



Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600

10 March 2016

Dear Committee Secretary,

RE: Joint Education Unions response to the Trans-Pacific Partnership (TPP) agreement

We the Australian Education Union (AEU), Independent Education Union (IEU) and National Tertiary Education Union (NTEU), represent the industrial and professional interests of over 250,000 teachers, academics and professional staff working in schools, colleges, early childhood and vocational settings, universities and research institutes in all states and territories of Australia. We thank the Joint Standing Committee on Treaties (JSCOT) for the opportunity to highlight our concerns with the TPP agreement.

A case study in the democratic deficit

We would first emphasise that throughout the TPP negotiations the Department of Foreign Affairs and Trade (DFAT) have made neither clear public pronouncements, nor provided the opportunity for dedicated meetings about the government's bargaining intentions in relation to trade in education goods and services. If not for media comment preceding finalisation of the text, we would have had no basis to expect that the National Interest Analysis (NIA) by DFAT would contain assertions that "beneficiaries of the Agreement will include Australian service suppliers across a range of sectors including: education", and that benefits might include "guaranteed access to a number of existing and growth markets in Brunei

Darussalam, Japan, Malaysia, Mexico, Peru and Vietnam” or “access through the supply of online education services across the region”.

If any of our unions had been given the courtesy to meet with DFAT during the negotiation process, it would have been possible to establish what the underlying rationale, principles and goals of the Australian government's approach to the reservations were in relation to investment and cross-border trade in education services or online education. This would include understanding the government's bargaining position in relation to the Australian workforce, industry by industry. Following the tabling of the text in Parliament and the release the NIA this remains unclear.

The exclusion of so many civil society groups and trade unions from the debate means that the international obligations the government is committing Australia to may not be consistent with the views and values of everyday Australian citizens. We are also particularly concerned that our priorities as member-based organisations are in many ways at odds with those taken by the Australian government.

We believe that if stakeholders were more equitably provided an opportunity to scrutinise the government's intentions preceding entry into the negotiation of free trade agreements, such as the TPP, these debates would offer an opportunity to deliver greater democratic accountability around the outcomes of trade negotiations. In making this statement, we are conscious of the fact that in response to the Foreign Affairs, Defence and Trade (FADT) Senate Committee's *Blind Agreement* report,¹ the Australian government recently declined to make any changes to the Commonwealth treaty-making process and this includes in relation to amendments that would ensure a statement was made by the Australian government preceding entry into negotiations.² The Australian government has in effect taken a position that there is no democratic deficit.

Shortcomings of the National Interest Analysis (NIA)

The NIA has many profound shortcomings including the lack of any independent cost-benefit analysis. For example, the document does not attempt to identify let alone quantify the costs or benefits in relation to the provision of education services, or costs and benefits in relation to the Australian workforce.

¹ Senate Standing Committee on Foreign Affairs, Defence and Trade (2015) *Blind agreement: reforming Australia's treaty-making process*
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report

² Government Response to the Committee's Recommendations, *Hansard*, 2 February 2016,
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F6b734b2a-e113-486c-bacc-822e11cbf7e6%2F0156%22>

Not only would an analysis of these issues be useful to compare to economic modelling conducted by international organisations such as the World Bank (who predict that Australia will barely attain a 0.7 percentage point increase in GDP by 2030). It would also provide a basis to review specific policy concerns expressed in Australia. For instance, we note that the Global Development and Environment Institute Working Paper 'Trading Down' predicts employment losses in every TPP country, caused by "reduction of labour shares" and "changes in the composition of output, with more capital-intensive and export-oriented production".³ In Australia, this is predicted to be a net loss of 39,000 jobs over a ten-year period. They also have predicted growing social inequality with the focus on "capital-intensive, export-oriented products" leading "to job losses and downward pressure on wages".

Even academic papers unconditionally in support of the TPP such as by Petri and Plummer (2016) predict increases in job churn, and claim that the TPP will impose adjustment costs on lower skilled workers.⁴ Predictably, DFAT's analysis contains no detail on escalation in precarious employment, unemployment, or social inequality in Australia.

Our priorities in relation to trade in education goods and services

As Australia's education unions, we would like to take this opportunity to outline our approach to the role of trade in the provision of education. Education creates a range of public goods that are essential to public welfare in both national and global contexts. Access to education is one of the most powerful forces for tackling global social inequality and this is a view shared across the international community, with global commitments made through UN's Millennium Development Goals (2000) and Sustainable Development Goals (2014) consistently asserting the role of education as a transformative social force, central to reducing poverty and achieving a much broader global development agenda.

While the international exchange in educational services and information is not reducible to simple economic costs and benefits, we understand that these must be taken into account and that these must remain consistent with our obligations to international organisations such as the United Nations, UNESCO, the ILO and others. We must ensure international trade in education goods and services, whether this relates to any of the known modes of trade in education services such as cross border supply, consumption abroad, commercial

³ Jeronim Capaldo and Alex Izurieta with Jomo Kwame Sundaram (2016) 'Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement', *Global Development and Environment Institute Working Paper*, No. 16-01, pp. 1-22.

⁴ Peter A. Petri and Michael G. Plummer (2016) 'The Economic Effects of the Trans-Pacific Partnership: New Estimates', *Petersen Institute of International Economics Working Paper*, 16-2, pp. 1-33.

presence, or presence of natural persons, is guided by broader human rights and global development goals, as well as the principles of 'fair' trade.

Our priorities are consistent with those held by Educational International and other education unions around the world including:

- Understanding that trade and investment agreements will have far-reaching implications for the world economy, particularly where they are being promoted as benchmarks for future deals.
- Recognising that developing countries are likely to be more adversely affected by rules of trade and investment agreements that limit and prevent the establishment and expansion of public services, including education.
- Supporting agreements that promote decent jobs and growth, protect quality public services and safeguard labour, consumer, environmental and health and safety standards. We are unconvinced by the claims that trade and investment agreements will lead to more jobs and improved economic benefits for working people, and we are concerned that economic gains will be outweighed by the costs to working people and their families. It is incumbent upon the Australian government to provide the opportunity for these gains and costs to be robustly and transparently analysed and debated.
- Opposing multilateral, plurilateral, regional and bilateral trade agreements that compel nations to commercialise and privatise public services, including education. We are concerned by the use of 'negative lists' which leave industries open to trade liberalisation unless a specific exclusion is entered, and 'ratchet clauses' that ensure parties are unable to undo trade liberalisation without paying significant compensation.
- There are widespread and legitimate concerns about the new generation of trade and investment agreements that go far beyond traditional tariff reductions by imposing constraints on what governments can do behind their national borders (see the changes raised with ISDS in the TTIP in January 2014), including the promotion of regulatory coherence and convergence across countries irrespective of national priorities, and irrespective of the maturity and transparency of their domestic judicial systems.
- Such agreements can pose direct threats to the provision of quality public services, including education, in particular through restricting the capacity of future governments to regulate in the public interest. This can be seen with the proliferation of ISDS clauses that these agreements undermine the jurisdiction of Australia's domestic courts and negate national sovereignty.

- The Australian government should support trade and investment policies that fully respect our obligations under international law to human rights, including the right to education, to provide decent work, to respect Indigenous peoples' rights, to raise the living standards of all peoples, and ensure environmentally sustainable development.

Acknowledging that cross-border delivery by foreign education providers (particularly in relation to post-secondary education) is an accelerating trend, it is our view that this also raises significant questions about the capacity for future Australian governments to sustain a coherent regulatory framework to protect education as a human right, and that a comprehensive carve-out of education is fundamental to ensure future Australian governments are not straddled with constraints upon their regulatory authority.

The provision and protection of public education

As the Joint Education Unions, we wrote to the former Minister for Trade, Andrew Robb, on 26 January about our concerns with the TPP. In this letter (which is attached for your information) we are highly critical of the Australian government's failure to include a comprehensive carve-out in relation to public education. We stated that the reservations for public education and other services in the investment and services chapters listed in Annex II do not apply to limiting the use of Investor State Dispute Settlement (ISDS) processes.

Our concerns were, for example, if a government decided to address the current problems with private providers in the Vocational Education and Training system through new regulation, foreign-owned providers would have the option of suing for damages through ISDS. Whilst not legislated, current government policy seeks to extend public subsidies to private higher education providers, which would involve changes to funding protocols, including operating grants and subsidies. We are concerned that the TPP would ensure that future legislative reforms to amend or limit access to public subsidies by foreign providers would also expose Australia to ISDS cases.

In our letter to the Minister for Trade, we also drew attention to what can only be described as highly deceptive language used by the Australian government about the impact of the TPP upon the delivery and regulation of public education. Public documents composed by DFAT state "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". Such statements are wrong. We contend that "safeguards" in the TPP to protect public education do not prevent future ISDS cases. The only area where there is a complete exclusion is in relation to future tobacco regulation (Article 29.5), an exception which demonstrates that general safeguards do not exclude

ISDS cases in areas such as education. The exposure of education to the ISDS provisions in itself has the effect of locking-in and intensifying pressures of commercialisation and privatisation.

Furthermore, the reservations made in Annex II apply only to a specific list of exemptions for education goods and services, namely:

- autonomy in admissions policies, setting tuition rates, development of curricula or course content;
- non-discriminatory accreditation and quality assurance procedures for education and training institutions;
- government funding, subsidies or grants; and
- the need for education and training institutions to comply with non-discriminatory requirements related to the establishment and operation of a facility.

It must be noted that this provides four specific public education exemptions to the chapters on Investment and Cross-Border Trade in Services and does not exclude any other regulatory matter.

We have had no subsequent communication from the Trade Minister's office and therefore do not have a formal response to our fundamental concerns about the language of the agreement. Without this response, it is not possible for our organisations to properly evaluate whether there are necessary changes to existing legislation.

Regulation of cross-border trade in educational goods and services

There are numerous additional clauses in the TPP that are intended to facilitate trade in educational goods and services, for instance Article 10.6 which ensures that 'service suppliers' are not required to establish a company in the relevant nation for the purposes of cross-border supply.

We would like to emphasise that in relation to cross-border trade in education services, we have had recent first-hand experience of massive regulatory failure in Australia with the collapse of the international post-secondary education market in 2009. In rebuilding the reputation of Australian international education, the Australian government made significant changes around the registration, accreditation and quality assurance of providers, and the conditions and financial penalties affecting those providers. These laws also introduced shifts in the regulatory burden of at-risk providers, changes to English language entry levels, and modifications to the availability of student visas based upon country-of-origin. These changes were, at the least, strategically necessary to improve the reputation of Australia's international education industry and recover losses caused by a considerable deterioration in

international student enrolments. These changes disproportionately impacted upon private providers, a significant proportion of whom were internationally owned. Under the TPP, such providers may well be able to sue under ISDS, unlike domestic providers. Alternatively they may seek to provide educational services in Australia without the need to establish a company in Australia by relying on cross-border supply of education services provisions of the TPP.

We are concerned that the TPP agreement establishes conditions that will accelerate unethical cross-border trade in education goods and services. The absence of a comprehensive carve-out around education exposes future Australian governments to the threat of ISDS cases from foreign education providers, where legislative changes may be designed to address regulatory failures but which involve indirect expropriations of the rights, property or access to subsidies of foreign owned companies.

Other concerns

We endorse the ACTU submission and the issues it raises around labour standards, labour market testing and ISDS.

We would welcome the opportunity to present our concerns to the Senate Committee. Please do not hesitate to contact us through Dr Jen Tsen Kwok at (03) 9254 1910 or jtkwok@nteu.org.au or Jeannie Rea (jrea@nteu.org.au).

Yours sincerely,



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