Chapter 4

Key issues

Introduction

4.1 This chapter considers some of the key issues raised in submissions to the inquiry. These included:

- investor-state dispute settlement;
- labour market testing;
- skills assessment processes;
- investment facilitation arrangements; and
- environmental standards.

Investor-state dispute settlement

4.2 Investor-state dispute settlement (ISDS) provides 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.[1] Chapter 9 of ChAFTA, Investment, commits Australia and China to non-discriminatory treatment of the other party's investors and investments. It also commits both parties to Most Favoured Nation (MFN) treatment, meaning neither party can offer more favourable treatment to foreign investors in any future agreements.[2] Chapter 9, Section B, outlines the agreed ISDS arbitration tribunal processes.

4.3 Currently, Australia has agreed ISDS provisions in free trade agreements with Chile, Singapore, Thailand and Korea. It has also agreed to ISDS provisions in 21 bilateral investment treaties, including with China.[3]

4.4 A large number of submissions to the inquiry from individuals opposed the inclusion of ISDS processes within ChAFTA and other Australian trade agreements. These submissions pointed to cases in which foreign investors took legal action against governments under ISDS provisions for enacting health, environmental or other public interest legislation.

4.5 Some of those opposed to ISDS processes argued that the cost of litigation and compensation awarded to foreign investors can also act to discourage governments from proceeding with legitimate domestic legislation in the national interest. For example, the Public Health Association of Australia stated:

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1 Department of Foreign Affairs and Trade, 'Investor-State Dispute Settlement', http://dfat.gov.au/trade/topics/Pages/isds.aspx (accessed 9 October 2015).

2 Department of Foreign Affairs and Trade, 'ChAFTA Summary of Chapters and Annexes', http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/chafta-summary-of-chapters-and-annexes.aspx#chapter-9 (accessed 9 October 2015).

3 Department of Foreign Affairs and Trade, 'Investor –State Dispute Settlement', http://dfat.gov.au/trade/topics/Pages/isds.aspx (accessed 9 October 2015).

> From a public health point of view, one of the biggest concerns is the chilling or deterrent effect that ISDS can have on public health policy. An example is the stalling of plans to introduce tobacco plain packaging in New Zealand, while the ISDS case against Australia by Philip Morris Asia is decided.[4]

4.6 The potential for the ChAFTA ISDS mechanism to influence the scope of future Australian regulation was a key issue raised. This was illustrated by CHOICE which outlind the potential for ChAFTA ISDS processes to prevent future reform of Australia's food labelling laws.[5]

4.7 Philip Morris Asia is currently challenging Australia's legislation, enacted in 2011, regulating for the plain packaging of tobacco products under the ISDS processes of Australia's investment agreement with Hong Kong. This arbitration is still ongoing.[6] While this arbitration is the first major ISDS case to be brought against Australia, several submissions pointed to an increased use of ISDS cases against other national governments. In particular, Dr Kyla Tienhaara noted:

> Over the last decade there has been an explosive increase of cases of investor-state dispute settlement (ISDS). Until the mid-nineties, only a handful of cases had emerged. Then, following a few high-profile cases, everything changed. Between 2003 and 2013, one arbitral body registered more than thirty new cases every year and more than fifty cases in each of the last three years of that decade. As of the end of 2014, the total number of known cases was 608. By then, one hundred and one governments had responded to one or more ISDS claims.[7]

4.8 Many opposed to ISDS provisions noted that the Investment Chapter within ChAFTA is unfinished, with negotiation of some provisions to occur during a review process within three years of the date of entry into force of the agreement. For example, AFTINET stated:

> …the section is unfinished, with important definitions of the criteria that can be used to sue governments to be determined by review process in three years' time. These include two of the most controversial aspects of ISDS, the definition of indirect expropriation and the definition of minimum standard of treatment of foreign investors. These are provisions often used to sue governments under other agreements. The Australian Parliament is being asked to vote for the implementing legislation for this agreement without having the details of what these future provisions may be.[8]

4.9 Other submissions spoke of the lack of transparency in ISDS cases and disagreed with the legal processes used in ISDS cases. The Electrical Trades Union of

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4 *Submission 34*, p. 3.

5 *Submission 49*, p. 1.

6 Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, 2012-12, available at http://www.pcacases.com/web/view/5 (accessed 4 November 2015).

7 *Submission 8*, p. 2.

8 *Submission 14*, p. 11.

Australia (ETU) characterised ISDS as 'an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors'.[9]

4.10 However, some submissions indicated support for the inclusion of an ISDS mechanism in ChAFTA. Both GrainGrowers and the Australian Chamber of Commerce and Industry (ACCI) considered the ISDS provisions in ChAFTA would provide protection for Australian investors. The ACCI highlighted that 'ISDS clauses ensure that Australian investments abroad receive the same non-discriminatory and fair access to markets accorded to foreign investments in Australia'.[10]

4.11 Others emphasised the limited scope of the ChAFTA ISDS provisions. For example, Dr Luke Nottage described the scope of ISDS-backed protections for investors as 'narrow'.[11] Lexbridge Lawyers observed that there is always a degree of risk associated with ISDS in regard to a potential challenge to government action or regulation:

> However, in recognising this risk it is also necessary to recognise that the exposure varies between agreements and depends on the specific provisions in each agreement. A proper assessment of the risk of ISDS therefore requires a detailed examination of the relevant agreement, including the scope of ISDS and any applicable safeguards…In our view, an examination of these factors leads to the conclusion that the exposure under ChAFTA – in terms of a challenge to government regulation – is significantly less than the vast majority of Australia's agreements containing ISDS.[12]

4.12 In particular, Lexbridge Lawyers highlighted the safeguards in ChAFTA:

> ChAFTA contains a set of safeguards which are similar to those found in other recent agreements including the Korea-Australia FTA. In addition ChAFTA contains additional procedural safeguards which have not been included in any existing Australian agreement. Most notably, these include an innovative safeguard to block – and potentially prevent claims against non-discriminatory public welfare regulation.[13]

Labour market testing

4.13 Conflicting views were expressed on the ChAFTA impact on labour market testing. Article 10:4 states:

> 3. In respect of the specific commitments on temporary entry in this Chapter, unless otherwise specified in Annex 10-A, neither Party shall:
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> …

9 *Submission 38*, pp 25-26.

10 *Submission 35*, p. 9.

11 *Submission 7*, p. 1.

12 *Submission 23*. p. 1.

13 *Submission 23*, p. 6.

> (b) require labour market testing, economic needs testing or other procedures of similar effect as a condition for temporary entry.[14]

4.14 Many submitters were concerned that the removal of the requirement for labour market testing would mean that Australian workers could lose employment opportunities to temporary migrants. For example, the Australian Nursing and Midwifery Federation commented:

> We note that temporary visa holders working in health and aged care under the visa class 457, 442 and 485 along with international students and working holiday makers now constitute a significant and growing temporary migrant workforce at a time when local nurses and midwives are struggling to gain employment.[15]

4.15 Likewise, the ETU commented that the removal of the labour market testing provision for issuing 457 visas to Chinese workers 'sets the stage for Australian workers to be robbed of opportunities, and undercut by a new class of immigrant working poor'.[16] Several submitters also argued there were existing problems with the 'lack of enforcement' of standards for 457 visa workers and gave examples of temporary migrant workers being employed in unfair and unsafe conditions.[17]

4.16 Conversely, the Master Builders Association (MBA), while it is 'first and foremost committed to the local building and construction industry and…the training and upskilling of Australians' thought that labour market testing should be removed as it is unreliable and ineffective. The MBA also stated that temporary migration would be important to the building and construction industry given that:

> The industry's challenge is to meet the rising demand for a skilled workforce against a background of decreasing apprentices in training, from 56,000 to 43,100 since 2010. In addition, the apprenticeship commencement rate has decreased by 18.8 per cent since 2010, from 22,100 to 18,000 commencements in the past five years…[18]

4.17 Migration Council Australia considered that existing 457 visa provisions would ensure that Australian workers would be given preference. It stated:

> …Chinese citizens on 457 visas under ChAFTA will still require English proficiency and sponsorship under standard terms and conditions of the 457 visa program, including market salary rates and a wage threshold. In effect, those elements of the 457 regulatory framework that have been shown to be most effective in preventing employers from preferencing overseas workers will still apply.[19]

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14 Department of Foreign Affairs and Trade, *Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China*, p. 113.

15 *Submission 1*, p. 1.

16 *Submission 38*, p. 4.

17 For example, *Submission 14*, p. 6.

18 *Submission 27*, pp 5-7.

19 *Submission 5*, p. 3.

Skills assessment processes

4.18 Submissions from individuals and organisations also voiced their concerns regarding a side letter to ChAFTA which removes the requirement for mandatory skills assessment for temporary skilled visas for a number of trades, with the remaining trades to be reviewed within two years. In all cases there was concern that Chinese workers may not have skills and health and safety training of an Australian standard which could lead to harm to themselves and others.

4.19 The ETU stated:

> Electrical work is inherently dangerous…removing the requirement for overseas trade workers to be assessed to see if their skills meet our standards is dangerous for the workers, their colleagues and for the public.
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> China does not have the level of trades training and safety standards in comparison to Australia. The ChAFTA arrangements will only serve to erode electrical safety in our country and lead to accidents, injuries and death to workers and members of the public.[20]

4.20 The CFMEU expressed concern with the quality of trade training in China and quoted an assessment made by the World Bank in 2013 of the Chinese VET system:

> At technical/vocational schools in China, curriculums and training methods are outdated and can barely keep pace with the evolving market's needs…teachers often lack practical skills themselves; students don't get enough hands-on training and workplace experience as they hope.[21]

4.21 In contrast, Migration Council Australia said removing mandatory testing:

> …signals Chinese qualifications will be treated in the same manner as other countries, such as the United Kingdom, recognising the continuous improvement in the Chinese formal education sector and the growth in the maturity of the Chinese labour market.[22]

4.22 The CFMEU expressed concern that the trades of cabinetmaker, carpenter, carpenter and joiner, and joiner do not have licensing requirements to work in the trade. The submission stated:

> Removing mandatory skills assessments for Chinese 457 visa applicants in these trades is therefore removing the last and only regulatory safeguard designed to prevent employers nominating for 457 visas Chinese workers who do not possess Australian-standard skills in these trades.[23]

4.23 The CFMEU also cited the removal of mandatory skills assessment as a potential cause of exploitation of temporary migrant workers, with employers nominating them for skilled 457 visas but putting them to work in lower-skilled jobs.

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20 *Submission 38*, p. 4.

21 *Submission 66*, p. 24.

22 *Submission 5*, p. 4.

23 *Submission 66*, p. 22.

The CFMEU noted that this was commonplace prior to the introduction of mandatory skills assessments for China.[24]

4.24 The Business Council of Australia did not see the removal of mandatory skills testing as problematic because workers on 457 visas are still required to obtain the necessary licences to work in Australia.[25] Similarly the Export Council of Australia noted that the 'relevant provisions reflect that important regulatory conditions must be complied with before overseas workers can be employed in Australia including any mandatory licencing or registration requirements'.[26]

Investment Facilitation Arrangements

4.25 The concerns of organisations and individuals in regard to the removal of the requirement for labour market testing and mandatory skills testing were reiterated in a number of submissions which discussed the Memorandum of Understanding (MOU) on Investment Facilitation Arrangements (IFA). A key concern was that Australian workers may be displaced by temporary migrant workers on 457 visas. The Australian Council of Trade Unions noted:

> A mandatory requirement for Australian workers to have first priority on Australian infrastructure projects would be entirely consistent with the position advocated by Australian unions and in line with community expectations. However, there is nothing in the text of ChAFTA or in the MOU that provides such a guarantee…In fact, the MOU states explicitly that 'there will be no requirement for labour market testing to enter into an IFA'.[27]

4.26 As with 457 visa arrangements, some organisations also believed IFAs could leave migrant workers vulnerable to exploitation. The Textile Clothing and Footwear Union of Australia noted that workers employed under IFA provisions would be more vulnerable than those on 457 visas:

> …a worker's migration status is tied to their employment, and there is no entitlement to remain in the country to find a new job before the visa's expiration (even 457 visa workers have 90 days to find a new job). Dr Joanna Howe, Senior Lecturer of Law, University of Adelaide, explains:
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> > The worker's right to remain in Australia is wholly contingent upon the employer's continuing demand for their labour. Withdrawal of support from the employer-sponsor may mean cancellation of the visa. This threat, actual or perceived, may induce an IFA worker to accept any degree of substandard working conditions and creates a strong disincentive for these workers to voice concern for fear of being sent home.[28]

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24 *Submission 66*, p. 22.

25 *Submission 68*, p. 3.

26 *Submission 60*, p. 3.

27 *Submission 50*, p. 15.

28 *Submission 65*, p. 5.

4.27 Civil Liberties Australia noted that the lack of a requirement for labour market testing could lead to lesser conditions for Australian workers:

> The likely lower rate paid to Chinese workers who have not had the chance to negotiate their terms and conditions will give Chinese firms or firms with Chinese investors an unfair advantage over local Australian firms. As the numbers of such special condition firms expands, their freedom from paying the going rate and lesser requirements for occupational health and safety provisos could be used to drive down Australian wages and conditions more generally in the relevant industries.[29]

4.28 The Migration Council of Australia called for further information regarding IFA provisions, requesting 'the government clarify whether labour market testing can occur for an IFA or whether this is precluded given Chapter 10 of ChAFTA as labour market testing is not referenced in the MOU'.[30]

4.29 However, some organisations believed that the IFA provisions would require investors to provide evidence of a lack of suitable Australian workers to complete projects. The Australian Chamber of Commerce and Industry (ACCI) noted that '…the labour agreements will require evidence of labour market shortages as part of the rigorous process the Department of Immigration and Border Protection puts in place to finalise an agreement'.[31] The ACCI also maintained that the IFAs would not place downward pressure on the wages of Australian workers as labour agreements:

> …provide some ability to seek concessions to the 457 program (similar to those mentioned in the MOU). But no concessions are available on the 457 sponsor obligations, including the need to pay market wage rates and comply with all workplace laws.[32]

4.30 The Minerals Council of Australia was also supportive of the IFA provisions, perceiving them as beneficial for Australia:

> IFAs are innovative 'umbrella' project-wide agreements designed to promote increased investment in large infrastructure projects above $150 million, leading to increased jobs and economic prosperity for Australians. They respond to Chinese companies' concern that they were unable to secure skilled staff for projects in a timely way during the mining boom.[33]

Environmental standards

4.31 Some submitters considered that ChAFTA should contain additional environmental protections.[34] AFTINET observed that while Australia's free trade agreement with Korea contained an environment chapter, ChAFTA does not. It stated

29 *Submission 30*, p. 6.

30 *Submission 5*, p. 6.

31 *Submission 35*, p. 7.

32 *Submission 35*, p. 7.

33 *Submission 53*, p. 27.

34 For example, Dr Romaine Rutman, *Submission 24*, p. 4.

that this indicated 'that neither government has made any commitment to implement agreed international environmental standards':

> China still has very high levels of industrial pollution which harms both the environment and public health…Lack of compliance with environmental standards reduces costs for both local Chinese firms and global firms subcontracting to China, cost reductions not available to local Australian firms. The ChAFTA places no obligations on the Chinese government to improve its environmental standards. In fact it rewards current standards by granting preferential market access to Australia for its products.[35]

35 *Submission 14*, p. 13.