



Senate Standing Committee on Foreign Affairs, Defence and Trade

References Committee

Inquiry into:

The Commonwealth's treaty-making process

**Submission from the
Australian Digital Alliance**

And

The Australian Libraries Copyright Committee

Executive Summary:

The Australian Digital Alliance (ADA) and Australian Libraries Copyright Committee (ALCC) thank the Senate Standing Committee for the opportunity to make this joint submission. As copyright advocacy groups this submission is focussed on the interaction between intellectual property (IP) and the treaty making process.

Obligations entered into under treaties have a significant and increasing impact on our domestic laws and legislative policy space. For copyright, Australia is party to at least 16 overlapping agreements and is in the process of negotiating and ratifying several more. These obligations regulate the terms of protection, prescribe criminal provisions, define the space available to make exceptions (in some cases, preventing exceptions altogether) and much more.

Decisions taken during the treaty making process have a direct impact on cultural institutions, schools, universities, industry, creators, the Australian economy and Australians themselves. As such, it is concerning that repeated recommendations regarding the framing, negotiation, assessment and review of treaties have not been implemented.

The ADA and ALCC make the following proposals to improve the treaty making process:

A more informed approach

1. For significant (Category 1) treaties, a scoping study should be prepared before the decision is taken to enter into negotiations. The brief for such a study should require realistic examination of risks and costs, and include potential trade diversion in any modelling of potential outcomes.
2. Negotiations on sensitive subject matters such as IP should only be included if there is a specifically identified and probable benefit to Australia in their inclusion.
3. An overarching framework to apply to future international IP negotiations should be developed by a body such as the Productivity Commission. This should be approved and periodically reviewed by JSCOT.
4. The negotiating mandate and conditions of negotiation should be approved by JSCOT prior to negotiations commencing.
5. Following JSCOT approval of the negotiation mandate, the priorities, objectives and anticipated costs and/ benefits of the treaty should be tabled in parliament.

Greater stakeholder engagement

6. Before and during negotiations, the Department of Foreign Affairs and Trade (DFAT) should take steps to proactively identify and engage with stakeholders.
7. As much information as possible regarding matters under discussion should be released, on an ongoing basis, to help stakeholders identify whether they have an interest in the matter being negotiated
8. Negotiating text and position statements should be made publicly available. If that is not possible due to negotiation agreements or constraints, DFAT should make an informed decision as to what could be released with a presumption towards transparency. At a minimum text should be made available to subject-matter experts and stakeholders (including industry and civil society) with appropriate safeguards.

Improved oversight

9. Australian industry, civil society and parliamentarians should receive at least as much access to the text as the equivalent groups in its negotiating partners.
10. Treasury should oversee ongoing analysis of treaties and their impact during negotiation. Analysis includes input from portfolio agencies and stakeholders.

Evidence-based decision making

11. When treaties are sent to the Joint Standing Committee on Treaties (JSCOT), they should be accompanied by independently prepared cost/benefit analysis.
12. The National Interest Analyses (NIAs) and Regulatory Impact Statements (RISs) should be more comprehensive.
13. When preparing analysis of the agreement, legal risk, including ambiguities as to implementation, should be taken into account.

Effective Implementation

14. Treaties should be implemented to give maximum benefit to Australia. This may require legislative change to areas impacted but not covered by the treaty.
15. Periodic reviews should measure the effects of treaties and that analysis should feed into the current negotiation framework and positions. JSCOT or other parliamentary committees may oversee significant reviews.
16. Where appropriate harmonisation and consolidation of Australia's international agreements should be pursued.

We recognise that not all treaties will require this level of parliamentary oversight, stakeholder engagement and analysis. Many treaties are uncontroversial and relative routine in form. The Department of Foreign Affairs and Trade (DFAT) already makes a distinction between Category 1 treaties, Category 2 treaties and minor treaty actions, each with different standards of parliamentary consultation.¹ The recommendations above would apply only to Category 1 treaties, although now may be an appropriate time to revisit these categorisations and ensure they are still fit for purpose.

About the Australian Digital Alliance

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumers, galleries, museums, IT companies, libraries, archives and charitable organisations.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.

¹ From DFAT website [Tabling of Treaty Actions in Parliament](#) (accessed 2015)

About the Australian Libraries Copyright Committee

The Australian Libraries Copyright Committee is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Australian Library and Information Association
- Australian Government Libraries Information Network
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

A more informed approach

Relevant Terms of Reference:

a) the role of the Parliament and the Executive in negotiating, approving and reviewing treaties;

g) the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties;

Currently the decision to enter treaty negotiations is made by the executive. The parliament plays no role in the decision to enter negotiations, or in setting the framework for negotiation.

The ADA and ALCC agree with the Productivity Commission's recommendation that for bilateral and regional trade agreements:

“Before entering negotiations with any particular prospective partner, it [the Australian Government] should undertake a transparent analysis of the potential impacts of the options for advancing trade policy objectives with the partner. All quantitative analysis and modelling should be overseen by an independent body.”²

For major non-trade agreements³ a similar analysis should be done.

The analysis should not just cover potential cost and benefits, but also identify the context of the agreement, the existing international obligations, choice of forum and affected stakeholders.

This initial level of analysis is essential to choose the appropriate content to be negotiated. Historically, IP has been dealt with in open multilateral fora such as the World Intellectual Property Organisation (WIPO) or the World Trade Organisation (WTO). Recently, we have seen a move to

² Productivity Commission 2010, [Bilateral and Regional Trade Agreements, Research Report](#), Canberra at 67

³ As noted above, these recommendations apply to major treaties, treaties which DFAT would categorise as Category 1 with the subsequent 20 day JSCOT process (see for example <http://www.dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/tabling-of-treaty-actions-in-parliament.aspx>). As part of any reforms the categorisation criteria should be looked at to ensure that they are still relevant. We are not suggesting this level of oversight would be appropriate for routine treaties or minor treaty actions.

changing international IP standards in bilateral or multilateral trade agreements which are negotiated without public or Parliamentary input.

This has caused issues for Australia. Reviewing the effect of the IP chapter in the Australia-US Free Trade Agreement (AUSFTA), one of Australia's earliest bilateral trade deals with an extensive IP chapter, the Productivity Commission concluded:

“the changes following the AUSFTA have make it less likely that an appropriate balance between supplier and user interests prevails in Australia's intellectual property system”.⁴

They went on to recommend Australia:

“avoid the inclusion of IP matters as an ordinary matter of course in future BRTAs [bilateral regional trade agreements]. IP provisions should only be included in cases where a rigorous economic analysis shows that the provisions would likely generate overall net benefits for the agreement partners”.⁵

Testimony from DFAT suggest that this recommendation is not being applied. When asked about the recent Korea – Australia Free Trade Agreement (KAFTA) and why IP was included, Chief Negotiator Adams replied:

“The basic reason that we have international agreements covering intellectual property issues or laws is that it is part of international trade, so we have all sorts of international agreements on IP, including in trade agreements.”⁶

In other words, rather than including IP because it had been identified that there were specific goals that should be achieved, or because specific problems in the Australia-Korea trade relationship relating to IP that had been identified, IP was included “because it is part of international trade”. The strategy here is unclear: both Korea and Australia already have high levels of IP protection (in part owing to the fact that each is already a party to a free trade agreement with the US). The provisions of the IP chapter of the agreement achieve nothing concrete for Australian IP owners, and operate mostly to constrain domestic policy flexibility.⁷ A more targeted analysis of the need for a chapter, and the problems to be addressed, could have avoided this outcome.

Proposal 1: For significant (Category 1) treaties, a scoping study should be prepared before the decision is taken to enter into negotiations. The brief for such a study should require realistic examination of risks and costs, and include potential trade diversion in any modelling of potential outcomes.

Proposal 2: Negotiations on sensitive subject matters such as IP should only be included if there is a specifically identified and probable benefit to Australia in their inclusion.

⁴ Productivity Commission 2010, [Bilateral and Regional Trade Agreements, Research Report](#), Canberra at 166

⁵ Productivity Commission 2010, [Bilateral and Regional Trade Agreements, Research Report](#), Canberra recommendation 4(b) at xviii

⁶Hansard Foreign Affairs, Defence and Trade References Committee [Committee Hearing 09/09/2014](#) - Korea-Australia Free Trade Agreement

⁷ For more detail, see Australian Digital Alliance [submission 62](#) to Senate Standing Committee on Foreign Affairs Defence and Trade, inquiry into Korea- Australian Free Trade Agreement and Weatherall [Submission on the IP Chapter of the Korea-Australia Free Trade Agreement](#)

If a targeted analysis concludes that Australia should negotiate on matters of IP, a framework should be established with clear goals and parameters.

Australia has had mixed success with IP negotiations in international agreements. The IP chapter in AUSFTA, for example, came with significant economic costs to Australia: the copyright term extension alone was estimated at \$88 million per year.⁸ In the period since AUSFTA, sensible reform options have not been possible owing to the terms of AUSFTA and the constraints it imposes.

Some of these shortcomings may have been avoided with a more strategic and focussed framework for IP. The lack of such an overarching framework was recently singled out for criticism in the *Competition Policy Review Draft Report*:

“The Panel is concerned that there is no overarching IP policy framework or objectives guiding changes to IP protection or approaches to IP rights in the context of negotiations for international trade agreements.”⁹

As the panel noted:

“Determining the appropriate extent of IP protection is complex. IP rights can help to break down barriers to entry but can also, when applied inappropriately, reduce exposure to competition and erect long-lasting barriers to entry that fail to serve Australia’s interests over the longer term. This risk is especially prevalent in commitments entered into as part of international trade agreements.”¹⁰

Looking to recent free trade agreements such as AUSFTA, KAFTA and the Trans-Pacific Partnership (TPP), the strength of the US negotiation template is evident. The strong correlations between all chapters have their roots in a consistent US approach to IP. Australia could benefit from an analysis of our offensive and defensive aims in IP negotiations, carried out by a body such as the Productivity Commission, which could inform our future negotiations.

Professor Luke Nottage expanded on this point recently:

“I have been saying for several years that Australia should be looking to develop its own model international investment treaty, like many of our trading partners do, both developed countries and developing countries.... But I think there would be a lot of benefit in more structured public discussion led by the government about not only investor-state dispute settlement but also the broader international investment treaty regime, including the substantive rights.”¹¹

Because this framework will guide the negotiators and inform the parameters of the agreement, it should be subject to parliamentary oversight. JSCOT, having primary responsibility for the treaty process at conclusion, would seem a natural body to have oversight of such a framework, and to periodically review it, either in light of new treaty possibilities or to ensure it remains up to date. Such a process would allow expert opinion as well as stakeholder input before the negotiations begin. Other countries have realised the importance of early consultation. The European Union for

⁸ Dee, Dr Phillipa *The Australia – Us Free Trade Agreement An Assessment* [2004] Canberra at 22

⁹ Competition Policy Review *Draft Report* (2014)

¹⁰ *Ibid.*

¹¹ [Hansard 6 August 2014](#) Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 to the Foreign Affairs, Defence and Trade Legislation committee

example has a very formal process including stakeholder questionnaires, civil society engagement and formal interactions with the Council and European Parliament.¹²

Proposal 3: An overarching framework to apply to future international IP negotiations should be developed by a body such as the Productivity Commission. This should be approved and periodically reviewed by JSCOT.

Due to the impact of treaties on the parliament's ability to legislate and govern, it is unsurprising that there have been calls for parliament to have a greater role. For example, JSCOT recommended in 2012:

“Recommendation 1: That prior to commencing negotiations for a new agreement, the Government table in Parliament a document setting out its priorities and objectives including the anticipated costs and benefits of the agreement.”¹³

The current system, which confers all discretion to the executive, not only cuts out the people's representatives, but it can lead to unclear mandates which may conflict with other government policies.

Tabling the priorities, objectives and anticipated costs and benefits of the treaty in parliament would give DFAT clarity over their mandate, and ensure that they are working from the same base assumptions as the parliament and the population. It would also assist stakeholders in knowing what may be of benefit or concern to their interests.

At their conclusion, treaties must satisfy the Parliament and the people. The EU may again provide an illustrative example. In the EU the final decision depends on the members of the European Parliament and “for that reason the negotiators are very attentive to the Parliaments' views”¹⁴ on the initial negotiation mandate. Increased parliamentary oversight at the ratification stage would presumably have a similar effect in Australia if the opportunity to provide input at an early stage existed.

Proposal 4: The negotiating mandate and conditions of negotiation should be approved by JSCOT prior to negotiations commencing.

Proposal 5: Following JSCOT approval of the negotiation mandate, the priorities, objectives and anticipated costs and/ benefits of the treaty should be tabled in parliament.

Greater stakeholder engagement

Relevant Terms of Reference

- a. the role of the Parliament and the Executive in negotiating, approving and reviewing treaties

¹² European Union [Factsheet: Transparency in EU Trade Negotiations](#) (2013)

¹³ Joint Standing Committee on Treaties [Report 128: Inquiry into the Treaties Ratification Bill 2012](#)

¹⁴ European Union [Factsheet: Transparency in EU Trade Negotiations](#) (2013)

- h. the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties
- i. a comparison of the consultation procedures and benchmarks included by our trading partners in their trade agreements

Currently, the process of consultation with stakeholders occurs on an *ad hoc* basis, with the responsibility placed on stakeholders to monitor proposed treaty actions, ascertain their relevance and self-identify to DFAT.

As DFAT states on its website:

“It is not always possible to know all the community groups which might wish to contribute to the process of setting Australia's objectives and positions. To facilitate public input, the Government prepares a list of all multilateral treaties currently under negotiation or review which can be found on the Australian Treaties Library Internet site. The list is updated approximately twice a year and tabled in both Houses of the Commonwealth Parliament. The list includes the name of the contact officer in the responsible Department to whom comments or questions can be directed for each treaty under negotiation. This provides greater transparency in the treaty making process and ensures that interested groups and individuals are in a position to contribute freely to Australia's negotiating position.”¹⁵

This system works reasonably well for openly negotiated multilateral treaties. For example, the stakeholders for the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty)¹⁶ found it easy to identify the treaty as important to their interests as the text was openly available. Indeed, many of them were actively involved in the negotiations at WIPO.

However, there are challenges for closed, secret negotiations. To use one pertinent example, for the TPP (currently being negotiated) DFAT does not even have an official list of all the chapters available online. The official link in Australian Treaties Library does not even mention that it is a trade agreement.¹⁷ And while there is some more helpful information available, discovering it requires effort.¹⁸ It is hard for stakeholders to self-identify as interested parties when they don't know what is being negotiated.

Even where stakeholders may know the general subject matter, as long as the text remains secret it will be hard to know what specific interests they may have.

Proposal 6: Before and during negotiations, the Department of Foreign Affairs and Trade (DFAT) should take steps to proactively identify and engage with stakeholders.

¹⁵ DFAT website at <http://www.dfat.gov.au/international-relations/treaties/treaty-making-process/pages/treaty-making-process.aspx> accessed on 26 February 2015

¹⁶ [Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled](#) (2013)

¹⁷ See Australian Treaty Library at <http://www.austlii.edu.au/au/other/dfat/mta/> accessed on 20 February 2015

¹⁸ For example this undated slide presentation is perhaps the most comprehensive document available from DFAT online <http://www.dfat.gov.au/trade/agreements/tpp/Documents/tpp-overview.pdf> However it would not be immediately obvious to a casual observer

Not all matters relevant to copyright may be in the IP chapter, and the copyright provisions may affect organisations that were not cognizant of the connections between their areas and IP.

Changes to copyright impact on innovation, competition, broadcasting, media, cultural and communications policy. To use just a few examples of the wide scope:

- The new online copyright infringement draft code would exist under the Telecommunications Act 1997 and be administered by the [Australian Communications and Media Authority \(ACMA\)](#).
- The [authorisation process](#) for the collecting agency the Australasian Performing Rights Association (APRA) is a function of the Australian Competition and Consumer Commission (ACCC)
- Parallel importation raises issues about consumer guarantees and protections under the Competition and Consumer Act 2010.

The ADA and ALCC have identified the IP chapter as key to our member interests, and have also identified enforcement (including investor-state dispute settlement or ISDS) as important in connection with the chapter. To our knowledge there is nothing in the other chapters that is of direct concern, but we have no way of knowing. There is no current process that would allow that information to flow effectively through to us. And while we are confident that DFAT, knowing that we are interested civil society stakeholders, have listened to our objectives and concerns, they are not subject-matter specialists, and may not see the relevance of subject matter or treaty provisions not labelled clearly as such. Additionally, it is our understanding that negotiators for the various chapters are not involved in the negotiation of the other chapters, so many would have a limited knowledge of the contents of those chapters.

Proposal 7: As much information as possible regarding matters under discussion should be released, on an ongoing basis, to help stakeholders identify whether they have an interest in the matter being negotiated.

As well as our domestic framework, Australia is also subject to a number of international copyright obligations. These include:

- The Berne Convention for the Protection of Literary and Artistic Works
- The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
- The Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms
- The Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite
- The Agreement on Trade-Related Aspects of Intellectual Property Rights
- The WIPO Copyright Treaty
- The WIPO Performances and Phonograms Treaty
- The Australia and New Zealand Free Trade Agreement (AANZFTA)
- The Australia-Chile Free Trade Agreement
- The Malaysia-Australia Free Trade Agreement
- The Australia-United States Free Trade Agreement (AUSFTA)
- The Singapore-Australia Free Trade Agreement
- The Japan-Australia Economic Partnership Agreement (JAIPA)

- The Korea-Australia Free Trade Agreement (KAFTA)

Agreements that we have signed but are not yet in force, or which we are still currently negotiating, include:

- The Marrakesh Treaty
- The Anti-Counterfeiting Trade Agreement (ACTA)
- The China-Australia Free Trade Agreement (ChAFTA)
- The Trans-Pacific Partnership (TPP)

Additionally, Australia has obligations through its membership of bodies such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the World Health Organisation (WHO) which also interact with our specific intellectual property obligations.

These agreements overlap and interact in complex matters. Each time we negotiate a new copyright provision it must be checked for consistency against existing agreements, and the implications of further reducing the future policy space must be considered.

The difficulties of this process are perhaps best illustrated by KAFTA. During the Senate Committee hearing, DFAT was confident that:

“we were not going beyond international commitments already made—so, commitments already made under the TRIPS agreement, other intellectual property agreements or other free trade agreements.”¹⁹

However, in its response to Questions on Notice, and following evidence from IP experts identifying new obligations, DFAT revealed that KAFTA imposed at least 12 new international-level commitments, mainly in the area of broadcast.²⁰

In such a complex area, the insights of subject-matter experts, industry and civil society are undoubtedly of benefit, as those groups are able to point out connections and conflicts that may not be obvious even to experienced negotiators. The secrecy surrounding agreements such as the TPP reduce the ability of these groups to provide detailed assistance.

Case Study: Technological Protection Measures

As part of the AUSFTA negotiations, the US insisted on new provisions relating to Technological Protections Measures (TPMs). In short, Australia agreed to implement a system whereby the circumvention of TPMs is a criminal offence unless it falls within a prescribed exception. Seven exceptions were written into AUSFTA, and there is a set process for adding further exceptions.

This system has proved burdensome and administratively unworkable.²¹ But more importantly, as the Parliamentary Committee charged with reviewing the scheme concluded, it contains

¹⁹ Hansard Foreign Affairs, Defence and Trade References Committee [Committee Hearing 09/09/2014](#) - Korea-Australia Free Trade Agreement

²⁰ Department of Foreign Affairs and Trade [responses to questions on notice from hearing - intellectual property questions](#) - 9 September 2014

²¹ The exceptions have not been reviewed properly since 2006. Further, the conclusions from the 2012 review by the Attorney-General's Department have still not been released: see Attorney-General's Department, Review of Technological Protection Measure Exceptions Made Under the *Copyright Act 1968* (2013) <<http://www.ag.gov.au/consultations/pages/ReviewofTechnologicalProtectionMeasureexceptionsmadeundertheCopyrightAct1968.aspx>>. Universities Australia in their submission to the present inquiry note the

“a lamentable and inexcusable flaw in the text of Article 17.4.7; indeed, it is a flaw that verges on absurdity.”²²

The flaw is that for two of the exceptions, and for any new exceptions introduced, liability still arises for manufacturing or trafficking or dealing in circumvention devices. As the Committee concluded *“[t]he effect is to make Article 17.4.7 work against itself, for it creates the potential scenario of those with permitted exceptions to circumvent under Article 17.4.7(e)(v), (vii) or (viii) being denied the very tools to perform this circumvention. In this light, these exceptions appear to be little more than empty promises.”²³*

The Attorney-General’s Department suggested some work-around solutions: including that Australians could obtain from overseas devices that could not be made in Australia. However, the Committee was of the conclusion that “[i]n essence, no satisfactory solution has been proposed to the egregious flaw in the text”²⁴ and to date no solution has been implemented.

While not certain, it seems likely that subject-matter experts would have identified the issue and been in a position to contribute alternative textual suggestions that would have been satisfactory to both the US and Australia.

Ideally, the text would be openly available, allowing debate and discussion about the ramifications. This has been the international norm in copyright, through organisations such as WIPO. The increasing move to enforcing and changing standards in secretly negotiated free trade agreements has led to the propagation of troubling and uneconomic provisions.

Case Study: 70 year copyright term

One striking example of dubious policy spreading through the mechanism of trade treaties is the term copyright term extension (to seventy years after death).

The international norm for copyright term for most works (set in the Berne Convention) is 50 years after the death of the creator. When the US legislated in 1998²⁵ to increase the duration of copyright to the life of the author plus 70 years for most copyright works,²⁶ civil society groups pointed out the severe impact the withholding of works from the public domain would have on the public’s access to

continued disadvantages to researchers and students from these provisions: Universities Australia, submission no 37 to the Inquiry into the Commonwealth’s Treaty-Making Process (2015) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Submissions>. The schools sector has also made repeated submissions on removal of restrictions, especially to allow them to assist students with special needs: see, for example, Copyright Advisory Group of the Standing Council on School Education and Early Childhood, submission to the Review of Technological Protection Measure Exceptions Made Under the *Copyright Act 1968* (2012) <<http://www.ag.gov.au/consultations/pages/ReviewofTechnologicalProtectionMeasureexceptionsmadeundertheCopyrightAct1968.aspx>>.

²² House Standing Committee on Legal and Constitutional Affairs, Review of Technological Protection Measures Exceptions (2006)

<http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=/la/ca/protection/chapter3.htm>, 3.118.

²³ Ibid.

²⁴ Ibid, 3.130.

²⁵ Copyright Term Extension Act 1998 (also known as the Sonny Bono Copyright Term Extension Act).

²⁶ The term was previously the life of the author plus 50 years. For works of corporate authorship, the period was extended from 75 years to 120 years after creation or 95 years after publication, whichever ended soonest.

education, entertainment and artistic experimentation.²⁷ During a constitutional challenge²⁸ to the extension seventeen esteemed economists argued against the extension, noting that even rightsholders would derive negligible value from the move.²⁹ The US recently held hearings into the appropriateness of the copyright term.³⁰

Worldwide, the economic basis for the extension has been widely discredited: a report in the UK concluded:

“Economic evidence is clear that the likely deadweight loss to the economy exceeds any additional incentivising effect which might result from the extension of copyright term beyond its present levels.”³¹

Another scholar concluded that both the retrospective and prospective aspects of the proposed extension were “indefensible economically”.³²

However once the term was US domestic policy, the USA set about seeking to impose the same TRIPS-plus copyright duration on other countries through bilateral treaties. Since signing AUSFTA, Australia has done the same.

Beginning with the Chile-United States Free Trade Agreement, signed in June 2003, the extension made its way into the domestic law of many countries, including much of South America, South Korea, and Australia (with the ratification of AUSFTA). At the time a conservative calculation put the cost of the term extension at a net economic loss of around \$88 million per year.³³

A leaked version of the intellectual property chapter of the TPP shows proposals to similarly increase the length of copyright to “life plus 70” in those countries that have not already done so,³⁴ continuing the global expansion.

The slow creep of 70-year copyright terms illustrates the way in which closed-door executive negotiations can propagate bad policy. In the face of evidence of negative economic, social and

²⁷ This has been supported by research showing a significant disparity between the number of titles available for purchase from Amazon that were originally published pre-1922 and those available that were originally published post-1922. There were far more titles available in the former category than in the latter. The significant difference was linked to copyright (as nearly all books published in the US in 1922 or earlier had by 2012 fallen into the public domain) see Heald, Paul J., How Copyright Keeps Works Disappeared (December 2014). *Journal of Empirical Legal Studies*, Vol. 11, Issue 4, pp. 829-866, 2014. Available at SSRN: <http://ssrn.com/abstract=2516113> or <http://dx.doi.org/10.1111/jels.12057> a simple discussion of the study can be found at <https://www.techdirt.com/articles/20120330/12402418305/why-missing-20th-century-books-is-even-worse-than-it-seems.shtml>.

²⁸ See *Eldred v Ashcroft* 537 US 186 (2003)

²⁹ See amicus curiae brief submitted by seventeen leading economists in *Eldred v Ashcroft* accessible at <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>

³⁰ Hearing before the Subcommittee on Courts, Intellectual Property, and The Internet: on The Committee on the Judiciary. House Of Representatives One Hundred Thirteenth Congress Second Session July 15, 2014 Serial No. 113-103 accessible at <http://judiciary.house.gov/cache/files/7422fa01-854f-4a19-b70f-0b3c056d49d7/113-103-88722.pdf>

³¹ Ian Hargreaves, ‘Digital Opportunity: A Review of Intellectual Property and Growth’ (May 2011) <https://ipo.gov.uk/ipreview-finalreport.pdf>

³² Marvin Ammori, ‘The Uneasy Case for Copyright Extension’ (2002) 16(1) *Harvard Journal of Law & Technology* 287, 320.

³³ Dee, Dr Phillipa *The Australia – Us Free Trade Agreement An Assessment* [2004] Canberra at 22

³⁴ At present, Japan, Malaysia, New Zealand, Vietnam and Canada all still adhere to the Berne Convention standard of the life of the author plus 50 years

cultural effects, trade treaties have been used to promulgate a piece of dubious domestic policy. The result is a growing number of countries who have altered domestic law to limit educational and cultural opportunities for citizens. FTAs, which of necessity require a certain level of ‘horse trading’ as different country wish-lists are traded against each other, are vulnerable to entrenching and spreading bad policy in this way. And once a country has agreed to such a term they may feel it actually advantages them to ensure that other countries are equally as hindered, despite analysis showing that this is not necessarily the case.³⁵ Meanwhile the secrecy that shrouds negotiations inhibits robust public discussion. A fuller, franker and freer discussion between civil society, the executive, industry groups and subject-matter experts may have prevented some of the damage.

We understand that sometimes it is not possible or unwise to have full transparency during the negotiation stage. As DFAT states on its website in regards the TPP:

“confidentiality safeguards our negotiating positions and strategies, which cover sensitive national interests in relation to market access and Australia’s trade and commerce more broadly.

Even if it were possible to release negotiating texts, these texts would be potentially misleading. The obligations under discussion evolve as negotiation rounds progress. Initial claims are amended gradually over the course of many negotiating rounds”³⁶

However there is a difference between full transparency and no transparency. Even if the full text cannot be released, there may be portions of text, or broad outlines, or negotiation mandates that would be of use that can be released.

Another danger is that the pattern we see in the TPP, TISA, TTIP and other major secret agreements, namely the leaking of sensitive negotiating documents, is repeated in future agreements. These leaks may come at particularly sensitive moments for Australia, and may be used to the advantage of our negotiating partners. A level of transparency would reduce the pressure for leaks and rob these leaks of most of their power to influence negotiations.

Proposal 8: Negotiating text and position statements should be made publicly available. If that is not possible due to negotiation agreements or constraints, DFAT should make an informed decision as to what could be released with a presumption toward transparency. At a minimum text should be made available to subject-matter experts, stakeholders (including the industry and civil society) and parliamentarians, with appropriate safeguards.

Improving Oversight

Relevant Terms of Reference

- a. the role of the Parliament and the Executive in negotiating, approving and reviewing treaties

³⁵ Productivity Commission Research Report [Bilateral and Regional Trade Agreements](#) at 260

³⁶ DFAT website ‘Frequently asked questions’
<http://www.dfat.gov.au/trade/agreements/tpp/Pages/frequently-asked-questions-on-intellectual-property-and-public-health-issues.aspx> accessed March 1 2015

- h. the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties

Australia must also ensure that it is not put at a disadvantage compared with its negotiating partners. To use one example, we are currently negotiating the TPP with 11 other countries including the US.

While US Congress members and senators have access to the text Australian parliamentarians do not have the same level of access. Additionally, US companies and interested organisations can apply to join special “trade advisory committees” (TACs).

The Office of the United States Trade Representative (USTR) says:

“USTR works closely with its trade advisory committees throughout the negotiating process to solicit their comments, advice, and feedback on various chapters and negotiating positions, and to regularly brief them on progress in the TPP negotiations.”³⁷

As at June 2012, the USTR had:

“conducted more than 147 meetings with the trade advisory committees. Since June 11, 2010, USTR has posted 110 TPP documents to a website for cleared trade advisors to review and provide comments.”³⁸

Australian stakeholders do not have this level of access. The US companies involved in the TACs for copyright are mainly rightsholders and have a vested interest in protectionist measures that support their business model. A similar approach during the negotiation of AUSFTA caused considerable economic detriment to Australia.³⁹

In our view, the Commonwealth’s current approach of not allowing stakeholders or subject matter experts access to negotiating text when experts and lobbyists in other countries do have access puts Australia at a serious negotiating disadvantage. This is not in Australia’s national interest.

Proposal 9: Australian industry, civil society and parliamentarians should receive at least as much access to the text as the equivalent groups of its negotiating partners.

During the negotiation it is important that continual cost/benefit analysis is carried out. This is especially crucial in contentious areas. If we have to choose between a five per cent tariff cut on dairy and a 20-year extension to the copyright term it would be important to calculate how much each would cost the economy. This analysis could build upon the analysis carried out before negotiations commenced.

That this analysis should continue throughout the process was a clear recommendation from the 2014 Competition Policy Review:

³⁷ US Trade Representative *Fact Sheet: Transparency and the TPP* USTR website accessed on 22 February 2015 <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/june/transparency-and-the-tpp#>

³⁸ US Trade Representative *Fact Sheet: Transparency and the TPP* USTR website accessed on 22 February 2015 <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/june/transparency-and-the-tpp#>

³⁹ See generally Dee, Dr Phillipa *The Australia – Us Free Trade Agreement An Assessment* [2004]

“Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions. Such an analysis should be undertaken and published before negotiations are concluded.”⁴⁰

While DFAT has oversight of treaties, it often relies on the expertise of the portfolio departments and agencies. This is evident from watching Senate Estimates, where questions as to modelling or costs are often unable to be answered by DFAT on the basis that they are questions for the portfolio ministry.

Naturally, some agencies have better capacity for modelling and assessment than others. And given the overlapping nature of many of the commitments, we would suggest that Treasury may have a role in coordinating the ongoing analysis of treaty options.

This ongoing analysis should include input from stakeholders. As the Law Council of Australia notes, it would be preferable to:

“provide opportunities for stakeholders to provide an input into preferential trade agreements before they actually go before parliament or before cabinet so that there is an input and that they actually review them and ask: is this actually in the national interest? Is there a benefit?”⁴¹

Realistically, by the time the agreements go to parliament and are considered by parliament, the deal is done. There may be some possibility of requesting changes in bilateral negotiations. But for multiparty agreements such as the TPP, the parliament simply has the choice to accept or reject.

The Law Society summed up the frustration of many stakeholders who only saw the agreement when it was tabled:

“I was asked whether I would like to make a submission on preferential trade agreement with Japan through the Law Council. My attitude to that was: well, it has been signed, it is not going to change so there is no point.”⁴²

Proposal 10: Treasury should oversee ongoing analysis of treaties during negotiation. This analysis should include input from portfolio agencies and stakeholders.

Evidence-based decision making

Relevant Terms of Reference

- a. the role of the Parliament and the Executive in negotiating, approving and reviewing treaties
- b. the role of parliamentary committees in reviewing and reporting on proposed treaty action and implementation
- f. the scope for independent assessment and analysis of treaties before ratification

⁴⁰ Competition Policy Review [Draft Report](#) (2014) at 87

⁴¹ Mr Percival [Hansard 6 August 2014](#) Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 to the Foreign Affairs, Defence and Trade Legislation committee

⁴² Ibid.

- h. the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties

Currently when treaties go to JSCOT they are accompanied by both a National Interest Analysis (NIA) and a Regulatory Impact Statement (RIS). Parliamentary Committees,⁴³ the Productivity Commission,⁴⁴ a report commissioned by IP Australia⁴⁵ and others have all made recommendations to include a proper cost/benefit analysis if IP chapters are to be included in trade deals.

When Australia signed AUSFTA, with its comprehensive IP chapter, the Senate Select Committee noted that it was:

“alarmed by the lack of adequate research being undertaken prior to Australia committing itself to trade agreements. Balanced and comprehensive research on the economic, social, cultural and policy impacts of any trade treaty Australia proposes to enter into is a vital part of ensuring that there is proper scrutiny of the agreement and would contribute greatly to the quality of the public debate on these issues.”⁴⁶

Such analysis could build upon modelling done at the negotiation stage, however if possible, an independent body should undertake the analysis. The analysis should not simply look to direct economic impacts, but also try to assess cultural and social impacts.

An example of the cultural impacts, as a result of the term extension in AUSFTA we have now had 10 years where no photos have entered the public domain. The practical effect of this is that Australia’s photographic heritage up until 1955 is increasingly available online, easily accessible even for those in regional and remote communities. From 1955, however, the bulk of cultural institutions’ photo collections is accessible only on site. The loss to education and culture is not easy to put a dollar figure on, but the result is a sepia-coloured history of Australia.⁴⁷

The current NIAs and RISs are not adequate replacements for this form of analysis.

In the most recent NIA the ADA analysed, assessing KAFTA, there was no assessment of the costs either of changes to domestic legislation (a proposal to legislatively overturn the High Court decision in *Roadshow Films Pty Ltd v iiNet*⁴⁸) or the changes to international level obligations noted above.

Meanwhile the RIS noted that there would need to be changes to the Copyright Act 1968 (Cth) (the Act) but failed to indicate what they would be. In the end, the agreement has come into force with no changes to the Act, and the issue concerned is being dealt with by non-legislative processes.⁴⁹

⁴³ See for example Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Final Report (2004) at 2.97; Joint Standing Committee on Treaties Report on the Review into Treaty tabled on 21 November 2011 (ACTA) at 3.41

⁴⁴ Productivity Commission Research Report Bilateral and Regional Trade Agreements at 14.5

⁴⁵ Harris, T., Nicol, D., Gruen, N. 2013 Pharmaceutical Patents Review Report, Canberra recommendation 3.2

⁴⁶ Senate Select Committee on the Free Trade Agreement between Australia and the United States of America Final Report (2004) at 2.97

⁴⁷ See for example Australian Digital Alliance (*Not So*) *Happy Public Domain Day*

<http://digital.org.au/content/not-so-happy-public-domain-day>

⁴⁸ *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (20 April 2012)

⁴⁹ See Communications Alliance Draft Code *Online Copyright Infringement* available at

http://www.commsalliance.com.au/_data/assets/pdf_file/0005/47570/DR-C653-2015.pdf

Overall the NIA and RIS provided no evidence of economic or other analysis of the impact of the IP chapter in KAFTA. No particular problems Australian rightsholders currently experience were identified (and indeed, Australian copyright holders are already protected by the provisions of KAFTA as a result of Korea's existing FTA with the US and the operation of the principles of national treatment and most-favoured nation). Meanwhile the potential issues surrounding extending our international obligations and constraining our domestic policy space were not analysed, despite their adverse effects on areas such as education, cultural institutions, disability services, tech and innovation sectors and consumers.

Proposal 11: When treaties are sent to the Joint Standing Committee on Treaties (JSCOT) they should be accompanied by an independently prepared cost/benefit analysis.

Proposal 12: The National Interest Analyses (NIAs) and Regulatory Impact Statements (RISs) should be more comprehensive.

When undertaking a cost/benefit analysis, legal and implementation risks should also be considered.

When giving evidence in the Senate Committee examining AUSFTA, DFAT was confident it had negotiated an agreement with considerable flexibility in implementation:

"I think, as I said in response to a previous question, the IP chapter does contain elements of the US Digital Millennium Copyright Act. It also contains flexibility for us to implement that in a way that is appropriate for us. So I believe it is an incorrect reading of the IP chapter to think that it requires us to implement US law word for word in our system. Whilst we have treaty level obligations, we will be implementing those within our own legal context."⁵⁰

However the legislation drafted to implement our copyright obligations was not acceptable to the US. After objections were raised to the implementing legislation, the Trade Minister agreed to pass additional amendments.⁵¹ These were not minor amendments, the Bill's Digest prepared at the time noting:

"Although they are certainly technical, almost all of the proposed amendments will affect substantive rights and/or increase the likelihood of prosecution for copyright offences."⁵²

Proposal 13: When preparing analysis of the agreement, legal risk, including ambiguities as to implementation, should be taken into account.

Effective Implementation

Relevant Terms of Reference

- g. the scope for government, stakeholder and independent review of treaties after implementation;

⁵⁰ Hansard DFAT testimony (Harmer) Senate Committee into the Australian Unites States Free Trade Agreement at 102 available at

http://www.aph.gov.au/~media/wopapub/senate/senate/commttee/S7661_pdf.ashx

⁵¹ See correspondence Vaile to Zoellick November 17 2005 accessible at

https://ustr.gov/archive/assets/Trade_Agreements/Bilateral/Australia_FTA/Implementation/asset_upload_file_337_6947.pdf

⁵² http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0405/05bd071

When implementing treaties, consideration should be given to the best way to implement them to Australia's advantage. Sometimes this may include legislative changes that are not required by the treaty, but are complementary.

As a case study, the net impact of implementing AUSFTA in Australia was to set a level of copyright protection that is higher than that in the US. This is because we matched their higher level of copyright protection and enforcement, but have maintained our lower level of copyright users' rights. Thus, the balance of interests favours copyright owners to a greater extent in Australia than in the United States.

Both JSCOT and the Senate Standing Committee that examined AUSFTA recommended further reforms to copyright, including increasing flexibilities in exceptions to compensate for the increases in copyright protections and restrictions. When treaties are implemented consideration should be given to adjusting other related legislation when that will increase the benefits to Australia. Given the short time period JSCOT has to analyse and report on treaties, this work may be better carried out by portfolio or subject-specific parliamentary committees.

Periodic parliamentary reviews into the effects of AUSFTA and other major treaties may help identify areas that could be adjusted to achieve maximum benefit to Australia. The analysis and evidence collected in such a review could then feed back into the negotiating mandates and cost/benefit analyses for future agreements.

Another aspect that could be considered is harmonisation. As DFAT says:

“harmonisation reduces differences in law and practice so that owners and users of intellectual property may interact in a familiar legal environment, thereby reducing transaction costs.”⁵³

The review process is also an opportunity to review Australia's international commitments and consider renegotiation of existing agreements that either overlap or come into conflict with the new agreements. As we continue to increase our number of international agreements, the necessity of consolidating our commitments will increase.

To give a feel for the scope of the problems, at the time of the last full-scale review of the treaty making process in 1995, DFAT estimated Australia was party to around 920 active treaties.⁵⁴ Since that time Australia has:

- signed 381 bilateral treaties;
- acceded to 79 treaties; and
- ratified 95 treaties.

Overall an **additional 607 treaties have entered into force since 1 January 1996.**⁵⁵

This matter is particularly pertinent with the TPP nearing completion, as we already have existing trade agreements with the majority of TPP countries. Some consolidation of these agreements would be preferable.

⁵³ DFAT testimony to Senate Select Committee on the Free Trade Agreement between Australia and the US August 2004

⁵⁴ *Trick or Treaty? Commonwealth power to make and implement treaties* (Nov 1995)

⁵⁵ As determined by the Australian Treaties Database accessed on February 24 2015 at <http://www.info.dfat.gov.au/treaties>

When we are seeking to renegotiate or consolidate, the overarching framework and analysis on IP should be used to ensure that the consolidation is to our benefit.

Proposal 14: Treaties should be implemented to give maximum benefit to Australia. This may require legislative change to areas impacted but not covered by the treaty

Proposal 15: Periodic reviews should measure the effects of treaties and that analysis should feed into the current negotiation framework and positions. JSCOT or other parliamentary committees may oversee significant reviews.

Proposal 16: Where appropriate harmonisation and consolidation of Australia's international agreements should be pursued.

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