
SUBMISSION

Senate Foreign Affairs, Defence
and Trade References Committee
inquiry into the proposed
Comprehensive and Progressive
Agreement for Trans-Pacific
Partnership (TPP-11)

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The Business Council of Australia draws on the expertise of Australia's leading companies to develop and promote solutions to the nation's most pressing economic and social challenges.

ABOUT THIS SUBMISSION

The Business Council of Australia welcomes the invitation to make a submission to the Senate Foreign Affairs, Defence and Trade References Committee inquiry into the proposed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11). The Business Council strongly supports ratification of the TPP-11 as soon as possible.

KEY RECOMMENDATION

- ▶ The Business Council recommends that the Australian Parliament support the ratification of the TPP-11, and that this ratification occur as soon as possible.

OVERVIEW

The Business Council welcomes the decision of the Australian Government and the other members of the TPP-11 to proceed with the Agreement in the wake of the withdrawal of the United States from the original Trans-Pacific Partnership (TPP). This was a forward-looking, strategic decision at a time of turbulence in the global trade environment, and the Business Council congratulates the Australian Government for championing this approach.

It remains important to maintain a broad view of the Agreement and its potential contribution to wider international trade negotiations and outcomes, and to Australia's place in the world. The TPP-11 will influence countries such as the US and China. It will set an important standard for other trade agreements and provide momentum to their negotiation, as well as enhancing Australia's influence both regionally and globally. In addition to boosting Australian exports and jobs, the TPP-11 will provide a positive example of international cooperation for mutually beneficial trade and investment liberalisation against the backdrop of increasing international trade tensions. Thus, beyond its immediate economic benefits for Australia, the TPP-11 is a timely and far-sighted contribution towards stabilising the current situation and encouraging cooperative approaches internationally.

It is therefore important that Australia ratify the Agreement as soon as possible. Following entry into force of the Agreement, the door should be open to new members willing to agree to the TPP-11's existing provisions and high-standard market access packages. All countries should be encouraged to participate on this basis.

The Business Council previously submitted views to the Australian Parliament on the original TPP agreement in September 2016.¹ Those views remain relevant to the current agreement. The proposed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) is a chapeau agreement, in which the parties remaining after the withdrawal of the United States have agreed to apply to each other the full text of the original TPP agreement, except for a small number of suspended articles.

1. Business Council of Australia, *Submission to Senate Foreign Affairs, Defence and Trade References Committee's Inquiry into the Trans-Pacific Partnership*, September 2016.

This submission addresses in depth several issues in the Committee's terms of reference, including the Agreement's outcomes on (a) temporary business entry and labour market testing; (b) Investor-State Dispute Settlement; and (c) impact on social and public policymaking. The Business Council believes that none of these outcomes diminishes the benefits of the TPP-11 to Australia and indeed enhance the quality of the Agreement.

BUSINESS COUNCIL COMMENTS ADDRESSING THE COMMITTEE'S SPECIFIC TERMS OF REFERENCE

a. Australia's economy and trade

The Business Council considers that the TPP-11 will contribute strongly to Australia's economic and trade performance by:

- eliminating 98 per cent of tariffs on trade between TPP-11 countries, the destination for nearly one-quarter of Australia's exports. This will enhance the competitiveness of Australian exporters in these markets compared with exporters from countries outside the TPP-11. Conversely, remaining outside the TPP-11 would put Australian exporters at a disadvantage given the tariff preferences that will be enjoyed on intra TPP-11 trade.
- providing significant, and specific, new market access opportunities on a wide range of agricultural and non-agricultural goods, both with respect to the lowering of tariffs and the expansion of tariff rate quotas in destination TPP-11 markets, including in Japan, a key market for Australia. Resources and energy exports will also benefit from the elimination of tariffs, including on gas and petroleum sector exports to Vietnam.
- adopting common rules-of-origin arrangements and the ability to self-certify the origin of goods traded between TPP-11 members, which will both lower administration costs for Australian businesses and provide enhanced opportunities to engage in global value chains.
- lowering barriers for Australian service providers in key TPP-11 markets, including in a wide range of professional services; mining equipment and technology services; transportation; the financial sector (including new opportunities in insurance services); education services; hospitality and tourism; and telecommunications.
- benefiting Australian businesses by increasing deployment of intra-corporate transferees. Apart from enhancing the capacity to draw on international talent and transfer skills and knowledge to the Australian workforce, this outcome will also see new opportunities for the deployment of Australians abroad, thus benefiting and enriching their positions and careers, and promoting international engagement.
- lifting restrictions on Australian investment abroad, including in key sectors such as mining, while at the same time providing balanced protections for investors. There will also be new opportunities to participate in overseas government procurement contracts.

The Business Council considers the liberalisation embodied in these outcomes will have a positive effect on goods and services trade; international engagement and connectivity; people-to-people links across TPP-11 member countries; domestic Australian employment; and on the broader economic welfare of the Australian community. This view is supported by

modelling from the Peterson Institute for International Economics, which indicates that Australia's real income will be 0.5 per cent higher in 2030 under the TPP-11 compared with baseline outcomes, and exports four per cent higher.² Overall, the TPP-11 will deliver material benefits to Australian consumers in the form of lower prices, and expand opportunities for Australian businesses and exporters by lowering barriers in the TPP-11 member economies.

b. Australia's domestic labour market testing obligations and laws regarding wages, conditions and entitlements of Australian workers and temporary work visa holders

The Business Council supports the TPP-11's temporary entry outcomes, which apply to the following business categories: (a) intra-corporate transferees; (b) investors and independent executives; (c) contractual service suppliers subject to employer sponsorship; (d) spouses of business entrants; and (e) installers and servicers of equipment and machinery.

Australian workers will benefit from reciprocal temporary entry

The TPP-11's temporary entry chapter contains important reciprocal commitments to Australia by Canada, Mexico, Vietnam, Malaysia, Brunei Darussalam and Japan, including in relation to duration of stay; applicable categories; labour market testing; and work permit requirements. The overall outcomes will assist Business Council member companies, both in their Australian and overseas operations, including by enhancing and safeguarding opportunities to recruit and deploy Australians in TPP-11 member countries.

As a strongly services-oriented economy, Australia's interests will be served by facilitating service exports, including by removing barriers to the ability of Australian business people and professional service providers to operate in overseas markets. Cross-border service delivery often requires work on site, so the ability of Australian contractual service suppliers to work and reside in client markets overseas is vital. Through this Agreement, Australia is gaining commitments to increase or guarantee access for business professionals to reside and operate in-person in TPP-11 member countries.

It is important to note that the level of access enjoyed by Australian business persons and contractual service suppliers in counterpart TPP-11 countries will not be determined solely by the TPP-11 agreement. Comparing commitments contained in the TPP-11's temporary entry chapter and associated schedules in isolation may provide an incomplete picture of the level of access. Other bilateral arrangements must also be considered. For example, in the case of New Zealand, deep commitments on temporary entry and skills recognition already exist in the form of the Trans-Tasman Travel Arrangement and the Trans-Tasman Mutual Recognition Arrangement, and these commitments surpass any outcomes that could be achieved under the TPP-11. Likewise, Australia's Free Trade Agreement (FTA) with Singapore contains commitments to Australia on contractual service providers that are not provided in the TPP-11.

Temporary entry requirements into Australia continue to apply

It is also important to note, in relation to Australia's reciprocal commitments, that Australia is not making commitments in the TPP-11 agreement that would permit the temporary entry of

2. Peterson Institute for International Economics, working paper, *Going It Alone in the Asia-Pacific: Regional Trade Agreements Without the United States*, October 2017.

any specific type of skilled worker or occupational category, notwithstanding the inclusion of the broad category of 'contractual service suppliers' in the text. This is because the commitment to allow the temporary entry of contractual service suppliers will be operationalised through Australia's Temporary Skills Shortage (TSS) visa arrangements, rather than by the text of the TPP-11 itself. Australia will retain full control over which types of skill or occupation are listed, or delisted, under the TSS arrangements. Currently, the eligible occupation lists are decided by the Department of Jobs and Small Business based on its assessment of labour market conditions and requirements. The TPP-11 commitments on contractual service suppliers are, therefore, fully consistent with Australia's economic priorities and requirements, and do not compromise Australian policymaking and control.

The relaxation of labour market testing for contractual service suppliers and intra-corporate specialists from those TPP-11 countries making comparable commitments to Australia will promote employment, training and skills transfers. It will enable more rapid recruitment of qualified staff to impart skills and know-how to Australian workers, including by leading, coaching or contributing to workplace teams where additional, specific technical knowledge or experience may be required.

In some cases, companies urgently need to fill vacancies in skilled positions due to turnover of staff, and in these circumstances labour market testing can pose undue interruption or delay to their operations. It can also pose difficulties for companies where advertising a sensitive position may inadvertently signal confidential business plans or intentions. Greater flexibility on labour market testing helps avert the risk of Australian businesses relocating their operations offshore to locations where access to required skills is less bureaucratic.

Importantly, visa access for contractual service suppliers under the TPP-11 is for a 12-month initial stay only and subject to employer sponsorship, and so is not 'open slather'. Australian business has little appetite for recruiting overseas where local skills are available. Overseas recruitment and transfer is expensive, due to the high cost of international relocation and visa application processes. Because there are already strong incentives to recruit and train locally, the Business Council considers that requirements to advertise before sponsoring applicants for TSS visas are unnecessary and burdensome. They are also duplicative given the prior labour market assessment undertaken by the Department of Jobs and Small Business in forming the eligible occupation lists.

Finally, it is important to note that neither the temporary business entry commitments, nor the TPP-11 outcomes more broadly, require any changes to Australian fair work or employment conditions, or to qualification requirements for professional employment and practice in Australia. Recruitment and employment terms under the TPP-11 business entry arrangements must still comply with those conditions, without any dilution or diminution.

Overall, the TPP-11's temporary entry outcomes will help deepen Australia's international connectivity, networking, people-to-people links and global business engagement, and promote trade, investment and economic performance.

c. Australian investment

As in all chapters of the TPP, Australian commitments are based on broad reciprocity of outcomes. In return for commitments in relation to inbound investment, Australian investors abroad are gaining important new access opportunities in TPP-11 partner countries.

The TPP provides important and expansive new opportunities for Australian investors through a negative-list approach to investment in TPP-11 member countries. This liberalising approach means that, unless an exception has been specifically scheduled in Annex I or II of the TPP, Australian investors will be able to invest in any area of a TPP-11 member's economy.

Canada and Mexico have committed to permitting investment without screening for transactions below CAN\$1.5 billion and US\$1 billion respectively, while Japan, Vietnam and Brunei Darussalam have committed to avoid imposing new restrictions on foreign investment, except with respect to the initial sale of government assets.

By raising Foreign Investment Review Board (FIRB) investment screening thresholds for investors from TPP-11 member countries, which currently comprise around 13 per cent of total foreign investment in Australia, the proposed agreement provides important encouragement for a diversification of the sources of foreign investment in Australia.

Australia's Annex I and II notifications under the TPP fully preserve the Australian Government's ability to continue regulating, restricting and/or screening foreign investment by state investors, and foreign investment in a wide range of sectors, including but not limited to: agricultural land; gambling and tobacco products; broadcasting and media; cultural services; and air and maritime transportation.

d. The effect of Investor-State Dispute Settlement (ISDS) provisions

The Business Council considers that treaty-backed ISDS provisions provide an important avenue for Australian investors to seek remedy in the event of arbitrary, opaque or unfair decisions by foreign governments.

Not all such decisions are contestable under the TPP-11's ISDS provisions. The decisions that may be contested are those that breach obligations undertaken directly between TPP-11 governments and investors, or that relate to obligations in the investment chapter of the TPP-11, and they must also involve damage or loss attributable to that breach. By extending access to ISDS for decisions meeting these criteria, the TPP-11 encourages transparency, fairness and due care in government decision-making.

Australia has defended its position before an ISDS tribunal on one occasion only, namely the case involving Philip Morris Asia. Australian investors have, however, used ISDS on several occasions in foreign jurisdictions to safeguard their interests. The difference in these numbers reflects the fact that Australia's governance standards and judicial systems provide substantial confidence to foreign investors, while this is less often the case overseas.

Agreement to allowing foreign investors to access ISDS in Australia must be seen in terms of the reciprocal access that Australian investors will gain to ISDS abroad, rather than narrowly in terms of the often-heard argument that domestic investors cannot access ISDS. All Australians investing overseas in TPP-11 jurisdictions will be able to access ISDS on an equal basis with all investors from other TPP-11 countries outside their home jurisdictions.

Australia's participation in ISDS arrangements is not new. Australia already has 20 bilateral Investment Promotion and Protection Agreements (IPPAs) that contain ISDS, as well as ISDS in six of Australia's existing FTAs. The TPP-11 arrangements will result in the termination and replacement of existing bilateral ISDS arrangements with Mexico, Peru and Vietnam. Given that the TPP-11 includes enhanced levels of procedural transparency,

ratification of the TPP-11 will enable Australia to replace and improve upon the ISDS provisions in these earlier bilateral agreements. In effect, the choice is whether to keep these older ISDS arrangements with Mexico, Peru and Vietnam, with their inferior provisions, or to recommend their replacement and improvement by adopting the TPP-11.

The TPP-11 includes articles on 'conditions and limitations'; 'selection of arbitrators'; 'conduct of arbitration'; and 'transparency of arbitral proceedings', which are set out extensively in Articles 9.21 to 9.24 of the Agreement. The provisions include, for example, hearings to be conducted in public, and scope for *amicus curiae* submissions from civil society organisations. Investors pursuing ISDS claims under TPP-11 arrangements must also waive any right to pursue the same claim through the domestic court system.

The TPP-11's ISDS provisions also include a detailed annex which tightens understanding about the meaning of indirect expropriation (Annex 9-B). Specifically, it clarifies that actions by a government that adversely affect the economic value of an investment do not, in and of themselves, establish that an indirect expropriation has occurred. The Annex also states that non-discriminatory policies for public welfare purposes, such as public health, safety and the environment, do not constitute indirect expropriation, except in rare circumstances.

Much has been made of the addition of the words 'except in rare circumstances', but it is important to bear in mind that this formulation seeks to preserve the capacity of fair-minded arbitrators to assess specific circumstances, subject to a high threshold. Fairness requires that cases be determined on their merits and differing circumstances, rather than prejudged by completely ruling out the ability to litigate. The objective of any FTA text cannot be to determine prescriptively whether certain types of dispute are merit-worthy or not, but rather to develop a balanced and careful architecture for considering and resolving disputes.

The TPP-11 has nonetheless excluded tobacco control measures from the scope of ISDS. Australia has also made clear that decisions on whether to approve or reject a proposal for a foreign investment in Australia will not be subject to ISDS.

In sum, ISDS provisions must preserve access and the ability of arbitrators to assess cases on their merits, while at the same time including appropriate guidance and thresholds on the operation of the system. They must also balance the need for governments to make decisions in the interests of their citizens and the sovereign risk of investors. The Business Council considers that the ISDS provisions in the TPP-11 appropriately balance these various objectives and, in particular, ensure that Australian investors will have access to dispute settlement mechanisms that safeguard their investments in foreign jurisdictions.

e. Australia's health, environment, social and cultural policies, including regulation of essential services

Across all chapters and schedules of the TPP, provision has been made to preserve the Australian Government's capacity to introduce new policies and regulations in the areas of health; environment; social and cultural policies; and essential services, among other areas. The retention of broad policy capacity in all these areas is reflected in the scheduling by the Australian Government of non-conforming measures in the annexes to the TPP agreement, and in the broad reservations in the chapter on Exceptions and General Provisions.

Moreover, the preservation of domestic policy and regulatory space is also reflected in the fact that the Agreement will not result in Australian legislation needing to be introduced or amended by the Parliament of Australia, with the exception of the *Customs Act 1901*, the

Customs Tariff Act 1995, and the *Government Procurement (Judicial Review) Bill* introduced in 2017, as well as changes to a small number of subordinate legislative instruments. TPP chapters on environment and labour reinforce Australia's commitment to high-standard public policymaking in these areas.

f. Rights for consumers

The TPP-11 addresses many contemporary trade challenges and contains pioneering provisions in relation to consumer rights. For example, there are specific provisions on consumer rights and protections in the Competition Policy and Electronic Commerce chapters. More broadly, the Agreement is consumer-centric by encouraging lower prices on traded goods, including goods from countries not previously FTA partners with Australia.

g. Other matters: A timely and historic agreement

The Business Council considers that the TPP-11 agreement represents a timely and historic contribution towards international economic cooperation, particularly when viewed against the background of recent international trade policy developments.

The Business Council is concerned by recent developments in the international trading environment, including the potential imposition of punitive tariffs by the United States and China on each other's trade. The tariff penalties being threatened by the United States and China cover a substantial proportion of their bilateral trade and, if imposed, could have a significant impact on Australia's exports and consequently employment.

With no outcome yet in sight in US – China trade negotiations, the TPP-11 can make an important contribution to the diversification and robustness of Australian exports and thus help to insulate Australia against potential disruption in our key markets. The TPP-11 will also provide an important benchmark in the negotiations for a Regional Comprehensive Economic Partnership (RCEP) with ASEAN and other neighbouring countries, thus further assisting the opportunities for trade diversification. More broadly, the TPP-11 will also contribute to Australia's engagement in Asia, and increase Australia's weight and influence in trade and strategic dialogue in the region.

Furthermore, the TPP-11 provides an important, positive example of international cooperation promoting rules-based trade and investment liberalisation. Ratification of the agreement by Australia would be a far-sighted and timely contribution towards stabilising the current international trade environment and, through its demonstration effect, reinjecting momentum into cooperative trade liberalisation and rules-based approaches on a global basis. The Agreement might also help reinject momentum into WTO negotiations, by providing an important model or template that could be used in plurilateral cooperation under WTO auspices.

If Australia is to capitalise on these opportunities to play a constructive and leading role in the current trade policy environment, both regionally and internationally, it should ratify the Agreement as soon as possible.

For now, the focus should be on bringing the TPP-11 into effect without delay. Following the Agreement's entry-into-force, wide participation by new members in the Agreement should be encouraged, and this invitation should be strictly rules-based. Membership should be open to any country, without exception, that is prepared to apply all the Agreement's chapter provisions and negotiate a high-standard market access package. This approach to

membership is important to encapsulate the commitment of TPP-11 countries to non-discriminatory, rules-based global trade. The Business Council further affirms its view that the provisions and articles included in the new TPP-11 agreement provide an appropriate standard for future accession negotiations.

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