

Dissenting Report by Senator Rex Patrick

Issues with the TPP need to be addressed before, not after

The Work of the Committee and the Parliament

1.1 I thank the committee for the work it has done in relation to this inquiry, and note that there has been an extensive level of parliamentary scrutiny of the Trans-Pacific Partnership (TPP), including three inquiries by the Joint Standing Committee on Treaties and one inquiry by the Senate Foreign Affairs, Defence and Trade References Committee.

1.2 While this level of parliamentary scrutiny may be unprecedented for a trade agreement, it is for good reason.

1.3 Centre Alliance does not support the committee's recommendation to pass the bills. Centre Alliance is of the view that bills must be amended to ensure that harmful Investor-state dispute settlement (ISDS) clauses do not apply to this trade agreement and that labour market testing is not waived under the trade agreement.

ISDS Provisions

1.4 As noted in my additional comments to the Foreign Affairs, Defence and Trade References Committee report into the TPP, ISDS provisions allow foreign corporations to sue the Australian Government if they believe they have been affected by changes in public policy. The sole aim of the provisions is to protect foreign investment, shifting sovereign risk from the investor to the taxpayer.

1.5 It is completely improper that Australia is signing up to an agreement that still contains rights for foreign investors to bypass national courts and sue governments for millions and potentially billions of dollars in international tribunals if they can argue that a change in law or policy has reduced the value of their investment.¹

1.6 ISDS provisions are an attack on Australia's legal sovereignty and must be removed from this trade agreement and any future trade agreements that Australia is a party to.

Labour Market Testing

1.7 I also noted in my additional comments to the Foreign Affairs, Defence and Trade References Committee report that while concerns of underemployment and low wages are at an all-time high in Australia, the TPP-11 in its current format would see labour market testing waived for 'contractual service suppliers' for six signatory countries. This would mean workers from Canada, Peru, Brunei, Mexico, Malaysia and Vietnam would be able to fill jobs in Australia without these jobs being offered to Australians first.

1.8 The waiving of labour market testing is unacceptable and must be reinstated.

1 AFTINET, *Submission 12*, p. 1

Support from the Labor party

1.9 It is clear that the Labor party is not comfortable with ISDS provisions or the waiving of labour market testing. It is disappointing that when Labor had the opportunity to push back, even if it were to achieve some minor concessions, they have signalled they will not.

1.10 It is great that Labor believe the way Australia negotiates free trade agreements need to change² but the current trade agreement presents the best opportunity to do so.

1.11 Labor also moved a second reading amendment to the TPP enabling legislation in the House of Representatives. It is quite remarkable. Paragraph 1 of that amendment notes the following:

...the Coalition Government has waived labour market testing for contractual service suppliers for six new countries in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership as well as including investor state dispute settlement mechanisms which Labor does not support.³

1.12 But Labor has stated publicly it isn't going to stand in the way of the enabling legislation; they are going to wave it through. If they don't support the waiver of labour market testing, and if they don't support the inclusion of ISDS clauses, then one must wonder why they are supporting the very legislation that gives effect to them.

1.13 Labor's support for these bills will mean that the enabling legislation will sail through the Senate and become law. Labor says they will fix things when they get into government. They are certainly feeling confident, but it's still a pretty big assumption that they will form government after the next election.

1.14 Even if they were to form government in the next parliament it is highly likely that Labor won't be changing course on trade policy. There will be a lot of talk about greater openness and transparency in the negotiations. There will be policy reviews. Numerous experts will be called in to look at things. But I doubt it will amount to much. I doubt very much that there's much stomach on the part of Labor's frontbench to challenge the trade orthodoxies within the Foreign Affairs and Trade bureaucracy.

1.15 If Labor's policy backflip is anything to go by, there will be much talk about the difficulties of revisiting existing agreements and about the challenges of trade policy in the context of the US presidency of Donald Trump. They will eventually say that it's all too hard and will seek to move the policy conversation elsewhere.

2 AFTINET, *Submission 12*, p. 1

3 Second reading amendment moved by the Hon. Jason Clare MP, Shadow Minister for Trade and Investment, *Proof House of Representatives Hansard*, 13 August 2018, p. 7

The pathway forward

1.16 While it is acknowledged that the TPP cannot be amended by these bills, or by amendments to these bills, there is a way around this 'take it or leave it' approach.

1.17 Labor is in a position to delay the commencement of these bills, and therefore the TPP, if it supports an amendment to prevent the bills from commencing until bilateral side letters are exchanged between Australia and each other party to the Agreement agreeing that:

- Chapter 9 of the Agreement, which deals with Investor-State disputes, does not apply in relation to an investment in Australia; and
- Labour market testing must occur in relation to contractual service suppliers entering, or proposing to enter, Australia from the other Party.

1.18 If the above amendments are unsuccessful, alternative amendments should be passed to include a sunset clause so that unless bilateral side letters are exchanged relating to ISDS provisions and labour market testing by 1 January 2020 the legislation will automatically be repealed.

1.19 Labor has the numbers in the Senate to stop the TPP-11 coming into effect until after the cancer is cut out of the agreement. Labor has the numbers in the Senate to legislate its recently announced intention to have the bad parts of the TPP-11 removed next year, irrespective of the election outcome.

Recommendation 1

1.20 That the commencement date of the legislation be delayed until bilateral side letters are exchanged between Australia and each other party to the Agreement agreeing that:

- **Chapter 9 of the Agreement, which deals with Investor-State disputes, does not apply in relation to an investment in Australia; and**
- **Labour market testing must occur in relation to contractual service suppliers entering, or proposing to enter, Australia from the other Party.**

Recommendation 2

1.21 That in the event recommendation 1 is not agreed, alternative amendments should be passed to include a sunset clause so that unless bilateral side letters are exchanged relating to ISDS provisions and labour market testing by 1 January 2020 the legislation will automatically be repealed.

Recommendation 3

1.22 That unless either of the above recommendations is adopted, the bills be opposed.

Rex Patrick
Senator for South Australia