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Committee Secretary
Senate Foreign Affairs, Defence and Trade References Committee
PO Box 6100
Parliament House
Canberra ACT 2600
**Sent by email**: fadt.sen@aph.gov.au

Dear Mr Sullivan

**Proposed Trans-Pacific Partnership Agreement**

The Environmental Defenders' Offices of Australia (**EDOs of Australia**) welcomes the opportunity to assist the Committee with its inquiry into the proposed Trans-Pacific Partnership (**TPP**) Agreement.

EDOs of Australia is a network of eight independently constituted community legal centres specialising in public interest environmental law. Each of our offices:

- Provide legal representation and advice;
- Take an active role in environmental law reform and policy formulation; and
- Offer a significant education program designed to facilitate public participation in environmental decision-making.

We wish to comment on the following three matters, which fall under Terms of Reference 'd' (Australia's social, cultural and environmental policies) and 'g' (rights for consumers):

1. Improving national environmental laws under Chapter 20 (Environment) of the TPP;
2. Access to justice under Chapter 20 (Environment) of the TPP; and
3. The impact of Investor-State Dispute Settlement provisions contained in Chapter 9 (Investment) of the TPP.

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## 1. Improving national environmental laws under Chapter 20 (Environment) of the TPP

Chapter 20 of the TPP outlines a series of obligations which if fully implemented could improve Australia's national environmental laws, in particular the *Environment Protection Biodiversity Act 1999* (**EPBC Act**), *Fisheries Management Act 1991* (**FM Act**) and *Illegal Logging Prohibition Act 2012*. It also provides an opportunity to strengthen consumer protection under the *Competition and Consumer Act 2010* with respect to the labelling of seafood and palm oil products, respectively. For example:

- Article 20.4 requires each Party to affirm its commitment to the multilateral environmental treaties (**MEA**) to which it is signatory. This is an opportunity to improve implementation of MEAs under the EPBC Act,[1] including by amending the Act to:
    - impose a duty on all persons (including the Minister) to minimise harm to matters of national environmental significance (**MNES**);[2]
    - protect World Heritage *properties* as well as World Heritage *values*;[3]
    - include certain criteria to circumscribe the national interest exemption provisions;[4]
    - add new MNES, including Ecosystems of National Environmental Significance and significant land clearing; and
    - require the Minister to act consistently with the principles of ecologically sustainable development (**ESD**) when deciding whether to approve or refuse a controlled action (i.e. development) under the Act.[5]

- Article 20.17 requires each Party to (*inter alia*) 'take appropriate measures to protect wild flora and fauna that it has identified to be at risk within its territory, including measures to conserve the ecological integrity of specially protected natural areas, for example wetlands'. This arguably requires strengthening the EPBC Act, including by amending the Act to:
    - require an approval under the Act for any action that is likely to have more than a *minimal impact* on Ramsar wetlands;[6] and
    - include a package of measures to strengthen protections for threatened species, ecological communities and their habitats, including specific measures to strengthen critical habitat protection.

- Article 20.16 requires each party to (*inter alia*) promote the long-term conservation of sharks, marine turtles, seabirds and marine mammals through the implementation and effective enforcement of conservation and management measures. This arguably requires strengthening of the FM Act, including by amending the Act to:

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[1] The EPBC Act derives the majority of its constitutional validity from a series of MEAs to which Australia is signatory. These include the: Convention on Biological Diversity; Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention); Convention for the Protection of World Cultural and Natural Heritage (World Heritage Convention); Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention); Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

[2] As per s. 37AA of the *Great Barrier Reef Marine Park Act 1975* (Cth).

[3] The World Heritage Operational Guidelines (which are an integral part of World Heritage processes) require each Party to protect the entire World Heritage area, not just its values. See Haigh, David, Australian World Heritage, the Constitution and international law, (2005) EPLJ 385.

[4] At present, this provision confers complete discretion on the Minister to determine whether a controlled action may be exempted on the grounds that such an exemption is in the 'national interest': EPBC Act, s. 158.

[5] Rather than merely being required to take ESD 'into account': EPBC Act s. 136(2)(a).

[6] At present, the EPBC Act regulates actions that are likely to have a significant impact on MNES. It does not render these actions unlawful. Rather, it requires assessment and approval under the Act.

- include objects that place greater emphasis on biodiversity conservation;
- require all decisions made under the Act and the exercise of all functions under the Act to be consistent with principles of ESD,[7] best-available science, best practice and any relevant treaty obligations; and
- prescribe specific circumstances in which Australian Fisheries Management Authority (**AFMA**) is exempted from creating a Plan of Management (**POM**) for a fishery.[8]

We have provided detailed legal advice to Humane Society International (**HSI**) regarding best-practice implementation of Chapter 20 under the aforementioned statutes. Subject to our client's consent, we can provide the Committee with the particulars of these proposed amendments.

## 2. Access to justice under Chapter 20 (Environment) of the TPP

We wish to draw the Committee's attention to Article 20.7, which imposes obligations regarding access to justice. This arguably encompasses the inclusion of third party appeal and enforcement rights in national environmental laws.

The obligations outlined in this Article highlight the importance of the extended standing provisions contained in s. 487 of the EPBC Act.

To that end, we refer the Committee to EDO NSW's 2015 submission to the Senate Standing Committee, Environment and Communications, outlining the importance of extended standing under s. 487. This submission is available online.[9]

## 3. The impact of Investor-State Dispute Settlement provisions in Chapter 9 (Investment) of the TPP.

While Chapter 20 provides a strong basis to strengthen our environmental laws and policies, it is vital that the necessary reforms are not undermined by other provisions, in particular the Investor-State Dispute Settlement (**ISDS**) provisions contained in Chapter 9 of the TPP.

By way of background, environmental and other public policy concerns continue to be raised about ISDS provisions. More specifically, these provisions provide new ways for corporations to directly sue local, state and federal governments in private forums, instead of relying on more conventional state-to-state dispute resolution.

We briefly note four concerns about ISDS provisions relating to environment protection and public participation:

- First, notwithstanding assurances of 'appropriate protections',[10] ISDS proceedings may seek (and have sought) to invalidate government policy measures to improve environmental standards and protections.[11]

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[7] The Minister and AFMA are required to 'pursue' (rather than implement) a range of objectives in administering the Act, including 'ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development…': s. 3(1)(b). However, it is advisable that this objective be complemented by substantive provisions regarding implementation of ESD, best-available science, best practice and relevant treaty obligations.

[8] Currently, s. 18(1A) provides AFMA with broad discretion to determine whether or not a POM is warranted for a particular fishery.

[9] https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2241/attachments/original/1442298845/150911_EPBC_Amendment_Standing_Bill_2015_-_EDOA_sub_FINAL.pdf?1442298845

- Second, while government policy measures may be defensible, the threat of lengthy and expensive ISDS disputes is no less real. This may have a 'chilling effect' on future government policies to improve environmental standards or address emerging public policy challenges.
- Third, evidence suggests that the number and cost of ISDS disputes has rapidly increased.[12] Rulings and settlements often involve multi-million dollar transfers from developing country governments to multinational corporations. This raises questions of intragenerational and intergenerational equity.
- Finally, ISDS cases are often conducted in private, so the outcomes of disputes and even the parties involved may not be publicised or scrutinised. This can erode transparency, accountability and public confidence in the legitimacy of international trade agreements.

Overall, the complex issues surrounding ISDS provisions demonstrate the need for the Committee to scrutinise the impact that these provisions may have on implementation of Chapter 20 of the TPP, and on national environmental laws more generally.

Please do not hesitate to contact us if you have any questions about the issues raised in this letter.

Kind Regards,

Dr Emma Carmody
**Policy and Law Reform Solicitor**

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[10] For example, the KAFTA NIA notes in very brief terms:

> *KAFTA includes an investor-state dispute settlement mechanism [in the Investment Chapter (Chapter 11)] with appropriate protections in areas such as public welfare, health, culture, environment and foreign investment screening.*

[11] In *Vattenfall I v Germany*, €1.4 billion claims forced the City of Hamburg to drop environmental standards for a foreign owned coal-fired power plant on the Elbe River (see: http://www.foeeurope.org/isds). In *Ethyl v Canada*, a US corporation forced Canada to reverse a ban on toxic chemicals and pay a $13 million settlement (see: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl-08.pdf).

[12] 2012 saw the highest number of new ISDS cases (58). A further 57 cases commenced in 2013. This brings the total number of known ISDS cases to 568. Two-thirds have been brought against developing or transitional countries. See UNCTAD, *Recent developments in Investor-State Dispute Settlement (ISDS)*, 2013 and 2014, at http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.