

Chapter 3

Key issues

Introduction

3.1 This chapter will outline evidence received in relation to key issues in the terms of reference of the inquiry. These include the impact of the TPP on:

- the economy and trade;
- labour issues;
- investment;
- social, cultural and environmental policies;
- the investor-state dispute settlement provisions;
- copyright and other intellectual property; and
- consumer rights.

Economy and trade

Outcomes

3.2 The economic and trade outcomes of the TPP for Australia are highlighted in the TPP's National Interest Analysis (NIA) which states that '[i]ncreased and more efficient trade and investment in the region will benefit the Australian economy':

Improved market access for Australian goods and services exports and lower import prices will increase capital accumulation, raise productivities and improve utilisation of resources...The TPP market access outcomes build on existing access Australia has with its FTA partners of Japan, the US, Chile, New Zealand, Malaysia, Singapore, Brunei and Vietnam. The TPP also creates valuable new market access opportunities for Australian exporters in the three TPP countries where Australia does not have a FTA, namely Canada, Mexico and Peru...¹

3.3 A number of Australian business and industry organisations emphasised the benefits for their sectors that were likely to accrue from the TPP coming into force.² Areas where the TPP's outcomes improved on existing trade agreements or established arrangements with countries with which Australia did not have an FTA were often highlighted. For example, Wine Australia noted that, assuming political obstacles to ratification are overcome, 'the TPP promises significant benefits for Australian wine exporters'. It was particularly excited by the opportunities in Mexico 'where an imported wine market of 61 million litres will be opened up for Australia through the

1 NIA, p. 4.

2 For example, Grain Growers, *Submission 45*, p. 2, Australian Sugar Industry Alliance, *Submission 13*, p. 1-2; Meat and Livestock Australia, *Submission 30*, p. 2; Minerals Council, *Submission 35*, p. 2.

removal of the 20 per cent tariff, thus levelling the playing field with wines from Chile and the USA'. While it acknowledged that there were also defensive interests for the Australian domestic wine market, it observed that Australia already has FTAs eliminating tariffs with other major wine producing countries participating in the TPP.³

3.4 Others industry groups, while generally supportive of the TPP, had a more balanced view of the outcomes achieved. For example, AUSVEG observed that the Australian vegetable industry's export potential is primarily covered by other FTAs which are already in effect. It stated:

While the benefits delivered to our industry by the TPP in isolation are relatively few at this time, the continued work being performed to enhance Australia's relationships with key trading partners supports Australian growers' expansion of their export capabilities, and we look forward to future export development into the future.⁴

3.5 Significant impediments to market access for Australian exporters which were not addressed in the TPP were also identified. For example, Australian Pork noted:

Other pork-exporting TPP members will share the market access wins available to Australian exporters under the agreement. [Australian Pork] would welcome this competition if it were to be conducted on a level playing field. Unfortunately, a number of TPP members, most notoriously Canada, provide large, trade-distorting subsidies to their domestic industry, undermining the ability of Australian producers to compete in third markets.⁵

Rules of Origin

3.6 The TPP includes a number of commitments intended 'to lower the cost of doing business' between TPP countries.⁶ The Business Council of Australia (BCA) observed that 70 per cent of Australia's exports flow to TPP countries:

Global supply chains underpin the global economy. Reducing barriers and costs across the global value chain will improve the ability of businesses to trade internationally. Businesses face a range of regulatory barriers that slow down processing and delivery. The TPP addresses these through a range of commitments to ensure that over 40 per cent of the global economy is operating under consistent, harmonised rules.⁷

3.7 In particular, the BCA made the point that the TPP will improve the conduct of trade by simplifying regulations and procedures. It considered that a key reason for the low-utilisation of Australia's existing FTAs was the overlapping and sometimes

3 *Submission 1*, p. 2.

4 *Submission 18*, p. 4.

5 *Submission 49*, p. 2.

6 NIA, p. 9.

7 *Submission 9*, p. 2.

confusing Rules of Origin. Rules of Origin are the criteria used to determine whether goods will qualify for preferential treatment under trade agreements (that is, whether a good originates within the territory of a party to trade agreement, such as the TPP).⁸ The TPP will establish a set of regional Rules of Origin and a single set of documentary procedures for products traded under the TPP.⁹ The BCA stated:

These arrangements will support the development of regional supply chains by encouraging global multinationals to establish operations within TPP countries. This will permit inputs used in the production of a good from one TPP country to be treated as the same as inputs from any other TPP country when producing the good...These arrangements will also allow businesses to save on administrative costs and allow them to trade under the one set of rules, rather than under existing multiple bilateral FTAs.¹⁰

3.8 Blackmores also considered this was an important development. It noted that as it entered new export markets, it faced increasingly complex administrative arrangements through multiple Rules of Origin and multiple documentation requirements. It stated that the TPP would set 'a new standard for the harmonisation of administrative processes for international business'.¹¹

3.9 However, the Australian Chamber of Commerce and Investment raised significant concerns regarding the calculated benefits of the Rules of Origin in the TPP. It argued that '[c]reating novel and divergent regulatory requirements for exporters and producers increases red tape' and that the TPP could introduce 'yet another set of rules and compliance for Australian importers and exporters'.¹² It recommended that the Australian Government instruct its negotiators to ensure that new regional agreements 'harmonise the existing practices of the preceding bilateral agreements and Australia ASEAN, New Zealand Free Trade Agreement (ANZFTA), and also embrace the WTO Trade Facilitation Agreement and the provisions of the Revised Kyoto Convention of Simplification and Harmonisation of Customs Procedures – including Annex K – Rules of origin'.¹³

Services sector

3.10 The Australian services sector was perceived as gaining additional opportunities under the TPP. The NIA emphasises that the beneficiaries of the TPP include 'Australian service suppliers across a range of sectors including: education, financial, mining-related, professional, telecommunications and transport and logistics services'. ITS Global highlighted the importance of the TPP's coverage of the services sector, noting that in 'developed economies, 70-90 percent of growth is generated by

8 NIA, p. 16.

9 NIA, p. 10.

10 *Submission 9*, p. 4.

11 *Submission 86*, p. 2.

12 *Submission 16*, p. 25.

13 *Submission 16*, p. 5.

services industries'.¹⁴ ANZ also argued the TPP will provide many opportunities for Australian businesses, particularly in the services sector, at a time when diversification is important to the Australian economy:

Australia already has a relatively open economy in terms of tariffs on goods. Around half the expected gains from the agreement will be from liberalisation of services and investment. This is a boon for Australia's growing services sector; services now represent more than 70 per cent of Australia's GDP and comprise 54 per cent of Australia's total exports.¹⁵

3.11 Similarly, Universities Australia believed the TPP would 'facilitate greater education engagement and expand Australia's education services across the region and into Latin America, further strengthening a vital pillar of the Australian economy, whilst delivering considerable non-economic benefits through research collaboration and public diplomacy'. It was particularly pleased by the Australia–Vietnam Memorandum of Understanding which would 'support a pilot program enabling Australian universities to provide online education to Vietnamese students'.¹⁶

Economic modelling

3.12 The NIA states that modelling by the World Bank 'suggests that Australia is set to benefit from the TPP through GDP growth of around 0.7 per cent by 2030'. It also notes that 'similar findings were made in modelling by the Peterson Institute for International Economics and the Research Institute of Economy Trade and Industry, which found increases of 0.6 per cent and 1.9 per cent respectively to Australia's GDP, over similar time periods'.¹⁷

3.13 However, the overall economic benefits of the TPP for the Australia economy were questioned. For example, Dr Anis Chowdhury characterised the Peterson Institute studies of the benefits of the TPP as making 'heroic assumptions about growth, mainly by attributing relatively large, but very dubious growth gains from 'non-trade measures''. She noted that the World Bank acknowledges that 'estimating the impact of deep and comprehensive trade agreements is still very much a work in progress' and the TPP's 'ultimate implications, however, remain unclear'.¹⁸

3.14 AFTINET and a number of other submitters highlighted that there has been no independent economic modelling of the specific impacts of the TPP on the Australian economy as a whole measured by GDP.¹⁹ Similarly, the CFMEU considered that 'the overall economic benefits of the TPP have been found to be marginal and no rigorous independent assessment has been undertaken as to the likely costs to the Australian economy'. It noted that:

14 *Submission 7*, p. 1.

15 *Submission 33*, p. 1.

16 *Submission 81*, p. 1.

17 NIA, p. 4.

18 *Submission 21*, p. 2.

19 *Submission 39*, p. 26.

The United States Department of Agriculture released a report that found that even under the most favourable assumptions the TPP would result in zero change in GDP for Australia. Other analysis has all found benefits of less than 1 percent of GDP over a decade or more.²⁰

3.15 AFTINET pointed out that any benefits from the TPP for Australia need to be balanced against 'the loss to government revenue...resulting from tariff reductions'.²¹ If the TPP entered into force in early 2017, the estimated loss of tariff revenue for Australia would be approximately \$25 million in 2016-2017 and \$135 million over the forward estimates period.²²

Labour issues

3.16 Chapter 19 of the TPP deals with Labour issues. The NIA described the TPP as addressing contemporary trade challenges, in part, through 'the recognition and emphasis by TPP parties on the importance of internationally recognised labour rights'. It states:

Each Party is required to adopt and maintain in its legislation and practices the rights contained in the International Labour Organization Declaration, such as elimination of forced labour, abolition of child labour, freedom of association and the right to collective bargaining. The TPP will also enhance cooperation and consultation on labour issues, and effective enforcement of labour laws in TPP Parties.²³

3.17 However, a number of specific criticisms were made of this aspect of the TPP. AFTINET described the inclusion of a chapter on labour rights as welcome but suggested 'the DFAT description paints a rosier picture than is revealed by the details in the text'. It noted:

Labour law experts have criticised the chapter because much of it is aspirational rather than legally binding, even in relation to 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 proved effective in other agreements.²⁴

3.18 Similarly, the CFMEU argued that the TPP in its current form 'fails to protect the rights of workers'. It noted that the 'TPP does not make reference to detailed International Labour Organisation (ILO) Conventions, but only to the shorter and more general principles in the ILO Declaration'.²⁵

20 *Submission 55*, p. 2.

21 *Submission 39*, p. 26.

22 NIA, p. 18.

23 NIA, p. 11.

24 *Submission 39*, p. 7.

25 *Submission 55*, p. 4.

3.19 Chapter 12 of the TPP deals with the temporary entry of business persons and includes exemptions from labour market testing. Labour market testing means that Australian employers seeking to access the subclass 457 visa programme must first test the local labour market to ensure that there is no suitably qualified and experienced Australian citizen or permanent resident or 'eligible temporary visa holder' readily available to fill that position.²⁶ Exemptions from labour market testing have been controversial aspects of previous trade agreements.

3.20 The NIA notes that in order to implement the TPP a 'Ministerial determination will need to be made under section 140GBA of the *Migration Act 1958* to exempt from labour market testing the intra-corporate transferees, independent executives and/or contractual service suppliers of those TPP Parties to which Australia extended temporary entry commitments.²⁷

3.21 The scope of proposed changes were highlighted in the ACTU submission:

In the case of Australia, its commitments to grant temporary entry extend beyond business visitors and high-level independent executives and include the category of 'contractual service suppliers'. This category is defined expansively to include all 'business persons' with trade, technical and professional skills. Essentially, this commitment would appear to cover temporary entry for all skilled occupations under the 457 visa program, such as nurses, engineers, electricians, plumbers, carpenters, bricklayers, tilers, mechanics and chefs. The DFAT explanatory materials confirm these commitments will be implemented though the 457 visa program...

Under the TPP, Australia has signed away labour market testing for an additional six countries: Canada, Mexico, Malaysia, Peru, Brunei and Vietnam.²⁸

3.22 The ACTU argued:

We have no objection to overseas workers from any country being employed in Australia, provided there is genuine, verifiable evidence through labour market testing that the employer has not been able to find a suitable, qualified Australian to do the job, and those workers are treated well and receive their full entitlements. However, we cannot support this fundamental obligation on employers to support Australian jobs first, simply being waived as part of the cost of pushing through free trade agreements.²⁹

3.23 The CFMEU repeated its argument, previously made in relation to the China-Australia Free Trade Agreement (CHAFTA) that 'the removal of adequate labour

26 Department of Immigration and Border Protection, 'What is labour market testing', available at <http://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-is-labour-market-testing-for-subclass-457> (accessed 16 January 2017).

27 NIA, p. 18.

28 *Submission 38*, pp 13, 15.

29 *Submission 38*, pp 10-11.

market testing for engaging temporary overseas workers would undermine local working conditions and safety'.³⁰ Similarly the Electrical Trades Union (ETU) recommended that the TPP should require 'mandatory skills assessment and labour market testing for licenced trades and occupations'. It argued:

Removing the requirement for overseas trades workers to be assessed to see if their skills meet our standards is dangerous for the workers, their colleagues and for the public. To allow foreign companies to bypass the Australian labour market and bring in a workforce comprised of people untrained and unfamiliar in Australian practices (including an electrical wiring standard that differs substantially from most countries), and entirely dependent on their employer for residence in Australia, is unsafe and unfair for all parties and economically unsound.³¹

3.24 Several submissions highlighted recent examples of the exploitation of temporary workers in Australia, including underpayment, long hours and insufficient health and safety training leading to injuries. AFTINET argued that it was 'not acceptable that the TPP expands temporary entry without requiring labour market testing, and without any provisions to prevent such exploitation'.³² It noted:

Academic studies comparing various recent trade agreements have demonstrated that a range of governments are using temporary work visas without local labour market testing as a means of deregulating labour markets. Such arrangements create groups of workers with less bargaining power who are more vulnerable to exploitation because loss of their employment can lead to deportation.³³

3.25 The potential impacts of the TPP on employment and inequality was also raised. Research by the Global Development and Environment Institute at Tufts University was frequently cited as evidence the TPP could have adverse impacts in these areas. This research projected that the TPP could cause employment losses overall with employment in Australia contracting by 39,000 jobs by 2025.³⁴

3.26 The TPP was also projected to increase inequality with a lower labour share of national income both in Australia and overseas. The Tufts University paper expected competitive pressures on labour incomes, combined with employment losses, to push the share of national income for labour further down, redistributing income from labour to capital in all countries. Dr Anis Chowdhry commented:

While production for export may grow production for domestic markets is likely to decline in the face of import competition. But exports may be less

30 *Submission 55*, p. 3.

31 *Submission 5*, p. 4.

32 *Submission 39*, p. 22.

33 *Submission 39*, p. 21.

34 Jeronim Capaldo and Alex Izurieta, 'Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement', Global Development And Environment Institute Working Paper No. 16-01, January 2016.

labour-intensive with adverse consequences for employment while more imported inputs for export-oriented production will reduce national linkages and multiplier effects compared to domestic production. Businesses may seek to become more competitive by cutting labour costs. This will negatively affect income distribution.

Real incomes for employees, especially the less skilled, are likely to be further depressed, as in recent decades, due to greater international competition following trade liberalization. The TPP, thus, will likely lead to higher inequality due to declining labour shares of national incomes. This will in turn weaken domestic demand.³⁵

Investment

3.27 The NIA states that the TPP will 'create new investment opportunities and provide a more predictable and transparent regulatory environment for investment'. It outlines:

The TPP will promote further growth and diversification of Australian outward investment by liberalising investment regimes in key sectors for which the TPP region accounts for a major share of global investment, such as mining and energy, telecommunications and financial services...

The TPP will also promote further growth and diversification of foreign investment in Australia by liberalising the screening threshold at which private foreign investments in non-sensitive sectors are considered by the Foreign Investment Review Board (FIRB), increasing it from \$252 million to \$1,094 million for all TPP Parties.

Under the TPP, Australia has retained the ability to screen investments in sensitive sectors to ensure they do not raise issues contrary to the national interest. All investments by foreign governments will continue to be examined and lower screening thresholds will apply to investments in agricultural land and agribusiness.³⁶

3.28 Comments received were generally supportive of these aspects of the TPP. For example, ITS Global made the point that Australia 'has always depended on foreign investment to build economic growth' and noted that while Australia once was a net recipient of foreign capital, it is now as much an investor offshore and an importer of capital. It made the argument that 'Australia needs more outward investment and more inward investment to secure the benefits on offer in the global economy'.³⁷ Similarly, ANZ considered the TPP would encourage both inward and outward investment:

Inward FDI stocks are projected to increase by around AUD13 billion; an increase of 1 per cent. Australia's outward FDI stocks are likely to increase

35 *Submission 21*, pp 2-3.

36 NIA, p. 9.

37 *Submission 7*, p. 3.

by around \$30 billion (3 per cent). This means that Australian investors and companies will become more engaged with the global economy.³⁸

Social, cultural and environmental policies

3.29 A series of concerns were expressed that Australia's social, cultural and environmental policies would be undermined by provisions in the TPP. In particular the lack of enforcement for environmental measures and the possible impact on health policies in Australia were raised.

Environmental issues

3.30 DFAT's supporting documentation observes that the TPP Environment Chapter 'aims to promote sustainable development through mutually supportive trade and environmental policies, and to achieve higher levels of environmental protection in TPP countries'. It states:

The TPP Environment Chapter promotes the effective enforcement of domestic environmental laws and lays the foundation for TPP Parties to work together to address a range of trade-related environmental challenges, such as protecting the ozone layer, protecting the marine environment from ship pollution, combatting illegal wildlife trade, and combatting over-fishing and illegal fishing.³⁹

3.31 Environmental Defenders' Offices of Australia considered that 'Chapter 20 of the TPP outlines a series of obligations which if fully implemented could improve Australia's national environmental laws, in particular the *Environment Protection Biodiversity Act 1999* (EPBC Act), *Fisheries Management Act 1991* (FM Act) and *Illegal Logging Prohibition Act 2012*'. For example, it noted that Article 20.4 requires each Party to affirm its commitment to the multilateral environmental treaties. It argued this was an opportunity to improve the implementation of multilateral environmental treaties under the EPBC Act.⁴⁰

3.32 However, Friends of the Earth considered the TPP would have detrimental effects on the ability of Australia to effectively protect the environment. It stated:

Legally meaningless rhetoric pervades the text with few conservational and environmental issues actually addressed...The environment chapter neglects to ensure a standard of commitment from the countries involved, allowing each nation to 'establish its own level of domestic environmental protection', however, this is in juxtaposition to the fact that enforcement of those laws is dependent on breaches affecting trade and investment.

Of the four multilateral environmental agreements (MEAs) included in the text only one is enforceable – Trade in Endangered Species (Article 20.17.2) ...

38 *Submission 33*, p. 2.

39 DFAT, 'Outcomes: Environment Chapter – Trans-Pacific Partnership', 18 December 2015, p. 1.

40 *Submission 48*, p. 2.

The section in the TPP that deals with climate change never uses the words 'climate change' nor does it mention the global treaty under the United Nations, the [United Nations Framework Convention on Climate Change], which contains binding agreements that every country in the TPP has signed onto.⁴¹

3.33 Many those who provided correspondence to the committee were concerned that the environment standards mentioned in the TPP had weak enforcement measures and did not acknowledge climate change issues. The ETU recommended that 'a full, public study of the environmental impacts of the TPP be carried out urgently, with the findings to inform the inclusion of a new chapter in the agreement that deals with environmental standards that includes commitments by governments to implement agreed international environmental standards which should be enforced by the government-to-government disputes process of the agreement'.⁴²

Health issues

3.34 In relation to health, many submitters and persons who contacted the committee were concerned regarding the impact of the TPP on Australia's health system and particularly the Pharmaceutical Benefits Scheme. For example, the Public Health Association of Australia (PHAA) stated:

Trade agreements are a significant determinant of health. They can affect many aspects of health care and public health...PHAA is particularly concerned about the emerging trend of trade agreements that aim to extend into areas that have previously been matters for domestic policy making.⁴³

3.35 The PHAA, together with other health organisations, had undertaken a health impact assessment (HIA) on the early versions of the TPP text which were available prior to the TPP being agreed. It described a HIA as a 'systematic process that considers the potential health effects of a proposed policy, plan, or project, and offers recommendations to mitigate health harms and improve benefits'. The PHAA outlined:

The HIA identified concerns related to regulation of alcohol control, tobacco control, and food labelling (potential impacts to the cost of medicines have been discussed in other parts of this submission). The HIA found that the technical barriers to trade chapter, the wine and spirits annex, and the intellectual property chapter may make it more difficult for Australia to implement innovative control measures, such as health warning labels on alcohol containers, particularly where the evidence base for the intervention is still developing. Similarly, rules in the technical barriers to trade chapter may limit future legislation for food labelling. The regulatory coherence and transparency chapters could also enable a greater role of the

41 *Submission 47*, p. 5.

42 *Submission 5*, p. 5.

43 *Submission 42*, p. 4.

processed food industry in policymaking, which may influence the food labelling system used in the future.⁴⁴

3.36 In addition to the impact of the ISDS provisions, the PHAA outlined a number of other potential areas of the TPP which could affect Australia health policy. These included ambiguous provisions in relation to biologic products, which are produced through biological processes and account for a significant and growing share of government expenditure on pharmaceuticals. 'Generic' or 'follow-on' versions of biologics are called 'biosimilars'. The PHAA noted that monopolies on just ten biologic drugs listed on Australia's Pharmaceutical Benefits Scheme cost Australian taxpayers over \$205 million in 2013-14.

3.37 DFAT supporting documentation outlines there is a two-track outcome on biologics protection in the TPP:

Parties can choose to provide effective market protection through at least 8 years of data protection. Alternatively, Parties can choose to provide effective market protection through at least 5 years of data protection, along with other measures, including existing measures in the case of Australia, and recognising market circumstances. These measures and circumstances include regulatory settings, patents, and the time it takes for follow-on medicines to become established in the market. Australia will follow the 5 year option, which reflects our current system and requires no changes. This acknowledges that different tracks can deliver comparable outcomes.

Australia is not required to change any part of its current law, including data protection for biologics, or our patent regime. There will be no adverse impact on the Pharmaceutical Benefits Scheme and no price increases for medicines.⁴⁵

3.38 However, the PHAA considered that the final text of the TPP's Intellectual Property (IP) Chapter contained 'problematic language and troubling ambiguities'. It stated:

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 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.⁴⁶

3.39 Medicines Australia considered it was 'misleading to suggest that data protection will add costs to patients when accessing prescription medications through the pharmacist'. However, it submitted that the Australian Government needed to provide insight and clarity as to whether and how the TPP articles on data protection for new pharmaceutical products would be domestically implemented. It argued that

44 *Submission 42*, p. 13.

45 DFAT, 'Outcomes: Biologics', 7 July 2016, p. 2.

46 *Submission 42*, p. 8.

this clarity will 'encourage greater consistency and transparency in both the domestic and international business environment within which innovative pharmaceutical companies make their investment decisions'.⁴⁷

Investor-State Dispute Settlement

3.40 ISDS provisions provide foreign investors with the right to access an international arbitration tribunal if they believe actions taken by a host government are in breach of its investment obligations. Australia has signed a series of bilateral investment treaties which include ISDS provisions. ISDS provisions were also part of free trade agreements with Chile, Singapore, Thailand, Korea, Japan and China. Notably, Australia did not agree to ISDS provisions as part of the Australia-United States Free Trade Agreement.

3.41 Sharply opposing views were expressed regarding the ISDS provisions in the Investment Chapter of the TPP. Many of the arguments made in relation to the ISDS provisions in the TPP were familiar to the committee from previous inquiries into major trade agreements. For example, Ms Steffie Baird observed:

In its 2010 report, the Productivity Commission stated that there did not 'appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements'. The report also noted the 'policy and financial risks' for governments posed by ISDS.⁴⁸

3.42 A number of submitters also reminded the committee of then High Court Chief Justice Robert French's commentary in 2014 regarding ISDS provisions. This included:

Arbitral tribunals set up under ISDS provisions are not courts. Nor are they required to act like courts. Yet their decisions may include awards which significantly impact on national economies and on regulatory systems within nation states... The possible inclusion of an ISDS provision in the TPP has become an issue of intense debate with some critics seeing it as a Trojan horse for the enhancement of the power of international corporations at the expense of national sovereignty and interests.⁴⁹

3.43 The inclusion of ISDS provisions in the TPP was a point of particular concern for many individuals who wrote to the committee to urge that the TPP be rejected. For example, Ms Chay Neal wrote:

This system is not about protecting a foreign investor from direct expropriation of assets, and instead has long been a system for foreign investors to block or control regulation by the host government in the public interest. This system is a gross violation of the ordinary concept of national

47 *Submission 51*, p. 2.

48 *Submission 8*, p. 1.

49 Chief Justice Robert French AC, 'Investor-State Dispute Settlement – a cut above the courts?', Supreme and Federal Courts Judges' Conference, 9 July 2014, Darwin, available at: <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf> (accessed 16 January 2017).

sovereignty, because it overrides the constitutional legislative functions of federal, state and local government, and the constitutional functioning of Australia's judicial system.⁵⁰

3.44 The increasing use of ISDS provisions by overseas investors worried many submitters. For example, the Logan and Albert Conservation Association noted:

The Australian government is entering into this risky space at a time when there is an enormous ramping up of ISDS challenges globally. Only 50 ISDS challenges occurred in the 50 years to 2000. Since 2000 more than 600 cases have been launched, the majority of these challenging environmental and resource regulations.⁵¹

3.45 Dr Kyla Tienhaara provided the committee with a paper on possible costs of ISDS provisions for Australia based 'on available global data and a direct comparison with the experience of Canada' under the North American Free Trade Agreement. This paper outlined that:

- American investors initiate a large portion of ISDS cases globally (20 per cent);
- the TPP's carve-out of tobacco is of very limited value given that ISDS claims are initiated by investors from a wide variety of industrial sectors over a wide range of issues;
- ISDS cases can arise over measures brought by any level of government;
- states lose or settle ISDS cases more often than they win them;
- even when states 'win' ISDS cases, they 'lose' because they have unrecoverable legal costs;
- damages awarded by tribunals and compensation settlements vary wildly;
- it is difficult to quantify the cost of 'regulatory chill' but there is mounting evidence that it is an identifiable phenomenon; and
- ISDS provides no discernible public benefits—the only beneficiaries of the system are corporations, and particularly large multinationals.⁵²

3.46 In contrast, the Centre of Independent Studies also provided the committee with papers relevant to the inquiry including those which made the case for investor-state arbitration. It characterised ISDS provisions as strengthening the rule of law, providing legal predictability and equality in the international arena among disputing parties, introducing competition in the delivery of justice by allowing 'international investors to choose whether to pursue their grievances in either domestic courts or ad-

50 Correspondence received 28 October 2016.

51 *Submission 63*, p. 1.

52 *Submission 20*, p. 3.

hoc tribunals' and reducing 'the sovereign risks associated with investments across borders.'⁵³

3.47 Dr Jeffrey Wilson argued the TPP would promote certainty in relation to ISDS provisions. He noted:

Despite featuring in many bilaterals, differing ISDS implementations have resulted in a lack of clarity over precisely what rights and obligations these impose. A particular concern has been around the definition of 'expropriation', to what extent this impacted on governments' ability to engage in public welfare regulation. Providing a single ISDS template via the TPP can help end this regulatory uncertainty for both businesses and governments.⁵⁴

3.48 The TPP NIA stresses the safeguards which had been 'built into the rules guiding ISDS, making this one of the most protective treaties in existence worldwide in terms of its protections for legitimate regulation':

Procedural safeguards in the TPP provide enhanced levels of transparency in the management of ISDS claims. In addition, specific Australian policy areas are carved-out from certain ISDS claims including: social services established or maintained for a public purpose, such as social welfare, public education, health and public utilities; measures with respect to creative arts, Indigenous traditional cultural expressions and other cultural heritage; and Australia's foreign investment policy, including decisions of the Foreign Investment Review Board. Australia's tobacco control measures as defined under the TPP will not be able to be challenged.⁵⁵

3.49 The BCA considered that the TPP ISDS provisions had appropriate safeguards and would create investment certainty by allowing Australian investors to protect their investments from discriminatory treatment overseas. It argued:

It is important to note that the TPP's ISDS provisions do not protect an investor from a mere loss of profits following a change in government policy or regulation. ISDS also does not prevent the Australian Government from changing its policies or regulating in the public interest. It also does not freeze existing policy settings. Investors cannot mount a case against the government merely because an investor does not agree with a new policy or that a policy adversely affects its profits....

The ISDS text will not prevent either government from regulating in the public interest. Explicit safeguards are included to re-affirm the right of governments to take decisions in the public interest, including explicit caveats covering areas such as health and the environment.⁵⁶

53 *Submission 23*, p. 4.

54 *Submission 6*, p. 4.

55 NIA, p. 9.

56 *Submission 9*, pp 4-5.

3.50 However, other submitters were not assured by the ISDS safeguards in the TPP. For example AFTINET stated:

Claimed ISDS 'safeguards' for health, environment and other public welfare measures have not prevented ISDS cases. These 'safeguards' do not address the main structural deficiencies of ISDS tribunals, which have no independent judiciary, no precedents and no appeals process. Tribunals have enormous discretion in interpreting the meaning of 'safeguards'...

The claimed 'safeguards' which actually apply to the ISDS section of the investment chapter cannot be described as clear carveouts or exclusions. The only clear carveout or exclusion is that governments have the option of excluding future tobacco control laws from ISDS cases...[T]his begs the question of why other public interest laws are not clearly excluded...⁵⁷

Copyright and other intellectual property

3.51 TPP's Intellectual Property (IP) chapter (Chapter 18) covers patents, trademarks, copyrights, industrial designs, geographical indications, trade secrets, other forms of intellectual property, and enforcement of intellectual property rights.⁵⁸ The NIA states that the chapter is consistent with Australia's existing intellectual property regime and will not require any changes to Australia's legislation. In order to implement the TPP '[m]inor regulatory changes relating to encoded broadcasts will be required in order to extend benefits in Part VAA of the *Copyright Act 1968* that Australia already extends to parties to the Rome Convention and AUSFTA to broadcasts from Malaysia, Singapore, Brunei Darussalam and New Zealand'.⁵⁹

3.52 Despite this assurance, Chapter 18 was a key area of criticism in submissions received. For example, the Intellectual Property Committee (IPC) of the Business Law Section of the Law Council of Australia (Law Council) stated:

The TPP IP Chapter is the latest in a series of recent trade agreements to include detailed commitments regarding the form and substance of domestic IP law. Of all of the agreements concluded in the last decade or so, the TPP is the most complex, in part owing to its plurilateral nature.

A first problem with this complexity is that it is becoming increasingly difficult to ascertain exactly what Australia's international IP obligations are.

A second problem with detailed and complex rules is that they can tend to limit reform options. Australia's IP laws are not perfect and the need for future reform is foreseeable based on the experience of the recent past.

...[C]onsistency in at least basic IP rules – is not being achieved. In fact, it is notable that in the case of the TPP, the IP Chapter does not in fact create a 'common set of rules' (National Interest Analysis, [37]3) for IP law. For

⁵⁷ *Submission 39*, p. 15.

⁵⁸ DFAT, 'Summary of the TPP Agreement', p. 9.

⁵⁹ NIA, p. 18.

example, in relation to online intermediary liability, the chapter provides at least 4 different regimes applicable to different parties to the TPP.⁶⁰

3.53 The Law Council also disputed the NIA's statement that Australia's TPP obligations are consistent with Australia's existing intellectual property regime and require legislation changes. It pointed to a number of areas including online service provider liability and technological protection measures where amendments to Australian law may be required.⁶¹

3.54 Associate Professor Kimberlee Weatherall argued that the key effect of Chapter 18 of the TPP was to 'lock in' existing Australian IP law:

This is not a good thing unless Australia's current IP laws (1) are perfect; and (2) will continue to be perfect in the medium to long term regardless of changes in technology, changes in business models, changes to Australia's areas of comparative advantage, and changes to other countries' IP settings. Obviously this cannot be true. The number of reviews we have had of current Australian IP law, and the number of changes that have been proposed for Australian IP law by those reviews, suggests otherwise.⁶²

3.55 She recommended the committee 'condemn Chapter 18 for locking in existing IP law; hindering or preventing future reform; and creating a breathtaking degree of complexity and legal uncertainty'.⁶³ Dr Matthew Rimmer also considered the TPP was unbalanced and distorted the aims, objectives, and principles of copyright law:

There is a failure to properly represent the traditional objectives of copyright law in promoting learning, access to knowledge, and scientific progress. Moreover, the Trans-Pacific Partnership does not promote copyright goals – such as creativity, innovation, competition, and access to goods and services.⁶⁴

3.56 The broader impacts of the TPP's treatment of IP regulation was also discussed in submissions. For example, Electronic Frontiers Australia considered the 'TPP has failed to internationalise a balanced and modern copyright regime and is instead a reflection of controversial concepts and ideas which negatively impact users and have not been proven to increase innovation and creativity so as to justify this invasion of user rights'.⁶⁵ Dr Aoife O'Donoghue and Dr Ntina Tzouvala argued that increased patent protection in the TPP would disproportionately affect developing states 'who are unable to take advantage of the looser regulation that accompanied fast economic development in the Global North'.⁶⁶

60 *Submission 26*, pp 1-2.

61 *Submission 26*, p. 3.

62 *Submission 82*, p. 3.

63 *Submission 82*, p. 1.

64 *Submission 84*, p. 3.

65 *Submission 79*, p. 3.

66 *Submission 22*, p. 2.

Consumer rights

3.57 Parts of the TPP directed to the benefit of consumers included commitments on personal information protection, enforceable consumer rights, addressing 'spam' and the high costs of international mobile roaming.⁶⁷ However, in submissions for the inquiry, discussion regarding the possible impact of the TPP on consumer rights centred on tariff reductions and the influence of the TPP, particularly the ISDS provisions, on future regulation intended to benefit consumers.

3.58 The NIA characterises Australia's tariff elimination schedule as 'ambitious', with 93 per cent of all tariff lines eliminated or bound at zero tariff rates upon entry into force. Almost all remaining tariffs, covering sectors where tariffs still provide some level of protection against imports, would be eliminated in either three or four years.⁶⁸

3.59 The Business Council of Australia argued that '[o]pen markets deliver material benefits to consumers through greater competition and access to a greater variety of goods and services. It noted that 'eliminating tariffs on goods imported from key import markets' would benefit Australian consumers and businesses using imported input.⁶⁹ Further:

The TPP will enhance transparency, cooperation and promote good practice with regard to establishment and maintenance of technical regulations. A better understanding of each party's regulatory systems will improve public safety and benefit Australian consumers.⁷⁰

3.60 The Financial Services Council argued that lower barriers to trade would allow Australian consumers of financial services 'access to a greater range of products'. It noted that 'while Australia's market for financial services is already one of the most open and well-regulated in the world, free trade agreements provide the opportunity to broaden the range of products available to Australian consumers'.⁷¹

3.61 In contrast, CHOICE focused its submission on the potential effect on consumers of the ISDS provisions of the TPP. It highlighted its concern that the TPP would place 'future reform to benefit Australian consumers at risk':

Specifically, CHOICE is concerned about ISDS action against Australia should the Federal Parliament pass legislation or if the Government implements regulations to:

- Require specific-ingredient labelling on food products, like palm oil;
- Change or strengthen our country of origin labelling system;

67 NIA, p. 11.

68 NIA, p. 13.

69 *Submission 9*, p. 3.

70 *Submission 9*, p. 4.

71 *Submission 41*, p. 2.

- Require the display of 'health stars' or 'traffic lights' on the front of packaged foods;
- Ban the import of products that are dangerous or potentially dangerous;
or
- Improve the Australian Consumer Law to, for example, ban unfair trading or to strengthen consumer guarantees.⁷²

72 *Submission 43*, p. 2.