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Dear Mayor,

Re: Impact of Trans-Pacific Partnership (TPP) agreement on Local Government regulation and services

The Australian Fair Trade and Investment Network is a network of 60 community organisations and many more individuals which advocates for fair trade based on human rights, labour rights and environmental sustainability.

I am writing to express our concerns about the impact on local government of the Trans-Pacific Partnership Agreement (TPP) which is a trade agreement being negotiated between Australia, the US and 10 other Pacific Rim countries. The text will be finalised in the next few months. Although a trade agreement may seem remote from the concerns of local government, this agreement is relevant to local government precisely because it is not mainly about trade issues like reduction of tariffs or taxes on imports.

Although the details of the negotiations are secret we know from government statements, industry submissions and some leaked documents that the agenda is being driven by the US, on behalf of its major industries and corporations. Most of the 29 TPP chapters are about changes to domestic law which suit the interests of these industries and many are modelled on US law. The aim is to create uniform regulation across the region. Unfortunately US industry interests do not often coincide with national and community interests in other countries.

Many of these proposals could have negative effects on the regulation and services provided by National, State and local government in Australia and other countries. The negotiations have now dragged on into their fourth year partly because of resistance to US proposals.

Industry submissions and leaked documents have revealed proposals for stronger patents on medicines, which would mean higher medicine prices, reduction of government price controls on medicines through schemes like our Pharmaceutical Benefits Scheme, stronger copyright and criminalisation of copyright breaches on the Internet, less local content in government procurement and audio-visual media, and weakening of food labelling requirements. They also want Investor-State Dispute Settlement (ISDS), the right of foreign investors to sue governments for damages over domestic law or policy if they can allege it harms their investment.

Secrecy and Democracy

Like most trade agreements the details of the TPP negotiations are secret, and Cabinet will make the decision authorising the Trade Minister to sign it. The text is published and reviewed by the Joint Standing Committee on Treaties only after it is signed. The committee can only make recommendations without changing the text. Parliament cannot change the text, and can only vote on the legislation required to implement the agreement. Many provisions, including ISDS, do not require legislation.

AFTINET believes that domestic laws and policies at all levels of government should be determined through public debate and democratic Parliamentary processes, not secretly decided in trade negotiations. Governments should not be restricted by trade agreements from developing new laws, regulation and policies in response to community debate and concerns. The text of the TPP should be released for public debate and discussion before the decision is made to sign it.

Our concerns about the impact of the TPP on democracy, including local government, are summarised below.

Investor Rights to sue: impacts on democratic government laws and policies

Investor-State Dispute Settlement (ISDS) enables a foreign investor to sue a government at local, state or national level for tens or even hundreds of millions of dollars, if the investor alleges that a law or policy harms their investment. The disputes are heard by international investment tribunals. Their major concern is whether investments have been harmed and whether the investor has been given fair and equitable treatment, rather than whether the law or policy is in the public interest. Even if the case is unsuccessful, legal fees and fees paid to arbitrators mean that governments have to spend millions of dollars defending the case.

The inclusion of ISDS in any trade agreement is a dangerously short-sighted policy, which could lead to local, state and federal governments having to pay hundreds of millions of dollars in legal fees and compensation. It could also have dire consequences for the ability of governments to legislate democratically in response to community concerns, such as those of rural communities which want more government regulation of coal seam gas mining for environmental reasons

The US Lone Pine mining company is currently using an investor rights clause in the North American Free Trade Agreement to sue the Canadian Quebec government for \$250 million because it dared to conduct an environmental review of gas mining. [Fifty-four Australian rural groups](#) have written to the Trade Minister expressing their strong opposition to investor rights to sue governments because they fear similar action could be taken here following the NSW and Victorian Government state environmental reviews of coal seam gas mining.

Many Australians have been outraged by the current attempt of the Philip Morris tobacco company to sue the Australian government for hundreds of millions of damages over plain packaging legislation, using an investor state dispute clause in an obscure Hong Kong Australia investment agreement. This case is attempting to overrule not only democratic legislation but also the Australian High Court decision which found the tobacco companies were not entitled to damages under Australian law. This shows that ISDS is a threat to democracy and sovereignty.

The impact of these cases has led to an effect described as “regulatory chill”. This is a situation in which governments are made aware of the threat and costs of both protracted litigation and damages, and are discouraged from legitimate regulation because of these threats. This effect is very relevant to local government, which has fewer resources than other levels of government.

The Howard Coalition government did not agree to include ISDS in the US-Australia Free Trade Agreement. The Productivity Commission found in 2010 that there were no economic benefits from ISDS and recommended against it. The previous ALP government had a policy against including ISDS in trade agreements.

However the current Coalition Government has said it is prepared to negotiate the inclusion of ISDS in trade agreements. The Trade Minister claims that the “public welfare, health and the environment” can be excluded and there is no need to fear that Australian governments could be sued over health or environmental legislation. But the same “exclusions” in the Peru–US Free Trade Agreement and the US-Central America Free Trade Agreement did not stop the Renco lead mining company from suing the Peruvian government when they were required to clean up their lead pollution, nor the Pacific Rim Company from suing the El Salvador government because it refused a mining license for environmental reasons. Investors have also pursued cases in other countries by claiming the process of developing the law did not include “fair and equitable” treatment for them.

ISDS impacts on specific local government regulation and services

There have been examples of local governments being sued by foreign investors. The US Metalclad company used ISDS provisions in the North American Free Trade Agreement and was successful in suing a Mexican local government for US \$16.2 million because of a refusal for a waste dump permit on the grounds that it would contaminate local water sources.

There have been cases in other countries over environmental regulation, which in Australia could affect regulation at local government level. For example, some local governments have policies against the use of pesticides in parks and gardens. The US Dow Chemical Company attempted in 2009 to sue the Quebec provincial government because of an environmental ban on the use of 2-4D pesticides in public parks and other public spaces. The case was withdrawn but legal fees cost millions.

Other examples of local government decisions which could be challenged by ISDS cases include land use, planning regulations and development approvals.

Other TPP chapters which could impact on local government: services, government procurement and libraries

Services

The services chapter of the TPP has a negative list structure, which means it applies to all services unless they are specifically excluded. Because the text is secret, we do not know if local government services have been excluded. If local government services are not excluded, they must be treated as commercial services and opened up to competition from international investors. Trade rules like national treatment and non-discrimination apply to them, and governments have less ability to regulate them. This means that governments cannot require minimum levels of local investment, or that the investor must locate the service in a certain area, employ or train local people or use local products. Regulation of services must also be “not more burdensome than necessary” for investors.

Procurement

It is not clear whether local government procurement will be included in the TPP. If local government procurement is included, then government purchasing policies must also apply to national treatment and non-discrimination rules for foreign tenderers. This means there can be no requirements for local content provisions and no preference for local firms in government procurement.

Copyright charges: impacts on local government libraries

The US government is proposing on behalf of media and information technology companies that the period for copyright payments on publications, books and other creative products be extended from the life of the author +70 years to the life of the author +90 years in some cases. There are also proposals for more restrictions and criminal penalties for downloading temporary copies from the Internet. These proposals have been strongly opposed by the [Australian Digital Alliance](#), which represents schools and public libraries, on the grounds that it would greatly increase costs.

What can local government do?

We are asking you to discuss these concerns at your local Council and to raise them with the Minister for Trade, who is responsible for the negotiation of the TPP.

To assist this discussion, we have drafted some points for a resolution for debate which includes the issues raised above, and asks for the text of the TPP to be released for public and parliamentary discussion before the decision to sign it is made by Cabinet. This is not prescriptive or exhaustive. If you would like further information please visit our website at www.aftinet.org.au or call us on 02 9699 3686.

Yours sincerely



Dr. Patricia Ranald
Convenor, Australian Fair Trade and Investment Network

Draft points for local government resolution

We are concerned about the potential impact of the TPP on local government.

The TPP should not contain provisions which:

- enable a foreign investor to sue governments for damages over policy, laws or regulations at local, state or national level
- increase the period for copyright royalties and/or increases restrictions or penalties for temporary downloads from the internet
- restrict local government policies which encourage local employment support local economic and industry development and encourage good employment practices and initiatives
- restrict local government policies which encourage good environmental practices and initiatives
- restrict local government supply and regulation of services or require the commercialisation of services
- prevent local government procurement policy from giving preference to local suppliers

The text of the TPP should be released for public and parliamentary discussion before the decision to sign it is made by Cabinet.