

1. This submission is from the SPSF Group of the CPSU.
2. The SPSF Group of the CPSU supports the recommendations of the AFTINET submission to the Joint Standing Committee on Treaties Inquiry on Certain Aspects of the Treaty-Making Process in Australia in respect to trade agreements. This submission supplements the AFFINET submission by outlining further recommendations on public services.

### **About the CPSU**

3. The CPSU, the Community and Public Sector Union (“CPSU”) is the largest union representing State and Federal system public sector employees in Australia.
4. The CPSU is composed of two groups; the SPSF Group which represents State public sector workers (“the SPSF”) and the PSU Group which represents Federal and Territory public sector workers (“PSU”).
5. The SPSF Group of the CPSU represents the industrial interests of around 79,000 employees of State Governments in departments, agencies, statutory authorities, instrumentalities and State-owned corporations, as well as general staff employees of universities and private prisons
6. While most of the SPSF Group members are within the jurisdiction of the various State industrial tribunals, four major groups of our members are in the Federal jurisdiction:
  - 6.1. employees of the Crown in Right of the State of Victoria and its agencies;
  - 6.2. general staff in universities;
  - 6.3. employees in private prisons; and
  - 6.4. Direct employees of State-owned corporations that are constitutional corporations
7. As the name of the SPSF Group suggests, it is a federation composed of five autonomous State registered unions, known in the SPSF Rules as “Associated Bodies”. The Victorian Branch exists only as a branch of the Federal union as there is no separate State workplace relations system in Victoria.
8. The eligibility rules of the Associated Bodies are essentially mirrored in the SPSF Rules as Branches of the SPSF for New South Wales, South Australia, Western Australia and Tasmania. Victoria has no corporate existence other than as a branch of the SPSF.
9. The Associated Bodies of the SPSF are defined as:
  - 9.1. The Public Service Association and Professional Officers Association Amalgamated Union of New South Wales (“PSANSW”);
  - 9.2. The Public Service Association of South Australia Incorporated (“PSASA”);
  - 9.3. The Community & Public Sector Union (SPSFT) Inc Tasmania (“CPSUT”);
  - 9.4. Civil Service Association of Western Australia Incorporated (“CSA”); and
  - 9.5. Western Australian Prison Officers Union of Employees (“WAPOU”)
10. Each of the five “Associated Bodies” is registered under their respective State industrial legislation.

### **Summary of Recommendations**

11. Any agreement should not include a negative list and ratchet structure in the trade in service chapter because it prevents governments from introducing new forms of regulation and creates barriers to re-nationalising public services.
12. The secrecy of the negotiation and signing process means that the inclusion of these provisions and their impact on public services does not become public until after the agreement has been signed. The potential restrictions on the right of governments to regulate in the public interest should be publicly debated before agreements are signed and government should be held accountable for such decisions.
13. In addition, CPSU supports the AFFINET (2020) submission which makes the following recommendations:
  - 13.1. Prior to commencing negotiations for bilateral or regional trade agreements, the Government should table in Parliament a document setting out its priorities and objectives. The document should include

assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, health, gender and environmental impacts which are expected to arise.

- 13.2. There should be regular public consultation during negotiations, including submissions and meetings with all stakeholders, release of negotiating texts and reports to Parliament.
- 13.3. The Australian government should follow the example of WTO multilateral negotiations and the European Union and should release the final text of agreements for public and parliamentary discussion before they are authorised for signing by Cabinet.
- 13.4. The current National Impact Assessment process is inadequate. After the text is completed but before it is signed, comprehensive independent studies of the likely economic, regional, health, gender and environmental impacts of the agreement should be undertaken and made public for debate and review by JSCOT.
- 13.5. There should be a separate subcommittee of JSCOT to deal with review of trade agreements. This subcommittee should review the text of a trade agreement which has been released before signing with the independent assessment of its costs and benefits and make a recommendation to Parliament.
- 13.6. The categorisation of trade agreements should not be changed in a way that would reduce scrutiny of trade agreements.
- 13.7. Legal experts agree that the Executive power to enter treaties is a prerogative power which can be abrogated or controlled by legislation. There is no constitutional barrier to Parliament playing a greater role in the treaty decision-making process. After release of the text, the JSCOT review of the text and the independent assessment of the costs and benefits of the agreement, Parliament should then decide whether the Executive should approve the agreement.
- 13.8. If the agreement is approved by Parliament, and following approval of signing by the Executive, Parliament should then vote on the implementing legislation before ratification.
- 13.9. There should be public reviews of trade agreement outcomes 5 years after entry into force with independent assessments of economic, regional, health, gender and environmental costs and benefits.

#### **A negative list and ratchet structure restrict future government regulation**

14. Free Trade Agreements should not impede a governments ability to regulate essential services, especially in areas such as health, education, core utilities and the public service.
15. All trade agreements contain state to state provisions which enable governments to dispute actions of other government that are parties to the agreement if they break the rules of the agreement.
16. The inclusion of “ratchet” clauses in trade in services chapters in trade agreements effectively impede parties to the agreement from reversing liberalisation that has already taken place
17. Where services are exempted on a negative list basis it is claimed that public services can be exempted.
  - 17.1. However, public services need to be specifically defined to be included in the negative list and any ambiguity may result in many services not being covered by the definition.
18. The negative list and ratchet structure can also create barriers for governments to respond to changed circumstances.
  - 18.1. For example, the Australian Government had to introduce new financial regulation following the Global Financial Crisis, which a United Nations Study has shown would have been difficult If negative list and ratchet services rules had been in place (United Nations 2009)
  - 18.2. Public services, which have been so vital in responding to the COVID19 pandemic, can be at risk as prior privatisation can be locked in and difficult to change via negative listing and ratchet clauses.
    - 18.2.1. In 2013, the Victorian Government took the decision to buy back the Mildura Base Hospital, the State’s only remaining privately owned and run hospital due to poor management (Cook 2013). Without specific exemptions, if the hospital had been owned by a foreign company covered by a trade agreement and a

services chapter with a ratchet structure, the re-nationalisation of the hospital could have been impeded.

19. Even when there are exclusions for state-to state disputes, if trade agreements also include Investor-state Dispute Settlement clauses, these measures may not prevent foreign corporations from suing governments.
  - 19.1. An example of this is the recent failure of de-regulation and privatisation of Australian vocational education services which resulted in government re-regulation of these services in 2016 (Conifer 2016).
    - 19.1.1. If this had occurred when a trade agreement with a trade in services chapter was in force without very specific exemptions, other governments could have invoked the state-to-state dispute mechanism to prevent re-regulation
    - 19.1.2. In addition, a private education provider from a country covered by such an agreement could argue the value of its investment had been reduced and could launch an ISDS case to claim millions in compensation from the government.
20. The negative list and ratchet structure should be removed from current agreements and not included in any future trade agreement negotiations as it can prevent government regulation of essential services and lead to ISDS claims against the state.

### **Conclusion**

21. CPSU recommends that Joint Standing Committee on Treaties no longer agree to the inclusion of negative list and ratchet structure in trade in services chapters in current and future treaty negotiations.
22. CPSU endorses the recommendations outlined in AFFINET's submission to the committee.

### **References**

AFFINET (2020), *Submission to the Joint Standing Committee on Treaties Inquiry on Certain Aspects of the Treaty-Making Process in Australia in respect of trade agreements*, viewed July 21, 2020.

Conifer, D 2016, 'Parliament passes bill to scrap troubled VET loans, overhaul vocation education sector', ABC News online, December 2 2016, viewed July 22, 2020 at <https://www.abc.net.au/news/2016-12-02/parliament-passes-bill-to-scrap-troubled-vet-loans/8085860>

Cook, H 2013, 'Naphthine Government to buy back Mildura Base Hospital', *The Age*, 26 July 2013, viewed July 22, 2020 at <http://www.theage.com.au/victoria/naphthine-government-to-buy-back-mildura-base-hospital-20130725-2qnc0.html>

United Nations (2009) Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (the Stiglitz Commission), New York.