



Electrical Trades Union of Australia

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SUBMISSION

Joint Standing Committee on Treaties

Examination of the *Free Trade Agreement between the
Government of Australia and the Government of the
People's Republic of China*



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Executive Summary

The Electrical Trades Union (ETU) is the Electrical, Energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The ETU represents approximately 65,000 workers electrical and electronics workers around the country and the CEPU as a whole represents approximately 100,000 workers nationally, making us one of the largest trade unions in Australia.

The ETU welcomes the opportunity to submit to the Committee in relation to its examination of the Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (ChAFTA).

The role of the Committee (Appendix 1) is to assess the ChAFTA and form a view as whether it is in Australia's national interest.

We submit that the provisions around labour mobility, training, worker protections (or lack there-of), corporate rights and more, mean the agreement cannot be supported by the Committee in its current form.

The ChAFTA will lock Australians out of job opportunities, erode industrial and public safety standards, and expose Australia to unfunded legal action that costs millions.

Earlier this year the Productivity Commission voiced significant concerns over Free Trade Agreements¹ and, like unions, continue to argue that these agreements don't deliver measurable economy wide benefits as claimed, impose significant costs, and are oversold by governments.

These criticisms are applicable to the ChAFTA and in our view should not be supported on that basis alone. However, the ChAFTA is an agreement that includes provisions

¹ Productivity Commission, Trade and Assistance Review 2013-14, June 2015.



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and arrangements negotiated by current federal government that make it much worse than previous agreements.

The agreement means Chinese companies involved in projects in Australia worth more than \$150 million in many industries, including agriculture and resources, can bring workers from China without first advertising the jobs locally in Australia.

At a time of when national unemployment is at a historical high of over 6%, and national youth unemployment rate of 13 percent, this preferential treatment for Chinese companies and their workers is unacceptable and represents a government that has abandoned its responsibilities to the Australian labour market.

In the power sector, which is capital-intensive, \$150 million is not a great deal of money. There are a number of Chinese companies considered likely buyers for the privatised New South Wales power transmission and distribution networks. The maintenance and upgrade contracts for these assets, as well as those in the Victorian energy sector that are already owned by Chinese companies, are well in excess of \$150 million. The same is true of most large residential and commercial construction ventures and the vast majority of mining operations exceed the threshold, as do tourism developments.

The removal of Labour Market Testing from the non-concessional 457 visa program for Chinese workers means all 457 visa sponsoring companies, not just Chinese companies, can import unlimited numbers of Chinese workers under the standard 457 visa program without first having to provide evidence that these workers meet a skill shortage and domestic workers are not available. This sets the stage for Australian workers to be robbed of opportunities, and undercut by a new class of immigrant working poor.



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The arrangements set out by the ChAFTA mean Chinese workers in a range of high-risk trades won't have their skills automatically assessed in Australia. This is particularly dangerous for a high safety risk trades like electricians.

The ChAFTA's side letter on skills assessment and licencing allows for the removal of mandatory Australian skills assessments for ten occupations under the 457 visa sub class including for trades that are potentially lethal if practiced by workers who do not meet Australian skills standards. In addition, this list of occupations is set to grow as the agreement is reviewed, with a stated goal that all skills assessments are to be removed within 5 years.

Electrical work is inherently dangerous, that's why there are stringent electrical training and safety standards in Australia that have been developed over decades. Removing the requirement for overseas trades workers to be assessed to see if their skills meet our standards is dangerous for the workers, their colleagues and for the public.

China does not have the level of trades training and safety standards in comparison to Australia. The ChAFTA arrangements will only serve to erode electrical safety in our country and lead to accidents, injuries and death to workers and members of the public.

To allow Chinese companies to bypass the Australian labour market and bring in a workforce comprised of people untrained and unfamiliar in Australian practices (including an electrical wiring standard that differs substantially from most countries'), and entirely dependent on their employer for residence in Australia, is unsafe and unfair for all parties and economically unsound.

A professionally trained and qualified electricity network worker currently employed by a China State Grid-owned company in Victoria could be laid off and later replaced with a worker from China under the terms of the China Free Trade Agreement.



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Right now, power companies are sacking thousands of workers in New South Wales². If these companies are snapped up by Chinese buyers, will their next round of hiring occur in Sydney, or Shanghai? Under the terms of the ChAFTA this is a very real possibility. Austnet, which is partly owned by China State Grid is currently lined up as the prime bidder for the privatisation of NSW transmission network provider Transgrid³.

Jobless tradespeople will take little consolation in the knowledge economic and labour modelling indicates there will be opportunities in the wine export business in eight years' time.

This submission is not an attack on China – far from it. China remains an important trading partner, however our trade agreements require close scrutiny and the Committee has a responsibility to ensure that Free Trade Agreements are in the interests of all Australians regardless of with whom the agreements are struck.

The current China Australia Free Trade Agreement and its accompanying arrangements are not in our interests, and never will be, while it contains provisions that undermine jobs and standards. They are unsafe, unfair and unnecessary.

² <http://www.dailytelegraph.com.au/news/nsw/electricity-networks-sharpen-the-axe-for-3000-jobs/story-fni0cx12-1227419240471>

³ <http://www.afr.com/business/energy/electricity/ausnet-services-primed-to-take-lead-on-transgrid-bid-20150713-giasxm>



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Recommendations

We submit the following recommendations to the Committee:

Recommendation 1

The Committee makes a finding that the ChAFTA is not in the Australian national interest and should not be ratified in its current form.

Recommendation 2

Investor State Dispute Settlement clauses, or any similar arrangements, undermine Australian legal sovereignty. These arrangements and clauses should be immediately removed from the ChAFTA, and any future trade agreement or treaty that Australia enters into.

Recommendation 3

Labour Market Testing is a critical tool for ensuring the interests of the Australian domestic workforce are protected. The ChAFTA provisions which remove, exempt or water down Labor Market Testing requirements in Australia should be immediately stripped from the ChAFTA and its accompanying documents.

Recommendation 4

The ChAFTA side letter on skills assessment and licencing should be revoked in its entirety immediately, and mandatory skills assessment for those listed occupations should be re-instated immediately as part of the visa process.

Recommendation 5

The ChAFTA should be referred to the full Parliament for an open debate, including aspects that do not require implementing legislation.



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Recommendation 6

That a full, public study of the environmental impacts of the ChAFTA be carried out urgently, with the findings to inform the inclusion of a new chapter in the agreement that deals with environmental standards that includes commitments by governments to implement agreed international environmental standards which should be enforced by the government-to-government disputes process of the agreement.

Recommendation 8

The ChAFTA should include commitments by governments to implement agreed international labour rights and enforced labour exclusion which should be enforced by the government-to-government disputes process of the agreement.

Recommendation 9

Prior to the final ratification of the ChAFTA the conducting and release of detailed social and economic impacts assessments of the ChAFTA text and its accompanying documents, followed by immediate commencement of detailed stakeholder consultation (including industry, unions and civil society groups).



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Side Letter on Skills Assessment and Licencing

An independent and transparent process for both skilled and semi-skilled temporary migrants is essential to ensure that qualifications gained overseas and held by temporary overseas workers meet the contemporary requirements of Australian qualifications and licensing arrangements. This is in the interests of both the worker and the employer and the public.

The ChAFTA has a separate side letter on Skills Assessment *“which constitutes an integral part of the agreement”*⁴ which agrees to streamline relevant skills assessment processes for temporary skilled labour visas. This includes reducing the number of occupations currently subject to mandatory skills assessment for Chinese applicants for an Australian Temporary Work (Skilled) Visa (subclass 457).

The ChAFTA skills assessment and licencing side letter exempts overseas workers from China from in ten occupations, including electricians, from having their skills tested through mandatory skills assessment before they are granted visas to work in Australia, as happens currently.

The side letter on skills assessment and licencing reads:

‘Australia will remove the requirement for mandatory skills assessment for the following ten 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]*

⁴ ChAFTA Side Letter on Skills Assessment and Licencing.



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*Motor Mechanic (General) [32 12 11]
Motorcycle Mechanic [32 12 13]*

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.'

There evidence presented from the Government that justifies the removal of the requirement for mandatory skills assessment of these professions and the action was taken with no meaningful consultation with industry or state government.

For our trades specifically, in our view this represents the most stringent attack on licenced electrical trades in Australian history, and will only serve to undermine the quality and value of our well trained Australian electrical workers, and increase the likelihood of occupational and public health and safety risks.

When these concerns have been put to the Government, the response has been concerning. In answer to these important questions the Government states that applicants will still be required to demonstrate to the Immigration Department that they possess the requisite skills and experience to work in this country, including evidence of identity, work history, qualifications, memberships of relevant bodies or association, references and other documents.

This confirms that mandatory skills assessment in Australia for Chinese electrical workers will no longer be performed, and that the Immigration Department will do no more than inspect paperwork.

In short, under ChAFTA proper skills testing has been reduced to a paper shuffle.



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Additional skills assessment from a registered training organisation approved by Trades Recognition Australia will be only be conducted in limited circumstances if further verification is required by the Immigration Department, usually after a visa has been granted. The Immigration Department does not have the technical expertise to make the decision on whether further verification is required in the 10 trades, that is one reason why mandatory skills assessment is so crucial.

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.

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.

It also would seem that the federal government wants to avoid all of its responsibilities by relying on the licencing regimes in state jurisdictions as an occupational licencing 'safety net'. This means that the Immigration department can approve a visa for a worker based on sighting overseas licences or training qualifications, then leave it to the states to assess the skills.

This opens up the very likely scenario where, with the visa granted by the Immigration Department, overseas workers from China will be working as electricians or trades assistants doing work they are not properly qualified to do.

The risks associated with this are enormous.



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Case Study – ABC Tissues

In 2006 a \$60 million construction project supported by the federal and NSW governments employed foreign workers on temporary work visas was closed after it received 39 safety infringement notices.

Approximately fifty workers documents revealed they did not meet basic criteria for eligibility for their 457 visas at the site in Wetherill Park, Sydney, where ABC Tissues is building a tissue-paper mill and plant.

At the ABC Tissues site there were forklift drivers and electricians without appropriate licences. The site was closed by ABC Tissues after inquiries by WorkCover. It transpired they were being paid in China, in breach of the visa conditions, by a Chinese Government-owned company acting as labour hirers.

Australian workers on the site said none of the Chinese workers could speak English, read safety signs or follow emergency procedures. Many had to be trained to perform basic tasks. One Australian tradesman said he was stunned to see one of the guest workers make a non-compliant Chinese power tool fit a socket by stripping the cord and inserting naked wires straight into the plug.

There will be little or no policing or enforcement of licencing checks by either level of government because they don't have the time or resources.

In 2013-2014 there were 35285 active 457 visa sponsors. Of these 2223 (6.3%) were monitored and only 1278 (3.62%) were actually visited. Of those that were monitored 717 (32.25%) were found to be in breach of their sponsorship obligations.

It doesn't happen now, and it will just get worse under these arrangements.

Overall there can be no confidence or solace taken in the Government's responses to the very real issues raised by the removal of mandatory skills assessment.



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Put simply, the arrangements under ChAFTA will destroy electrical trades in Australia. That is why we at the Electrical Trades Union will not rest in our efforts to protect our trades by having the unfair, unsafe and unwarranted arrangements under ChAFTA abolished.

Memorandum of Understanding on Investment Facilitation Arrangement (IFA MOU)

The ChAFTA's arrangements include a Memorandum of Understanding on Investment Facilitation Arrangements that in our view allows the importation of entire workforces for investment projects worth over \$150 million that has a Chinese investment component of as little as \$22.5 million or 15%).

The conditions under which workers can be imported, including minimum wages, skill and qualification levels, English language requirements, and any requirement for labour market testing (LMT), are all subject to negotiations on a case by case basis, with no minimum standards applying. This effectively locks out Australian workers from such projects and significantly increases the risk of worker exploitation under the IFA MOUs.

As with the ChAFTA side letters, the IFA MOU is separate from the text of the ChAFTA, but was negotiated alongside it and is integral to the overall context and operation of the CHAFTA.

The IFA MOU allows for the establishment of special arrangements between the Department of Immigration and Border Protection of Australia or its equivalent, and an eligible project company. The project company is eligible where either a single Chinese enterprise owns 50% or more of the project company, or where no single enterprise owns 50% or more of the project company, a Chinese enterprise holds a substantial interest in the project company. A footnote states that a "substantial interest" is as defined in Australia's foreign investment policy, which occurs when "a



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single foreign person has 15% or more (or several foreign persons and any associates have 40% or more) of issued shares, voting power, or potential voting power of the corporation”⁵. This means that a project could qualify with 15% to 50% of Chinese investment. Projects must be related to infrastructure development in food and agribusiness, resources and energy, transport, telecommunications, power supply and generation, environment or tourism⁶.

This is a very low and broad threshold which would include most building and infrastructure projects in a wide range of industries.

Investment Facilitation Agreements between the government 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. There will be no requirement for local labour market testing⁷.

This means that the minimum wage to be paid to the temporary workers will be the subject of negotiation between the project company and the Department of Immigration and Border Protection, and may not be equivalent to the rates paid to local workers in the industry⁸.

This is a significant risk for the exploitation of workers.

Given the removal of skills assessment for the ten occupations in the side letter discussed above, there is no way of assessing whether occupational licensing and skills standards will be met, and the ability to negotiate the minimum rate in means it

⁵ IFA MOU Clause 2a.

⁶ IFA MOU Clause 2b.

⁷ IFA MOU Clauses 6,7.

⁸ IFA MOU Clause 4.



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may be below The current Temporary Skilled Migration Income Threshold is \$53,000 which is below the rates paid to local skilled workers in infrastructure projects.

In summary, the IFA MOU enables investment projects meeting the low threshold of \$150 million to bypass the local workforce and employ unlimited numbers of temporary workers who will be tied to one employer, not subject to skills or licensing assessment, including health and safety skills, and who may be paid a minimum rate below the rates of equivalent local workers. They will be isolated from the local workforce and extremely vulnerable to exploitation.

Labour Mobility Provisions

We support a diverse, non-discriminatory labour migration arrangements and we recognise there may be a role for some level of temporary labour migration to meet critical skill needs.

However, there needs to be a proper, rigorous process for managing this and ensuring there are genuine skill shortages and Australian workers are not missing out.

The ChAFTA contains unprecedented labour mobility provisions as compared to any previous Australian trade agreement. There are several different aspects of these provisions are complex and have to be read in conjunction with each other to be fully understood.

In the ChAFTA text, labour mobility is dealt with in Chapter 10 '*Movement of Natural Persons*' and Annexure 10-A '*Specific Commitments on the Movement of Natural Persons*'. In addition there are two different Memoranda of Understanding which are not part of the text of the agreement itself, but were negotiated as a condition of reaching the agreement.



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As part of the arrangements for occupations covered by Chapter 10 of the ChAFTA the Australian government has made the explicit commitment that there will be no labour market testing or economic needs test of temporary skilled workers and contractual services suppliers. This means there is no requirement for employers to check whether local skilled workers are available to do the work, whereas past agreements have required domestic labour markets testing by employers.

All China-based and Australian companies contracted to do work on these projects can use unlimited numbers of Chinese 'standard'⁹ 457 visa workers in all 651 skilled 457 occupations with no legal obligation to prove there are no qualified Australian workers to do the job, ie to undertake 'labour market testing'.

China-based and Australian-based companies contracted to do work on these projects under the special 'Infrastructure Facilitation Arrangements' can also get 457 visas for a specified number of Chinese workers who do not meet the minimum standard 457 requirements eg workers in semi-skilled occupations, substandard English skills etc.

Under the *Migration Act 1958* companies currently have no legal obligation to undertake 457 'labour market testing' as specified in the Act as the companies are approved under a 'labour agreement'. As previously stated, the IFA MOU explicitly states that 'There will be no requirement for labour market testing to enter into an IFA' and further, that labour market testing will not be mandatory under 'labour agreements' for employers contracted to do work on the project.

There have been claims by the government that an investor may only be approved to bring in a limited number of qualified workers with the specific skills required for a limited period of time.

⁹ 'Standard' 457s means the workers meet all the minimum requirements for a 457 visa in terms of skill level of occupation, English skills, qualifications etc.



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We refute this claim as being false.

The 'limited number' applies only to the 457 visa workers brought in under the IFA MOU arrangements for 'concessional' 457 visa workers, (workers in 'skilled' occupations but who have substandard English and qualifications) and workers in semi-skilled occupations. There is no limit whatsoever on the number of Chinese 457 visa workers who meet all the minimum requirements of the 'standard' 457 visa program.

The contention that 457 workers will be here for 'a limited period of time' is also misleading as 457 visas workers can be approved for a stay in Australia of up to four years and can be extended beyond that.

Memorandum of Understanding on Work and Holiday Visa Arrangement (Holiday Visa MOU)

This Holiday Visa MOU commits Australia to grant up to 5000 multiple entry "Work and Holiday" visas per annum for young people with tertiary education and a level of proficiency in English which is assessed at as at least functional, to stay in Australia for a period of 12 months for the purposes of a working holiday¹⁰. There is no equivalent commitment for work and holiday arrangements for Australians in China.

The work is supposed to be incidental to the holiday, and visa holders are not supposed to work for the full 12 months, but there is no upper limit on the total period of employment. They may not be employed by any one employer for more than six months¹¹.

¹⁰ Holiday Visa MOU, Clause 1.

¹¹ Holiday Visa MOU, Clause 2.



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The Holiday Visa MOU will be reviewed within three years, at which time a reciprocal arrangement may be considered for Australians on working holidays in China. As with the IFA MOU, it may be changed or suspended through diplomatic channels¹².

There is no mention in the Holiday Visa MOU of compliance with applicable Australian laws and workplace standards. This is surprising, given that current lack of enforcement of these standards for workers on working holiday visas was recently exposed on the ABC *4 Corners*¹³ and *7.30 Report*¹⁴ programmes which evidenced violations of Australian laws including failure to pay even minimum wages, lack of compliance with maximum hours of work and lack of health and safety training and standards leading to workplace injuries.

In the context of these reports of exploitation of workers under current work and holiday visas, these arrangements could create greater numbers of temporary workers vulnerable to exploitation.

The scale and scope of these arrangements are greater than in any previous agreement in their application to arrangements governing temporary workers working in Australia. In stark contrast, the reciprocal provisions for Australian workers who want to work in China as much narrower in comparison.

Investor State Dispute Settlement (ISDS)

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS provisions grant additional

¹² Holiday Visa MOU, Clause s 3-7.

¹³ <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>

¹⁴ <http://www.abc.net.au/7.30/content/2015/s4259918.htm>



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special rights to foreign investors to sue governments for damages in an international tribunal if they can claim that a change in domestic legislation has ‘harmed’ their investment.

ISDS was originally designed to compensate for nationalisation or expropriation of property by governments in developing countries and to provide protection against political instability and legislation and tax changes with no recourse against the state. However, ISDS has developed concepts like “indirect” expropriation which do not exist in national legal systems. These enable foreign investors to sue governments for millions and even billions of dollars of damages or compensation if they can argue that a change in law or policy has “harmed” their investment.

In most circumstances investor state arbitration clauses will involve a choice between arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules or/and the arbitration procedures of ICSID. The formulation of this choice varies from treaty to treaty.

The ChAFTA only makes reference to the ICSID arbitration rules.

Conversely, article 10 of the Australia-Hong Kong FTA of 1993 binds the parties to arbitration under UNCITRAL rules, while the Singapore- Australia FTA of 2003 allows either party to submit disputes either to ICSID or UNCITRAL arbitration.

Many experts including Australia’s High Court Chief Justice French¹⁵ and the Productivity Commission have noted that ISDS is not independent or impartial and lacks the basic standards of national legal systems. ISDS has no independent judiciary. Arbitrators are chosen from a pool of investment law experts who can continue to practice as investment law advocates. In Australia, and most national legal

¹⁵ <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>



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systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest.

ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider and appeal mechanisms to ensure consistency of decisions.

ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. Even if a government wins the case, a 2012 OECD study¹⁶ found ISDS cases last for 3 to 5 years and the average cost is US\$8 million per case, with some cases costing up to US\$30 million.

The ISDS landscape has been transformed in recent years by new participants. An arbitration industry has emerged, led by entrepreneurial layers advising potential clients about options for resolving investment disputes through international arbitration that would not have been considered only a few years ago. In 2011, the German Government settled an ISDS case with Swedish energy company Vattenfall, which launched a €1.4 billion claim against the government for strict restrictions that were imposed on a coal-fired power plant it was planning to build on the banks of the River Elbe.¹⁷ To settle the case, the German government had to agree to withdraw the restrictions. Now Germany is facing another ISDS claim from the same energy company, this time against the decision to wind back nuclear power after the Fukushima nuclear disaster.

In 2007 TCW Group, a US investment management corporation that jointly owned with the government one of the Dominican Republic's three electricity distribution firms, claimed that the government violated Dominican Republic–Central America Free

¹⁶ http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf

¹⁷ See Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. The Federal Republic of Germany, ICSID, Request for Arbitration (20 September 2009); id., Award (11 March 2011).



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Trade Agreement (CAFTA) by failing to raise electricity rates and failing to prevent electricity theft by poor residents.¹⁸ Société Générale (SG), the French multinational that owns TCW Group, filed a parallel claim under the France-Dominican Republic agreement.

TCW launched its claim two weeks after CAFTA's enactment, arguing that decisions taken before the treaty's implementation violated the treaty.¹⁹ TCW took issue with the government's unwillingness to raise electricity rates, a decision undertaken in response to a nationwide energy crisis. TCW also protested that the government did not subsidise the electricity rates, which would have diminished electricity theft by poor residents. TWC alleged expropriation and violation of CAFTA's guarantee of fair and equitable treatment. TCW demanded US \$606 million from the government. The tribunal in this matter ruled in favour of SG, the government decided to settle with SG and TCW. The Dominican government paid the out US \$26.5 million to bring the arbitration claim to a close.²⁰

Veolia Propreté, a French multinational corporation, launched an investor-state claim against Egypt in 2012, demanding at least US \$110 million under the France-Egypt BIT over disputes relating to a 15 year contract for providing waste management services in the city of Alexandria.²¹ The corporation claims that having to comply with charges to Egyptian laws of general application violated the government's contractual commitments to keep payments to Veolia aligned with cost increases.

Among its claims, Veolia argues that changes to Egypt's labour laws- included increases to minimum wages- have negatively affected the company's investment and

¹⁸ TCW Group, Inc., et. al v. the Dominican Republic, Notice of Violations of Chapter 10 of the Central America Dominican Republic-United States Free Trade Agreement, Ad hoc—UNCITRAL Arbitration Rules (2007)

¹⁹ Letter from Paul Hastings Attorneys to the Dominican Republic Direccion de Comercio Exterior, "Notice of Violations of Chapter 10 of the Central America - Dominican Republic – United States Free Trade Agreement," March 15, 2007.

²⁰ http://peterson.live.subhub.com/articles/20091008_12

²¹ *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15 <http://www.italaw.com/cases/2101>



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that Egypt has violated its contract and the BIT's investor protections by not helping the corporation offset such costs. Additionally, no public documentation of this challenge has been released.

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico in the North American Free Trade Agreement, the Coalition Howard government did not include ISDS in the US-Australia free trade agreement in 2004. That is why the US Philip Morris tobacco company²² had to move some assets to Hong Kong and claim to be a Hong Kong company so that it could use ISDS in a Hong Kong-Australia investment agreement to sue for billions of dollars. This case has been ongoing for 4 years and has already delayed the New Zealand government from proceeding with similar legislation.

The Australian Government continued defence of its tobacco plain packaging laws in a case brought by Philip Morris Asia in the Permanent Court of Arbitration and a number of countries in the WTO dispute settlement body. This case highlights the potential (and unprovisioned) contingent liability of ISDS provisions in trade and investment agreements that confer procedural rights to foreign investors not available to domestic residents. The final outcome of the case is not expected to be known for some time. The ongoing costs to Australian taxpayers of funding the preparation and defence of the tobacco plain packaging legislation, and the ultimate ruling, are unknown, unfunded and likely to be substantial.

The main reason the Australian government has not experienced more ISDS cases is that Australia's agreements containing ISDS are with smaller developing countries, which do not have the giant corporations with the resources to launch cases. The inclusion of ISDS in recent agreements with South Korea and China are likely to lead

²² <http://www.mccabecentre.org/focus-areas/tobacco/philip-morris-asia-challenge>



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to more ISDS cases because South Korea and China now have international corporations capable of launching cases.

An examination of foreign investment trends with Australia's main foreign investment partners suggests that ISDS provisions are unlikely to have been relevant considerations in the investment decisions of Australian firms investing abroad or foreign firms investing in Australia.

Figure 1 - Australia's major foreign investment relationships – Inward and Outward Investment

Country	Inward stock (%)		Country	Outward stock (%)	
	2003	2013		2003	2013
United States	27.5	26.7	United States	38.1	28.9
United Kingdom	24.9	22.9	United Kingdom	15.7	15.7
Japan	4.4	5.3	New Zealand	6.7	5.0
Singapore*	2.1	2.5	Germany	1.7	3.5
Hong Kong*	2.7	2.1	Canada	1.0	3.3
Switzerland	2.0	1.9	Japan	3.6	3.1
Netherlands	2.1	1.5	Switzerland	1.1	2.3
China*	0.3	1.3	Singapore*	2.2	2.2
New Zealand	1.2	1.2	France	1.9	2.1
Canada	1.1	1.1	Netherlands	2.6	2.1
Other ISDS*	0.2	0.5	Other ISDS*	3.4	6.4
Other countries	30.8	33.0	Other countries	22.1	25.5
Total	100.0	100.0	Total	100.0	100.0

^a Refers to total foreign investment. * Signifies agreement in force prior to 2003 which contains ISDS provisions.

Source – DFAT 2014

Many ISDS cases are conducted in secret, but the most comprehensive figures on known cases from the United Nations Committee on Trade and Development²³ show that there has been an explosion of known ISDS cases in the last 20 years, from less

²³ http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf



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than 10 in 1994 to 300 in 2007 and 608 in 2014, of which 80% come from global corporations based in the US and Europe. US-based companies are by far the most frequent users, with twice as many cases as the country of the next largest users. The Most recent UNCTAD figures show most cases are won by investors. There are increasing numbers of cases against health, environment and other public interest legislation. Tobacco companies are systematically using ISDS cases against Australia and Uruguay to undermine public health regulation of tobacco advertising.

There has been a growing number of ISDS cases in recent years with 42 new claims in 2014. A broad range of government measures have been challenged in recent years including changes related to investment incentive schemes, cancellation or alleged breaches of contracts, revocation or denial of licenses and alleged direct or de facto expropriation (in part, the issue at the heart of Philip Morris Asia's claim against the Australian Government). While information on the amount of compensation sought by applicant investors is scarce, the amounts claimed ranged from US\$8 million to US\$2.5 billion for cases where this information was reported. However, a combined award of US\$50 billion to investors in three closely related cases in 2014 was the highest known award on record²⁴.

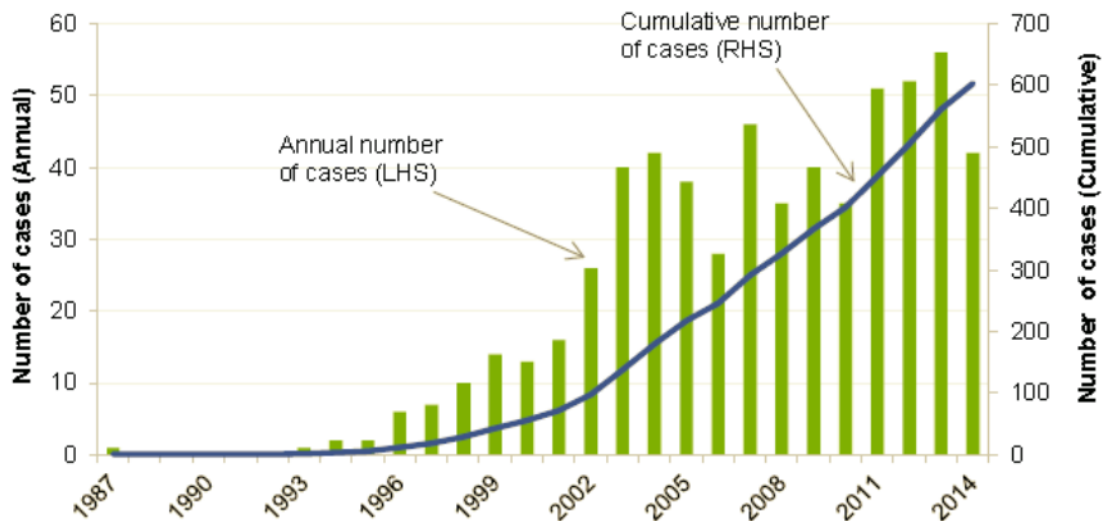
²⁴ Productivity Commission, Trade and Assistance Review 2013-14, June 2015, p77.



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Figure 2 - Known ISDS cases, 1987 to 2014



Source – Productivity Commission 2015

In short, ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors.

There is no need to give international investors additional general powers to sue governments which are not available to domestic investors.



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Case Study – Infinity Cables

The case of the Infinity Cables clearly demonstrates the risks associated with not enforcing Australian standards are met.

More than 40,000 homes and businesses nationwide have had more than 4000km of installed electrical cable from China that does not meet the applicable Australian manufacturing standard, and are now subject to a national recall by the ACCC.

(<http://www.accc.gov.au/update/infinity-cable-recall-act-now-before-its-too-late>)

Anyone who bought a house, renovated or had work done between 2010 and 2013 is potentially at risk. Safety risks will begin as early as next year in some states as the cables degrade.

The cables were made in China, and it took someone from the Cablemakers Association blowing the whistle before anyone noticed. If this is the state of play when Chinese imports aren't getting special treatment under the FTA, it's very worrying what could happen once the ChAFTA is in effect.

There also the question of whether a company like Infinity could actually sue Australia in a Trade Commission for damages if a product like this was recalled in future.

Given the way ISDS clauses are applied, it is conceivable that a company could sue the Australian government over a safety related product recall such as this.

Labour Rights

The ETU believes that skilled migrants make a valuable and substantial positive contribution to Australia's economic, social and cultural fabric and must treated with equity and respect -particularly with reference to wages and industrial conditions - as compared to Australian citizens.

Trade agreements should include commitments by governments to implement agreed international labour rights which should be enforced by the government-to-government disputes process of the agreement. The ChAFTA labour chapter has relatively low standards and weak commitments, and they are not enforceable



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through the government-to- government dispute process which applies to other chapters in the agreement.

All overseas workers should have the right to join and be represented by a trade union and also have the right to be treated fairly and equitably. Unfortunately there are still many employers who seek to exploit overseas workers or not uphold their responsibilities to Australian workers. The nature of the instances include:

- workers being engaged where skilled and qualified Australian workers were available to do the work;
- Breaches of employer sponsorship obligations;
- Under-payment of workers;
- Excessive working hours;
- Workplace bullying;
- Debt bondage;
- 457 visa workers nominated to work in skilled occupations and then being required by their employer to perform unskilled work on a regular or permanent basis;
- Employers offering to sponsor workers for permanent residency for a fee up to \$50 000
- Exorbitant charges and interest payments on loans for 457 visa holders to be placed in jobs;
- Salary deductions to pay for migrant agent fees on the promise of getting permanent residency
- Threats from employers to not join a union, including contracts that 457 visa workers are forced to sign stipulating they can be sacked for talking to a trade union;
- Attempts by employers to recover costs such as accommodation and food;



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- A number of cases where overseas workers have uprooted themselves to come to Australia only to find after a short time (or immediately in some cases) the job is no longer there.

Case Study – Schneider Elevators Australia Pty Ltd²⁵

Whilst following up a claim from an electrician regarding non-payment of wages by their employer Schneider Elevators Australasia Pty Ltd, the ETU has uncovered a much larger problem.

It was discovered that a group of 457 visa workers were forced to sleep on an office floor after being left high and dry by their employer in Melbourne. The workers (11 Filipino and 1 British) were owed six weeks' pay by Schneider Elevators and were left with no money, no job, nowhere to live and no way to get home. The majority of the 457 visa workers are Filipino, except for one from England, and were brought into the country during December 2014 to January 2015.

These workers have not only been underpaid on their normal weekly wages, but were also not been paid for many hours of overtime that they have worked on a number of projects in Melbourne. It was estimated that Schneider Elevators owed approximately \$172 000 to employees.

These workers were brought to Australia on the promise of good wages and conditions of employment, yet what transpired in reality was the opposite where they were paid well below local industry standards, lived in backpacker accommodation and when their money ran out they had to ask to sleep on the office floor because they had nowhere else to go.

The workers also revealed that Schneider Elevators had been deducting its government sponsorship fees and 457 visa fees from their wages. It left them with amounts between \$150 and \$500 per week in cash.

The ETU condemns the immoral exploitation of vulnerable workers by employers such as Schneider Elevators and it serves as a salutary reminder of why temporary visa classes and workers need government to provide a practical, effective and enforced regulatory environment – not a loose framework such as the arrangements under the ChAFTA which will simply make it easier for employers to exploit workers.

²⁵ <http://www.theage.com.au/national/workers-in-visa-row-forced-to-sleep-in-office-union-claims-20150320-1m3v7q.html>



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Environmental Standards

Trade agreements should include commitments by governments to implement agreed international environmental standards which should be enforced by the government-to-government disputes process of the agreement. The ChAFTA environment chapter has relatively low standards and weak commitments, and they are not enforceable through the government-to-government dispute process which applies to other chapters in the agreement.

Flawed Economic Modelling

The only ChAFTA specific modelling of which we are aware is the 2005 ChAFTA DFAT feasibility study²⁶, that estimated that had a China Australia free-trade agreement been signed in 2005 by 2015, Australia's GDP would have only been about \$3bn or 0.37% bigger.

The more recent CIE report modelling includes the Japan and Korean FTAs as well as the ChAFTA, and even with very favourable assumptions, and the inclusion of the other two agreements, the modelling estimates very modest economic benefits after 20 years.

Public Hearings

The ETU would welcome the opportunity to appear before the Committee at one of its public hearings.

Our state branches would welcome the opportunity to provide further localised information and case studies in support of this submission.

²⁶ dfat.gov.au/fta/acfta/feasibility_full.pdf



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Conclusion

The Blind Agreement Senate Inquiry Report²⁷ into the Australian trade agreement process criticised the current secret and undemocratic process and called for the text of trade agreements to be released for public and parliamentary scrutiny before they are signed. These demands have grown because trade agreements now deal with issues like medicines, copyright, food regulation, labour rights and other public interest issues which should be decided through the democratic parliamentary process, not secretly signed away in trade deals.

The complexity of bilateral and regional trade agreements and the potential for provisions to impose net costs on the community presents a compelling case for the negotiated text of an agreement to be comprehensively analysed before signing.

Current processes fail to adequately assess the impacts of prospective agreements. They do not systematically quantify the costs and benefits of agreement provisions, fail to consider the opportunity costs of pursuing preferential arrangements compared to unilateral reform, ignore the extent to which agreements actually liberalise existing markets and are silent on the need for post-agreement evaluations of actual impacts.

The questionable claims of job created by the ChAFTA assumes all jobs are exchangeable – that a laid-off linesman or electrician can just slot into a newly-created banking or viticulture role.

²⁷http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report



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The provisions of the agreement that allow Chinese-backed projects worth \$150 million or more to bring in workers without first advertising the jobs in Australia are deeply concerning.

In the power sector, which is capital-intensive, \$150 million is not a great deal of money. There are a number of Chinese companies considered likely buyers for the privatised New South Wales power transmission and distribution networks. The maintenance and upgrade contracts for these assets, as well as those in the Victorian energy sector that are already owned by Chinese companies, are well in excess of \$150 million.

The same is true of most large residential and commercial construction ventures. You'd be hard-pushed to find a mining operation that does not exceed the threshold, and tourism developments would be almost universally above this figure.

To allow Chinese companies to bypass the Australian labour market and bring in a workforce comprised of people untrained in Australian practices (including an electrical wiring standard that differs substantially from most countries'), and entirely dependent on their employer for residence in Australia, is both provably unsafe and economically unsound.

This is not a matter of unions simply asserting that "jobs will go" because we have an incomplete understanding of the dynamics of the labour market. We are protesting a



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manifestly damaging provision that locks all Australian trades workers and labourers out of major projects funded by Chinese-backed companies.

A professionally trained and qualified electricity network worker currently employed by a China State Grid-owned company in Victoria could be laid off and later replaced with a worker from China under the terms of the China Free Trade Agreement.

Power companies sacking thousands of workers in New South Wales²⁸. If these companies are snapped up by Chinese buyers, will their next round of hiring occur in Sydney, or Shanghai? Under the terms of the ChAFTA this is a very real possibility. Austnet, which is partly owned by China State Grid is currently lined up as the prime bidder for the privatisation of NSW transmission network provider Transgrid²⁹.

Jobless tradespeople will take little consolation in the knowledge economic and labour modelling indicates there will be opportunities in the wine export business in eight years' time.

Agreements like the CaFTA also give corporations the ability to sue governments for loss of profits if they perceive that a policy has damaged their interests. Would an attempt to protect Australian workers, or require decent redundancies or retraining

²⁸ <http://www.dailytelegraph.com.au/news/nsw/electricity-networks-sharpen-the-axe-for-3000-jobs/story-fni0cx12-1227419240471>

²⁹ <http://www.afr.com/business/energy/electricity/ausnet-services-primed-to-take-lead-on-transgrid-bid-20150713-giasxm>



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for sacked workers be grounds for a challenge under these provisions? It's more than likely.

We are not blind to the idea that the labour market can grow, but we are rightly concerned about how this happens, and what it means for the very real people it affects.

That this agreement was kept secret through a decade of negotiations is testament to how unpopular these provisions would have been if subjected to any serious scrutiny.

It will take more than vague assurances of job creation and some misapplied economic theory to convince our union that the ChAFTA can do anything but harm the working people we represent.



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Appendix 1 – Committee Terms of Reference

The Joint Standing Committee on Treaties is appointed by a resolution of appointment passed by the House of Representatives on 21 November 2013 and the Senate on 2 December 2013. The committee was appointed to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.