Trans-Pacific Partnership: the monster out of the cupboard

Australia is now a member of the Trans-Pacific Partnership, despite the large amount of negative publicity it initially received. Joanne Martin, FB Rice, explores the effects of the TPP from the perspective of Intellectual Property Law, and for the country more generally.

The 6th October 2015 saw the release of the finalised TPP agreement. It is a monster of a document, some 6,000 pages and 30 chapters, covering a broad range of topics. These topics are not only trade focused, but also include intellectual property, telecommunications, privacy, labour rights, environmental protections, sustainability, investment government procurement and financial services.

What is the Trans-Pacific Partnership (TPP)?

The TPP is essentially a Free Trade Agreement (FTA) offering enhanced trade and investment opportunities between twelve countries which circle the Pacific Rim: Australia, New Zealand, Brunei, Malaysia, Singapore, Vietnam, Japan, Canada, United States, Mexico, Peru and Chile. The following indicates the size of the marketfor these 12 countries:

- Approximate population: 800 million
- Approximate annual GDP: US$ 30 trillion (approximately 40% of global GDP)
- In 2011, 70% of Australia's trade was in the Asia-Pacific region
- The TPP member countries represent approximately 35% of Australia's total trade.

Whether the TTP will deliver on the big picture benefits which are promised is yet to be seen. The TPP Leaders' Statement, issued in November 2011, included the following bold claim: "...we are confident that this agreement will be a model for ambition for other free trade agreements in the future, forging close linkages among our economies, enhancing our competitiveness, benefitting our consumers and supporting the creation and retention of jobs, higher living standards, and the reduction of poverty in our countries."

The TTP is expected to deliver the usual benefits of FTAs, economic integration and trade liberalisation. Specific outcomes promised by TTP are elimination of up to 98% of tariffs on goods, reduction of barriers faced by service providers, transparent rules for investors, as well as improved supply chains and market access and fewer barriers for sellers of goods and services.

Is the TPP good or bad for Australia?

In the global economy, FTAs are a necessary strategic response to globalisation. Multilateral or bilateral FTAs have served Australia well in the past to facilitate Australian trade growth. Australia now has closer integration as a result of such trade agreements with New Zealand, Singapore, Thailand, ASEAN, Japan, South Korea and China. To date, deals have been primarily about food, manufactured goods, resources and energy. However, the TPP is expected to bring most gains to the Australian services sector including financial services. The TPP adds a number of new trading partners for Australia

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IP The IP Navigators

with whom it does not have current FTAs, namely Canada, Mexico, Peru and Chile.

Just how successful the TPP will be in providing enhanced trade opportunities for Australia is to be seen. The World Bank released a new report indicating that for Australia the annual boost to growth resulting from TPP membership is likely to be below one half of one tenth of 1%, and that it will contribute no more than 7% to the Australian economy by 2030. The USA is expected to be in a similar position, whereas Malaysia, for example, could experience 8% trade growth by 2030 resulting from the TTP initiatives, while New Zealand could expect 3% growth.

Australia sits in the Pacific Rim and benefits from trade schemes that improve growth of economies in this region. In the words of John Kerry, US Secretary of State, when discussing the TPP as a 21st century agreement: "...a nation's interests and the wellbeing of its people are advanced not just by troops or diplomats, but are advanced by entrepreneurs, chief executives of companies, by the businesses that are good corporate citizens".

It is expected the TTP will be ratified in Australia without significant difficulty as Australia's core requests, tobacco ISDS safeguards and biologic drug data restrictions were agreed during the negotiations. As with any deal, not every point provides a win-win for every member. For Australia, the pros and cons of its membership in the TTP have received significant media coverage, both balanced and scare-mongering. The proponents for the TPP clearly see more benefits than downsides in cross border deregulation and co-operation in the Pacific region, which is known for complex legal frameworks and highly burdensome regulatory systems. However it is also useful to consider those matters which attracted most controversy and raised most public concern.

What attracted the most commentary?

Concerns frequently raised in the media and editorial related to loss of sovereignty, in particular the Investor State Dispute Settlement clauses, as well as concerns about impact of the provisions on Australia's public health policies and environmental and privacy initiatives. The Australian government negotiators made it clear during the TPP updates to the public that the TTP was a trade negotiation. While there was lip service to global concerns, such the effect of the TPP on sustainability, environmental outcomes, access to health and medicine, equity for developing nations, international labour laws and national sovereignty, these were not the focus of the negotiations. However, Australians did raise their voices in relation to some matters and key concerns are discussed below.

Secret negotiations

Controversy arose because of limited information shared with the public during the negotiations. Non-disclosure of discussions, so as to keep the negotiators out of the spotlight and to limit media coverage, no doubt improves sharing of ideas around the negotiation table. The lack of transparency led to concerns that the TTP was the tool of corporations, such as big pharma and big tobacco. Jean-Paul Gagon, Assistant Professor in Politics at the University of Canberra, speaks of "democratic deficit" in the negotiations on the basis these had little input from the people the TPP aims to assist. He sees benefit in providing opportunity for citizens of the member nations to debate the outcomes for a reasonable period of time, before ratification. Political expediency will no doubt rule this out.

Investor State Dispute Settlement (ISDS)

The ISDS clauses are rights provided to foreign investors of the member countries to sue member governments who introduce legislative changes that could harm their investments. Reasons propounded against Australia signing up to the TPP incorporating ISDS clauses included the belief that ISDS clauses promote a "regulatory chill", such that governments are less likely to legislate for public benefit in the face of risk of suit by foreign investor companies.

The fact that during the final stages of the negotiations the Australian government was being sued by Philip Morris, Asia focussed a spotlight on the ISDS bogeyman. The Australian High Court decided against Philip Morris' claim that plain paper packaging of cigarettes was illegal. This led to Philip Morris using an ISDS provision in an Australia- Hong Kong Investment Treaty. This was the first ISDS action against Australia, and Philip Morris was seeking suspension of the plain packaging legislation and compensation of billions of dollars. Its claims were unsuccessful, and it is likely the company will be required to pay the Australian governments costs for the proceedings.

The ISDS clauses grant foreign investors the right to sue if a government discriminates, seizes a foreign investment or renders it worthless without paying adequate compensation or denies justice in the local courts.The outcomes to date suggest that the processes are working well: they are not secret proceedings, follow standard legal processes and are bound by precedent. There have been over 600 ISDS cases over the years and only 87 of these have ruled in favour of corporate litigants, who received compensation of less than 10% of the amount sought.

Australia is already party to 28 agreements that include ISDS provisions. Because of the outcome of the Philip Morris action, and because the TPP exempts public interest regulation from ISDS actions, majority of concerns about ISDS provisions should be alleviated.

Australian Pharmaceutical Benefits Scheme

The Australian Pharmaceutical Benefits Scheme (PBS) is an Australian government program that subsidises medicines to make them more affordable to the Australian public. It was of serious concern to the Australian government and public to avoid increases to the price of medicines by delaying the entry of generic or biosimilar medicines.

The US pharmaceutical lobby wanted 12 year protection to be recognised under the TPP for biologics or biopharmaceuticals derived from biological sources. 12 year protection is granted in the US for biologics, from the date of grant of marketing approval by the Food and Drug Administration (FDA). The market exclusivity is compensation for the amount of data needed to enable FDA approval.

Australia does not have equivalent protection for biologics but the Therapeutic Goods Administration (TGA), which regulates introduction of medicines onto the market, provides a data protection period of 5 years (the data exclusivity period), during which follow-on products cannot rely on data submitted by the biologics originator. Therefore, biosimilar products typically can enter the Australian market 6 years after the originator product. Extending this period would delay the entry of cheaper generic 'biosimilar' medicines and could add to the cost of running the PBS scheme by hundreds of millions of dollars annually.

A compromise was reached so that TPP members have options. A member can provide an eight years data exclusivity period, or 'deliver a comparable outcome in the market' by:

- providing at least five years of data exclusivity
- providing market protection through other measures, and
- recognising that market circumstances also contribute to effective market protection.

Australia's 5 years data exclusivity period is likely to remain in place as there is little political appetite to amend the existing patent law. However market protection through other measures is likely to be the subject of ongoing pressure from the US and may ultimately require legislative changes in Australia to meet TPP commitments. For example, amendment of the TGA regime to provide what is, in essence, eight years data exclusivity period is an option. It is a case of 'watch this space'.

The TPP and IP

Chapter 18 of the TPP deals with intellectual property touching on trademarks, copyright, patents, confidential information, pharmaceutical intellectual property, domain names and internet service provider liability. The outcomes appear to be 'business as usual' for Australia, subject to resolution of the biologics and data exclusivity issue.

For example, the TPP has significant requirements in relation to operations of internet service providers, being those who provide internet access or provide services on the internet. There are requirements for policing copyright infringement by forwarding infringement notices to subscribers, take down infringing material, and identifying copyright infringers using their service if there is sufficient legal claim to do so. Fines can be imposed for non-compliance. While this does not alter current Australian law to any great degree, harmonisation of law across the region is beneficial.

Biggest gains for service sectors

It is the deregulation and co-operation measures which will assist the service sector and provide the most opportunities for Australian trade in the region. The Australian financial sector is the largest single sector of the Australian economy, a major employer across all states, and as of 2013, export of financial services was approximately AU$55 billion or 17% of all exports, larger than tourism or education exports. Other significant service sector exports are IT, legal and accountancy. The main facilitators for service sector growth in overseas markets are secure digital environments, ability to open offices on the ground quickly and easily, and confidence that contractual obligations can be enforced. The TPP promises:

- greater certainty to investors operating in TPP member countries
- opportunity for service providers to compete on a more level playing field
- ecognition of professional qualifications;
- some harmonisation of IP laws
- reduced restrictions, such as the limitations on the numbers of suppliers or requiring establishment of local representative offices
- ability for service providers and investors to easily enter and temporarily stay in other TPP member countries, including expeditious processing of immigration documents such as work visas, and
- fair and transparent treatment of suppliers for government procurement contacts.

Next step ratification, then it remains for the benefits of the TPP to be promoted to Australian businesses, the government to facilitate export of goods and services to TPP member nations by appropriate initiatives, and for traders to take up the challenge and for the promises to come to fruition. No doubt we will hear a lot more about the TPP.

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This article originally appeared in The Trademark Lawyer Magazine, February 2016.

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