

NTEU National Office



Submission to the Senate Legal and Constitutional Affairs Legislation Committee

Inquiry into

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

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

September 2018

Committee Secretary

Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email: legcon.sen@aph.gov.au

9 September 2018

Dear Members of the Committee

Please find attached a copy of the NTEU's submission to Joint Standing Committee on Treaties (JSCOT) inquiry into the Comprehensive Progressive Trans-Pacific Partnership (CPTPP) or TPP-11 dated 2018 April .

Our submission raises concerns about some serious flaws in the process about to how both the TPP and now the TPP-11 were formulated and the potential consequences of its formal implementation, including that. :

- the government is yet to provide any modelling demonstrating the benefits of the TPP or indeed the TPP-11 to the Australia economy.
- negotiations continue be held in secret and not subject to broader scrutiny, but determined by executive prerogative alone,
- the potential, as with past treaties, of any such deal to handcuff Australia into further obligations which might have unintended consequences on issues such as academic freedom as a consequence of implementing legislation, as was the case with

introduction of *Defence Trade Controls Act 2012* (in response to a Australia-US Defence treaty), and

- the lack of any provision for a requirement for labour making testing.

In addition to these very serious concerns the NTEU has a more fundamental issue with TPP-11 which is the extent to which it effectively undermines our national sovereignty in relation to law-making aimed at protecting or promoting the interests of Australian citizens. Our particular concern is that TPP, and now TPP-11, does not exclude or carve out public education from the list of trade services which are covered by the agreement.

Our concerns about the lack of a carve out for public education are heightened by Australia's recent and demonstrably failed experiment with a full contestable funding in relation to the provision of vocational education and training (VET). This experiment not only undermined the financial viability of many public TAFE campuses and courses, but also saw significant rorting of the VET-FEE-HELP scheme by private for-profit providers. Indeed the rorting was so extensive, that from 1 January 2017 the Coalition Government abandoned the VET-FEE-HELP scheme and replaced it with the VET Student Loans scheme, which had far stricter eligibility requirements. The salient point from this failed policy experiment and the government's is that had Australia been a signatory to the TPP or TPP-11 at the time, this course of action:

- 1) might not have been possible because of the 'standstill' or 'ratchet' provisions which prevent a sovereign nation from imposing greater regulations, or
- 2) had it proceeded, may have given foreign owned providers a mechanism whereby they could seek compensate through the ISDS provisions (presumably even if they had been involved in some the initial rorting of the scheme.

The NTEU urges the Committee to not support the implementing legislation which is the subject of this inquiry. At very minimum, we request that Australian public education to be explicitly excluded from or carved out of the TPP-11.

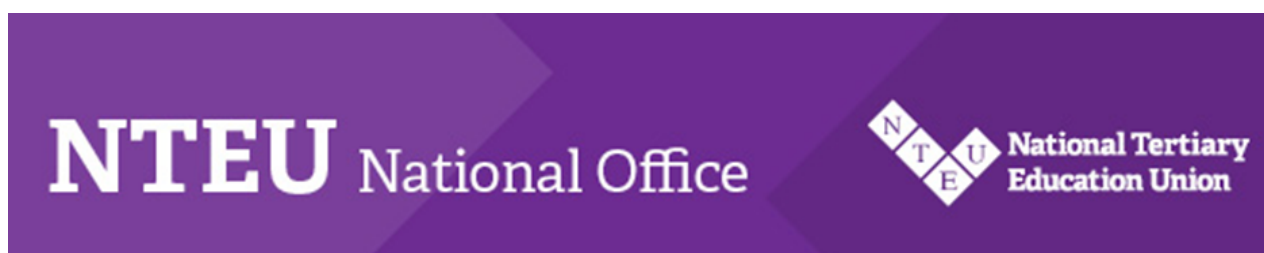
Yours faithfully,

Jeannie Rea

NTEU National President

9 September 2018

Attachment



Committee Secretary
Joint Standing Committee on Treaties
Email: jsct@aph.gov.au

20 April 2018

Dear Members of the Committee,

RE: TPP-11 Inquiry

The National Tertiary Education Union (NTEU) represents the professional and industrial interests of over 28,000 staff working in higher education, including staff in Australia's universities and research institutes and other tertiary sector organisations. On behalf of our members, we welcome the opportunity to provide a submission to the JSCOT TPP-11 inquiry.

The NTEU has had the opportunity to provide submissions previously and to give evidence at Senate Committees on matters we raise in this submission. As a trade union and a professional association representing Australia's diverse university workforce, we are deeply concerned by the likely impact of Australia's approach to negotiating trade agreements, both domestically and internationally.

Following the election of Donald Trump as the 45th US President in 2016, very few Australians anticipated that remaining TPP nations would continue to pursue the agreement. Nonetheless, without the US, and without a public mandate to secure an agreement on the same or different terms, the Australian government agreed to a host of late amendments. Telling was the fact that Canada secured side letters with every nation so that it could "adopt or maintain discriminatory requirements on service suppliers or investors to make financial contributions for Canadian content development" and "maintain measures that restrict access to online foreign audio-visual content".

Australia achieved no such commitments. The Australian government has also persistently declined to pursue provisions demanded by civil society organisations, including in relation to human rights, labour rights and environmental protections, the removal of Investor State Dispute Settlement (ISDS), or the inclusion of labour market testing in relation to labour mobility.

The Comprehensive Progressive Trans-Pacific Partnership (CPTPP) still represents the largest multilateral trade deal in history, overtaking NAFTA, covering 11 countries, 495 million people and 14 per cent of global GDP, and 15 percent of world trade. Considering the scale of its economic impact, it is incumbent upon organisations such as ours to point out the social and political risks at stake in formalising this agreement.

It is the view of the NTEU that Parliament is not genuinely taking into account the interests of the Australian people in relation to treaty-making decisions. Australians are effectively being excluded from the process. While the JSCOT review process attempts to legitimise the parliamentary process, we believe this has in fact passed its use-by date. The absence of a stronger oversight role for JSCOT, let alone the absence of any new transparency measures, means the Australian government has neither the capacity nor the resolve to demonstrate that signing up to the CPTPP, or any other trade agreement for that matter, is in the national interest.

1. There are (still) no demonstrable benefits to the Australia economy

As has been widely discussed in relation to the previous TPP negotiations, the few independent studies conducted indicate there are no demonstrable benefits to the Australian economy. A World Bank study predicted a 0.7% increase in Australia's GDP to 2030. A recent Petersen Institute study estimates that the increase to Australia's GDP would be 0.5% by 2030. A Tufts University paper argued that Australia would likely lose 39,000 jobs over the course of a decade, and that those significant job losses would be complemented by a rise in social inequality.

The NTEU is greatly concerned that the CPTPP represents an unacceptably low benchmark in relation to the negotiation of future agreements. If the Australian government cannot prove through legitimate and independent economic analysis that there are strong benefits to the Australian economy, let alone establish a legislative process that robustly, independently and transparently evaluates the economic merits of each trade agreement, it is not apparent how the government's treaty-making powers serve the national interest.

Furthermore, if trade negotiations are being used as a regional geopolitical tool then the Australian people deserve to know this from the outset, so that future losses in domestic jobs, infrastructure and economic activity can be transparently considered and debated.

2. Trade deals should not be determined through executive prerogative alone

The NTEU is concerned that the response of the Australian government to the Senate Standing Committee on Foreign Affairs, Defence and Trade's (FADT Committee) *Blind Agreement* report in 2015 undermines the legitimacy of existing and future treaty making, especially in the instance of the CPTPP.

The *Blind Agreement* report explored the current treaty-making process and made a number of modest recommendations, including the provision of a detailed explanatory statement to parliament before trade negotiations start, the tabling of agreements in Parliament prior to authorisation for signature, the tabling of an independent cost-benefit analysis of the trade agreement before authorisation, and a larger oversight role for JSCOT. The inquiry also importantly found that there were no constitutional barriers to parliament playing a greater role in Commonwealth treaty-making. We note that the Productivity Commission previously

has made recommendations for the public release of the final text and independent assessments of the costs and benefits of trade agreements.

Against this considered advice, the Australian government stated on 6 July 2017 that “Australia's existing treaty-making system is working well, but the Government will continue to explore new options for securing input from stakeholders and disseminating information on free trade agreements”. We would remind the Committee that the only reason why most civil society organisations were able to comment on the substance of the TPP was because key chapters were illicitly released by the Wikileaks organisation. Is this demonstrative of a system working well? By ignoring both the Productivity Commission and the FADT committee, it is peculiar that the Australian government has elected to not proceed with any alternative safeguards to protect the integrity of the treaty-making process.

The NTEU emphasises that a significant moment passed when the Turnbull government decided not to fully engage in the process or adopt the recommendations of the *Blind Agreement* report. The decision taken by the Turnbull government to avoid the introduction of basic transparency and accountability measures leads us to conclude that the Australian government has responded by privileging the almost unfettered discretion it exercises over the Australian body politic in relation to treaty making. This process remains largely unaccountable.

3. Australia could be handcuffed to further obligations

In a previous submission to the FADT Senate Committee, the NTEU detailed evidence about how the terms of a major Defence Treaty between Australia and the US did not anticipate the introduction of implementing legislation that fundamentally impacted upon the academic freedom of university researchers. In the first instance, neither consultation during the treaty process, nor in relation to the initial 2012 legislation included university representative bodies such as the NTEU. In fact, legislation impacting the university sector was introduced only following an exchange of diplomatic notes after the treaty was signed. The lack of transparency about this agreement led to the introduction of the *Defence Trade Controls Act 2012*, which was condemned at the time not only by the Greens, nearly all the House of Representatives crossbenchers, but even by members of the Labor and Liberal parties.

On the basis of this example, we concluded that the scope of the domestic impact contained in Commonwealth treaty-making could extend well after the signing of a treaty, into the exchange of diplomatic notes, and processes relating to a treaty partner requiring further conditions, such as in the case of the United States where further conditions were introduced by the US Congress by its treaty certification process.

We argued that this case demonstrates that we need to strengthen parliamentary scrutiny when international agreements are negotiated, as well as mechanisms to ensure Parliament can initiate and conduct routine opportunities for assessment and review after a treaty is signed. We are concerned, for example, with the news that US President Trump intends to potentially re-negotiate the CPTPP, which could mean that Australia would be subject to the reintroduction of currently excluded provisions, such as copyright extensions, longer monopoly rights on medicines and other controversial provisions, or perhaps even worse provisions that the US government imposes as a condition of its entry into the CPTPP. Even if the Australian government currently represented the broad interests of the Australian

people in signing the CPTPP, they would not be required to seek a mandate in reaching an agreement if the US sought to renegotiate.

4. The broader threats to Australian society are fundamental to the way we work and live

The NTEU has a wide range of concerns about the immediate implications of the CPTPP upon the way Australians work and live.

National sovereignty is the ability for governments to protect citizens through law making

Sovereign power at its most basic is broadly understood as the authority of a state to govern itself without the interference of outside sources or bodies. In this context, Australia's involvement in the TPP and now the CPTPP represents the most comprehensive expression our country has ever seen where executive prerogative has been used to undermine the future exercise of Australia's sovereign power.

The constraints that the Australian government has negotiated on our behalf not only locks Australians into global processes of trade liberalisation, and exposure of the Australian economy to greater regional labour mobility (and its potential impact on local jobs, wages and conditions), but disarms Australia's future capacity to regulate where governments seek to govern in the interests of people, the environment and public welfare. The process also potentially imposes tremendous costs upon the Australian taxpayer where such actions are considered in tribunals outside our robust judicial process to be a constraint on trade by international companies. In this process of relinquishing the rights of Australian citizens and the rights of future generations, there has been no consultation other than through the court of public opinion.

Clauses about public services do not carve-out public education

The Department of Foreign Affairs and Trade (DFAT) stated in its initial public advice about the TPP that "certain Investor State Dispute Settlement (ISDS) claims in specific policy areas in Australia cannot be challenged, including social services established or maintained for a public purpose, such as... public education". In its National Interest Analysis (NIA) DFAT claimed that "specific policy areas are carved out or excluded from certain ISDS claims" including "public education" (page 9, para 33). These sections are unchanged in the CPTPP, and as we have previously noted, they do not appear to be accurate.

While the Australian government added through Annex II provisions in the TPP that reserve "the right to adopt or maintain measures with respect to the provision of social services established or maintained for a public purpose", such as "public education", these reservations do not apply to expropriation and compensation and therefore are not a protection against ISDS claims where a company has suffered a loss on investment. It is apparent that the TPP lacks a comprehensive carve-out for public education or any other public services when we look at the one comprehensive exclusion, which is in relation to tobacco regulation (Article 29.5). The existence of this exception reinforces the paucity of the agreement's safeguards for the provision of public education.

The CPTPP puts public education under threat

Though there are no clauses in the CPTPP that compel governments to privatise their education systems, as we have previously argued, future trade liberalisation in public

education would be rendered irreversible through the CPTPP's 'ratchet' and 'standstill' clauses.

Once a 'public' social service is opened to competition, regulatory actions undertaken by government will have a cost that is ultimately defrayed onto the taxpayer. Take Australia's experience of profound market failure in the deregulation of vocational education and training (VET), where State and Federal governments have been forced to intervene and reregulate against the private provision of those services. Ratification of the CPTPP means that a for-profit VET provider owned by an overseas company could demand compensation from a State/Territory or Federal government if they changed laws which led to the company being deregistered, losing a licence, or being excluded from access to public subsidies.

The absence of a comprehensive education carve-out also ensures that the provision of public education will be increasingly defined by international competition between public and private providers. We note the CPTPP ensures that no member nation can require a service supplier to establish or maintain a representative office or affiliate in its territory in order to supply a service. Annex II reserves for Australia the right to adopt or maintain measures in relation to 'Local Presence' but only for primary and public education. Relevant to education providers delivering services through online learning platforms, Chapter 14 contains commitments relating to the free flow of information through the internet. The CPTPP in effect enables greater competition between the provision of public education and private online education.

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. We can already identify the emergence of private providers who are seeking to provide cheap, offshored academic support services which have the potential to impact upon pedagogy, including through tutoring and marking services, and who are indirectly benefiting from the provision of Commonwealth public subsidies.

ISDS clauses undermine the rule of law, bypassing domestic courts

The ISDS arbitration system that the CPTPP imposes to resolve trade disputes is manifestly flawed, empowering companies with new avenues to sue governments, processes without an independent judiciary, no appeal mechanisms, and no system of common law precedent. As claimed by former Chief Justice of the High Court, Robert French, "The problem becomes acute if there is any possibility that an ad hoc arbitral panel can be established to hear and determine a claim in which it is asserted that the decisions of courts of a developed legal system constitute a breach of one or more of the obligations of the host State under an international investment agreement". ISDS is in effect a measure to undermine the rule of law. We note that the European Court of Justice recently ruled ISDS undermines national legal autonomy and is incompatible with EU law.

Deregulation of temporary migration flows will undermine Australian jobs and wages

The NTEU is concerned that the CPTPP commits Australia to accept unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam through "contractual service providers" in a wide range of professional, technical and skilled trades occupations, without labour market testing to establish whether there are local workers available, nor being able to ensure that such workers are employed within Australian labour laws and practices. The approach taken by the Australian government in binding us to the CPTPP directly contradicts findings from the recent report, *A National Disgrace: The*

Exploitation of Temporary Work Visa Holders, which explicitly recommends labour market testing of all temporary 'skilled' workers.

Labour market testing in Australia is excluded and could potentially impact education professionals

Lastly, the NTEU is concerned with chapter 12, which provides an opportunity for parties to set out their commitments with regard to the temporary entry of 'business persons'. This chapter covers a very wide range of skilled workers who are not business people, through the category "contractual service suppliers". In fact, it appears that the CPTPP commits Australia to receive unlimited numbers of temporary workers from Canada, Mexico, Chile, Japan, Malaysia and Vietnam in a wide range of professional, technical and skilled occupations, without labour market testing to establish whether there are local workers available. While education workers are not currently listed in the Skilled Migration List, Australia has decided not to protect workers in industries and occupations related to education, where it is apparent that parties like Canada have acted to maintain labour market testing.

The ratification of the CPTPP in the end is a blow to Australian democracy. The effects upon the Australian people are profound and can shape basic characteristics of our work, our environment and the very function of Australian society. With each proposed new trade agreement, the Australian government in fact damages the reputation and very integrity of Australia's parliamentary democracy. We believe it is time to call out the exercise of unconstrained executive prerogative in relation to treaty making on matters of trade as lacking basic legitimacy.

We urge JSCOT not to endorse the implementing legislation for the CPTPP. I would welcome the opportunity to discuss our submission and our concerns with you at

Yours faithfully,

Jeannie Rea

NTEU National President