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Hon. Members  
Joint Standing Committee on Treaties  
Parliament House  
CANBERRA ACT 2600

Dear Hon. Members

RE: TRANS PACIFIC PARTNERSHIP AGREEMENT (TPP)

The principal object of our organisation is to advance the conservation of birds in Queensland. The fulfilment of this object has many positive consequences for present and future generations of Australians, including the maintenance of biodiversity and viable ecosystems that underpin sustainable use of our natural assets such as grasslands, forests, river systems and coastal and marine habitats. It is critical to the national interest of Australia that we are able to demonstrate to domestic and international customers that our industries are sustainable and not environmentally destructive. To take but one example, **Meat and Livestock Australia** state on their website:

*“MLA invests up to \$5.7 million a year in environment and sustainability R&D. This investment aims to help producers improve the short and long-term environmental credentials of their business, while boosting productivity. It also assists producers in ensuring community expectations of responsible land stewardship and management are met.”*

<http://www.mla.com.au/Research-and-development/Environment-sustainability>

Our national interest in this regard faces an unprecedented threat in the form of Climate Change and environmental degradation. For bird biodiversity, predictions are alarming and we are already seeing some bird species undergoing habitat loss and calamitous population decline. Trying to reverse this will involve significant public expense. Ignoring it will lead to extinctions, impoverished ecosystems and diminished capacity for sustainable resource use. It is our strong belief that Australian governments in the near future will need to pursue very flexible environmental strategies underpinned by costly scientific research if Australia's good environmental credentials are to be maintained for our future prosperity.

It is on this account that we are moved to make a submission to you on the TPP and we are grateful for this opportunity. We make no case for or against the

Agreement itself but wish to question the national interest value of the Investor-State Dispute Settlement (ISDS) provisions which, in certain circumstances, permit foreign corporations to sue national governments for loss of profits consequent upon government decision-making. As Australians, we are all of course aware that our government has been sued under certain ISDS-type rules by Philip Morris Limited over our Tobacco Plain Packaging laws and any judgment obtained would be paid out of Australian consolidated revenue i.e. the public purse. In theory, therefore, ISDS rules are a means of placing private corporate profit above the public interest policy-making of governments. That may be ethically acceptable where the government decision-making is flawed or sham, but where governments are truly acting in the national interest and in line with their community expectations, defending litigation and being ordered to pay damages to a private corporation that acts only in the financial interests of its shareholders is, in our view, ethically unsupportable.

With concern, we note the words of Chief Justice French of the High Court of Australia in a speech on 9 July 2014 that “arbitral tribunals set up under ISDS provisions are not courts. Nor are they required to act like courts. Yet their decisions may include awards which significantly impact on national economies and on regulatory systems within nation states. Questions have been raised about the consistency, openness and impartiality of decisions made in ISDS arbitrations.”

We further note the suggestion that the ISDS provisions may create a “regulatory chill” effect. As we understand it, this would occur when a government is dissuaded from making and implementing decisions that are truly in the public good for fear of inviting expensive litigation from a foreign corporation that had, in earlier times and circumstances, acquired a valuable interest in the local economy. This, indeed, is our principal concern. As stated above, we believe that our governments will need to meet the challenge of Climate Change with a suite of flexible and innovative environmental policies. We further believe that it would not be in the national interest to have that policy-making process impeded, directly or indirectly, by ISDS arbitral tribunals giving priority to the shareholders of private corporations that acquired a valuable interest (such as mining or grazing) in times past when the perils of Climate Change were not recognized and environmental threats were less severe.

As this scenario involves government and private corporations, we feel it is relevant to note growing criticism of the current state of Corporation Law, particularly through the Corporation 2020 movement (<http://www.corporation2020.org>). We commend the words of Pavan Sukhdev that corporations must look beyond shareholder dividends and now need “to evolve in order to secure not only the corporate form but also the future of mankind on our only home, Planet Earth.” They need to broaden their focus “to forge an ‘economy of permanence’, also known as a green economy or a sustaining economy, one which increases human well-being, increases social equity, decreases environmental risks, and decreases ecological scarcities” [ P. Sukhdev, *Corporation 2020*, Island Press, 2012, p. 11].

Putting aside such idealism, we note that the Law Council of Australia supports the TPP as “a boon for the Australian legal profession”:

[http://www.lawcouncil.asn.au/lawcouncil/images/1602 --  
\\_TPP provisions a boon for the Australian legal profession.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/1602_-_TPP_provisions_a_boon_for_the_Australian_legal_profession.pdf)

We also note that Chief Justice French in his speech referred to submissions made by the Law Council of Australia to the effect that the inclusion of ISDS provisions in any agreement should be assessed on a case-by-case basis. He stated that the LCA “also points out that there are exceptions to ISDS provisions which can be made along the lines of Art 20 of the GATT 1947, such as exceptions for the protection of human and animal health and welfare, the environment and public morals.” This we feel is the answer to this dilemma.

We urge that **the TPP not be adopted unless the ISDS provisions are expressly excluded from applying to government decision-making for the protection of the environment.** It would not be in Australia’s national interest to place limitations, real or perceived, upon its ability to exercise full flexibility in responding to the threat of Climate Change, which threat we note has bipartisan recognition in Australian politics. We also consider it against the national interest for Australian consolidated revenue to be burdened with recompensing private shareholder profit expectations that arose in historical circumstances that have lost their relevance. Those monies should instead be directed to the scientific research that will be essential to successful climate change adaptation.

Yours sincerely



President  
Birds Queensland