and should be consistent for all – one set of rules for everyone. There should not be a special set of rules to the advantage of corporate interests, and no workers in Australia should be exempted from Australian labour law based on their country of birth.

Australian unions are long-standing supporters of strong, diverse and non-discriminatory immigration program. Our clear preference is that the migration program operates occurs primarily through permanent migration where workers enter Australia independently. This gives migrants a greater stake in Australia's long-term future and it removes many of the 'bonded labour' type problems that can arise with temporary migration where a worker is dependent on their employer for their sponsorship and ongoing prospects of staying in Australia. 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.

The proliferation of secretive regional and bilateral deals are extremely concerning, as they consistently fail to take into account human rights, democratic principles, environmental sustainability and the basic rights of unions and workers. ChAFTA is a prime example of this trend.

SCOPE OF THE REVIEW

The decision to review only Chapters 8 and 9 on services and investment in conjunction with the associated Investment Facilitation Arrangement MOU, is inappropriately narrow for a trade deal that is so broad in its scope of application and its direct impacts on Australian and Chinese workers, businesses and economies.

Legitimate public concern has been raised in several areas, including: over the lack of labour market testing for Chinese workers, the potential for unsafe work due to the removal of mandatory skills testing, and increasing scope for abuse of migrant workers. The narrow scope of the review, whether by design or accident, attempts to preclude any examination of the impacts of the ChAFTA on these issues. This not appropriate and out of step with the broader public expectation of what can and should be taken in as part of any review of ChAFTA.

For these reasons, in addition to the ***IFA MOU***, this submission examines and makes comment on all labour related sections of the ChAFTA and its associated documents with particular reference to the labour mobility provisions. In ChAFTA itself there are references to movement of people in the agreement text in ***Chapter 10***, along with **a side letter to the agreement** and a ***second MoU on Work and Holiday Visa arrangements***. The four different aspects of these provisions are complex and must be read in conjunction with each other to be properly understood.

THE ACTU BELIEVES THAT:

1. Information that has come to light publicly suggests that the former Trade Minister directly responsible for the negotiation of ChAFTA has direct links with parties that may stand to benefit from the agreement. These reports should be investigated by an appropriate and authoritative body. Irrespective of the outcome of such investigation, it is important to ensure that checks and balances are in place to avoid actual, perceived or potential conflicts of interest when trade agreements are being negotiated and for a reasonable period following the conclusion of those negotiations.

2. The Memorandum of Understanding (MoU) on Investment Facilitation removes labour market testing for infrastructure projects, and allows for Chinese workers to be exploited and paid below the minimum wage.

3. The side letter to the agreement sets out the Government's aim to remove mandatory skills assessment for all 457 visa occupations within five years. This undermines the value of Australian occupational licensing standards and has the potential to lead to increased risks to Chinese and Australian workers and Australian public more broadly.

4. In Chapter 10 the Australian Government commits to removing all labour market testing for natural persons of China. Despite claims to the contrary by the Prime Minister, the new Temporary Skills Shortage visa does not reintroduce labour market testing as existing international obligations such as those in the ChAFTA are exempt.

5. The investment and services chapters and their associated documents create an unlevel playing field for Australian businesses. Australia uses a 'positive' list for investment and services while the Chinese use a 'negative' list, giving substantially different access to markets.

6. The 'negative' list in trade service commitments undermines the ability of Australian governments to regulate in the public interest for essential services including health, education, energy, water and social services like age care.

7. Investor State Dispute Settlement provisions leave Australia unnecessarily vulnerable to lawsuits from powerful corporations.

RECOMMENDATIONS:

1. A public register of all investment arrangements under ChAFTA be established. Such as register should detail the parties involved, the capital invested and the nature of the project.

2. All workers that are brought into Australia under ChAFTA arrangements should be entitled to the same legal and workplaces protections as local workers. This includes being afforded the protections available under our industrial laws, such as the Fair Work Act and the National Employment Standards.

3. The ACTU make an urgent formal recommendation to the Government for the immediate establishment of a federal National Integrity Commission or Independent Commission Against Corruption.

4. The MOU on Investment Facilitation is not part of the text of the agreement; it can and should be immediately cancelled.

5. The side letter removing mandatory skills testing for 457 visa occupations should be removed and skills testing reintroduced for all skilled and semi-skilled migrant workers seeking to participate in licensed trade occupations.

6. Commitments contained in Chapter 10 and the MOU to provide exemptions to labour market testing requirements should be removed.

7. Australia should change the 'negative onus' list to a 'positive onus' list, agreed upon in Parliament, in order to level the playing field for Australian businesses and to ensure public interest is protected above private gain.

8. Investor State Dispute Settlement provisions should be removed from the agreement.

9. The Department of Immigration and Border Protection should release all visa data in coordinated, timely and comparable form, so that the impact of FTAs on the structure of the workforce can be monitored.

The analysis put forward in this submission draws upon the submission of the Australian Free Trade and Investment Network (AFINET) authored by Dr Patricia Ranald, which we also fully support. However, all opinions expressed are those of ACTU.

1. CHAFTA NEGOTIATION

The ACTU is extremely concerned by reports concerning the Minister responsible for ChAFTA, Mr Andrew Robb. It has been reported that, before leaving Parliament in July 2016, Mr Robb took an $880,000-per-year contract to work, part-time, for Ye Cheng's Landbridge Group, the Chinese company that controversially acquired the port of Darwin while he was trade minister.[1]

The Sydney Morning Herald reports that in April 2016, less than three months before his consultancy agreement began, Mr Robb visited China with an Australian delegation in his capacity as Australia's trade envoy, during which the delegation was lobbied to support the "Two Countries, Two Parks" proposal.

It is reported that, within weeks, One of Mr Ye's companies produced lobbying material in Mr Robb's name in which the former trade minister described the Rizhao trade park as a project that "advances the objectives in the historic (CHAFTA) accord [that] I was honoured to play a significant role" while trade minister.[2] The ethics code for departing ministers bans them for a period of 18 months from lobbying or advocating to the government or public service on any matters they previously dealt with as a minister.

Irrespective of what the ethics code provides (and we do not suggest it has been breached), the media reports do raise questions about whether these types of associations meet community expectations for matters of such significant national interest. Beyond media reports, Australia lacks the accountability mechanisms necessary to investigate such matters of clear public interest, ensure confidence in the probity of trade negotiations and set best practice guidelines. The lack of a National Integrity Commission or Federal Independent Commission Against Corruption means that legitimate public interest matters have no official forum; such is the case here.

There is a clear gap around the political elements of the probity framework of trade agreement processes that is best filled by the establishment of a National Integrity Commission or federal Independent Commission Against Corruption, only then will transparency and accountability levels meet public expectations.

2. IMMIGRATION DATA

ChAFTA, and the side letters, include provisions for Chinese short-term migration under the following visas:

- 400 Short Stay Specialist visa (previously 456 and 459 visas);
- 457 Temporary Work (Skilled) visa. Now replaced with the Temporary Skill Shortage visa,
- 485 Temporary Graduate visa
- 462 Working Holiday visa

[1] https://www.themonthly.com.au/issue/2017/september/1504188000/richard-denniss/canberra-needs-watchdog
[2] http://www.smh.com.au/national/investigations/liberal-andrew-robb-took-880k-china-job-as-soon-as-he-left-parliament-20170602-gwje3e.html

However, it is not currently possible to compile comparable data on these visas. Much of the Department of Immigration and Border Protection visa data is opaque and not regularised; some visa data is released by financial year while others runs to a calendar year release schedule. Visas are also frequently replaced. This makes tracking and analysis very difficult.

Based on the available data on Working Holiday visas (462), 457 visas and recent graduate visas (485), we believe there has been an increase of 63% in terms of visas granted to Chinese people between 2014 and 2016; from 12,907 to 21,060.

We have repeatedly called for proper government intervention into the systemic exploitation of working Holiday visas especially in the Agriculture Sector. These visas has unfortunately become synonymous with unscrupulous labour hire companies that abuse their workers. Evidence released from the Fair Work Ombudsman last year revealed the systemic exploitation of Working Holiday Makers (where those visa holders from Asian countries seem to be particular vulnerable). The report highlighted the following;

• 28 percent did not receive payment for work undertaken
• 35 percent stated they were paid less than the minimum wage
• 14 per cent revealed they had to pay in advance to get regional work
• 66 per cent felt employers take advantage of people on Working Holiday Visas by underpaying them.

Given the 'normalisation' of underpayment of wages and breaches of workplace conditions amongst Working holiday Makers there is clearly a financial incentive to employ Working Holiday Makers.

The 485 visa numbers alone rose from 6254 to 10390. This is particularly worrying given that 485 visas require no labour market testing, and they increase the direct competition for our young workers. Youth unemployment nationally is 13.5%, but up to a staggering 28% in the regions, and the national youth underemployment rate is 18%. The government is not only failing to address this most important problem for a generation, but exacerbating it. 485 visa holders can apply for up to 4 years of work in Australia, and may work in any sector regardless of their degree subject. Many 485 visa holders end up working in low skill insecure jobs, and are vulnerable to exploitation.

To date we have found no public releases of 400 visa information, or of the predecessor 456 and 459 visas. While the 400 visa is nominally for 'highly specialised work', such as international intra-company transfers, it is available for managers, professionals, technicians and trades[3] – and possibly even sub-trade occupations.

The lack of transparent data makes it impossible for concerned parties to fully gauge the impact of changes in visa arrangements and labour commodification clauses in FTAs. The ACTU call for the Department of Foreign Affairs and Trade work with the Department of Immigration and Border Protection to rectify this shortfall in public accountability.

[3] https://www.border.gov.au/Visas/supporting/Pages/400/highly-specialised.aspx?modal=/visas/supporting/Pages/400/specialised-skills.aspx

3. IMPACTS SO FAR

Chinese investment in Australia has increased dramatically since the signing of ChAFTA, from US$8.3 billion in 2014 to US$11.5 billion in 2016, with a record number of deals being signed in 2016.[4] Attracting inward investment is hugely important to the Australian economy, and with the proper safeguards it can lead to equitable growth. GDP per capita and skilled worker wages have both been shown to increase with higher levels of FDI[5][6]. But this has only been shown where domestic and migrant workers have equal access to the same legal labour rights. The MOU specifically signs away Chinese workers' rights to bargain under Australian law. The minimum wage for workers brought to Australia under this arrangement will be the subject of negotiation between the BOI and the company concerned.

Anecdotal evidence of Chinese workers being abused has already been identified. Fairfax Media reported on Chinese welders being paid $US70 a day, a fraction of the going rate for a lift industry worker of $42 an hour. It is also below the national minimum wage is currently $18.29 for a full-time adult worker. The workers received no pay slips, no penalties, no superannuation, and had no WorkCover insurance.

Penny Wong and Brendan O'Connor have identified cases of workers being exploited under ChAFTA. They released a statement which states that Chinese workers brought to Australia under the China-Australia Free Trade Agreement (ChAFTA) are being paid less than $10 an hour.[7]

As predicted by our affiliates and academics, health and safety has also been affected. Whitecards are required under the Occupational Health and Safety Regulations for all workers on construction sites. The general construction induction training provides workers with basic knowledge of construction work, the work health and safety laws that apply, common hazards likely to be encountered in construction work and how the associated risks can be controlled.

A Fairfax media investigation revealed that despite Chinese workers being unable to speak or read English, they nevertheless completed a training course only available in English. When questioned on this, a representative of the training group, ABE, stated that "Yeah ... We've got another company, a Chinese construction company, who have done the first one [White Card test] for them and then they hand out the answers to them and then they go online and then do it themselves."

The ChAFTA reduces the labour rights of Chinese workers, sometimes below Australian legal minimums. At the same time it removes labour market testing, putting Australian workers at a disadvantage with Chinese workers. The result is a net reduction in good jobs and safe work for both Australian and Chinese workers, and potentially the public at large.

4. CHEAP LABOUR IMPORT PROVISIONS IN CHAFTA

A. MEMORANDUM OF UNDERSTANDING ON INVESTMENT FACILITATION

[4] https://home.kpmg.com/cn/en/home/insights/2017/05/demystifying-chinese-investment-in-australia-may-2017.html
[5] Beata Javorcik, Does FDI Bring Good Jobs to Host Countries?, BACKGROUND PAPER FOR THE WORLD DEVELOPMENT REPORT 2013
[6] OECD, THE IMPACT OF FOREIGN DIRECT INVESTMENT ON WAGES AND WORKING CONDITIONS, 2008
[7] https://www.pennywong.com.au/media-releases/turnbull-government-failing-chafta-pledge/

The Investment Facilitation MoU applies to infrastructure projects worth $150 million over the full term of the investment, and which have between 15% and 50% of Chinese investment. The MOU removes mandatory local labour market testing, skills assessment, and limits on numbers and occupations of temporary workers. It also establishes special arrangements between the Department of Immigration and Border Protection of Australia and a project company. The project company will be eligible where either a single Chinese enterprise owns 50 per cent or more of the project company, or, where no single enterprise owns 50 per cent or more of the project company, a Chinese enterprise holds a substantial interest (15%) in the project company.

The project must be related to infrastructure development in food and agribusiness, resources and energy, transport, telecommunications, power supply and generation, environment or tourism (**MOU Clause 2b and c**). This is an extremely low figure with regards to infrastructure projects. To put this into context $150 million would pay for approximately 300 meters of the WestConnex highway.

DFAT will assess the project against the relevant criteria within 20 days of receiving the application from the company. Following this the Department of Immigration and Border Protection will negotiate the occupations to be covered, English language requirements, qualifications and experience, and calculation of the terms and conditions of the Temporary Skilled Migration Income Threshold. This means that the minimum wage to be paid to the temporary workers will be determined through negotiation between the project company and the Department of Immigration and Border Protection, with workers and their representatives excluded from the basic right to collectively bargain under the Fair Work Act.

MOU Clause 4 allows for rates paid to be lower than to the rates paid to local workers in the industry. The current Temporary Skilled Migration Income Threshold is $53,900. This is well below the rates paid to local skilled workers in infrastructure projects: for example in 2016 the average bricklayer in Australia earned $82,000.[8] Investment Facilitation Agreements between the Department and the project company will set out occupations and the terms and conditions against which overseas workers can be nominated for a temporary skilled visa for the purposes of the eligible project, valid for four years with the possibility of extension. The agreement will record any requirements and conditions that the project company must comply with.

MOU Clauses 6-8 stipulate that there will be no mandatory requirement for local labour market testing. Despite misleading claims by the Prime Minister that the government is putting “Australian jobs first” by including labour market testing in the Temporary Skill Shortage (TSS) visa, the TSS has no labour market testing requirement if an “international obligation”[9] such as this MOU applies. This means that the already weak employer-conducted labour market testing promised by the Prime Minister are avoided through this MOU. A commitment to Labor prior to the treaty being ratified resulted in an amendment which indicates that employers may have to carry out labour market testing under the 457 visa arrangements. However, the 400 visa can be used to circumvent this safeguard.

All projects must nominally comply with Australian laws including workplace law, work safety law and licensing regulation and certification standards. However given the current widespread exploitation of foreign temporary workers it is clear that this is simply lip service. It is widely acknowledged that temporary

[8] https://www.traderisk.com.au/how-much-do-tradies-earn
[9] https://www.border.gov.au/Trav/Work/457-abolition-replacement

migrant workers are the most vulnerable to exploitation and to health and safety violations. The FWC reports that 75% of wage fraud cases involve foreign workers on temporary visas.[10] Safe Work Australia has concluded that migrant temporary workers are maimed and killed in workplace injuries at far higher rates than domestic employees.[11] The Fair Work Ombudsman reported that temporary visa holders accounted for one in 10 complaints to the agency[12].

The Coalition's commitment to Labor that DIBP will continue to investigate evidence-based allegations of non-compliance with visa conditions, including those concerning licensing and registration, has provided no comfort. Indeed Senator Wong and Brenda O'Connor's Media Release in October stated "Reports that Chinese workers brought to Australia under the China-Australia Free Trade Agreement (ChAFTA) are being paid less than $10 an hour.[13] This reveals that the Turnbull Government is failing to uphold a pledge that the trade agreement would not be used to undermine Australian wages and conditions." The same situation is possible under Investment Facilitation Agreements.

It is deeply troubling that IFAs will not be publicly accountable, and are effectively secret deals between the Department of Immigration and Chinese firms. This includes labour agreements under which employees carrying out work in Australia but do not have access to Australian legal rights and entitlements. We agree with the Business Council of Australia that these secret deals are a step too far.[14] Private arrangements between the DOI and Chinese companies over potentially sub-legal labour pay targets Chinese workers unfairly, will supress wages and conditions for Australia workers and undermine public confidence in ChAFTA.

The ILO states that "the principle of equal treatment between migrant and national workers should be respected to guard against the development of substandard conditions"[15] because there are simply no positive examples of migrant workers operating under lower legal pay and conditions than host country workers. Such arrangements lead to horrific abuses by employers, including wage theft, slavery and physical abuse.

In summary, this MOU allows for Australian infrastructure projects to be implemented by workers with no right to bargain wages under Australian law, who are statistically more likely to suffer injury and death, with no skills assessment including health and safety knowledge, and are likely to be paid below minimum rates for local workers. Furthermore, this MOU has been agreed with no parliamentary scrutiny, meaning that Australian workers and citizens have no ability to influence the content through democratic channels.

---

[10] http://www.smh.com.au/business/workplace-relations/75-per-cent-of-wage-fraud-court-cases-involve-workers-on-visas-fair-work-20161117-gsrgj9.html

[11] http://www.smh.com.au/business/workplace-relations/sharp-rise-in-migrant-workers-killed-maimed-in-industrial-accidents-20160825-gr117u.html

[12] http://www.smh.com.au/national/one-in-five-migrant-workers-on-457-visas-could-be-underpaid-or-incorrectly-employed-20150529-ghcmxr.html

[13] https://www.pennywong.com.au/media-releases/turnbull-government-failing-chafta-pledge/

[14] Business Council of Australia, Submission to the Joint Standing Committee on the ChAFTA, August 2015, p 4.

[15] ILO, PROTECTING THE RIGHTS OF MIGRANT WORKERS: A SHARED RESPONSIBILITY, 2009

B. COMMITMENTS ON THE MOVEMENT OF WORKERS IN CHAPTER 10 AND SIDE LETTER

Chapter 10, Movement of Natural Persons, sets out to remove barriers to movement of temporary workers between China and Australia; specifically labour market testing and skills testing.

LABOUR MARKET TESTING

Under the terms of CHAFTA, a general prohibition on labour market testing applies to positions being filled by Chinese nationals under the standard 457 and 400 visa programs – or any other temporary visa types for that matter. This means an employer will not have to provide any evidence of their efforts to first employ an Australian worker to fill those positions.

Article 10.4.3 states that:

> *In respect of the specific commitments on temporary entry in this Chapter, unless otherwise specified in Annex 10-A, neither Party shall:*
>
> *(a) impose or maintain any limitations on the total number of visas to be granted to natural persons of the other Party; or*
>
> *(b) require labour market testing, economic needs testing or other procedures of similar effect as a condition for temporary entry.*

The removal of labour market testing and limitation on visa numbers could result in straightjacketing of government labour market control, constraining government of the ability to protect local labour markets or maintain a cohesive labour market policy. There is the potential for local workers to suffer profound displacement by temporary migrant workers, and downward pressure on wages and conditions for Australian workers.

The Prime Minister has claimed that the immigration system must ensure that Australian jobs are filled by Australians wherever possible "and that foreign workers are brought into Australia in order to fill critical skill gaps and not brought in simply because an employer finds it easier to recruit a foreign worker than go to the trouble of hiring an Australian."[16] However, as mentioned above, the TSS visa contains a stipulation which removes the requirement for labour market testing if this conflicts with an existing obligation such as a free trade deal. The removal of labour market testing under ChAFTA makes a mockery of his claims. Further still the Turnbull government is pursuing the removal of labour market testing in other trade deal amendments, such as the Singapore FTA. The exact same problems of immigrant worker exploitation and the decline of decent jobs of Australians will be replicated in these upcoming FTA amendments.

[16] http://www.afr.com/news/politics/malcolm-turnbull-axes-457-visas-in-aussie-jobs-first-pitch-20170417-gvmlha

SKILLS ASSESSMENT

The 17 June 2015 Side Letter removes mandatory skills assessment for 10 key skilled occupations, including licensed occupations like electricians. There is a separate exchange of side letters on skills assessment "which constitute an integral part of the agreement" in which the parties agree to "streamline relevant skills assessment processes for temporary skilled labour visas, including through reducing the number of occupations currently subject to mandatory skills assessment for Chinese applicants for an Australian Temporary Work (Skilled) Visa (subclass 457)" (ChAFTA Side Letter on Skills Assessment: 1-2). The side letter states:

"Australia will remove the requirement for mandatory skills assessment for the following 10 occupations on the date of entry into force of the Agreement.

- *Automotive Electrician [321111]*
- *Cabinetmaker [394111]*
- *Carpenter [331212]*
- *Carpenter and Joiner [331211]*
- *Diesel Motor Mechanic [321212]*
- *Electrician (General) [341111]*
- *Electrician (Special Class) [341112]*
- *Joiner [331213]*
- *Motor Mechanic (General) [321211]*
- *Motorcycle Mechanic [321213]*

The Chapter 10 articles quoted above and the side letter provisions together mean the Government agreed to both the removal of local labour market testing and the removal of skills assessment for temporary workers in skilled occupations. This assessment is essential to ensure not only quality of work, but also to ensure occupational and public health and safety. There is no indication in the side letter of any process by which the Australian Government or government agencies have assessed that the skills and qualifications to be recognised in these particular occupations are in fact equivalent to those required in Australia.

At the time ChAFTA was made, the ACTU and affiliated unions sought to understand the reason for the absence of assessments, especially given the safety implications for the workplace and the public at large. In the case of motor mechanics, the implications of unqualified persons servicing vehicles are severe. Perhaps even more so, the potential for disaster should unlicensed electricians be allowed access to electrical systems in workplaces, in public or in homes, beggars the imagination. Yet the Government persists with the magical thinking that by virtue of their country of origin and the presence of ChAFTA, all will be safe. The potential for injury and loss of life is severe.

The licensing for these 10 occupations takes place at a state government level. It is not clear whether or how relevant licenses are being granted.

It appears that these occupations were chosen because the licensing occurs at state government level. The Commonwealth has simply agreed to recognise paper qualifications for the purposes of granting visas, and has left any assessment to the state licensing bodies. This could lead to a situation where there is no guarantee that temporary workers will have the same level of skills, health and safety knowledge and qualifications as are required for local workers, potentially endangering themselves, other workers and the public.

Furthermore the side letter states that *"The remaining occupations will be reviewed within two years of the date of entry into force, with the aim of further reducing the number of occupations, or eliminating the requirement within five years"*. No new list of occupations has been found at the time of writing. It is concerning that the government should set out to eliminate skills testing in trades, such as electricians, which could endanger the lives of workers and the public. Setting out the objective of completely eliminating skills testing requirements in all 457 occupations would expand the list of non-skill tested occupations to include petroleum, mining and biomedical engineers, chemists, surgeons, GPs and paediatricians, to name but a few occupations which have significant safety implications for Australians, as well as threats to decent employment.

These are matters of critical importance for our members and for Australian workers. Australian workers deserve a guarantee that they will have first access to Australian jobs, through a labour market testing obligation on employers to provide evidence they have made all genuine efforts to find a suitable Australian worker before they employ a temporary overseas worker. This is particularly important in light of persistently high levels of unemployment and ongoing job losses across the country. When Australia signs onto agreements such as the TPP, the onus must be on the Government to be up-front and explain clearly to the community exactly what it has signed Australia up to in terms of labour mobility. They must confirm the status of current labour market testing requirements and what this means for Australian jobs. The Government has failed singularly to do this.

C. THE MEMORANDUM OF UNDERSTANDING ON WORK AND HOLIDAY VISA ARRANGEMENTS

This MOU commits Australia to allow 5000 12 month multiple entry Work and Holiday visas per year, for tertiary educated young people with a degree of English proficiency. No reciprocal arrangements have been made for young Australians.

Despite this visa being described as a holiday visa with working rights, the MOU contains no limitations on the amount of work carried out by the visa holder over the 12 months, only that they may not be employed longer than 6 months with one employer. The MOU contains no mention of compliance with Australian laws, workplace standards, or specific provisions for ensuring migrant workers are able to access basic rights, despite the poor record of migrant worker abuse on working holiday visas.

In relation to Australian workers, this can only have negative implications. It has been demonstrated through multiple academic studies both in Australia and overseas that unskilled migrant labour places a

downward pressure on wages and conditions for domestic unskilled workers.[17,18,19] The unnecessary inclusion of this asymmetric holiday visa will further lower wages, particularly for workers in the regions where unemployment is highest, and particularly for young workers. In 2015-2016, 5000 Chinese workers were admitted under this visa arrangement, while in 2016-2017 the number reached 5189.[20]

For the Chinese workers, we are deeply concerned about the potential for them to be exploited under this arrangement. It has been widely acknowledged that temporary migrant workers have been let down by our broken industrial relations rules. Abuse of temporary migrant workers are well documented, both in terms of wages[21] and health and safety.[22],[23] This MOU contains nothing to prevent these foreseeable and well-documented abuses of vulnerable workers.

5. INVESTOR STATE DISPUTE SETTLEMENT

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

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

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

---

[17] Migration Advisory Committee. "Analysis of the Impacts of Migration." Home Office, London, 2012.
[18] http://www.migrationobservatory.ox.ac.uk/resources/briefings/the-labour-market-effects-of-immigration/
[19] Mengqi Yan, Yuting Yuan and Skanda Eshwar Chandra Rajachandra, Do skilled immigrants affect the wage rate of Australian workers? DPIBE, Dec 2013
[20] https://data.gov.au/dataset/visa-working-holiday-maker/resource/3db4f3bb-5830-4859-a385-3e8cf3dafb3b
[21] https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/october-2015/20151012-hiyi-litigation
[22] http://www.smh.com.au/business/workplace-relations/sharp-rise-in-migrant-workers-killed-maimed-in-industrial-accidents-20160825-gr117u.html
[23] Underhill, Elsa and Rimmer, Malcolm 2015, Itinerant foreign harvest workers in Australia: the impact of precarious employment on occupational safety and health, Policy and practice in health and safety, vol. 13, no. 2, pp. 25-46.

an old FTA with Hong Kong), among a host of other examples. By 2015, there had been almost 700 ISDS cases reported.[24]

There is mounting evidence and alarm from many experts, including Australia's High Court Chief Justice French,[25] 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. This is not in the public interest. It also offends the doctrine of the separation of powers, notably impacting on the independence of the judiciary. In Australia, as in most national legal systems, judges cannot continue to be practising lawyers because of the obvious conflict of interest.

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

The myriad problems identified with ISDS provisions were well set out again in the recent JSCOT report into the China Australia Free Trade Agreement[26] . For example, the JSCOT report cited a now oft-quoted speech where Australian High Court Chief Justice French expressed concerns about the impact of ISDS on domestic court systems.

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

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

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

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

---

[24] 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

[25] 20French, 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

[26] 21http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/17_June_2015/Report_154

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.'[27]

Similarly, in 2015 the Productivity Commission found that ISDS mechanisms in trade deals:

"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" [28]

United Nations Human Rights independent expert Alfred de Zayas launched a damning report which argued strongly that trade agreements should not include ISDS. The report says ISDS is incompatible with human rights principles because it "encroaches on the regulatory space of states and suffers from fundamental flaws including lack of independence, transparency, accountability and predictability".[29]

Against all this evidence, the ChAFTA contains an investor-state dispute settlement (ISDS) clause that will allow foreign investors from China to sue the Australian Government if changes to domestic law and regulations harm their investment.

Canada is an excellent comparator to Australia due to significant political, social and economic parallels between the two countries. Under NAFTA, Canada has been hit with 39 ISDS claims – all from American

---

[27] 22Op. cit, pp. xxxii,, xxxxviii, 271.

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

[29] De Zayas, A., (2015) "UN Charter and Human rights treaties prevail over free trade and investment agreements," Media Release, September 17

corporations and investors. 69% of those cases have been initiated since 2006.[30] This is in line with global trends noting that ISDS disputes are becoming increasingly the norm. Canada has paid out at least $216.7 million Canadian dollars (CAD) in damages and settlements[31] .

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 ChAFTA.

6. CHAPTER 8: TRADE IN SERVICES[32]

Trade agreements should not undermine the ability of governments to regulate in the public interest, particularly regarding essential services like health, education, social services, water and energy. This review should seek to change Australia's services commitments in ChAFTA to a positive list rather than a negative list system. A positive list allows governments and the community to clearly understand what is included in the agreement, and therefore subject to the limitations on government regulation under trade law. It avoids the problem of inadvertently including in the agreement future service areas, which are yet to be developed. It also means that governments retain their right to develop new forms of regulation needed when circumstances change, as has occurred with the need for financial regulation following the Global Financial Crisis and governments' responses to climate change (United Nations 2009, Stiglitz 2016). The inclusion of essential services like health, water and education in trade agreements limits the ability of governments to regulate these services by granting full 'market access' and 'national treatment' to transnational service providers. This means that governments cannot specify any levels of local ownership or management, and there can be no regulation regarding numbers of services, location of services, numbers of staff or relationships with local services. Governments should maintain the right to regulate to ensure equitable access to essential services, service standards and staffing levels, and to meet social and environmental goals. Public services should be excluded from the ChAFTA and must be clearly defined. ACTU is critical of the definition of public services in many trade agreements which defines a public service as "a service supplied in the exercise of governmental authority ... which means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." This definition results in ambiguity about which services are covered by the exemption. In Australia, as in many other countries, some public and private services are provided side-by-side. Even when essential services are not publicly provided, governments need clear rights to regulate to ensure equitable access and to meet other social and environmental goals.

7. CHAPTER 9: INVESTMENT[33]

---

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

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

[32] We gratefully acknowledge Dr Pat Ranald as being the author of this section.

[33] We gratefully acknowledge Dr Pat Ranald as being the author of this section.

A. LOPSIDED ACCESS

The ChAFTA investment chapter is lopsided, in that Australia has given Chinese investors far more favourable access to invest in Australia than Australian investors will have in China. Combined with the incomplete ISDS provisions, this suggests there was pressure to finish the agreement on the part of the Australian Government. ChAFTA p. 86, Articles 9.3.1-9.3.4, state that Australia is obliged to give national treatment and non-discrimination to the establishment and acquisition of Chinese investment, as well as to ongoing investments. China does not have this general obligation for establishment and acquisition of Australian investment. This means there can still be limitations like requirement for joint ventures for new Australian investments in China, except for some specific service sectors which are discussed below. This difference in the levels of basic commitments to national treatment is very unusual. For example, the Korea-Australia FTA (KAFTA) has the same levels of commitment to national treatment (KAFTA, Article 11.3).

ChAFTA p. 88, Article 9.5.2 states that China has also exempted from the Investment Chapter all its other existing limitations on investment measures (known as nonconforming measures) across the economy. However there is some relaxation of these limitations listed in its positive list of commitments for Chapter 8 on Trade in Services. This list is in Annex III of the agreement. A positive list means China includes only those services which it has decided to include in the agreement. Some of the services included in the list have less limitations for foreign investors in some sectors. Some examples of the removal of restrictions for investment in services are in transport, tourism, hospitals, aged care, education and financial and insurance services. These are the “breakthroughs” in market access for services which the Australian Government is promoting.

Australia has used a negative list for Annex III for both investment and services, which means everything is included (including future measures) unless specifically excluded, and its nonconforming measures are therefore far fewer than China’s.

B. UNFINISHED ISDS PROVISIONS

The ISDS section in ChAFTA is unfinished, with important definitions of the criteria that can be used to sue governments to be determined by this review process (ChAFTA p. 90, Article 9.9). These include two of the most controversial aspects of ISDS, the definition of indirect expropriation and the definition of minimum standard of treatment for foreign investors. These are provisions often used to sue governments under other agreements. There is a “safeguard” clause to protect public interest measures from ISDS, but because the clauses are so far unfinished, it is not clear how this would interact with future clauses on indirect expropriation and minimum standard of treatment (ChAFTA p. 92, Article 9.11.4). In any case, as discussed above, all safeguard clauses are limited by the fact that the tribunals have enormous discretion in interpreting them. The procedures for ISDS cases in ChAFTA are less transparent than other agreements, notably the Korea-Australia FTA (KAFTA). ChAFTA p.101, Article 9.17.2 says parties “may” not “shall” agree to make ISDS hearings and documents public. This is a backward step compared with the equivalent clauses in KAFTA, which state that both documents and hearings “shall” be open to the public (KAFTA Articles 11.21.1 and 11.21.2). A side letter referred to in Article 9.12.9 says neither government will apply the UNCITRAL new rules on transparency, which do require hearings and documents to be made public. Given the issues discussed above, the Australian Government should seek to remove ISDS clauses completely in this review of the investment chapter of the ChAFTA.

8. ACTU position on the skilled migration program and the movement of temporary overseas workers under free trade agreements

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

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

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

Australian unions are long-standing supporters of strong, diverse and non-discriminatory immigration program. Our clear preference is that the migration program operates occurs primarily through permanent migration where workers enter Australia independently. This gives migrants a greater stake in Australia's long-term future and it removes many of the 'bonded labour' type problems that can arise with temporary migration where a worker is dependent on their employer for their sponsorship and ongoing prospects of staying in Australia. As highlighted in our submission to the recent Senate Inquiry into the temporary work visa program[34] and ongoing media coverage of cases such as at 7-Eleven, exploitation of temporary overseas workers is rife.

Dr Joanna Howe notes that "There is a substantial literature examining the phenomenon of temporary labour migration that clearly establishes the particular vulnerability of temporary migrant workers which renders these workers extremely vulnerable to exploitation despite a legal right to equality of remuneration, conditions, treatment and rights as local workers."[35]We accept there is a role for some level of temporary migration to meet critical short-term skill needs, provided there is a proper, rigorous process for managing this.

The priority must always be on maximising jobs and training opportunities for Australians – that is, citizens and permanent residents, regardless of their background or country of origin. Whether it is young Australians looking for their first job or older Australians looking to get back into the workforce or change careers, they deserve an assurance that they will have first access to Australian jobs. This is more important than ever at a time when unemployment remains stubbornly around the 6% mark, underemployment impacts on 1.1 million workers and youth unemployment is nearly 13%.

That is why the labour market testing requirements enshrined in the Migration Act 1958 are so important in ensuring that employers have a legal obligation to employ Australians first. For this reason it is essential that the labour market testing requirements of the Temporary Skill Shortage (TSS) visa, to be introduced in March 2018, be amended. The current requirement of *"mandatory labour market testing, unless an*

[34]http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa (see ACTU submission no. 48.) 10

[35] Dr Joanna Howe The Impact of the China-Australia Free Trade Agreement on Australian job opportunities, wages and conditions, 2015

international obligation applies"[36] allows trade agreements to bypass this vital social protection. This obligation should not be undermined or removed by labour mobility provisions in free trade agreements.

We have no objection to overseas workers from any country being employed in Australia, provided there is genuine, verifiable evidence through labour market testing that the employer has not been able to find a suitable, qualified Australian to do the job, and those workers are treated well and receive their full entitlements. However, we cannot support this fundamental obligation on employers to support Australian jobs first, simply being waived as part of the cost of pushing through free trade agreements.

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

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

[36] https://www.border.gov.au/Trav/Work/457-abolition-replacement