

The Senate

Legal and Constitutional Affairs
Legislation Committee

Customs Amendment (Comprehensive and
Progressive Agreement for Trans-Pacific
Partnership Implementation) Bill 2018
[Provisions]

Customs Tariff Amendment (Comprehensive
and Progressive Agreement for Trans-Pacific
Partnership Implementation) Bill 2018
[Provisions]

October 2018

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ISBN 978-1-76010-845-8

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Recommendation 1

2.1 The committee recommends that the bill be passed.

Chapter 1

Background and issues raised

1.1 On 23 August 2018, the Senate referred the provisions of the Customs Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Bill 2018 [*Provisions*] (Customs bill), and the Customs Tariff Amendment (Comprehensive Agreement for Trans-Pacific Implementation) Bill 2018 [*Provisions*] (Customs Tariff bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 10 October 2018.¹

1.2 The Senate Selection of Bills committee recommended that these bills be referred for inquiry to allow '[f]urther scrutiny by non-government Senators'.²

Background to the bill

1.3 The bills would amend the *Customs Act 1901* (Customs Act) to implement Australia's obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11). The TPP-11 is an international free trade agreement (FTA) that was signed by 11 countries, including Australia, on 8 March 2018 in Santiago, Chile. On introducing the bill, the then Minister for Trade, Tourism and Investment, the Hon. Steven Ciobo MP, outlined the benefits of the agreement:

The TPP-11 is one of the most comprehensive trade deals ever concluded and will eliminate more than 98 per cent of tariffs in a trade zone spanning the Americas and Asia, with a combined GDP worth \$13.7 trillion. Australian farmers, manufacturers and services exporters will benefit from new market access opportunities in economies with nearly 500 million consumers.

It will provide better access for farm exporters including beef and sheep meat producers, dairy producers, canegrowers and sugar millers, as well as cereal and grains exporters. There will be new opportunities for our rice growers, cotton and woolgrowers, horticultural producers and our wine exporters...

Our manufacturers will benefit from the elimination of tariffs on industrial goods. Our services exporters will have access to liberalised and improved regulatory regimes for investment, notably in mining and resources, telecommunications and financial services.

The TPP-11 is truly a next-generation trade agreement.

And for the first time in a trade agreement, TPP-11 countries will guarantee the free flow of data across borders for services suppliers and investors as part of their business activity. This 'movement of information' or 'data flow' is relevant to all kinds of Australian businesses—from a hotel which relies

1 *Journals of the Senate [Proof]*, No. 113, 23 August 2018, pp. 3606–3608.

2 Selection of Bills Committee, *Report No. 9 of 2018*, 23 August 2018, p. [3] and Appendix 1.

on an international online reservation system to a telecommunications company providing data management services to businesses across a number of the TPP-11 markets. It's important to note that TPP-11 governments have retained the ability to maintain and amend regulations related to data flows, but have undertaken to do so in a way that does not create barriers to trade.³

1.4 According to the Department of Foreign Affairs and Trade, the TPP-11 is:

...[an FTA] between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam...

This Agreement is a separate treaty that incorporates, by reference, the provisions of the Trans-Pacific Partnership (TPP) Agreement (signed but not yet in force), with the exception of a limited set of provisions to be suspended. The 11 countries have a shared vision of the Agreement as a platform that is open to others to join if they are able to meet its high standards.⁴

1.5 Essentially, the TPP-11 replicates many of the provisions of the earlier TPP FTA (now sometimes called TPP-12, to distinguish it from the later TPP-11). There are, however, significant differences. Most importantly, the TPP-11 does not include the United States as a member state. Consequentially, it omits some of the original agreement's provisions, as outlined in the Customs Bill Explanatory Memorandum.⁵

1.6 Regarding the opportunities for Australia in being a party to the TPP, DFAT has stated:

The TPP is a regional free trade agreement of unprecedented scope and ambition with great potential to drive job-creating growth across the Australian economy.

TPP outcomes include new market access opportunities for Australian exporters of goods and services, as well as investors, that are additional to Australia's existing free trade agreements. For investment, the TPP will create new opportunities and provide a more predictable and transparent regulatory environment.

The TPP will also establish a more seamless trade and investment environment across 12 countries by setting commonly-agreed rules and promoting transparency of laws and regulations. The TPP will provide

3 The Hon. Steven Ciobo MP, Minister for Trade, Tourism and Investment, *Proof House of Representatives Hansard*, 23 August 2018, p.6.

4 Department of Foreign Affairs and Trade, 'About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)' at <https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx> (accessed 27 September 2018).

5 Department of Foreign Affairs and Trade, 'TPP-11 Myth busters' at <https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Pages/tpp-11-myth-busters.aspx> (accessed 27 September 2018). Note the Customs Bill Explanatory Memorandum includes a chart outlining all the provisions of the TPP-12 that have been suspended in the TPP-11 agreement at Attachment B, pp. [28–33].

greater certainty for businesses, reduce costs and red tape and facilitate participation in regional supply chains.

The TPP addresses contemporary trade challenges in ways that have not previously been addressed in Australian FTAs, such as commitments on state-owned enterprises, which will promote competition, trade and investment and enable Australian exporters to compete on a more level playing field.⁶

Provisions of the bills

1.7 The bills would make amendments to the Customs Act to implement Australia's commitments as a signatory to the TPP-11.

1.8 The Customs bill would introduce new rules of origin for goods imported into Australia from nations that have entered into the TPP, as well as make provision for Australian authorities to ensure that Australian exporters meet relevant country-of-origin rules under the TPP. According to the bill's Explanatory Memorandum:

The TPP-11 amendments contained in the Bill will enable eligible goods that satisfy the new rules of origin to be entered into Australia at preferential rates of customs duty. The amendments will also impose obligations on exporters of eligible goods to a Party to the TPP-11 for which a preferential rate of customs duty is claimed, and on manufacturers who produce such goods.⁷

1.9 The amendments made by the Customs bill would be complemented by the Customs Tariff bill, including its provisions:

- providing preferential rates of customs duty, on entry into force of the TPP-11, for all goods, excluding excise-equivalent goods, that are Trans-Pacific Partnership originating goods determined in accordance with new Division 1GB of Part VIII of the [Customs Act]...;
- inserting new Schedule 8B to provide for excise-equivalent rates of duty on certain alcohol, tobacco and fuel products and for phasing rates of customs duty in accordance with the TPP-11; and
- amending certain concessional items in Schedule 4 to the Customs Tariff Act to maintain customs duty rates in line with the applicable concessional item and in accordance with the TPP-11.⁸

6 Department of Foreign Affairs and Trade, 'About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11)' at <https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx> (accessed 27 September 2018).

7 Customs Bill Explanatory Memorandum, p. 2.

8 Customs Tariff Bill Explanatory Memorandum, p. 2.

Parliamentary scrutiny of the Trans-Pacific Partnership

1.10 In introducing the bills, the Minister stated that:

Here in Australia, this agreement has undergone a level of scrutiny perhaps unprecedented by any other free trade agreement. It has been subject to four parliamentary committee inquiries.⁹

1.11 These parliamentary inquiries have included work undertaken by:

- the Joint Standing Committee on Treaties, in its inquiry into the Treaty tabled on 9 February 2016 (which lapsed with the dissolution of the Senate and the House of Representatives on 9 May 2016 and so did not produce a final report);¹⁰
- the Joint Standing Committee on Treaties, in its *Report 165: Trans-Pacific Partnership Agreement* (tabled 30 November 2016);¹¹
- the Senate Foreign Affairs, Defence and Trade References Committee, in its inquiry into the *Proposed Trans-Pacific Partnership (TPP) Agreement* (tabled 7 February 2017);¹² and
- the Joint Standing Committee on Treaties, in its *Report 181: Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (tabled 22 August 2018).¹³

Financial implications

1.12 The Explanatory Memoranda for both bills contain the same Financial Impact Statement, which estimates that implementing the TPP would reduce customs duty collections by \$195 million over the forward estimates, as forecast by the 2016–17 Commonwealth Budget.¹⁴

1.13 According to the Explanatory Memoranda these estimates are still current, with the 2018–19 Budget noting that there 'would be no additional costs of implementing the TPP-11'.¹⁵

9 The Hon. Steven Ciobo MP, Minister for Trade, Tourism and Investment, *Proof House of Representatives Hansard*, 23 August 2018, p. 7.

10 See the inquiry webpage at www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016 (accessed 27 September 2018).

11 See the inquiry webpage at www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TransPacificPartnership (accessed 27 September 2018).

12 See the inquiry webpage at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP (accessed 27 September 2018).

13 See the inquiry webpage at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11 (accessed 27 September 2018).

14 See the Customs Bill Explanatory Memorandum and the Customs Tariff Bill Explanatory Memorandum, both at p. 2.

15 See the Customs Bill Explanatory Memorandum and the Customs Tariff Bill Explanatory Memorandum, both at p. 2.

1.14 The Customs Bill Explanatory Memorandum includes a Regulatory Burden and Cost Estimate, which suggests that the TPP is expected to reduce compliance costs for Australian exporters to TPP-11 Parties. This would come from two sources:

First, the ability of exporters to use one set of documentary procedures to export to 10 other markets instead of under eight separate FTAs plus two non-FTA partners. Second, the possibility that some businesses that previously sought and obtained non-preferential certificates of origin (COOs) may now be able to self-certify the origin of their goods for exports to Brunei Darussalam, Canada, New Zealand, Mexico, and Vietnam. Existing agreements allow businesses to self-certify the origin of their goods for exports to Chile, Japan, Malaysia, Peru and Singapore.¹⁶

Compatibility with human rights

1.15 According to the Explanatory Memoranda, the bills are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.16 The Explanatory Memorandum for the Customs bill recognises that it engages the Right to not be subjected to arbitrary or unlawful interference with privacy in Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*.¹⁷ It concludes that the bill is compatible with human rights, as 'to the extent that it may engage the right to privacy, [its provisions] will not constitute an unlawful or arbitrary interference with privacy'.¹⁸

1.17 Regarding the Customs Tariff bill, the relevant Explanatory Memorandum states that its provisions do not raise any human rights issues.¹⁹

1.18 The Senate Scrutiny of Bills Committee stated that it had no comment in relation to the bills.²⁰

Regulatory impact

1.19 The Explanatory Memorandum for the Customs bill contains a Regulation Impact Statement covering both bills. This outlines the potential risks of Australia not becoming party to the TPP, should it choose to do so following the withdrawal of the United States from the agreement on 23 January 2017.²¹ These risks would primarily be missing out on the forecast benefits of the agreement, including that it is expected to:

16 Customs Bill Explanatory Memorandum, Attachment C, p. [1].

17 Customs Bill Explanatory Memorandum p. 24.

18 Customs Bill Explanatory Memorandum, p. 25.

19 Customs Tariff Bill Explanatory Memorandum, p. 12

20 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2018*, 12 September 2018, p. 10.

21 The original agreement cannot come into force without the participation of the United States, which signalled its intention to withdraw on 30 January 2017, a decision confirmed and formalised by Presidential Memorandum. See Customs Bill Explanatory Memorandum, Attachment B, p. [2].

- deliver commercially meaningful market access gains that will benefit Australian agriculture, resources, energy and manufacturing exporters, service providers, consumers and investors;
- secure Australian exporters' competitive position in the Asia-Pacific;
- deliver faster and deeper market access gains than are possible through multilateral [World Trade Organisation] negotiations;
- be consistent with WTO requirements for FTAs, and
- complement Australia's efforts to seek additional trade liberalisation from other TPP-11 parties through the WTO and regional mechanisms.²²

Conduct of the inquiry

1.20 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 10 September 2018. The committee also wrote directly to a number of individuals and organisations inviting them to make submissions.

1.21 The committee received 15 submissions, which are listed at Appendix 1. All submissions are available in full on the committee's website.²³

Structure of this report

1.22 This report consists of two chapters:

- This chapter sets out the background and provisions of the bill, as well as the administrative details of the inquiry; and
- Chapter 2 outlines the principal issues raised by participants in the inquiry, and sets out the committee's views and recommendations.

Acknowledgements

1.23 The committee thanks all organisations and individuals that made submissions to this inquiry.

22 Customs Bill Explanatory Memorandum, Attachment B, p. [38].

23 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs

Chapter 2

Issues raised by submissions

2.1 The bills would implement Australia's commitment to the TPP, to which it became a signatory on 8 March 2018, as outlined in the previous chapter. The primary purpose of the Customs bill is to give effect to new country-of-origin requirements, in line with Australia's TPP commitments. The Customs Tariff bill, meanwhile, sets out subsequent tariffs for imports for goods originating from fellow TPP nations.

2.2 While the bills simply give effect to Australia's TPP commitments, many submissions to the inquiry were primarily concerned with the broader question of Australia's membership of the TPP. In doing so, these submissions restated positions that had been put in submissions to previous parliamentary inquiries.

2.3 In this regard, the substantive provisions of the current bills—regarding country-of-origin standards and tariff rates—were only touched on tangentially in some submissions, if at all.

2.4 This chapter sets out support for the bills in evidence received by the committee, before briefly considering concerns raised about the TPP more generally. It then sets out the committee's views and recommendations.

Support for the bill

2.5 The submission made by the Minerals Council of Australia (Minerals Council) supported the proposed tariff framework contained in the Customs Tariff bill, as it would have benefits for Australian consumers:

The Australian tariff cuts introduced by the Bills are estimated by the Government to reduce customs duty collections by \$195 million over the Budget's forward estimates period. That represents a \$195 million tax cut for Australian households and businesses.¹

2.6 The Minerals Council also noted positive effects for Australian exporters coming from the reduction of tariffs by fellow TPP member states:

In return for these tariff reductions TPP-11 parties have agreed to reduce the tariffs they impose on Australian goods. As the TPP-11 parties include several large and fast-growing countries in the region, and have a combined population of 495 million and a combined GDP of \$14.2 trillion, this will create significant new export market opportunities for Australian businesses which will, in turn, support jobs in Australia.²

2.7 The Minerals Council further noted that the bills would give effect to the TPP treaty, which would bring broad benefits to Australia:

1 *Submission 2*, p. 1.

2 *Submission 2*, p. 1.

Passage of the Bills will not only reduce tariffs for Australian consumers and businesses, it will also contribute to the TPP-11's entry into force. Entry into force of the TPP-11 will see the implementation of its wider range of commitments, which extend well beyond tariff cuts to include liberalisation of services trade and investment, and the introduction of new standards in areas such as environmental protection and labour standards.³

Concerns raised in evidence

2.8 A number of submissions voiced broad opposition to Australia's membership of the TPP on a number of grounds.⁴ The majority of this evidence did not go to the specific provisions of the bill, and instead raised matters that have been considered at length in other parliamentary inquiries. These concerns are summarised below.

Negotiation process and lack of independent review

2.9 In opposing the TPP, some submitters claimed that it had been negotiated in a 'secretive and undemocratic way', and that Australia's entry into the agreement had not been sufficiently considered by an independent review of its effects.⁵ For example, the Australian Fair Trade and Investment Network (AFTINET) argued:

The decision to sign agreements is made by Cabinet before they are tabled in Parliament and only then examined by the Joint Standing Committee on Treaties. There is no independent assessment of the economic, environmental, health and other impacts of the agreement.

Parliament has no ability to change the text of the agreement and can only vote on the implementing legislation, which only deals with immediate changes to legislation like the Customs Amendment Bills.⁶

Investor-State Dispute Settlement Provisions

2.10 Some submissions raised concerns about the TPP's Investor-State Dispute Settlement (ISDS) provisions, arguing these could impinge on the Commonwealth's

3 *Submission 2*, p. 1.

4 See: Community and Public Sector Union and the State Public Service Federation (CPSU/SPSF), *Submission 1*, p. 1; Electrical Trades Union (ETU), *Submission 3*, p. 5; ActionAid, *Submission 4*, pp. 7–8; National Tertiary Education Union (NTEU), *Submission 5*, p. 2; Mr Alex McKechnie, *Submission 6*, p. 1; Mr Carlos Andrade, *Submission 7*, p. 1; Ms Linda Link, *Submission 8*, p. [10]; Unions WA, *Submission 9* (Attachment 1), p. 1; Mr Jim Morris, *Submission 10*, p. 1; Australian Fair Trade and Investment Network (AFTINET), *Submission 12*, p. 1; Mr Tom Marwick, *Submission 13*, p. 2; Friends of the Earth, *Submission 14*, p. 2; and the Public Health Association Australia (PHAA), *Submission 15*, pp. 5–8.

5 See: CPSU/SPSF, *Submission 1*, p. 1; ETU, *Submission 3*, p. 5; NTEU, *Submission 5*, p. 1; Mr Carlos Andrade, *Submission 7*, p. 1; Ms Linda Link, *Submission 8*, p. 5; AFTINET, *Submission 12*, p. 2; Friends of the Earth, *Submission 14*, p. 1; and PHAA, *Submission 15*, p. 6.

6 AFTINET, *Submission 12*, p. 2;

lawmaking powers, and risk the financial costs of disputing or settling claims made by foreign corporations.⁷ For example, AFTINET submitted:

The TPP-11 still contains ISDS rights for foreign investors to bypass national courts and sue governments for millions of dollars in unfair international tribunals if they can argue that a change in law or policy has reduced the value of their investment. The question from a civil society point of view is still whether these rules that suit global corporations but tie the hands of governments from regulating them are in the interest of most Australians.⁸

2.11 The Public Health Association Australia (PHAA) outlined the nature of ISDS, as well as how such cases have proliferated in recent years:

[ISDS] is a legal mechanism that enables foreign investors to sue governments for monetary compensation over the introduction of policies and laws that they perceive as infringing upon investor rights conferred to them by obligations in an international trade or investment treaty. Policies and laws introduced by Federal, State and Territory or local governments can be subject to disputes. Over the last decade there has been a large increase in investment arbitration cases; from fewer than 10 in 1998 to a total of 568 known cases at the end of 2013.⁹

Trade in services

2.12 Some inquiry participants suggested the TPP-11 would place certain restrictions on regulation of trade-in-essential-services and some state-owned enterprises.¹⁰ A number of sectors were highlighted as potentially at-risk from the TPP-11's trade in services chapter, including: state and local government services; community services like child and age care; the health sector; the environment and challenges of climate change; managing carbon emissions effectively; Commonwealth regulation of water and energy markets; financial services; education; and air transport services.¹¹

2.13 AFTINET gave an example, which suggested the trade-in-services chapter of the TPP may prevent governments being able to respond effectively to crises or address new policy challenges:

7 See: CPSU/SPSF, *Submission 1*, p. 1; ETU, *Submission 3*, p. 5; ActionAid, *Submission 4*, pp. 7–8; NTEU, *Submission 5*, p. 2; Mr Alex McKechnie, *Submission 6*, p. 1; Ms Linda Link, *Submission 8*, p. [10]; Mr Jim Morris, *Submission 10*, p. 1; AFTINET, *Submission 12*, p. 1; Mr Tom Marwick, *Submission 13*, p. 2; Friends of the Earth, *Submission 14*, p. 2; and PHAA, *Submission 15*, pp. 5–8.

8 *Submission 12*, p. 1.

9 *Submission 15*, p. 5.

10 See, for example: ETU, *Submission 3*, p. 6; ActionAid, *Submission 4*, pp. 3–4; and AFTINET, *Submission 12*, p. 2.

11 See, for example, the submissions made by: CPSU/SPSF, *Submission 1*, p. 1; Ms Linda Link, *Submission 8*, pp. 1–2; AFTINET, *Submission 12*, p. 3; and PHAA, *Submission 15*, p. 4.

The TPP-11 trade-in-services chapter remains unchanged from the TPP-12. The structure of the chapter treats regulation of services as if it were a tariff, to be frozen at existing levels or reduced over time, and not to be increased in future, known as the 'ratchet' structure. The negative list structure means that all services are included, unless specifically exempted. Exemptions are intended to be reduced over time. The exemptions do not apply to ISDS, and do not prevent ISDS cases on exempted services.

The negative list and ratchet structure are specifically intended to prevent governments from introducing new forms of regulation, which are seen as potential barriers to trade.¹²

Labour rights and market conditions

2.14 Some submitters questioned whether the implementation of the TPP would lead to a reduction in labour rights for Australian workers, and the entry into Australia of increased numbers of vulnerable temporary migrant workers.¹³ For example, AFTINET submitted that:

Labour law experts have criticised the chapter because much of it is aspirational rather than legally binding. For example, the clause on forced and child labour only commits governments to 'recognise the goal' of eliminating forced and child labour. The enforcement process for those few provisions which are legally binding is more qualified, lengthy and convoluted than in other chapters of the agreement. These processes have not proven effective in other agreements. The labour rights chapter is not specifically exempted from ISDS cases, and there is no reference to labour regulation in the claimed ISDS safeguards. This means that future changes to labour laws could be the subject of ISDS disputes.¹⁴

2.15 Some evidence also argued that the TPP-11 would diminish labour market testing, which would create fewer opportunities for Australians to find and secure jobs. Unions WA submitted that:

...a matter of critical importance for Australian workers is the ongoing commitment that they will have first access to Australian jobs, through a labour market testing obligation on employers to provide evidence they have made all genuine efforts to find a suitable Australian worker before they employ a temporary overseas worker.¹⁵

2.16 This was also noted by AFTINET, which noted that workers from overseas would be tied to one employer in Australia, so could potentially be threatened with

12 AFTINET, *Submission 12*, p. 3.

13 For example, see submissions made by: CPSU/SPSF, *Submission 1*, p. 1; ETU, *Submission 3*, pp. 5–6; NTEU, *Submission 5*, p. 2; and AFTINET, *Submission 12*, p. 2 and p. 10.

14 AFTINET, *Submission 12*, p. 10.

15 Unions WA, *Submission 9*, p. 2; also see AFTINET, *Submission 12*, p. 3.

deportation should they lose their jobs, which could make them vulnerable to being exploited.¹⁶

Environmental standards

2.17 Some submitters voiced concerns that the TPP would lead to the eroding of Australian environmental standards.¹⁷ In particular, it was noted that the TPP-11 only weakly enforces commitments to international environment agreements, if at all, and that this is sharply contrasted by the legal rights of corporations to bring ISDS cases, as discussed above.¹⁸

2.18 Additionally, several submissions noted that the TPP-11 omitted consideration of climate change and, in fact, would actually increase the consumption of fossil fuels through its favourable provisions for export of fossil fuels.¹⁹

Pharmaceutical products

2.19 The PHAA commented that the Commonwealth would face some challenges in healthcare funding, should the TPP enter into force, particularly from the higher cost burden of pharmaceutical subsidies:

If the poorly drafted and ambiguous biologics provisions are interpreted in such a way that the Australian Government is not able to bring biosimilars to market in a timely fashion, the [TPP-11] could add substantially to the costs of the Pharmaceutical Benefits Scheme. These costs are likely to be passed on to consumers through higher co-payments, resulting in a financial and health burden for already vulnerable people including those on low incomes, older people, and people with chronic illnesses.²⁰

Effects on the education sector

2.20 The National Tertiary Education Union (NTEU) suggested that the quality of education for Australian students could be threatened by an increase in online services that would be allowed following the enactment of the TPP-11:

A further concern is that education standards will be placed under threat by public providers outsource the provision of educational support services to companies who are able to deliver online services within the education supply chain, at cheaper cost, and with potentially very little regulatory oversight.²¹

16 AFTINET, *Submission 12*, p. 3.

17 AFTINET, *Submission 12*, p. 2;

18 CPSU/SPSF, *Submission 1*, p. 1; ETU, *Submission 3*, p. 5; Ms Linda Link, *Submission 8*, p. [10]; AFTINET, *Submission 12*, p. 10; Mr Tom Marwick, *Submission 13*, p. 2; Friends of the Earth, *Submission 14*, p. 2; and PHAA, *Submission 15*, p. 13.

19 For example, see: ETU, *Submission 3*, p. 5; Friends of the Earth, *Submission 14*, p. 2; and PHAA, *Submission 15*, p. 5.

20 *Submission 15*, p. 9.

21 NTEU, *Submission 5* (Attachment 1), p. 5.

Committee view

2.21 The committee notes that the bills would implement our national commitment to the TPP-11, which Australia signed on 8 March 2018. The bills would set country-of-origin standards for the movement of foreign and Australian goods under the TPP, and also set out the tariff rates for goods being imported into Australia from other TPP member countries.

2.22 Much of the evidence received in this inquiry raised concerns about the nature and effects of the TPP more broadly, and so did not address the specific provisions of the bill in any detail. The committee also notes that some submissions provided to this inquiry have already been considered by one or more of the four previous parliamentary inquiries into the nature and potential effects of the TPP.

2.23 While the committee has given thought to the broad issues raised in this evidence, it considers that they have been amply explored in previous parliamentary inquiries, as well as in the work that the Commonwealth has undertaken as part of negotiating the terms of the TPP.

2.24 The committee notes that Australia has already signed the TPP. While the question of the merits or otherwise of the TPP is outside the scope of this inquiry, the committee nonetheless emphasises its view that there are clear economic benefits for Australian consumers and businesses in enacting the agreement. Given this, the committee recommends that the bill be passed.

Recommendation 1

2.25 The committee recommends that the bill be passed.

Senator Jim Molan AO, DSC

Chair

Labor Senators—Additional Comments

1.1 This is now the third inquiry into the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP) which has been conducted in this term of Parliament.

1.2 Two earlier inquiries were conducted into the original Trans-Pacific Partnership Agreement (TPP) in this term of Parliament and inquiries were also commenced in the last term before both houses of Parliament were dissolved due to the double dissolution election called by former Prime Minister Malcolm Turnbull.

1.3 According to the Centre for International Economics (CIE) one in five Australian jobs is linked to trade. That means 2.2 million Australians work in a trade-related job. 67 per cent of mining jobs and 41 per cent of manufacturing jobs are trade-related. It concludes that increasing exports will typically lead to an increase in jobs.

1.4 Increasing exports also increases wages. The work undertaken by the CIE shows that the action undertaken by the Hawke and Keating Governments to rip down tariff walls has put almost \$8,500 in the pocket of every Australian family it would otherwise not have.

1.5 The CPTPP is a new, different agreement to the TPP signed in New Zealand in February, 2016. The original agreement included 40 per cent of the world's GDP whereas the CPTPP including only 13 per cent. The CPTPP also suspends 22 provisions of the original TPP and features additional side letters, including ten new side letters between Australia and other signatories alone.

1.6 Independent economic modelling of the finalised CPTPP has been conducted by Grant Thornton on behalf of the Victorian Government. This independent economic modelling indicates that this agreement will deliver modest economic benefits in the short term and more significant economic benefits in the longer term if more countries sign up to this agreement.

1.7 Previous inquiries have raised some concerns about this agreement. Labor members of this committee are primarily concerned that the CPTPP waives labour market testing for 'contractual service suppliers' for six signatory countries and includes Investor State Dispute Settlement mechanisms (ISDS).

1.8 It is important to note that the two bills this committee considered implement only the tariff changes related to the CPTPP. These bills do not deal with the other commitments that the Australian government has made in the CPTPP.

1.9 The Shadow Trade Minister has committed that a future Shorten Labor Government will remove existing ISDS clauses and waiving of labour market testing for contractual service suppliers from this and other existing agreements through the use of side letters.

1.10 This is possible and has been confirmed by the former Trade Minister publicly. It was also done by the New Zealand Labour Government, which used side letters to remove ISDS provisions with four countries between the collapse of the TPP

and the establishment of the CPTPP under new Prime Minister Ardern. These countries were Brunei, Malaysia, Peru and Vietnam.

1.11 Since the commencement of this inquiry the Shadow Trade Minister has also announced a number of policy reforms which would fix the problems of this agreement and stop these mistakes being made in future agreements. These include:

- Prohibiting the waiver of labour market testing;
- Prohibiting the inclusion of ISDS mechanism;
- Strengthening the role of the Parliament by briefing the Joint Standing Committee on Treaties at the end of each round of negotiations and providing it with the Government's Statement of Objectives for Negotiation for consideration and feedback;
- Legislating to establish a system of 'Accredited Trade Advisors' from industry, unions and civil society groups who would provide real time feedback on draft trade agreement text during negotiations;
- Providing public updates on each round of negotiations and releasing draft texts during negotiations where this is feasible; and
- Legislating to require an Independent National Interest Assessment to be conducted on every new trade agreement before it is signed to examine the economic, strategic and social impact of any new trade agreement.

1.12 The Parliament will soon consider a private member's bill in the House and the Senate which would implement a number of Labor's new policy commitments and stop the mistakes of the CPTPP being repeated. Labor members of this committee urge all members of Parliament to vote in support of that bill.

Senator Louise Pratt

Deputy Chair

Australian Greens–Dissenting Report

1.1 The Legal and Constitutional Affairs Legislation Committee Inquiry into the Trans-Pacific Partnership Agreement (the TPP) received submissions from peak bodies from trade and investment, to public health.

1.2 Despite the evidence provided and concerns raised by these experts, the Majority report, supported by the Government dominated committee, stated its support for the TPP implementing legislation and recommended that the bill be passed.

1.3 The Australian Greens are strongly opposed to the ratification of the TPP and recommend that the legislation be rejected.

1.4 The Greens have serious concerns regarding the secrecy under which the TPP was negotiated over the course of six years, and the failure by the government to conduct any independent assessments of the TPP, despite serious concerns raised by the Productivity Commission.¹ This deal was cobbled together behind closed doors; it was created by big business, for big business. It is not surprising that such a process has been met with deep scepticism from the Australian public. The Greens believe that the archaic and secretive process of treaty negotiation needs to be redesigned so that the Australian people can be at the centre of any future deals.

1.5 The Greens are concerned about the damaging effects of the TPP on agriculture and manufacturing, with industry commissioned modelling showing that grain exports will not change and all other agriculture may decline, as well as the potential for a 2 per cent decrease in durable manufacturing.²

1.6 The Greens are deeply concerned by the stronger monopoly rights this Agreement will secure for large multi-national pharmaceutical companies. These protected monopolies will delay patient access to cheaper medicines, such as those required to treat cancer, and drive up the cost to Australian consumers.

1.7 The Greens are further concerned that the TPP includes rights for foreign companies to sue the Australian government in international tribunals if they can

1 Australian Government Productivity Commission, *Trade and Assistance Reviews 2014-15*, Productivity Commission Annual Report Series, available at www.pc.gov.au/research/ongoing/trade-assistance/2014-15/trade-assistance-review-2014-15.pdf (accessed 9 October 2018).

2 Peter A. Petri and Michael G. Plummer, *Modelling Report, September 2018: Australia will gain from continued Asia-Pacific Trade Integration*, available at www.minerals.org.au/sites/default/files/180905%20Australia%20will%20gain%20from%20continued%20Asia-Pacific%20trade%20integration.pdf (accessed 9 October 2018).

argue that a change in domestic law or policy at a national, state or local level will potentially ‘harm’ their investment, known as Investor-State Dispute Settlement (ISDS). The Greens note that the Productivity Commission have recommended that the Australian Government avoid the inclusion of ISDS provisions in any trade agreements that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.³ The Greens additionally note that ISDS provisions have been found incompatible with European law and national sovereignty by the European Court of Justice.⁴

1.8 The Greens note that the TPP contains inadequate protection for labour rights and migrant workers in accordance with recognised international standards and deeply inadequate and enforceable environmental standards.

1.9 The Greens note that the Australian Labor Party’s National Platform opposes key components of the TPP⁵ and they have indicated they will attempt to amend it if they form government. This will not be possible; the only opportunity to fix the TPP is to halt its progress now.

Conclusion

1.10 The Australian Greens do not support the passage of the implementing legislation. The Greens are troubled by key components of the TPP. These include;

- the impacts on agriculture and manufacturing;
- the predicted increase in cost to Australians regarding essential pharmaceuticals;
- the ability for large multi-national corporations to sue Australian governments;
- poor labour rights protections; and
- a lack of enforceable commitments to key international environmental agreements.

3 Australian Government Productivity Commission, *Trade and Assistance Reviews 2014-15*, Productivity Commission Annual Report Series, p. 49, available at www.pc.gov.au/research/ongoing/trade-assistance/2014-15/trade-assistance-review-2014-15.pdf (accessed 9 October 2018).

4 European Commission Fact Sheet, *Commission provides guidance on protection of cross-border EU investments – Questions and Answers*, available at [http://europa.eu/rapid/press-release MEMO-18-4529 en.htm](http://europa.eu/rapid/press-release_MEMO-18-4529_en.htm) (accessed 9 October 2018).

5 Australian Labor Party National Platform, available at www.alp.org.au/media/1299/alp_national_platform.pdf (accessed 9 October 2018).

1.11 This deal was negotiated to afford the greatest possible advantage to major, international corporations and was not designed to help regular Australians. Any moves towards ratifying the TPP would be counter to Australia's interests and should be opposed.

Recommendation 1

1.12 The Australian Greens recommend that the bill be rejected.

Recommendation 2

1.13 The Australian Greens recommend that the process for signing and ratifying trade deals and treaty agreements be radically overhauled to ensure genuine transparency and community consultation. The current system is opaque, outdated and no longer serves the public interest.

Recommendation 3

1.14 The Australian Greens recommend that there be a legislated ban on current or future Governments negotiating or signing any trade agreement or treaty that includes ISDS provisions.

Senator Sarah Hanson-Young

Australian Greens

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

Appendix 1

Submissions

- 1 The Community and Public Sector Union, State Public Services Federation (CPSU SPSF)
- 2 Minerals Council of Australia
- 3 Electrical Trades Union of Australia
- 4 ActionAid Australia
- 5 The National Tertiary Education Union (NTEU)
- 6 Mr Alex McKechnie
- 7 Mr Carlos Andrade
- 8 Ms Linda Linke
- 9 UnionsWA
- 10 Mr Jim Morris
- 11 Ms Anna George
- 12 Australian Fair Trade and Investment Network
- 13 Mr Tom Marwick
- 14 Friends of the Earth International
- 15 Public Health Association of Australia
- 16 Australian Nursing & Midwifery Federation