Senate Foreign Affairs, Defence and Trade Reference Committee Inquiry

Proposed China-Australia Free Trade Agreement

Submission of the

Textile Clothing and Footwear Union of Australia

August 2015

Introduction

The Textile, Clothing and Footwear Union of Australia (TCFUA) welcomes the opportunity to make this submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the Proposed China-Australia Free Trade Agreement (ChAFTA).

The TCFUA is an organisation of employees registered pursuant to the *Fair Work Act 2009* (Cth). Our membership consists of workers employed either directly or in connection with the manufacture of textiles, clothing and footwear in Australia.

The TCFUA supports the submission made by the Australian Fair Trade and Investment Network (AFTINET), of which we are a member. We wish to make a brief submission to highlight our concerns specifically regarding areas of interest to our members and workers in the textile, clothing and footwear (TCF) industry.

For the reasons we will outline below, the TCFUA opposes the China-Australia Free Trade Agreement. Its impact on labour relations in Australia sets a new dangerous precedent for free trade agreements. It lacks labour clauses protecting the rights of workers. It contains deeply concerning (and unfinished) ISDS provisions which have been the subject of much criticism. Finally, it fails to ensure there is market testing to protect Australian jobs in the context of heightened unemployment and underemployment. The repercussions this Agreement will have on Australian workers, the Australian public and Australia's workplace relations system are far-reaching and highly alarming.

No Labour Clauses

The TCFUA is deeply concerned that the ChAFTA does not include a Labour Chapter. Such an omission demonstrates that neither party has made commitments to uphold labour rights, or to implement fundamental international labour standards.

The poor labour and health and safety standards in China, as the largest global TCF producer, are well documented, and are of serious concern. Yet under ChAFTA, the Chinese Government has no obligation to improve labour rights.

Indeed, it is the low cost of labour and exploitative conditions, which underpins the inequity in the cost of production between Australia and China and other low wage countries. Yet, ChAFTA provides an incentive for abuse of labour rights, as it grants Australia preferential market access to Chinese-made products.

The TCFUA is of the view that free trade agreements should, at a minimum, include enforceable commitments to the International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work, which establishes four fundamental labour rights and principles:

- Freedom of association and the effective recognition of the right to collective bargaining
- Elimination of all forms of forced or compulsory labour
- Effective abolition of child labour
- Elimination of discrimination in respect of employment and occupation

The TCFUA is of the view that it is in Australia's national interest to uphold labour rights and conditions. It is imperative that any free trade agreement with China contain clauses which protect, not undermine, labour, health and safety, environmental, and human rights standards.

Investor-State Dispute Settlement (ISDS) Clauses

ISDS refers to legal clauses in trade and investment agreements which allow for a foreign corporation to sue a government if it implements laws or policies seen as harming the corporation's commercial interests.

There is widespread criticism of the growing use of ISDS clauses in international trade agreements. The Productivity Commission has found that there is no evidence that ISDS has any economic benefits of that it encourages foreign investment. It has cautioned against including ISDS clauses in trade agreements because of the risks and costs that governments are exposed to through ISDS clauses.[1]

The general problems with ISDS clauses are deep-seated, and manifold. They include that:

- Arbitrators have vast discretion in these matters. There are no systems of appeals so decisions of arbitrators are final, meaning the process lacks fundamental safeguards. There is also no system of precedents, so decisions can vary widely and are frequently inconsistent.
- They employ legal concepts, such as "indirect expropriation", which are not recognised in the Australian legal system. Concepts like these allow governments to be sued for implementing laws or policies which harm investment.
- Most Australian companies do not have the resources to run ISDS cases. The companies that benefit from such clauses are the wealthiest global corporations. It is these companies that are given increased rights via ISDS clauses, at the expense of the rights of workers and the Australian public.

ISDS and Labour Laws

ISDS clauses allow companies to sue governments over decisions made in the public interest. Under the ISDS clause in the ChAFTA, it is possible that a Chinese company will be able to sue the Australian government for passing law or policy which protect jobs, labour rights or wages. Such a scenario is not purely speculative. In a current international ISDS case, the French Veolia Company, relying on an ISDS provision in a trade treaty between Egypt and France, is suing the Egyptian government over its decision to raise the minimum wage.[2]

OHS

In another international case, the government of Peru is being sued by a US company for $US800 million under an ISDS clause, because it demanded the company comply with contractual arrangements to clean up a toxic smelting plant.[3] As Australian commentators have asked, what does this mean for Australia

[1] Productivity Commission, (2015) *Trade and Assistance Review 2013-2014*, June, found at http://www.pc.gov.au/research/recurring/trade-assistance/2013-14/trade-assistance-review-2013-14.pdf.
[2] Benoît Bréville and Martine Bulard, 'The injustice industry and TTIP', *Le Monde Diplomatique, English Edition*, June 2014.
[3] Michael West, 'Trade deals acronym really translates to "we lose"', *The Sydney Morning Herald*, 20 June 2015.

enforcing its OHS and environmental laws when it comes to Chinese investment projects under the ChAFTA?[4] Journalist Michael West has asked:

> *What happens if the Chinese invest in an Australian resources project but are refused permission to operate the mine on environmental grounds? What happens if the costs blow out? Investors may have an ISDS suit, indeed even a case for loss of billions in future revenues.*[5]

Procurement

The TCFUA does not support Australian accession to trade agreements which restrict the ability of current and future Australian governments to make procurement decisions in the public interest. This includes the ability to implement national and state policies which support and encourage local employment and industry and skills development. It is in the interests of governments to allow for local preference, support and promote local employment and encourage industry innovation and ethical practices. It would be a mistake to reduce the flexibility of present and future State and Federal governments in this regard.

Lack of transparency

Because the Investment Chapter of the ChAFTA has been left unfinished, it is not clear what criteria could be used for cases where a Chinese company claims changes in Australian laws or policies harms their investment. The Agreement does contemplate "safeguards" to protect health, environment and other public welfare measures; however, the international cases mentioned above suggest such safeguards are, in practice, weak and unenforceable. Moreover, these criteria have been left to determine in three years' time, with no opportunity for Parliamentary scrutiny at that later stage. Asking Parliament to sign an agreement before knowing what is actually in it is reckless, and unacceptable.

The ISDS procedures under ChAFTA similarly suffer from a lack of transparency. Unlike ISDS clauses in other Free Trade Agreements, Article 9.17.2 of ChAFTA provides only that parties *may* make ISDS hearings and documents public; however, they are not under any obligation to do so.

No labour market testing

The ChAFTA provisions relaxing the conditions for temporary labour go further than any other trade agreement Australia has entered into before. The Agreement provides for the removal of labour market testing, meaning that there will be no requirements for an employer to prove they are unable to find Australian workers, or that there is a skills shortage in the area, before temporary visas can be granted to foreign workers.

This is in the context where there are over 800,000 Australians out of work[6] – the highest number in over 20 years.[7] Youth unemployment is 13.5% overall, and as high as 20.5% in some rural areas.[8] By removing labour market testing, ChAFTA will lead to a loss of potential local employment, as well as lower labour standards in Australia, from the expansion of temporary labour employed at minimum rates.

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[4] Ibid.
[5] Ibid.
[6] Australian Bureau of Statistics, Labour Force, July 2015.
[7] Peter Martin, 'Unemployment rate, jobs both record surprise jumps', *The Sydney Morning Herald,* 6 August 2015.
[8] Australian Bureau of Statistics, Labour Force, July 2015.

The provisions in Chapter 10, Movement of Natural Persons, allow for deregulated employment of temporary workers. Article 10.4.3 explicitly removes local labour market or economic needs testing for any category of temporary skilled worker. This marks a shift from labour market testing requirements under 457 visa provisions, where employers are required to test if local workers are available before bringing in temporary overseas workers.

Of further concern is the Side Letter the Agreement, in which the parties agree to measures to remove mandatory skills assessment for 10 key skilled occupations, including Electricians. The Side Letter does not refer to any process to confirm that the skills and qualifications to be recognised in these 10 key occupations meet the equivalent Australian standards. This could have dangerous implications for quality of work and OHS considerations.

The Side Letter, and the main text of the ChAFTA, must also be read together with the two Memoranda of Understanding on Investment Facilitation Arrangements and Holiday Visas, which were negotiated alongside ChAFTA. The MOU on Investment Facilitation Arrangements provides for special arrangements between the Department of Immigration and Border Protection and an eligible project company. In order to meet these eligibility requirements, a company needs to be involved in an investment project which meets a relatively low bar of A$150 million over the term of the project. Moreover, a company, under some circumstances, needs to have only 15% of Chinese investment to qualify.

Where DFAT assesses that a company meets the relevant criteria, then the company can negotiate with the Department of Immigration and Border Protection on the employment conditions, including minimum wages, of the temporary workers. This arrangement is excluded from the right to collectively bargain under the Fair Work Act, and wages may be below the rates paid to local workers in the industry. As set out in clauses 6 – 8 of the MOU, these agreements will be exempt from labour market testing.

This has far-reaching repercussions for the pay and conditions of Australian workers. It is conceivable that Australian companies meeting the requirement of 15% Chinese investment will be able to use the threat of pursuing an IFA during negotiations for agreements for a new project, to pressure Australian workers to accept reduced pay and conditions.

Moreover, while these projects are ostensibly intended to comply with Australian labour and OHS laws, it is likely that compliance will be poorly enforced. The lack enforcement for workers on 457 and working holiday visas has been heavily criticised. In a number of cases, temporary 457 workers have been found to be exposed to severe exploitation and even conditions akin to slavery.[9] The lack of labour market testing under ChAFTA paves the way for further exploitation of temporary workers. Moreover, under the Investment Facilitation Arrangement provisions, workers are even more vulnerable than under 457 visas. This is because under an IFA, a worker's migration status is tied to their employment, and there is no entitlement to remain in the country to find a new job before the visa's expiration (even 457 visa workers have 90 days to find a new job). Dr Joanna Howe, Senior Lecturer of Law, University of Adelaide, explains:

> *The worker's right to remain in Australia is wholly contingent upon the employer's continuing demand for their labour. Withdrawal of support from the employer-sponsor may mean cancellation of the visa. This threat, actual or*

[9] See, eg, Kieran Gair, 'Migrant worker lured to Australia, held captive in restaurant for 16 months', *The Sydney Morning Herald,* 19 July 2015.

> *perceived, may induce an IFA worker to accept any degree of substandard working conditions and creates a strong disincentive for these workers to voice concern for fear of being sent home.*[10]

The Minister has provided verbal assurances that labour market testing will occur under ChAFTA. But such assurances are not backed up by the facts, and contradict what is in the binding Memorandum of Understanding between the parties. Under the MOU, there is some opportunity for labour market testing at the final stage of the process, after the labour agreement has been made, and visas have been issued. But this will be at the discretion of the Department of Foreign Affairs, on a case-by-case basis.[11] The IFA MOU only states, in footnote 6, that there will be labour market testing *where required.*

As such, assurances by DFAT about labour market testing ring hollow. In a recent article in the Australian Financial Review, the Hon Dr Craig Emerson, former Minister for Trade, exposes the flaws in the Government's rhetoric about labour market testing:

> *In any event, the Immigration Department does not have the authority to provide any assurances about labour market testing for particular projects. That decision would be up to the government of the day. It is not difficult to imagine the present Australian government or a future government wanting to keep Australian construction workers and tradespeople off the site of large projects as an arm of its industrial relations policy.*[12]

Conclusion

The China Australia Free Trade Agreement, in its current form, contains alarming deficiencies. In particular, as outlined above, the TCFUA is concerned about:

- The lack of labour clauses in the Agreement, protecting labour rights.
- The inclusion of an ISDS clause, and in particular, the implications this has for labour rights, OHS and government procurement, as well as the lack of transparency around ISDS in this Agreement.
- No requirements for labour market testing to protect the jobs of local workers.

The China-Australia Free Trade Agreement is a poorly negotiated, flawed document, which fails to provide protection for workers, jobs and labour rights. It risks exposing Australian governments to exorbitant costs for making decisions in the national interest, without providing commensurate benefits to Australian companies, or Australian workers. In all, the effects of this Agreement will be far-reaching and damaging. For these reasons, the TCFUA opposes the ChAFTA.

[10] Joanna Howe, 'Abbott has sold out Australian workers to China', *Canberra Times*, 22 July 2015.
[11] Craig Emerson, 'Clearing the FTA labour thicket', *Australian Financial Review*, 1 September 2015.
[12] Ibid.