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Trick or Treaty? The Australian Debate over the Anti-Counterfeiting Trade Agreement (ACTA)

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CHAPTER 17

TRICK OR TREATY?: THE AUSTRALIAN DEBATE OVER THE ANTI-COUNTERFEITING TRADE AGREEMENT

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The secretive 2011 Anti-Counterfeiting Trade Agreement – known in short by the catchy acronym ACTA – is a controversial trade pact designed to provide for stronger enforcement of intellectual property rights.¹ The preamble to the treaty reads like pulp fiction – it raises moral panics about piracy, counterfeiting, organised crime, and border security. The agreement contains provisions on civil remedies and criminal offences; copyright law and trademark law; the regulation of the digital environment; and border measures. Memorably, Susan Sell called the international treaty a TRIPS Double-Plus Agreement,² because its obligations far exceed those of the World Trade Organization's TRIPS Agreement 1994,³ and TRIPS-Plus Agreements, such as the Australia-United States Free Trade Agreement 2004.⁴ ACTA lacks the language of other international intellectual property agreements, which emphasise the need to balance the protection of intellectual property owners with the wider public interest in access to medicines, human development, and transfer of knowledge and technology.

In Australia, there was much controversy both about the form and the substance of ACTA. While the Department of Foreign Affairs and Trade was a partisan supporter of the agreement, a wide range of stakeholders were openly critical.

After holding hearings and taking note of the position of the European Parliament and the controversy in the United States, the Joint Standing Committee on Treaties in the Australian Parliament recommended the deferral of ratification of ACTA.⁵ This was striking as representatives of all the main parties agreed on the recommendation. The committee was concerned about the lack of transparency, due process, public participation, and substantive analysis of the treaty. There were also reservations about the ambiguity of the treaty text, and its potential implications for the digital economy, innovation and competition, plain packaging of tobacco products, and access to essential medicines. The treaty has provoked much soul-searching as to whether the *Trick or Treaty* reforms⁶ on the international treaty-making process in Australia have been compromised or undermined.

Although ACTA stalled in the Australian Parliament, the debate over it is yet to conclude. There have been concerns in Australia and elsewhere that ACTA will be revived as a 'zombie agreement'.⁷ Indeed, in March 2013, the Canadian government introduced a bill to ensure compliance with ACTA.⁸ Will it be also resurrected in Australia? Has it already been revived? There are three possibilities. First, the Australian government passed enhanced remedies with respect to piracy, counterfeiting and border measures in a separate piece of legislation – the Intellectual Property Laws Amendment (Raising the Bar) Act 2012 (Cth). Second, the Department of Foreign Affairs and Trade remains supportive of ACTA. It is possible, after further analysis, that the next Australian Parliament – to be elected in September 2013 – will ratify the treaty. Third, Australia is involved in the Trans-Pacific Partnership negotiations. The government has argued that ACTA should be a template for the

Intellectual Property Chapter in the Trans-Pacific Partnership.⁹ The United States Trade Representative would prefer a regime even stronger than ACTA.

This chapter provides a portrait of the Australian debate over ACTA. It is the account of an interested participant in the policy proceedings.¹⁰ This chapter will first consider the deliberations and recommendations of the Joint Standing Committee on Treaties on ACTA. Second, there was a concern that ACTA had failed to provide appropriate safeguards with respect to civil liberties, human rights, consumer protection and privacy laws. Third, there was a concern about the lack of balance in the treaty's copyright measures; the definition of piracy is overbroad; the suite of civil remedies, criminal offences and border measures is excessive; and there is a lack of suitable protection for copyright exceptions, limitations and remedies. Fourth, there was a worry that the provisions on trademark law, intermediary liability and counterfeiting could have an adverse impact upon consumer interests, competition policy and innovation in the digital economy. Fifth, there was significant debate about the impact of ACTA on pharmaceutical drugs, access to essential medicines and health-care. Sixth, there was concern over the lobbying by tobacco industries for ACTA – particularly given Australia's leadership on tobacco control and the plain packaging of tobacco products. Seventh, there were concerns about the operation of border measures in ACTA. Eighth, the Joint Standing Committee on Treaties was concerned about the jurisdiction of the ACTA Committee, and the treaty's protean nature. Finally, the chapter raises fundamental issues about the relationship between the executive and the Australian Parliament with respect to treaty-making. There is a need to reconsider the efficacy of the *Trick or Treaty* reforms passed by the Australian Parliament in the 1990s.

1. The Joint Standing Committee on Treaties

In early 2012, the Joint Standing Committee on Treaties held a number of hearings on ACTA.¹¹ The committee received twenty-five submissions from a range of stakeholders – including academics such as Kimberlee Weatherall, Luigi Palombi, Anna George and Hazel Moir; the Pirate Party Australia; the generic drugs manufacturer Alphapharm Pty Limited; copyright industry groups such as the Australian Copyright Council and the Australian Federation Against Copyright Theft; copyright collecting societies; the Australian Digital Alliance, which represents libraries, universities and technology developers such as Google. The Internet Industry Association and CHOICE – which represents Australian consumers – had participated in the larger public policy debate over ACTA.

In June 2012, the Australian Parliament's Joint Standing Committee on Treaties released its report on ACTA.¹² It recommended that the Anti-Counterfeiting Trade Agreement not be ratified by Australia until

the Standing Committee on Treaties has received and considered the independent and transparent assessment of the economic and social benefits and costs of the Agreement [...]; Australian Law Reform Commission has reported on its Inquiry into Copyright and the Digital Economy; and the Australian Government has issued notices of clarification in relation to the terms of the Agreement as recommended in the other recommendations of this report.”¹³

The committee further observed that “[i]n considering its recommendation on whether or not to ratify the Anti-Counterfeiting Trade Agreement (ACTA), a future Joint

Standing Committee on Treaties have regard to events related to ACTA in other relevant jurisdictions including the European Union and the United States of America'.¹⁴

The chair of the Joint Standing Committee on Treaties, the Hon. Kelvin Thomson, discussed ACTA in the House of Representatives in the Australian Parliament.¹⁵ Citing the controversy in the European Union, the United States and elsewhere over the treaty, the chair observed:

The committee is concerned that, despite ACTA's intent, it exhibits a number of flaws, and the committee is not yet convinced that the agreement in its current form is in Australia's interest. We have asked for further analysis and clarification to be undertaken. This analysis includes the existing Australian Law Reform Commission Inquiry into Copyright and the Digital Economy.¹⁶ The committee is concerned about the lack of clarity in the text, the exclusion of provisions protecting the rights of individuals, and ACTA's potential to shift the balance in the interpretation of copyright law, intellectual property law and patent law.¹⁷

Considering the international reaction to ACTA, Thomson concluded: "Given all these events, it would be prudent for Australia to take the cautious approach that the committee has advocated."¹⁸

The Hon. Melissa Parke, the progressive Labor member for Fremantle, and a well-respected international and human rights lawyer and academic, discussed the treaty in the House of Representatives in the Federal Parliament.¹⁹ Summarising criticism of ACTA, she observed:

The committee's report rightly highlights the many worrying aspects of the agreement and of the National Interest Analysis that is being used to put the case for Australia's ratification of ACTA, including the absence of any economic cost-benefit analysis, the absence of justification for proposed new criminal penalties, the omission from ACTA of individual protections codified in the *TRIPS Agreement* and the vagueness of terms used in ACTA such as 'intellectual property', 'piracy', 'aiding and abetting' and 'commercial scale'.²⁰

Parke concluded: "Indeed, the list of frightening issues surrounding ACTA – in the way it was negotiated, in the content of the treaty itself and in the significant community and governmental opposition to the treaty around the world, particularly in Europe – indicated to me and to other members of the committee that Australia should be extremely wary about ratifying such an agreement in its present form."²¹

Senator Simon Birmingham, representing the Liberal Party and the State of South Australia, discussed how the report of the Joint Standing Committee of Treaties (JSCOT) on ACTA was exceptional.²² He noted that "[i]t is noteworthy because it does not recommend ratification at this time but instead takes the unusual step for JSCOT in outlining a range of steps that the treaties committee believed should be taken prior to further consideration regarding potential ratification of the treaty."²³ Birmingham was of the view that the report "shows that the treaties committee is keen to ensure that its work in this parliament is work that enhances Australia's treaty-making process and that ensures appropriate scrutiny is applied to treaties that Australia enters into."²⁴ He also noted that "some members of the committee are perhaps more hopeful that we will see a conclusion of ACTA than others,"²⁵ concluding that he would "certainly fall into the category of those who hope we will ultimately see something that provides a greater global strengthening of our copyright

and IP laws, which can be done in harmony with other countries and provide greater protection for those who develop and should rightly have some ownership of their IP into the future.”²⁶

Senator Scott Ludlam, representing the Greens and the State of Western Australia, has been an eloquent critic of ACTA.²⁷ He was critical of the Department of Foreign Affairs and Trade’s blind optimism about the treaty: “Australia risks being out there, effectively completely alone in its support for this flawed instrument.”²⁸ Ludlam made three points on the recommendations. First, he noted that there was a need for an independent and transparent assessment of the economic and social costs of the agreement. He observed: “For something such as this, it is not enough to simply proceed on some kind of blind ideological faith that all forms of trade agreement are uniformly good for all people in all countries, and that was the proposition that seemed to be advanced to JSCOT, with nothing to back it by way of formal or quantitative evidence.”²⁹ Second, he emphasised that the international treaty-making process should not override domestic law reform processes, such as the Australian Law Reform Commission’s inquiry into copyright law and the digital economy: “We believe that the committee, before it opens up the question of whether ACTA actually should be ratified again, should have in its possession that important piece of work by the ALRC.”³⁰ Third, Ludlam proposed that the Australian government issue notices of clarification with regard to the terms of the agreement as recommended in other parts of the report: “They should just be upfront and let the Australian public know – in this instance through the committee – what exactly it is and who exactly it is who will be benefiting from this treaty should it pass.”³¹

The Minister for Trade, Dr Craig Emerson, was disgruntled by the criticism of ACTA.³² He argued that it was unwarranted, and insisted that ACTA required no legislative amendments. Nonetheless, he maintained that he was happy to accept the recommendation to conduct an independent and transparent analysis of ACTA prior to its ratification in Australia. He argued: “I am actually on the consumer’s side here. I don’t want people misled by mystifyingly complex computer-generated equilibrium models that are pre-determined to achieve a particular result.”³³

In November 2012, the Australian government tabled its response to the report of the Joint Standing Committee on Treaties.³⁴ While the government agreed with a number of recommendations ‘in principle’ and ‘in part’, it did not by any means reject ACTA. The government observed that it would “consider ratification of ACTA following the receipt of the analysis recommended at Recommendation 2, but would also consider any further, timely, recommendations of JSCOT as part of that consideration.”³⁵ Indeed, even after much criticism, the government insisted that the treaty “allows considerable flexibility in its implementation” and that “Australia would retain considerable flexibility to modify its laws on copyright while still meeting its obligations under ACTA.”³⁶ It would appear that the executive of the Gillard government remains enthusiastic about the treaty.

ACTA’s fate in Australia will largely be determined by the composition of the future Australian Parliament. Much will depend upon who forms the government – between the Australian Labor Party; the Conservative Coalition of the Liberal Party and the National Party; and the Australian Greens – and what their attitude is to free trade agreements, particularly those with intellectual property chapters. It will also be

interesting to see how the Pirate Party Australia³⁷ and Wikileaks founder Julian Assange³⁸ perform in the federal election, given that both have campaigned on the issue of intellectual property and ACTA.

2. Human Rights

George Mina of the Department of Foreign Affairs and Trade asserted that ACTA would not violate human rights or civil liberties:

ACTA will not infringe upon people's civil liberties. ACTA does not change, for instance, the balance struck between the rights of users and producers of IP inherent in Australian law or the balance inherent in the WTO *TRIPS Agreement*... ACTA will not impact on freedom on the internet. ACTA will not require internet services providers, or ISPs, to monitor the activities of individuals. ACTA will not lead to censorship of the internet.³⁹

However, the Department of Foreign Affairs and Trade did not undertake any human rights assessment of ACTA.

ACTA Article 1 maintains: "Nothing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements."

There has been significant debate about the relationship between ACTA and human rights treaties. The agreement's preamble contains a number of rather anodyne statements about protecting fundamental freedoms and rights. However, the text of ACTA does not provide substantive protection for values such as human rights, privacy, consumer rights, and access to justice and rule of law.

On the question of human rights, Amnesty International has branded ACTA a 'Pandora's box' of potential human rights violations.⁴⁰ Amnesty International expressed the view that "the pact's content, process, and institutional structure impact in a number of ways on human rights – especially the rights to due process, privacy, freedom of information, freedom of expression, and access to essential medicines."⁴¹ Widney Brown, Senior Director of International Law and Policy at Amnesty International, commented: "Worryingly, ACTA's text does not even contain references to safeguards like 'fundamental rights', 'fair use', or 'due process', which are universally understood and clearly defined in international law."⁴² Parties to ACTA have no positive obligation to protect freedom of expression, consumer rights, fair process and privacy.

Australia is at a particular disadvantage to other jurisdictions because it offers comparatively weak individual protection of human rights, civil liberties and privacy rights. There is no express bill of rights under the Australian Constitution – merely a limited implied freedom of political communication.⁴³ Efforts to provide legislative protection of human rights under the Rudd and Gillard governments have faltered.⁴⁴ The Australian Law Reform Commission, which undertook an extensive review of Australian privacy law and practice,⁴⁵ recommended that "[f]ederal legislation should provide for a statutory cause of action for a serious invasion of privacy."⁴⁶ At present, there is a lack of redress for intellectual property users and consumers who have suffered violations of privacy as a result of the conduct of intellectual property owners.

The Joint Standing Committee on Treaties made a number of comments in respect of copyright law. For instance, it recommended that “the Australian Government publishes the individual protections that will be read into the ACTA from the TRIPS Agreement and how the protections will apply in relation to the enforcement provisions contained in ACTA.”⁴⁷

In light of the treaty’s clear human rights impacts, it would be appropriate for the new Parliamentary Joint Committee on Human Rights to consider ACTA and any attendant regulation, as required under the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).

3. Copyright Law and the Digital Economy

Peter Treyde of the Attorney-General’s Department maintained that ACTA would benefit companies in the digital economy, including search engines like Google and social networks such as Facebook:

It is the [United States] economy, with the framework that ACTA I guess supports, that has given rise to the Googles, the Facebooks and so forth. While there are many people who are concerned about freedoms being eroded, the other side of that balance is provided in creating the correct legal environment to support the establishment and growth of those industries. I think that is why we see it as being very important on a more regional level, because you will see that throughout the region and those same standards applying.⁴⁸

This is a curious argument given that companies like Google and Facebook have often argued for the need for stronger copyright exceptions in the United States and elsewhere in respect of the defence of fair use and safe harbours protection. The Department of Foreign Affairs and Trade also argued that strong obligations on copyright law under ACTA would be a boon to Australia’s copyright industries.

The Joint Standing Committee on Treaties raised a number of concerns about the definition of piracy; the civil offences in respect of copyright law; the proportionality of criminal offences; and the interference with domestic inquiries into copyright exceptions, and exceptions to technological protection measures.

First, the Joint Standing Committee on Treaties was concerned that ACTA had a broad, unwieldy definition of piracy.⁴⁹ The definition section is derived in part from a footnote to Article 51 of the TRIPS Agreement 1994. The ACTA clause defines pirated copyright goods as meaning

any goods which are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set forth in Chapter II (Legal Framework for Enforcement of Intellectual Property Rights) are invoked.

Australian courts have scorned the use of the term. In the ‘Panel’ case, McHugh, Gummow and Hayne JJ of the High Court of Australia expressed deep reservations and concerns about the use of terms such as ‘piracy’, ‘robbery’ and ‘theft’ to stigmatise the conduct of alleged infringers of intellectual property rights.⁵⁰

Scholars have been concerned about the ill-defined nature of the term ‘piracy’. In his scholarly historical monograph, *Piracy*, Adrian Johns traces the derivation, and the various meanings of the term.⁵¹ He comments on its slippery and mutable meaning: “To assume that piracy merely derives from legal doctrine is to get the history – and therefore the politics, and much else besides – back to front.”⁵² In the same vein, Andrew Rens comments: “The appearance of such a vague, yet central rhetorical term in a draft international instrument signals that the text is written entirely from the perspective of the interest group that uses the term, if not by that group itself.”⁵³ William Patry has written about how copyright industries have used moral panics over ‘piracy’ as a means to lobby in a self-interested fashion for corporate welfare measures in legislation and international treaties.⁵⁴ It is inappropriate to graft the political rhetoric of ‘piracy’ into the text of an international intellectual property agreement such as ACTA.

Second, ACTA contains extensive obligations with regard to respect of copyright law, which deal with civil remedies, criminal offences, border measures, enforcement of intellectual property rights in a digital environment, technological protection measures and electronic rights management information. David Quinn provides a good summary of the treaty’s numerous, prescriptive obligations, as well as its best practice clauses.⁵⁵ The National Interest Analysis asserted, very controversially and without evidence, that such obligations “constitute best practice forms of IP enforcement.”⁵⁶ There has also been concern that ACTA’s language on injunctions is inconsistent with that of the TRIPS Agreement 1994. Article 8.1 of ACTA does not adopt the language in TRIPS Article 44.1 1994 concerning innocent infringements. Knowledge Ecology International (KEI) argues that “ACTA is an agreement to change current international rules for the enforcement of intellectual property rights.”⁵⁷ KEI reiterated Professor Frederick Abbott’s criticism that ‘suggested retail price’ is an appropriate global norm in the calculation of damages.⁵⁸ It also observed that “[b]y creating higher norms for damages from infringement, the ACTA makes it more risky for businesses and consumers to undertake activities that may or may not actually constitute infringement.”⁵⁹ Finally, the group noted that “[e]veryone must become more risk averse, even when the activity they are engaged in may ultimately be legal.”⁶⁰

Third, the Joint Standing Committee on Treaties was concerned about the proportionality of criminal offences relating to copyright law:

The ACTA National Interest Analysis does not contain any empirical evidence that the criminal penalties contained in ACTA are proportionate. This makes it difficult for the Committee to make a judgement as to the veracity of criticisms of the proportionality of the criminal penalties.⁶¹

In written submissions and oral evidence, Kimberlee Weatherall provided an incisive analysis of the provisions on criminal offences in ACTA.⁶² The JSCOT recommended that “in circumstances where a treaty includes the introduction of new criminal penalties, the treaty’s National Interest Analysis justify the proposed new penalties.”⁶³ It also recommended that the government clarify and publish the meaning of ‘aiding and abetting’, as well as that of ‘commercial scale’ as they apply to ACTA.⁶⁴

Fourth, the Joint Standing Committee on Treaties was of the view that ACTA did not adequately address copyright exceptions and limitations:

ACTA neglects to consider appropriate exceptions and limitations to IP rights to facilitate access to knowledge, culture, information and research; it also removes TRIPS safeguards on a number of IP remedies and provides no concrete protection for interests such as individual privacy or commercial confidentiality or the rights of defendants to legal action. Its emphasis on the rights holder risks creating an imbalance between appropriate protections for creators and the public interest in flexible and fair use of content.⁶⁵

The JSCOT also emphasised that ACTA⁶⁶ should not be reconsidered until the Australian Law Reform Commission had handed down its report on *Copyright and the Digital Economy*.⁶⁷ The commission is undertaking a wide-ranging inquiry focused upon Australia's copyright exceptions in 2012 and 2013. In particular, it is considering whether Australia should adopt a defence of fair use, like the United States.⁶⁸

Fifth, concern was expressed during the inquiry that ACTA would undermine domestic reviews on technological protection measures as it prescribed extensive protection for so-called digital locks. Locking in standards in respect of para-copyright – technological protection measures and electronic rights management information – is also controversial.⁶⁹ Australia's position on technological protection measures is particularly messy given the undeniable tension that still remains between the ruling of the High Court of Australia in *Stevens v. Sony*⁷⁰ and the legislative measures introduced after the Australia-United States Free Trade Agreement 2004. The process for introducing new exceptions to technological protection measures has not been properly implemented. It would be inappropriate to adopt such heightened measures while the Attorney General's Department **is** still reviewing exceptions to technological protection measures.⁷¹

4. Trademark Law and Counterfeiting

George Mina from the Department of Foreign Affairs and Trade argued that ACTA would benefit Australian companies in addressing trademark enforcement against counterfeiting.⁷² He held that the treaty's intellectual property enforcement regime would support the 'innovation economy' and 'the knowledge economy':

By setting out a new international framework for dealing with pirated and counterfeited products in world trade it supports the production of and trade in legitimate products protected by intellectual property rights. ACTA will support our iconic brands in overseas markets. Australian exports, such as Billabong surfwear or Penfolds Wines, depend on the protection of their brands in overseas markets. We want companies like these to thrive.⁷³

Unfortunately, thus far there has been only passing analysis of the trademark dimensions of ACTA in both scholarly and policy circles in Australia. Meanwhile, a great deal of litigation has taken place of late in relation to trademark law, intermediary liability, counterfeiting and the digital economy.⁷⁴

There has also been disquiet that ACTA favours trademark owners.⁷⁵ The agreement emphasises that "the proliferation of counterfeit and pirated goods, as well as of services that distribute infringing material, undermines legitimate trade and sustainable development of the world economy, causes significant financial losses for right-holders and for legitimate businesses, and, in some cases, provides a source of revenue for organised crime and otherwise poses risks to the public."⁷⁶ ACTA was

part of a push to expand secondary liability and limit safe harbours for intermediaries in the digital economy. For instance, the International Trademark Association – one of the key proponents of ACTA – submitted to President Barack Obama: “ACTA can have a significant impact in fighting counterfeiting, a problem that exists globally and affects all national economies, and INTA supports the efforts by the United States and its negotiating partners who are working on this important initiative.”⁷⁷

First, counterfeiting is broadly and inclusively defined under ACTA.⁷⁸ The definition, again based upon the TRIPS Agreement 1994, provides that

‘counterfeit trademark goods’ means any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set forth in Chapter II (Legal Framework for Enforcement of Intellectual Property Rights) are invoked.

According to Andrew Rens, “‘Counterfeit’ as used in the title and preamble has a vague but ominous meaning intended to homogenise a heterogeneous set of regulations and practices.”⁷⁹ Indeed, the term ‘counterfeiting’ is something of a free-floating signifier in ACTA, which allows it to be constructed broadly by trademark owners. It should also be noted that ‘counterfeiting’ has quite different connotations in other contexts, such as the debate over ‘counterfeit medicines’, for instance, which is quite a separate discourse; as is the policy issue of ‘counterfeit currency’.⁸⁰

Second, the proposed international treaty contains obligations on border measures, as well as civil and criminal enforcement of trademark rights. The final agreement has some 26 references to trademarks. Initial drafts of the international treaty had a whole section devoted to online infringement. The final draft’s Article 27(4), provides:

A Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party’s law, preserves fundamental principles such as freedom of expression, fair process, and privacy.⁸¹

There have been concerns that the obligations could have an adverse impact upon consumers’ privacy, free speech, innovation, competition and the digital economy.

Third, ACTA fails to address the question of defences, exceptions and limitations under trademark law. In the 2012 landmark case of *JT International SA v. Commonwealth of Australia*; *British American Tobacco Australasia Limited v. The Commonwealth*, French CJ emphasised that Australian trademark law and its exceptions should serve larger public purposes:

There are and always have been purposive elements reflecting public policy considerations which inform the statutory creation of intellectual property rights. The public policy dimensions of trademark legislation and the contending interests which such dimensions accommodate were referred to in *Campomar Sociedad, Limitada v Nike International Ltd*.⁸²

The observation in that case that Australian trademarks law has ‘manifested from time to time a varying accommodation of commercial and the consuming public’s interests’ has application with varying degrees of intensity to other intellectual property rights created by statute.⁸³

There is a need to revise Australian trademark law⁸⁴ so that it better recognises the interests of consumers.⁸⁵ One model would be an open, flexible defence of fair use in trademark law, as has already happened in the United States.⁸⁶ US jurisprudence on the defence of fair use under trademark law, arguably, needs to be adopted by other jurisdictions, such as Australia, which have no such general defence for claims of trademark infringement, and instead rely upon purpose-specific exceptions.⁸⁷

Although it did not win support for ACTA from the Joint Standing Committee on Treaties, the Australian government nonetheless rushed through reforms on trademark enforcement in Schedule 6 of the Intellectual Property Laws Amendment (Raising the Bar) Act 2012 (Cth). The Minister for Innovation, Industry, Science and Research, Senator Kim Carr, emphasised in his second reading speech that the regime introduced a wide range of criminal and civil penalties in respect of trademark infringement, as well as border control measures. He stressed: “Criminal penalties play an important role in trade mark enforcement, by deterring infringements and punishing infringers.”⁸⁸ The minister also hoped that higher penalties would be “more effective in deterring infringement of trademark rights.”⁸⁹ He also envisaged that the changes would “introduce some summary offences, but with lower fault elements and lower penalties.”⁹⁰ In addition, Carr stressed that the amendments introduced a further remedy in civil actions for trademark infringement to allow a trademark owner to obtain ‘exemplary’ damages, adding that “The aim of awarding additional damages is to increase the deterrence for infringers.”⁹¹

The federal government maintained that it was merely implementing the recommendations of the Advisory Council on Intellectual Property in relation to trademark enforcement.⁹² However, there was no substantive debate at the committee stage over such amendments. There was concern that the government had, in effect, raised standards in respect of trademark enforcement by stealth through this schedule.

5. Patent Law, Health Care, and Access to Essential Medicines

In Australia, there was much debate as to what, if any, impact ACTA would have upon health care.

During the negotiations, the Department of Foreign Affairs and Trade denied that ACTA would deal, at all, with patent law. Surprisingly, the final text has only limited exclusions for patent law contained within footnotes. Members may choose to exclude patents from the entire civil enforcement section; and patents and protection of undisclosed information do not fall within the border measures section. Nonetheless, George Mina of the Department of Foreign Affairs and Trade insisted that ACTA would have a positive impact on health: “We had a seat at the negotiating table which enabled us to influence outcomes for the benefit of our exporters and for the health and safety of our consumers.”⁹³ This position was disputed in the Australian debate.

Locally, Medicines Australia – which represents brand-name pharmaceutical drug manufacturers – has supported strong intellectual property protection for medicines.

Internationally, one of the main proponents of ACTA was the Pharmaceutical Research and Manufacturers of America (PhRMA).⁹⁴ The industry group, in a submission to the United States Trade Representative, argued that the definition of counterfeiting should embrace a wide range of medical products and pharmaceutical drugs. In addition to trademark reform, PhRMA called for a range of other sanctions for intellectual property infringements: “Even in countries with strong IP regimes, trademark laws are inherently incapable of protecting drug distribution channels against the full spectrum of activities that contribute to the proliferation of counterfeit medicines.”⁹⁵ The group called for “a framework of strong, harmonised enforcement tools and remedies to combat the global proliferation of counterfeit medical products.”⁹⁶

There has been a long-standing debate over patent law and access to essential medicines in Australia, as well as internationally.⁹⁷

Alphapharm – the Australian generic drugs manufacturer – has expressed concern that the agreement could adversely impact the dissemination of generic medicines.⁹⁸ Dr Martin Cross, the Managing Director of the company, gave evidence to the Joint Standing Committee on Treaties:

By including patents, this creates major issues running forward... Because ACTA – unintentionally, we believe – has this extension into intellectual property, the possibility is that a totally legitimate generic medicine in Australia could now be considered a counterfeit under the agreement. This is extremely detrimental to our company's ability to bring the products to market, but, much more importantly to the Commonwealth, it has a huge impact on the cost of medicines for the Pharmaceutical Benefits Scheme.⁹⁹

The concern remains that ACTA could have an impact upon pharmaceutical drugs and access to medicines – whether through an over-broad definition of piracy and counterfeiting, or through trademark enforcement or patent enforcement in respect of essential medicines.

The preamble of ACTA stresses that the treaty recognises “the principles set forth in the Doha Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001, at the Fourth WTO Ministerial Conference.” However, the actual text of ACTA provides no such recognition or acknowledgment of the principles in the Doha Declaration,¹⁰⁰ or the WTO General Council Decision 2003.¹⁰¹

Notwithstanding the disclaimers, many fear that ACTA will have an adverse impact upon access to essential medicines. Brook Baker, for instance, has noted that “[e]xtending third-party enforcement and imposing provisional measures and permanent injunctions could interfere with the goals of robust generic competition and access to medicine.”¹⁰² Similarly, Andrew Rens has expressed concerns that ACTA “threatens access to medicines through the indeterminacy of the terms ‘counterfeit’ and ‘enforcement’,” as well as through provisions on injunctions and border measures.¹⁰³ ACTA has also been criticised by a number of activists in the health sector, including Médecins Sans Frontières,¹⁰⁴ Oxfam¹⁰⁵ and Health Action International.¹⁰⁶

There was also an uproar over customs interdicting generic medicines on the grounds of alleged intellectual property infringement following Dutch border officials’

interception of a shipment of such medicines en route from India to Brazil.¹⁰⁷ While ACTA excludes patents and confidential information from the border measures section, it does not address other forms of intellectual property.

Sadly, Australia has been slow to implement international declarations and decisions on access to essential medicines such as the 2001 Doha Declaration on the TRIPS Agreement and Public Health and the 2003 WTO General Council Decision. The mechanism established by that decision has been rarely used thus far. In fact, there has been one instance of such use, when the Canadian generic manufacturer Apotex relied upon the export mechanism to send drugs to Rwanda in 2008.¹⁰⁸ Up to now, too few countries have implemented an effective regime to allow for the export of essential medicines.

In 2007, JSCOT recognised that providing better access to medicines to the world's poorest people was a worthy subject for an international treaty.¹⁰⁹ The committee supported "acceptance of the Protocol, followed by any necessary amendments to the Patents Act 1990 (Cth) to allow for compulsory licensing to enable export of cheaper versions of patented medicines needed to address public health problems to least-developed and developing countries."¹¹⁰ However, the committee also noted that it shared my concerns that "the TRIPS Protocol requires intricate, time-consuming and burdensome procedures for the exportation of medicine, when what is needed is a simple, fast and automatic mechanism."¹¹¹

Three years after the Joint Standing Committee on Treaties report, IP Australia released its consultation paper entitled *Implementing the TRIPS Protocol* in April 2012.¹¹² After long debate, in 2011, Trade Minister Craig Emerson and the then Innovation Minister, Kim Carr, had promised better access to medicines for countries in need.¹¹³ Emerson observed: "Pandemics and other serious health issues remain a terrible problem in many of the world's poorest countries."¹¹⁴ A draft legislative bill was released – the Intellectual Property Laws Amendment Bill 2012 (Cth) – to establish an export mechanism for compulsory licensing of essential medicines.¹¹⁵ However, there have been doubts that this regime is too narrow and rigid in its construction to be effective with regard to generic drugs exports.

The parliamentary inquiry into ACTA reached a number of conclusions in the debate on patent law, trademark law and medicine. In Recommendation 7, the Joint Standing Committee on Treaties addressed the question of patent law:

In the event that the Australian Government ratifies the *Anti-Counterfeiting Trade Agreement* (ACTA), the Government prepares legislation to: Exclude patents from the application of the civil enforcement and border measures parts of ACTA; Ensure that products produced in Australia as a result of the invalidation of a patent or part of a patent in Australia are not subject to the counterfeiting prohibition in ACTA; and Ensure that the expression 'counterfeit' in ACTA is not applied to generic medicines entered or eligible for entry on the Australian Register of Therapeutic Goods.¹¹⁶

Anand Grover, the United Nations Special Rapporteur on the Right to Health, welcomed the rejection of ACTA, saying that the agreement "failed to address numerous concerns related to access to medicines, such as unnecessary inclusion of patents and civil trademark infringements and unjustified stricter civil enforcement provisions that could impede access to generic medicines."¹¹⁷ Grover cautioned

against “heightened enforcement standards, envisioned by agreements like ACTA, that would hinder the legitimate trade and transit of medicines and adversely affect the availability of, and access to, affordable generic medicines.”¹¹⁸ He expressed hope that “other signatories to ACTA and countries negotiating similar trade agreements would consider implications of such agreements on their people’s right to the highest attainable standard of physical and mental health and allow for more public scrutiny of the agreements fundamental to their health.”¹¹⁹

6. Tobacco Control and Plain Packaging

There has been concern that the tobacco industry has sought to use trade agreements such as ACTA and the Trans-Pacific Partnership to undermine tobacco control measures, including graphic health warnings and plain packaging of tobacco products, which have been contemplated by the World Health Organization Framework Convention on Tobacco Control.¹²⁰ This issue has been particularly pertinent and significant in Australia since the Gillard government has been a world leader in tobacco control.

In 2011, Australia passed the ground-breaking Tobacco Plain Packaging Act (Cth) and accompanying regulations.¹²¹ The legislation was designed to promote public health and implement the WHO Framework Convention on Tobacco Control. The regime was intended to address practices such as the use of tobacco packaging to recruit new consumers; engaging in misleading and deceptive advertising; and undermining and subverting health warnings.

The High Court of Australia has handed down a ground-breaking ruling on the plain packaging of tobacco products. Not only does the decision deal with questions of constitutional law, the court also considered the public purposes of intellectual property law. In the 2012 case of *JT International SA v. Commonwealth of Australia; British American Tobacco Australasia Limited v. The Commonwealth*, the tobacco industry challenged the constitutional validity of the Tobacco Plain Packaging Act 2011 (Cth) under the Australian Constitution.¹²² The tobacco companies argued that various intellectual property rights – including trademarks, copyright, designs, patents and business reputation – had been acquired by the Commonwealth government without compensation. By a landslide majority of six to one, the High Court of Australia ruled that the federal government had not engaged in an acquisition of property on less than just terms. Hayne and Bell J pithily summed up the matter:

The *Tobacco Plain Packaging Act 2011* (Cth) neither permits nor requires the Commonwealth to use the packaging as advertising space. The Commonwealth makes no public announcement promoting or advertising anything. The packaging will convey messages to those who see it warning against using, or continuing to use, the product contained within the packaging. Statutory requirements for warning labels on goods will presumably always be intended to achieve some benefit: usually the avoidance of or reduction in harm. But the benefit or advantage that results from the tobacco companies complying with the *Tobacco Plain Packaging Act 2011* (Cth) is not proprietary. The Commonwealth acquires no property as a result of their compliance with the *Tobacco Plain Packaging Act 2011* (Cth).¹²³

The regime is under challenge in international fora. For example, the Ukraine and others have mounted a challenge to the plain packaging regime in the World Trade Organization; and Philip Morris has questioned it under an investment treaty between Australia and Hong Kong.¹²⁴

It should be noted that the tobacco industry has been one of the main champions of ACTA. British American Tobacco made an extensive submission to the United States Trade Representative on this issue, submitting:

We applaud the efforts of the U.S. Government in negotiating the ACTA. We believe that ACTA will be a valuable tool to address the growing world market in counterfeit cigarettes. We would strongly advocate tobacco and tobacco products being prioritised in the course of the negotiations when specific areas of concern are being addressed... It is important that ACTA seek to create new IP protection and enforcement provisions that exceed already existing agreements.¹²⁵

It is notable that British American Tobacco was calling for TRIPS Double Plus protection for its intellectual property – above and beyond any existing agreements. There has been much concern of late about tobacco companies using trade and investment agreements to frustrate the introduction and implementation of public health measures such as tobacco control.

In the Australian inquiry into ACTA, a number of submissions raised the issue of plain packaging and tobacco control, including the academics Matthew Rimmer, Anna George and Luigi Palombi, as well as Dr Martin Cross of Alphapharm.¹²⁶

Another concern pertained to the fact that ACTA did not contain any exclusions or safeguards with respect to tobacco products – especially in light of Australia's landmark plain packaging regime and its ongoing battles with tobacco companies. In February 2013, New Zealand, too, announced that it would adopt plain packaging for tobacco products.¹²⁷ The country has been involved in both the ACTA and the Trans-Pacific Partnership negotiations. A number of other countries that participated in the ACTA negotiations, including the United Kingdom and Canada, have also been contemplating stronger tobacco control measures. There is a need to ensure that ACTA does not have any impact on the operation of the Framework Convention on Tobacco Control. There are similar concerns over the Trans-Pacific Partnership's text on tobacco control.¹²⁸

7. Border Measures

In the Australian debate, there was a strong discourse on ACTA's border measures. This tapped into a wider popular discourse in Australian politics, which was focused upon national security and border protection.¹²⁹

Part 5, Division 7 of the Copyright Act 1968 (Cth) currently deals with seizure of imported copies of copyright material. Part 13 of the Trade Marks Act 1995 (Cth) deals with importation of goods infringing Australian trademarks.

ACTA would provide additional requirements. Its Section 3 on border measures places a great burden upon customs and border authorities to police intellectual property infringements on behalf of intellectual property owners. This would involve a significant cost to the governments who become parties to ACTA. This cost was had not been properly addressed in the National Interest Analysis. It was particularly pertinent as it has been reported that Australian Customs will suffer significant budget cuts.¹³⁰ Furthermore, customs lack significant independent expertise in copyright law,

trademark law (and patent law). As such, there was a danger that customs and border authorities might be unduly influenced by intellectual property owners, both through the provision of information and the demand for remedies.

This section of ACTA failed to adequately to take into account the interests of importers and exporters. There was also a concern that intellectual property owners could try to block the import and export of the legitimate goods in order to reduce or prevent competition in a particular sector.

Furthermore, ACTA Section 3 did not provide adequate protection for consumers – whether they were travellers, or purchasers of goods by mail order or internet retailing. Consumers could be severely inconvenienced, both personally and financially, by the suspension, detention and destruction of their goods. This was a particularly significant problem given the sheer size and scale of online retailing and electronic marketplaces such as eBay.

In terms of international trade law, Section 3 could raise trade issues, particularly if customs and border authorities are over-zealous in enforcing intellectual property rights, and prohibiting the entry of goods and chattels. This could arise, for instance, if customs and border authorities target goods from a particular country or region (for instance, China).

While the debate over ACTA was the cynosure of all eyes, the Australian Parliament rushed through the Intellectual Property Laws Amendment (Raising the Bar) Act 2012 (Cth), without substantive debate at the committee stage. Schedule 6 contained numerous amendments strengthening the position of intellectual property owners in respect of customs and border control measures. The Minister for Innovation, Industry, Science and Research, Senator Kim Carr, noted that the legislation enhanced the powers of the Australian Customs and Border Protection Service to intercept goods that infringed copyrights or registered trademarks at the border.¹³¹ The minister maintained that the legislation “protects people from imitations and fakes” and “provides better border protection systems and stronger sanctions against counterfeits.”¹³²

There has been much debate as to whether or not the Australian government engaged in a strategy of ‘bait-and-switch’ with ACT , and the Intellectual Property Laws Amendment (Raising the Bar) Act 2012 (Cth). In any case, the end result was that the government passed heightened protection for intellectual property with regard to border and customs measures.

8. International Law

In Australia, there were worries over the fragmentation of international law in respect of intellectual property enforcement. The Hon. Melissa Parke was concerned that ACTA was “negotiated in an exclusive club approach in a secret and non-transparent manner outside of the usual fora established to address IP issues, namely the World Intellectual Property Organisation, WIPO, and the World Trade Organisation, WTO.”¹³³ There was also debate about whether ACTA was conceived of as an intellectual property agreement, a trade agreement or a border security agreement.

The preamble to ACTA maintains that “this Agreement operates in a manner mutually supportive of international enforcement work and cooperation conducted within relevant international organizations.” In fact, the treaty undermines the role of existing multilateral organisations, such as the World Intellectual Property Organization and the World Trade Organization, and duplicates and fragments international law on intellectual property enforcement.

ACTA Chapter IV deals with international cooperation on questions of intellectual property enforcement. Article 33 provides that “international cooperation is vital to realizing effective protection of intellectual property rights and that it should be encouraged regardless of the origin of the goods infringing intellectual property rights.” Kimberlee Weatherall has analysed the discourse of ‘cooperation’ in this treaty extensively.¹³⁴ The Australian Federation Against Copyright Theft argued that ACTA would facilitate international cooperation on cases such as the action against the New Zealand service Megaupload.¹³⁵ The industry group accused Megaupload of ‘digital theft’, but this undermines its argument given the controversy over the action against Megaupload in terms of due process and rule of law.¹³⁶

Chapter V deals with institutional arrangements – most significantly, the establishment of the ACTA Committee.¹³⁷ The remit of the committee is to review the implementation and operation of the agreement; consider any proposed amendments to the treaty; and consider any other matter that may affect its implementation and operation. This is a wide field of operations. Moreover, the ACTA Committee can establish ad hoc committees, working groups, seek the advice of groups or individuals, share information, and take other actions in the exercise of its functions. The committee can determine, as well as amend, its rules and procedures.

The supporters of ACTA argued that the committee would be a democratic body, which would complement existing institutions such as WIPO and the WTO. Moreover, the treaty’s advocates hoped that the committee would become an efficient international institution able to engage in quick decision-making – without the problems of stalemate and deadlock that have afflicted many multilateral institutions.

A number of civil society groups criticised this institutional structure. James Love from Knowledge Ecology International has expressed concerns that the ACTA Committee would not operate in an open, transparent and inclusive manner.¹³⁸ He feared that it would be captured by industry groups, and countries, with a maximalist intellectual property agenda. He was also concerned that the new committee would have the authority to amend the agreement; engage in selective accreditation favouring intellectual property right-holders; and endorse ‘best’ practices in relation to intellectual property enforcement.

Widney Brown from Amnesty International commented: “All global trade agreements must be negotiated transparently under the auspices of existing intergovernmental organizations such as the WIPO or the WTO.”¹³⁹ He feared that the ACTA Committee would lack “accountability, transparency, participation, equality and sustainability.”¹⁴⁰ Brown also expressed concern that “[t]he pact would set up an unelected ‘ACTA Committee’, which would have the power to set standards, negotiate accessions of new countries and promote ‘best practices’.”¹⁴¹ Moreover, the Amnesty representative commented: “It would also be the first port of call to interpret

the meaning of the frequently vague text of the agreement – creating meaning after parliaments had given their approval.”¹⁴² Brown feared that civil society would be excluded from its deliberations: “Most of these functions are already carried out by WIPO, where civil society has a voice and deliberations are generally transparent and predictable.”¹⁴³

According to the Electronic Frontier Foundation, “this institutional structure raises concerns for signatories’ national sovereignty and ability to set appropriate domestic policy.”¹⁴⁴

In the Australian Parliament, the Joint Standing Committee on Treaties was concerned that ACTA would be a protean, mercurial treaty, subject to future revisions, without due oversight or scrutiny:

It is possible for a circumstance to arise in which the development and entrenchment of guidelines that qualify provisions of ACTA could lead to a requirement for legislative change in Australia without amendments to the underlying treaty. Such changes would consequently occur without the benefit of public scrutiny required by a treaty making process.¹⁴⁵

There was also a concern that the ACTA Committee was an unnecessary addition to the already densely crowded field of international organisations dealing with intellectual property. In particular, there was a worry that the committee would seek to usurp the role of existing international organisations, particularly multilateral entities such as WIPO,¹⁴⁶ the WTO,¹⁴⁷ and the Internet Corporation for Assigned Names and Numbers (ICANN).¹⁴⁸

Conclusion

Trick or Treaty? The Australian Parliament and Intellectual Property Treaties

In Australia, there was anxiety that ACTA ran rough-shod over domestic law reform processes; trammelled the role of the Australian Parliament in law-making on intellectual property; and undermined the status and authority of international institutions, such as WIPO, the WTO, and the United Nations.

The Australian economist, Peter Martin, observed plaintively: “Why do we negotiate free trade agreements in secret?”¹⁴⁹

There has been much concern that ACTA was secretly negotiated by a cabal of trade representatives and diplomats from a limited number of nation states – including the United States, Japan, the members of the European Union, Switzerland, Singapore, South Korea, Australia, New Zealand, Canada and Mexico. Although there was input from intellectual property industries, there was little in the way of democratic deliberations with civil society groups or affected industries and communities. Sean Flynn summarised these concerns about the lack of due process, transparency, and accountability in the negotiations: “The negotiation process for ACTA has been a case study in establishing the conditions for effective industry capture of a lawmaking process.”¹⁵⁰ Professor Peter Yu has called this a ‘country-club’ approach to setting intellectual property standards.¹⁵¹ He has observed that the treaty “militates against domestic legislative reforms and the development of future intellectual property laws and policies.”¹⁵²

In Australia, the Commonwealth power to make and implement treaties was reviewed in a 1995 report called *Trick or Treaty?*¹⁵³ The report emphasised the need for greater parliamentary involvement:

International obligations are incurred at the point of entering into a treaty. However, the function of implementing the treaty is often reserved to the Commonwealth Parliament. Accordingly, it would be preferable to involve Parliament prior to ratification, so that it can make a free choice without the possibility of a potential breach of treaty obligations.¹⁵⁴

The report recommended the establishment of the Joint Standing of Committees and treaty impact statements.

There was also considerable disquiet about the performance of the Department of Foreign Affairs and Trade in the ACTA negotiations. The department conducted desultory consultations with stakeholders on the treaty, but these were little more than a charade since the text of the agreement and analysis was not made available during the negotiations. The Department of Foreign Affairs and Trade (DFAT) issued a cursory statement extolling ACTA's virtues in its National Interest Analysis,¹⁵⁵ but failed to provide a regulatory impact statement on the treaty. In addition, the DFAT did not provide any accompanying legislation despite the fact that the obligations were over and above those found in existing international treaties that Australia is party to. Regrettably, there has been no independent analysis of the treaty's impacts upon economics, human rights or health care in Australia.

Similar concerns were expressed in other jurisdictions. Kader Arif, Rapporteur for ACTA in the European Parliament, said of the process: "I want to denounce in the strongest possible manner the entire process that led to the signature of this agreement: no inclusion of civil society organisations, a lack of transparency from the start of the negotiations, repeated postponing of the signature of the text without an explanation being ever given, exclusion of the EU Parliament's demands that were expressed on several occasions in our assembly."¹⁵⁶ In the United States, Oregon Democratic Senator Ron Wyden put forward amendments calling for the US Congress to have greater oversight over international negotiations relating to intellectual property and trade.¹⁵⁷ Californian Republican Congressman Darrell Issa established a wiki to enable citizens to comment upon the ACTA text.¹⁵⁸ Wyden and Issa have argued that there is a need for a digital bill of rights to protect consumers from overly expansive intellectual property laws and treaties.¹⁵⁹

Like other legislative assemblies around the world, the Australian Parliament was concerned that the treaty would impinge on national sovereignty and constrain its role to engage in policy-making on matters of intellectual property. The Joint Standing Committee on Treaties raised a number of concerns about the ACTA process in the Australian context. Observing that there was a lack of proper analysis of the treaty, the JSCOT recommended that "in future, National Interest Analyses of treaties clearly intended to have an economic impact include an assessment of the economic benefits of the treaty, or, if no assessment of the economic benefit of a treaty has been undertaken, a statement to that effect, along with an explanation as to why it was not necessary."¹⁶⁰

The Joint Standing Committee on Treaties also made a number of other recommendations with respect to the national interest analyses,¹⁶¹ including that "the

Australian Government commissions an independent and transparent assessment of the economic and social benefits and costs of ACTA,”¹⁶² and that “in circumstances where a treaty includes the introduction of new criminal penalties, the treaty’s National Interest Analysis justify the proposed new penalties.”¹⁶³

Committee member Senator Simon Birmingham said of the report: “It is also positive in that it recommends a pathway forward and provides recommendations not just for the ACTA agreement but also for Australia’s treaty, made in the process, that hopefully will encourage greater scrutiny and consideration of future agreements.”¹⁶⁴

The ACTA case study highlights the need for reform of international treaty-making by the Australian government. In their classic work, *No Country is an Island*, leading international and public lawyers Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams lamented:

The power to commit Australia to new international obligations lies with the executive alone. Especially in regard to bilateral agreements, governments continue to make key decisions outside the public eye and without parliamentary involvement. Whether or not this is appropriate, it is fair to say that, even after the 1996 reforms, the role of parliament in the treaty process is a minor one.¹⁶⁵

ACTA’s secretive origins highlight the need for greater transparency and information-sharing about treaty negotiations; the necessity of democratic participation in policy formulation and development; and the demand for evidence-based policy-making informed by independent, critical research on the economic, social and political costs of treaties.

The role of the Department of Foreign Affairs and Trade in international intellectual property negotiations needs to be re-evaluated, both in light of its past performance and its current role in the discussions over the Trans-Pacific Partnership and other bilateral and regional free trade agreements. There should be a new lead agency to coordinate intellectual property negotiations in order to properly integrate the input from various government departments and stakeholders. As there is a need for evidence-based policy making, there should be a role for the Productivity Commission and the financial departments. Moreover, as envisaged by the *Trick or Treaty* reforms in the 1990s, there should be a greater critical role for the Australian Parliament and the Joint Standing Committee on Treaties in assessing and evaluating international treaties, particularly those relating to intellectual property.

There have been concerns over the transparency of the current negotiations over the Trans-Pacific Partnership (TPP) – a blockbuster plurilateral free trade agreement, spanning the Pacific Rim.¹⁶⁶ Senator Scott Ludlam of the Australian Greens was concerned that a similar approach would be taken by the Department of Foreign Affairs and Trade with regard to the TPP’s intellectual property chapter: “We have not in the committee gone very much into detail and did not directly address the Trans-Pacific Partnership Agreement, which many are aware is coming down the pipeline directly behind ACTA, but I think this is the first domino being pushed over into the Trans-Pacific Partnership Agreement, and I think it heralds some very significant flaws there as well.”¹⁶⁷

The United States has aggressively pushed for high standards for intellectual property in the Trans-Pacific Partnership talks. A draft proposal on the intellectual property chapter from the US Trade Representative was leaked in 2011.¹⁶⁸ The chapter sought to cover copyright law, trademark law, patent law, customs and border measures, and intellectual property enforcement. Sean Flynn and his colleagues provided a comprehensive analysis of the text, observing that “[t]he US proposals, if adopted, would create the highest intellectual property protection and enforcement standards in any free trade agreement to date.”¹⁶⁹ According to *Inside U.S. Trade*, Australia, New Zealand and Singapore have proposed replacing some elements of the US proposal on intellectual property enforcement with language drawn from ACTA.¹⁷⁰ This is disturbing given that the Joint Standing Committee on Treaties recommended postponing ACTA’s ratification. A further leak revealed that the United States and Australia had been seeking to confine copyright exceptions in the TPP negotiations.¹⁷¹ There has been much concern about the investment chapter of the Trans-Pacific Partnership, especially since a draft text was leaked in 2012.¹⁷² Concerns have also been expressed over the possibility that the investment chapter could be deployed in intellectual property disputes, such as those initiated at the WTO on plain packaging of tobacco products.¹⁷³

The Obama Administration has reiterated its enthusiasm for regional trade agreements. In his 2013 State of the Union address, President Obama stressed his support for not only the Trans-Pacific Partnership, but also a new pact between the United States and the European Union called the Trans-Atlantic Free Trade Agreement.¹⁷⁴

Instead of pursuing regional free trade agreements, the Australian Parliament and the Gillard government would do better to endorse the Washington Declaration on Intellectual Property and the Public Interest 2011.¹⁷⁵ To that end, Australia should ensure that intellectual property reforms respect human rights; value openness and the public domain; strengthen intellectual property limitations and exceptions; support cultural creativity; check enforcement excesses; and implement the Doha Declaration on the TRIPS Agreement and Public Health, the WTO General Council Decision 2003 and the WIPO Development Agenda 2007. It is particularly important that future domestic and international intellectual property reform is informed by evidence-based policy-making.

¹ *Anti-Counterfeiting Trade Agreement* 2011, [2011] ATNIF 22, not yet in force.

² Susan Sell, ‘The Global IP Upward Ratchet, Anti-Counterfeiting, and Piracy Enforcement Efforts: The State of Play’ (Research Paper No 15, Program on Information Justice and Intellectual Property at Digital Commons @ American University Washington College of Law). Although Susan Sell made these comments in respect of draft versions of ACTA, the comments are still applicable, given the differences between TRIPS-Plus Agreements and ACTA.

³ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3, annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) (entered into force 1 January 1995).

⁴ *Australia-United States Free Trade Agreement (AUSFTA)*, signed 18 May 2004 (entered into force 1 January 2005).

⁵ Joint Standing Committee on Treaties, *Report 126 – Treaty Tabled on 21 November 2011: Anti-Counterfeiting Trade Agreement 2011*, Canberra: Australian Parliament, June 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/21november2011/report.htm

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- ¹⁵ The Hon. Kelvin Thomson, 'Report 126: Treaty tabled on 21 November 2011 of the Joint Standing Committee of Treaties', the House of Representatives, Hansard, the Australian Parliament, 27 June 2012, 8172.
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- ²² Senator Simon Birmingham, 'Report 126: Treaty tabled on 21 November 2011 of the Joint Standing Committee of Treaties', the House of Representatives, Hansard, the Australian Parliament, 27 June 2012, 4716.
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