

Chapter 4

Issues raised with the committee

Introduction

4.1 This chapter is not an examination of all aspects of the Agreement but rather details the main issues raised with the committee. As noted in chapter 1, the focus of the report is the evidence from the current inquiry although evidence from other inquiries may also be referred to for clarity and context.

4.2 The issues discussed in this chapter focus on the areas outlined in the inquiry's terms of reference including: the Investor-State Dispute Settlement (ISDS) provisions, impact on Australian workers, intellectual property (IP), environmental standards, and government procurement.

Investor–State Dispute Settlement

4.3 Investor–State Dispute Settlement (ISDS) is a mechanism in a free trade agreement or investment treaty that provides foreign investors, including Australian investors overseas, with the right to access an international tribunal to resolve investment disputes. In a fact sheet the Department of Foreign Affairs and Trade (DFAT) provided the following information about ISDS provisions:

Australia has negotiated ISDS provisions over the past three decades to provide protection for Australian companies investing abroad. ISDS promotes investor confidence and can protect against sovereign or political risk. If a country does not uphold its investment obligations, an investor can have their claim determined by an independent arbitral tribunal, usually comprising three arbitrators.¹

4.4 Australia has ISDS provisions in six free trade agreements (FTA) as well as in the TPP-11 and the Peru-Australia FTA which are not yet in force.²

4.5 For a detailed background to the ISDS, please refer to Chapter 6 of *Report 165* from the Joint Standing Committee on Treaties (JSCOT) on the Trans-Pacific Partnership Agreement tabled in November 2016.

4.6 The ISDS provisions are in the Investment Chapter of TPP-11. As noted in chapter 2 of the committee's report, as part of the suspended provisions there has been some narrowing of the scope of claims that can be made under the ISDS provisions.

1 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) FAQs, Investor–State Dispute Settlement*, 23 February 2018, p. 1, <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Documents/tpp-11-faqs-isds.pdf> (accessed on 27 June 2018).

2 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) FAQs, Investor–State Dispute Settlement*, 23 February 2018, p. 1. The current FTAs with ISDS are: China–Australia, Korea–Australia, Australia–Chile, Singapore–Australia, Thailand–Australia and ASEAN–Australia–New Zealand.

4.7 In response to a question taken on notice, DFAT stated that the TPP-11 'contains a set of high-quality, modern rules governing the treatment of investors and their investments. It also contains robust safeguards'.³ The response detailed the 'robust safeguards' which include recognition that TPP-11 parties have 'an inherent right to regulate to protect public welfare, including in the areas of health and the environment' and includes a list of policy areas in Australia that cannot be challenged. Furthermore, the TPP-11 also includes procedural safeguards 'to enhance the arbitration process'.⁴

Concerns about ISDS provisions

4.8 Similar to the concerns with ISDS provisions raised in previous inquiries into the original TPP, the inclusion of ISDS provisions in the TPP-11 was a point of particular concern for many individuals who did not support the signing of the TPP-11.⁵ For example, Mr Harry Creamer argued that ISDS provisions are not in the national interest, arguing that 'many of our laws and policies, achieved through decades of public advocacy and measured government responses, will be threatened by trans-national corporations pursuing their own interests, backed by these provisions'.⁶

4.9 The Australian Fair Trade and Investment Network (AFTINET) argued that the ISDS process is:

...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.⁷

4.10 Submitters including AFTINET argued that serious flaws in the ISDS system have been identified and recommended that the TPP-11 should not contain ISDS.⁸

4.11 The Australian Manufacturing Workers' Union (AMWU) submitted:

Judicial, social and commercial concerns about ISDS are notorious, with no less a person than former Australian High Court Chief Justice Robert French expressing grave concerns about the procedures and practices of ISDS. The TPP-11 gives special rights to foreign investors to bypass national courts and sue governments for millions of dollars in these unfair tribunals over changes to domestic laws, even if those laws are in the public interest. Global companies have recently sued governments over medicine prices, protection of the environment, protection of Indigenous land rights and even a rise in the minimum wage. Notoriously Phillip Morris sued the

3 DFAT, answers to questions on notice, 30 July 2018 (received 20 August 2018), [p. 7].

4 DFAT, answers to questions on notice, 30 July 2018 (received 20 August 2018), [p. 7].

5 See for example: Mr Duncan Marshall, *Submission 3*, p. 3; Ms Linda Link, *Submission 10*, p. 1.

6 Mr Harry Creamer, *Submission 13*, p. 2.

7 *Submission 14*, p. 3.

8 *Submission 14*, p. 3

Australian government over cigarette plain packaging laws; whilst the Government was successful the cost was excessive. The Canadian Government has been sued by 35 companies utilising ISDS over a range of issues.⁹

4.12 Several submissions referred to growing opposition to ISDS in the European Union and noted the decision by the European Court of Justice 'ruling that ISDS undermines national legal autonomy and is incompatible with the law of the European Union'.¹⁰ AFTINET explained further:

In the case of the EU, there's been growing popular opposition to ISDS, but there have been, more importantly, two court decisions by the European Court of Justice that ISDS provisions violate national sovereignty and can't be negotiated by the EU Commission on behalf of EU member states. If an agreement contains ISDS, it must now be voted on by each European parliament. The result of that is that the European Commission fears that national parliaments will reject FTAs that contain ISDS and it has developed a fast-track process for agreements without ISDS to enable them to be approved by the European Commission alone.¹¹

ISDS implications for public health initiatives

4.13 The Public Health Association of Australia (PHAA) submitted its strong opposition to ISDS in trade agreements arguing that including such provisions have an adverse impact of public health. It was noted that the 'threat of legal action, or even the existence of an ISDS mechanism, can deter governments from implementing public health policies and laws'.¹² In this context, the PHAA was particularly concerned that the Australian Government may be inhibited from introducing health warning labels on alcohol containers in the future due to ambiguities in the supplementary labelling rules in Annex 8A of the Agreement. These provisions relate to the information provided on a supplementary label on alcohol containers and PHAA was concerned that these provisions may pose a barrier for the implementation of health warning labels on alcohol containers.¹³

4.14 The PHAA and others advocated for the provision of health information to be excluded from the supplementary labelling rules.¹⁴ This could be achieved by amending paragraph 5 of the existing text of Annex 8A, adding a paragraph to the Annex or 'at the very least, the text should be amended to affirm that a state may

9 *Submission 12*, p. 2.

10 See for example, Vintage Reds of the Canberra Region, *Submission 2*, p. 5; Public Services International, *Submission 5*, p. 5; New South Wales Retired Teachers' Association, *Submission 7*, p. 1; Ms Linda Link, *Submission 10*, p. 1.

11 Dr Patricia Ranald, Convenor, AFTINET, *Proof Committee Hansard*, 30 July 2018, p. 10.

12 *Submission 20*, p. 8.

13 The concern about Annex 8A was also raised by the Foundation for Alcohol Research and Education (FARE), *Submission 18*, [p. 2] and Dr Deborah Gleeson, *Submission 4*, p. 13.

14 *Submission 20*, pp. 13–14; *Submission 18*, [p. 13]; *Submission 4*, pp. 2–3.

prescribe the presentation and placement features for information it requires to be included on wine and spirits containers, including on supplementary labels'.¹⁵

Alternate views on ISDS

4.15 In contrast to the evidence outlined above, some evidence to the inquiry provided a different perspective to the ISDS provisions. Mr Mark Davis, Director, Trade and Investment, Minerals Council of Australia (MCA), responding at the committee's hearing on 30 July 2018 stated:

ISDS doesn't create a wide-ranging ability of a foreign company to take action against the Australian government for a policy it doesn't like because the policy hurts its profits, which is sometimes asserted. ISDS disputes must involve the commitments that are made between the countries under the investment chapter. You can't just raise a dispute about anything. It has to relate to whether the state is observing the commitments it has entered into under the investment chapter.¹⁶

4.16 In its submission, the MCA noted that the ISDS provisions contain 'extensive substantive and procedural safeguards':

The substantive safeguards mean the TPP-11 ISDS provisions cannot be used to challenge public policies in environmental protection, healthcare, education, social services, welfare policy, government service delivery, cultural and heritage protection and conservation policies. The procedural safeguards ensure that any claims, disputes or arbitrations under the TPP-11 ISDS provisions will be conducted in an open and transparent manner and will be subject to clear procedural rules and legal standards.¹⁷

4.17 In his submission, Dr Luke Nottage supported ratification of the TPP-11 and noted there have been minimal changes to the Investment chapter from the original TPP. Dr Nottage explained the merits of ISDS:

...•even qualified procedural rights for investors to bring direct action against host states for expropriation or other violation of substantive treaty commitments, in addition to the option of inter-state arbitration, has led historically to increased FDI on a world-wide basis;

•Australian investors now make good use of ISDS protections to recoup losses incurred by alleged treaty violations, notably by developing states;

•the risk of successful claims against Australia and hence supposed "regulatory chill" should be minimal – as shown by the outcome of the Philip Morris claim (and the merits decision in its claim against Uruguay over tobacco regulation) even under old treaties without TPP-like elaborations, as well as the ambit claims recently by some US investors.¹⁸

15 FARE, *Submission 18*, [p. 3].

16 *Proof Committee Hansard*, 30 July 2018, p. 57.

17 *Submission 37*, p. 4.

18 *Submission 8*, pp. 4–5.

4.18 In addition, Dr Nottage recognised the public concern about ISDS and suggested that Australia 'take leadership (preferably with New Zealand)' to commence formal negotiations with other TPP-11 parties 'about superimposing an appellate review mechanism after ratification' and develop guidance or a code of ethics for ISDS arbitrators.¹⁹ Dr Nottage noted that these actions may assist to remedy some of the public concerns about ISDS provisions.²⁰

4.19 According to the Business Council, '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'.²¹ The Business Council also pointed out:

Agreement to allowing foreign investors to access ISDS in Australian 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.²²

4.20 In response to a question on notice, DFAT provided a list of stakeholders who have expressed support for the ISDS mechanism in the TPP and TPP-11 including: Minerals Council of Australia, Business Council of Australia, Law Council of Australia, Australian Chamber of Commerce and Industry, Export Council of Australia, Australian Industry Group, ANZ Banking Group, Financial Services Council, Australian Petroleum Production and Exploration Association, Rio Tinto, BHP Billiton, Centre for Independent Studies and Chatto Creek Advisory.²³

DFAT response to stakeholder concerns

4.21 DFAT addressed concerns about ISDS in its *Myth Busters* document. The 'myth' in the document is 'Investor-State Dispute Settlement (ISDS) provisions allow foreign companies to sue the Australian Government for loss of expected profits'. The document says this is wrong and notes:

- TPP-11 investment rules help protect Australian investments and ensure Australian businesses are given a fair go – for example, by being given due process in local courts overseas.
- Investors cannot sue under ISDS for a mere loss of profits where a government has decided to change its policies or regulations. Instead, investors need to show that the government has broken a TPP-11 investment rule – for example, by nationalising an investment without compensation, or by denying the investor due process in a local court.

19 *Submission 8*, p. 3.

20 *Submission 8*, p. 4.

21 *Submission 35*, p. 6.

22 *Submission 35*, p. 6.

23 DFAT, answers to questions on notice, 30 July 2018 (received 20 August 2018), [p. 10].

•TPP-11 investment rules mean that the Australian Government can continue to make laws that are in the public interest, including regarding health and the environment. There are also rules that will deter frivolous claims and ensure that the Government is free to determine laws and policies without the threat of legal action.²⁴

ISDS Safeguards

4.22 The National Interest Analysis (NIA) explains that there are safeguards built into the rules guiding ISDS, 'making this one of the most protective treaties in existence in terms of its protections for legitimate regulation'.²⁵ In addition:

Procedural safeguards in the Agreement 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 FIRB [Foreign Investment Review Board]. Australia's tobacco control measures as defined under the Agreement will not be able to be challenged.²⁶

4.23 When providing evidence at a JSCOT hearing, DFAT emphasised that there are appropriate safeguards which will mean that the Australian Government 'will be able to continue to regulate in the public interest under the ISDS provisions' and also advised:

This set of provisions for the first time introduced new safeguards, procedural and substantive, to allow the government to protect legitimate public policy objectives. I think its article 9.16 of the agreement which sets out concerns for the public interest and legitimate public policy objectives in areas such as health and the environment. That is explicitly referenced. We have an explicit carveout for tobacco measures as a result of Australia taking advantage of a reservation in that area. There are a range of procedural benefits as well, including greater transparency in the application of arbitration and other procedural safeguards, that are built into this text. As a result of those improvements in the safeguards elements of the ISDS, we've taken the opportunity to update a few of our bilateral investor state dispute settlement provisions through our bilateral investment agreements. We've laid some of those to rest and said that we'll supersede those agreements with this new, improved ISDS mechanism with the safeguards that it includes.²⁷

24 <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Pages/tpp-11-myth-busters.aspx> (accessed 1 May 2018).

25 NIA, p. 12.

26 NIA, p. 12.

27 Mr Mina, DFAT, *Proof Committee Hansard*, 1 June 2018, p. 9.

4.24 DFAT explained that in article 9.16 of the Agreement, there is 'specific reference to our ability to legislate in pursuit of legitimate public policy objectives in health, environment and other areas'. With respect to the example of providing health warnings on alcohol containers, Mr George Mina said that there are 'substantial and procedural safeguards' under article 9.16 which will ensure that the Australian Government will be 'able to do what we want to do with respect to public policy on health, including alcohol control'.²⁸

4.25 DFAT further advised:

Annex 8-A to the TPP-11 does not prevent the Australian Government from regulating labelling requirements for wine and distilled spirits. The TPP-11 also incorporates specific safeguards that recognise Australia's right to adopt measures for legitimate public policy purposes, including the protection of public health. The TPP-11 provides for the establishment of a Committee on Technical Barriers to Trade (TBT), comprising representatives from TPP-11 Parties. This Committee can monitor the implementation of the commitments in the TBT Chapter, such as those in Annex 8-A, and provide a conduit for cooperation and technical discussions. Australia's ability to influence these discussions could be diminished if we are not in the first group of signatories to ratify the TPP-11.²⁹

4.26 In its submission, the MCA pointed out that the safeguards mean that the ISDS provisions cannot be used to challenge public policies in a range of areas and 'will also ensure that any claims under the TPP-11 ISDS provisions will be conducted in an open and transparent manner and will be subject to clear procedural rules and legal standards'.³⁰

4.27 Several submissions argued that the ISDS safeguards in the TPP-11 are insufficient.³¹ Public Services International argued that:

...assurances that safeguards exist within the TPP-11 allowing regulation in the interests of health and the environment lack merit. These same safeguards have not prevented companies commencing actions against democratically elected governments in these areas.³²

4.28 Public Services International also argued that 'assurances that Australia has ISDS provisions in multiple FTAs and has not faced a barrage of cases also lacks merit'.³³

28 Mr Mina, *Proof Committee Hansard*, 30 July 2018, p. 69.

29 DFAT, answer to question on notice, 20 August 2018 (received 10 September 2018), [pp. 1–2].

30 *Submission 37*, pp. 3, 24–25.

31 PHAA, *Submission 20*, pp. 6–7; Communist Party of Australia, *Submission 29*, p. 2; ACTU, *Submission 39*, p. 25.

32 Public Services International, *Submission 5*, p. 5.

33 Public Services International, *Submission 5*, p. 5.

4.29 Dr Patricia Randal, Convenor, AFTINET questioned the robustness of the ISDS safeguards:

As has been mentioned, the claimed general safeguards for ISDS in the TPP-11 have loopholes identified by legal experts. They won't prevent cases from being brought against Australia. The only cases which will be prevented from being brought will be on tobacco regulation, because that is the only total exemption in the agreement. I would argue that the fact that that total exemption was thought necessary by governments to actually exclude tobacco decisively shows that the other general safeguards are not going to be effective in preventing cases from being launched.³⁴

ISDS framework

4.30 Mr Paul Schofield, Director, Investment and Services Law Section, Trade and Investment Law branch, Office of Trade Negotiations, DFAT provided some detail to the committee about reform processes underway in relation to the ISDS framework which Australia is actively involved in:

The first one is UNCITRAL, which is the UN Commission on International Trade Law. They've set up a working group that's looking at procedural reform of ISDS...Obviously it's a UN body and a multilateral process. We're engaging with quite a few other countries in relation to that process, looking at things like developing a code of conduct for arbitrators to address some of the concerns regarding independence and impartiality. If you look at the TPP and the treaty, it actually provides for the parties to agree on a code of conduct...Separately we're also involved in ICSID, the International Centre for Settlement of Investment Disputes process.³⁵

4.31 Mr Schofield explained that the reforms considered through the ICSID process relate to technical, procedural rules, such as the number of days for lodging a submission. It was noted that some of those procedural changes would not require a change to the treaty text.³⁶ Furthermore, DFAT confirmed:

Should any discussions in UNICTRAL or ICSID lead to an amendment of an existing treaty or consideration of a new treaty, Australia's normal treaty making processes would be triggered. This would include consideration by the Australian Parliament through, for example, the Joint Standing Committee on Treaties.³⁷

Labour issues

4.32 Evidence to the inquiry highlighted concerns about how the TPP-11 may impact on Australian workers, including temporary entry of business persons and labour market testing.

34 *Proof Committee Hansard*, 30 July 2018, pp. 10–11. See AFTINET, *Submission 14*, pp. 13–15 for its more detailed comments about ISDS safeguards.

35 *Proof Committee Hansard*, 30 July 2018, pp. 70–71.

36 *Proof Committee Hansard*, 30 July 2018, pp. 70–71.

37 DFAT, answers to questions on notice, 30 July 2018 (received 20 August 2018), [pp. 12–13].

Temporary entry for business purposes

4.33 Chapter 12 of the TPP-11 deals with the temporary entry of business persons and includes exemptions from labour market testing. This chapter facilitates the entry and temporary stay of nationals and permanent residents to 'facilitate the pursuit of business or investment opportunities'.³⁸

4.34 As outlined in information published by DFAT, Australia's temporary entry commitments are 'limited to business persons from those TPP-11 countries that provide similar access for Australian business persons in equivalent categories'.³⁹

4.35 In accordance with the Agreement, Australia will provide temporary entry to workers from TPP-11 in five generic categories: intra-corporate transferees, contractual service suppliers, including professionals and technicians, investors and independent executives, installers and servicers of machinery and equipment, and short-term business visitors.

4.36 Australia's commitments for intra-corporate transferees, contractual service suppliers and independent executives will be implemented through the Temporary Skill Shortage (TSS) visa programme and installers and servicers and short-term business visitors will be implemented through the subclass 400 and 600 visas respectively.⁴⁰

4.37 The Australian Nursing and Midwifery Federation expressed concerns that the 'temporary labour provisions open the door to further exploitation of temporary migrant workers and are not subject to labour market testing to establish whether there are Australian workers available'.⁴¹

4.38 In its submission, the MCA noted there have been 'concerns about the impact on Australia's labour market of such movement of natural persons provisions in recent trade agreements' and the concern that waiving labour market testing requirements under Australia's temporary skilled migration program 'would lead to an influx of migrant workers at the expense of employment opportunities for Australian residents'.⁴² Drawing on data following the implementation of the China-Australia Free Trade Agreement (ChAFTA) and the Korea and Japan FTAs, the MCA noted there has not been an increase in the number of 457 visas granted to workers from these countries since the FTAs have been in effect.⁴³

38 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), Temporary entry of business persons*, 23 February 2018, p. 1.

39 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), Temporary entry of business persons*, 23 February 2018, p. 1.

40 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11), Temporary entry of business persons*, 23 February 2018, p. 1.

41 *Submission 11*, p. 2.

42 *Submission 37*, p. 26.

43 *Submission 37*, pp. 27–29.

4.39 Some witnesses indicated that avoiding labour market testing can benefit employers by reducing the regulatory burden on businesses and allowing them to be more competitive.⁴⁴ For example, Australian Pork Limited suggested farmers could save four weeks by not undertaking labour market testing.⁴⁵

Labour market testing

4.40 DFAT indicated that 'the commitments that Australia made on the movement of natural persons including the waiving of labour market testing for certain categories are unchanged between TPP-11 and TPP-12'.⁴⁶ DFAT further explained:

As was the case with TPP-12, the TPP-11 commitments, including the labour market testing waivers, will apply to certain categories of service suppliers, including contractual service suppliers, for six TPP countries: Brunei, Canada, Malaysia, Mexico, Peru and Vietnam.⁴⁷

4.41 AMWU suggested that the expansion of the existing labour market testing exemptions (in existing FTAs with China, South Korea, Thailand, New Zealand and Singapore) will 'add more exploitable workers to the pool of 1.4 million people who currently possess temporary work visa rights in Australia'.⁴⁸

4.42 The Australian Council of Trade Unions (ACTU) pointed out that other TPP-11 countries such as New Zealand and Brunei have specified that an economic needs test could or will be applied to the entry of overseas workers into their respective countries. Further to this, it is noted that Peru has reserved the right to impose labour market testing if another country is doing so.⁴⁹

4.43 Mr Damian Kyloh, Associate Director for Economic and Social Policy, ACTU provided additional detail at the public hearing:

We're particularly concerned with the provisions on contractual service providers because this includes all 430-odd occupations under TSS visa system, previously the 457 visas. Australian and overseas companies will be able to employ unlimited numbers of workers from at least six TPP member countries in hundreds of occupations, across nursing, engineering and the trades, without any obligation to provide evidence of genuine efforts to recruit Australian workers. This includes occupations such as nurses, engineers, electricians, plumbers, carpenters, bricklayers, tilers, mechanics and chefs. These occupations will be open to bring in unlimited numbers of temporary migrant workers from Vietnam, Malaysia, Japan, Canada, Mexico and Chile. Unions cannot support an agreement that

44 Australian Meat Industry Council, answer to questions on notice, 30 July 2018 (received 17 August 2018), [p. 2].

45 Australian Pork Limited, answer to questions on notice, 30 July 2018 (received 13 August 2018), [p. 1].

46 Mr Justin Brown, Deputy Secretary, DFAT, *Estimates Hansard*, 1 March 2018, p. 166.

47 Mr Brown, DFAT, *Estimates Hansard*, 1 March 2018, p. 166.

48 *Submission 12*, p. 1.

49 *Submission 39*, p. 11.

removes this basic protection and support of Australian jobs and puts thousands of temporary overseas workers at risk of exploitation. As we've seen under ChAFTA, some workers have been paid as low as \$10 dollars an hour.⁵⁰

4.44 Several submissions expressed concern about the waiving of labour market testing. The New South Wales Retired Teachers' Association suggested that the TPP-11 will provide for more vulnerable temporary migrant workers, and AFTINET submitted that because these temporary workers 'are tied to one employer and face deportation if they lose the job means that these workers are vulnerable to exploitation'.⁵¹

4.45 The NIA notes that:

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-11 Parties to which Australia extended temporary entry commitments.⁵²

4.46 DFAT officials provided further detail about labour market testing at JSCOT hearings. It was noted that Australia will extend the commitment to waive labour market testing in the contractual service supplier category to six TPP-11 countries: Brunei, Canada, Malaysia, Mexico, Peru and Vietnam. DFAT emphasised that Australia has obtained 'very significant equivalent reciprocal commitments' from each of the six countries.⁵³

4.47 At Additional Estimates in March 2018, DFAT explained that Australia's commitments under the TPP-11 with respect to contractual service suppliers will be implemented through the skilled occupations list administered by the Department of Jobs and Small Business:

Contractual service suppliers can apply for a temporary work visa under any of the occupations that are on the list at the time of application. As I mentioned, this occupation list is regularly updated to reflect labour market conditions and requirements, feedback from stakeholders, employment trends and a number of other things...⁵⁴

4.48 DFAT explained that the skilled occupations list is updated and modified frequently and as at March 2018, there were more than 400 specific occupations listed. In order to meet Australia's commitments under this category, contractual service suppliers need to meet certain requirements:

50 *Proof Committee Hansard*, 30 July 2018, p. 4.

51 New South Wales Retired Teachers' Association, *Submission 7*, [p. 1]; AFTINET, *Submission 14*, p. 4.

52 NIA, p. 19; DFAT, *Submission 48*, p. 30.

53 Mr Mina, DFAT, *Proof Committee Hansard*, 25 June 2018, p. 15.

54 Mr Justin Brown, *Estimates Hansard*, 1 March 2018, p. 170.

They have to meet certain trade, technical and professional skills and expertise. They have to have the necessary qualifications, skills and work experience to meet our domestic standards. And, importantly, these individuals need to have a contract to supply a service in Australia...Contractual service suppliers can apply for a temporary work visa under any of the occupations that are on the list at the time of application.⁵⁵

4.49 It was also noted that Australia has made commitments in the TPP-11 for the inclusion of contractual service suppliers and the waiving of labour market testing, but the skilled occupations list administered by the Department of Jobs and Small Business is not bound in the TPP-11 and is not legally guaranteed.⁵⁶

4.50 In response to a question taken on notice from the JSCOT hearing on 7 May 2018, DFAT advised that Australian service providers operate in a variety of sectors in the six countries and 'are particularly prominent in the mining, infrastructure, energy, professional services, finance and healthcare sectors'.⁵⁷

4.51 On the issue of skills testing, Mr Justin Brown, Deputy Secretary, DFAT explained during an Estimates hearing:

There's nothing in this agreement which makes commitments on behalf of the Australian government in relation to our skills testing and various other certification procedures. The Australian government maintains complete policy flexibility to impose whatever visa conditions on temporary skilled personnel entering Australia for certain periods, including in relation to skills certification and licensing.⁵⁸

Intellectual Property

4.52 As outlined by DFAT, the Intellectual Property (IP) provisions in chapter 18 of the TPP-11 affirm and build on the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), covering: copyright, trademarks, geographical indications, patents, industrial designs, confidential information, plant variety protection, and civil, border and criminal enforcement. The TPP-11 also includes provisions covering pharmaceutical products, cybersquatting of domain names and trade secrets theft.⁵⁹

4.53 The IP chapter was an area of criticism in submissions received in the committee's 2017 inquiry and was also raised in submissions for the current inquiry.⁶⁰

55 Mr Brown, *Estimates Hansard*, 1 March 2018, p. 170.

56 Mr Brown, *Estimates Hansard*, 1 March 2018, p. 171.

57 DFAT, *Submission 65* (to JSCOT), p. 3.

58 *Estimates Hansard*, 1 March 2018, p. 116.

59 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) FAQs—Intellectual Property*, 23 February 2018, p. 1.

60 Senate Foreign Affairs, Defence and Trade Reference Committee, *Proposed Trans-Pacific Partnership (TPP) Agreement*, February 2017, pp. 23–24.

4.54 As outlined in chapter 2, a number of IP provisions from the original TPP were suspended, including provisions relating to pharmaceutical products (including biologics), copyright and patents.⁶¹ Although acknowledging the suspended provisions, several submissions remained concerned about these sections with a number noting that the provisions could be re-introduced (at any stage) unless they are removed.⁶²

4.55 In a response to a question taken on notice at a JSCOT hearing, DFAT confirmed that the TPP-11 will not require any changes to Australia's policy, legal and regulatory settings on IP:

None of the pharmaceutical provisions in either the original Trans-Pacific Partnership (TPP) or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) would require changes to Australia's intellectual property laws or policies, including on the Pharmaceutical Benefits Scheme. As such, neither Agreement would result in any increase in the cost of medicines to Australians.⁶³

Copyright

4.56 A number of the TPP-11 provisions relating to copyright have been suspended.⁶⁴ The NIA states that 'the Agreement does not require an increase in the term of copyright protection in Australia, nor any other changes to Australia's copyright regime'.⁶⁵

4.57 Open Source Industry Australia (OSIA) expressed concern about the IP chapter. Although some of the concerns raised by OSIA in relation to copyright have been temporarily addressed with the suspended provisions, OSIA remains concerned that the application of Article 18.80(2) may prohibit the government from continuing to use public domain software.⁶⁶ OSIA suggested that the possibly ambiguity is a 'drafting error rather than a deliberate intention to do so' but they remain concerned.⁶⁷

Medicines

4.58 A number of the suspensions relate to the IP rules for pharmaceuticals that were requested by the United States. In particular, the provision to extend the data protection monopolies on biologic medicines has been suspended.⁶⁸

61 DFAT, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) FAQs—Intellectual Property*, 23 February 2018, p. 1.

62 See for example, Mr Peter Murphy, *Submission 21*, [p. 3]; PHAA, *Submission 20*, p. 5.

63 DFAT, *Submission 65* (to JSCOT), p. 20.

64 *Submission 44*, p. 4.

65 NIA, p. 15.

66 *Submission 47*, p. 11.

67 Mr Jack Burton, Director and Company Secretary, Open Source Industry Australia, *Proof Committee Hansard*, 30 July 2018, p. 43.

68 AFTINET, *Submission 14*, p. 29.

4.59 Noting that many of the provisions have been suspended, the PHAA emphasised that they still have concerns about the public health implications of the IP chapter.⁶⁹ One section that has not been suspended which is of particular concern to the PHAA is patent linkage. With reference to academic research, Dr Deborah Gleeson advised that:

A study that I did with colleagues a couple of years ago found that some of the countries are likely to need to make changes to their legislation to implement the patent linkage provision and only have short transition periods to do that. There's evidence to suggest that patent linkage in the United States has been a very successful strategy for the pharmaceutical industry to delay the introduction of generics. Patent linkage originated from the United States, and it's worth noting that the United States is the only country that seeks to introduce patent linkage through trade agreements. The United States, of course, is no longer party to the TPP, so it doesn't make sense for other countries to be agreeing to this provision in the TPP. The TPP also includes a number of enforcement provisions which haven't been studied closely in their final form but which could also have an effect on the developing countries.⁷⁰

4.60 Another area of concern for the PHAA is that the TPP 'also includes a number of enforcement provisions which haven't been studied closely in their final form but which could also have an effect on the developing countries'.⁷¹

4.61 In his submission, Mr Peter Murphy (with reference to material from AFTINET), noted that although some of the provisions of concern have been suspended, the IP chapter, 'still reinforces existing monopolies on medicines and restricts the ability of governments to change such regulation in future, for example to reduce monopolies on medicines'.⁷²

Environmental standards

4.62 Chapter 20 of the TPP-11 deals with the environment. In its Analysis of Regulatory Impact on Australia (ARIA), DFAT noted that the TPP-11 will address contemporary trade challenges including by:

...promoting high levels of environmental protection, including by liberalising trade in environmental goods and services, and ensuring TPP-11 Parties effectively enforce their domestic environmental laws. TPP-11 Parties must also take measures in relation to a number of important 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. In a breakthrough in the fight against overfishing, subsidies for fishing that negatively affect

69 *Submission 20*, pp. 8–12.

70 *Proof Committee Hansard*, 30 July 2018, p. 3.

71 *Proof Committee Hansard*, 30 July 2018, p. 3.

72 *Submission 21*, [p. 3].

overfished stocks and subsidies for vessels engaged in illegal fishing will be prohibited...⁷³

4.63 As with the committee's previous inquiry, submitters were concerned that the Environment chapter does not mention climate change or the United Nations Framework Convention on Climate Change (UNFCCC) and does not require TPP-11 countries to adhere to their UNFCCC commitments.⁷⁴

4.64 The PHAA also noted its concern about the 'potential use of the ISDS mechanism to limit or subvert government action to protect the natural and built environments', and detailed the range of government action from which corporations and companies have sought damages.⁷⁵

4.65 Friends of the Earth (FoE) submitted that the TPP-11 'will have detrimental effects on the ability of Australia to effectively protect its environment'.⁷⁶ FoE noted that the Environment chapter does not ensure a standard of commitment for the countries involved as each nation is allowed to establish its own level of domestic environmental protection. Furthermore, FoE explained that of the four multilateral environmental agreements (MEAs) included in the text, only one is enforceable—Trade in Endangered Species.⁷⁷

4.66 At the public hearing on 30 July, Ms Samantha Castro, Trades Spokesperson and Operations Coordinator, FoE stated:

It's inadequate. There are no obligations for countries to adhere to environmental protocols and compliance. In fact, they are unenforceable. They are wishful thinking. The environmental chapter neglects to ensure a standard of commitment from countries. Instead, it states that each nation can establish its own level of domestic environmental protection. At a time when we should be joining together to fight climate change, it seems these regional agreements are attempting to pull us apart.⁷⁸

4.67 In its submission, the City of Darebin (Darebin Council) also expressed concern about the Environment chapter:

The City of Darebin has two major concerns with this chapter. One, that the TPP-11 doesn't go far enough in urging international corporations to cut their emissions and two, that it opens the door for international corporations either operating in Darebin or planning to establish themselves her[e] to argue that they should be treated differently and not work with the rest of the community towards a zero emissions target. Either outcome is a poor

73 DFAT, *Analysis of Regulatory Impact on Australia*, p. 25.

74 PHAA, *Submission 20*, 13; Friends of the Earth, *Submission 15*, [p. 2]; Public Services International, *Submission 5*, p. 8.

75 PHAA, *Submission 20*, p. 12.

76 *Submission 15*, [p. 2].

77 *Submission 15*, [p. 3].

78 *Proof Committee Hansard*, 30 July 2018, pp. 44–45.

one not only for Darebin's but Australia's sustainability goals and public health.⁷⁹

Government procurement

4.68 The Government Procurement Chapter of TPP-11 seeks to ensure that governments do not discriminate against foreign suppliers when assessing tenders and awarding contracts. In accordance with the requirements of the TPP-11, governments cannot create specifications or procedures that create obstacles for foreign suppliers to compete for the contract and the contract must be awarded to the supplier offering the best value for money solely on the basis of the stated evaluation criteria.⁸⁰

4.69 The NIA provides some additional detail about procurement, explaining that TPP-11 will provide new opportunities for Australian businesses to bid for government procurement services contracts for a range of services, including accounting, auditing and taxation, management consulting, environmental protection, and health and social services. The NIA also notes that, for the first time, Australian METS (Mining, Equipment, Technology and Services) and oilfield service suppliers will be eligible to bid for government procurement opportunities with Mexico and Peru for services to their respective state-owned petroleum companies.⁸¹

4.70 As noted in the NIA, a legislative instrument under the *Public Governance Performance and Accountability Act 2013* (PGPA Act) will need to be made to replace the Commonwealth Procurement Rules (January 2018) (CPRs) to make the changes required to meet the Agreement's obligations.⁸²

4.71 In its submission, AFTINET expressed concerns with this process noting that the CPRs will be rewritten by the Department of Finance (Finance) and tabled in Parliament, but as they are not a disallowable instrument, they cannot be amended or voted against by the Parliament.⁸³

4.72 Finance officials confirmed that as the CPRs are issued under the PGPA Act, there will be 'some minor consequential amendments' required to the PGPA Act and these will be made via a non-disallowable instrument. Mr Nicholas Hunt, First Assistant Secretary, Finance noted that such an instrument is tabled periodically and is 'generally a relatively uncontroversial instrument'.⁸⁴

4.73 The committee inquired about whether the implementation of the TPP-11 would require any changes to the CPRs, in particular changes to paragraphs 10.31,

79 *Submission 61*, [p. 6].

80 Australian Government, *Trans-Pacific Partnership Agreement, Chapter Summary: Government Procurement*, 6 July 2018, p. 1.

81 NIA, pp. 10–11.

82 NIA, p. 19.

83 *Submission 14*, p. 27.

84 *Proof Committee Hansard*, 20 August 2018, p. 5.

10.32 and 10.10. Finance officials confirmed 'there is no impact from TPP-11' on these paragraphs.⁸⁵

85 Mr Hunt, *Proof Committee Hansard*, 20 August 2018, p. 4.

