

# Submission to the Senate Standing Committee on Foreign Affairs, Defence & Trade regarding the Trans Pacific Partnership



Open Source Industry Australia Ltd

*Amplifying the voice of the Australian open source software industry*

Lodged 26 October 2016

## About OSIA

OSIA represents & promotes the Australian open source industry by:

- Ensuring that the Australian business, government and education sectors derive sustainable financial and competitive advantage through the adoption of open source and open standards;
- Helping Australian Governments to achieve world leadership in providing a policy framework supportive of open standards and of the growth and success of the Australian open source industry; and
- Ensuring Australia's global standing as the preferred location from which to procure open source services & products.

OSIA's members are organisations in Australia who invest in or build their future on the unique advantages of open source software. For further information, see the OSIA website at <http://osia.com.au>.

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## Contents

<b>1</b>	<b>Executive summary</b>	<b>3</b>
1.1	Recommendations	3
<b>2</b>	<b>Impact on Australia's economy &amp; trade</b>	<b>4</b>
2.1	Domestic economic modelling	4
2.2	Foreign economic modelling	4
2.3	Free trade	5
<b>3</b>	<b>Effect of Investor-State Dispute Settlement</b>	<b>5</b>
3.1	Discrimination against domestic industry	5
3.2	Discrimination between industry sectors	6
3.3	Discrimination against SMEs	6
3.4	Excessive expansion of scope	6
3.5	Mitigation tactics miss the point	7
<b>4</b>	<b>Rights for copyright holders</b>	<b>8</b>
4.1	Unreasonable limits on rights of copyright holders	8
4.1.1	Access to source code	8
4.2	Unreasonable extensions of rights of copyright holders	8
4.2.1	Future domestic policy reform	8
4.2.2	Retrospective term extensions	9
4.2.3	Crown copyright	10
4.2.4	Regulatory freeze	10
4.2.5	Judicial discretion	11
4.2.6	Civil & criminal enforcement	11
<b>5</b>	<b>Rights for copyright consumers</b>	<b>12</b>
5.1	Technical circumvention	12
5.2	Government use of public domain software	13
5.3	End user representation	14
5.4	Reversal of the presumption of innocence	14
5.5	Automated misrepresentation & harassment	14
5.6	Double standards	15
<b>6</b>	<b>Other related matters</b>	<b>15</b>
6.1	Treaty scope & negotiation process	15
6.1.1	Transparency & discrimination	15
6.1.2	Democracy & sovereignty	16
6.1.3	Scope of agreement	16
6.2	The IP Chapter	18
6.2.1	Balance & contradictions	18
6.2.2	Double regulation of software	18
6.2.3	New patents on old technology	19

## 1 Executive summary

OSIA welcomes this further opportunity to comment on the Trans Pacific Partnership (TPP) and we thank the Committee for that opportunity.

Almost everything in this submission we have said before in other fora: to DFAT, to JSCOT and/or to the Productivity Commission. Nevertheless our members feel strongly that we should reiterate those points here for the Committee's benefit, given the sheer scope of likely impact associated with ratifying TPP.

Our members in the Australian open source software industry are great supporters of free trade. OSIA therefore is in favour of Australia entering into any treaty designed solely to enable free trade.

Unfortunately, TPP is overwhelmingly not about free trade. Of its 30 Chapters, only Chapter 2 speaks to free trade. Rather than the proliferation of free trade (which would be a worthy goal), the remainder of TPP appears carefully crafted to ensure the proliferation of *restrictions*, not only on trade but also on a vast array of unrelated fields of policy.

In some areas, ratification of TPP would require Australia to implement domestic laws and policy far more restrictive than exist at present. In other areas, ratification of TPP would lock Australia into its present-day regulatory regimes forever and by doing so undermine the sovereignty of Parliament on matters of domestic policy.

TPP was negotiated through a secret, anti-democratic process which was inherently biased in favour of a small cadre of entrenched interests, all based in the United States.

The Investor-State Dispute Settlement (ISDS) provisions are discriminatory and if implemented will turn Australian companies into second class citizens within our own borders. No amount of piecemeal side-letters hastily negotiated after the fact could possibly fix that.

The Electronic Commerce Chapter, if implemented, would block future domestic copyright reforms and may also hinder copyright enforcement actions in relation to open source software.

Most disturbing of all for OSIA is the Intellectual Property Chapter, which lacks balance, is internally contradictory, seeks to reverse the presumption of innocence and seeks to pre-empt the findings of at least one current Inquiry & to gazump the recommendations of several others. If implemented, it will serve to stymie progress (both domestically and on the world stage), to legitimise anti-competitive behaviour and to facilitate automated misrepresentation.

Furthermore, whilst no meaningful economic analysis of TPP has been conducted in Australia, independent economic modelling of TPP's impact conducted overseas suggests that the minute portion of TPP that does address free trade (Chapter 2) is likely to give rise to no significant economic growth for Australia.

OSIA's position remains that the minuscule (less even than the margins commonly allowed for error) growth expected through the operation of Chapter 2 cannot possibly justify the sheer breadth and depth of detriment Australia would suffer as a consequence of the following twenty-eight chapters.

### 1.1 Recommendations

OSIA makes the same recommendations to this Committee that we made to JSCOT in March 2016, namely that:

1. Australia should not ratify TPP.
2. Australia should show strong leadership in the Pacific region by opening fresh and completely transparent negotiations—with any and all former TPP Parties who may be interested in doing so—for a true free trade agreement (one whose sole purpose is to eliminate tariffs and quotas across the board).
3. A policy should be established prohibiting Australian participation in any treaty negotiated in secret (other than military treaties in time of war).

## 2 Impact on Australia's economy & trade

### 2.1 Domestic economic modelling

It is disappointing that the Commonwealth Government has failed to commission any independent economic modelling of the impact ratifying TPP would have on Australia's economy (a task the Productivity Commission would seem ideally placed to undertake).

We note, and agree with, the comments made by the ACCC in their recent submission to the Productivity Commission's Inquiry into Intellectual Property Arrangements<sup>1</sup> calling for a comprehensive and robust analysis of the actual impacts of TPP's IP Chapter.

OSIA has also called for independent economic modelling to be undertaken previously in our various submissions<sup>2</sup> and in our evidence before JSCOT<sup>3</sup>.

We note that as recently as last year the Committee reached the same conclusion<sup>4</sup>.

It is difficult to see how Parliament could ever justify entering into any treaty without first commissioning comprehensive independent economic modelling of its impact from an Australian perspective and confirming that that modelling shows sufficient economic benefit to Australia to justify the loss of sovereignty involved beyond doubt.

The National Interest Analyses (NIAs) published by DFAT are no substitute for independent modelling. As noted previously both by OSIA<sup>5</sup> and by the Committee itself<sup>6</sup>, it is only natural that an analysis of a treaty prepared by the same agency that negotiated that treaty is likely to be cast in rather glowing terms (after all, the agency in question would hardly be likely to negotiate something in which they did not see merit). An independent body (such as the Productivity Commission) would be far better suited to the task.

### 2.2 Foreign economic modelling

Despite the lack of Australian modelling, some analyses of TPP conducted overseas have included a measure of findings in relation to Australia, as noted previously in OSIA's submission to and evidence before JSCOT<sup>7</sup>.

Economic modelling conducted by the United States Department of Agriculture (USDA) found that the elimination by TPP of tariffs and tariff-rate quotas (TRQs) would have no measurable impact (0.00%) on Australia's real GDP in 2025<sup>8</sup>. The USDA report is particularly interesting because its model takes into account only the positive elements of TPP—the elimination of tariffs and TRQs—and still finds no real benefit for Australia.

Economic modelling conducted by the World Bank<sup>9</sup> was somewhat more optimistic than the USDA model, but still found that, by 2030 TPP will on average raise member country GDP by only 1.1 percent (which equates to a compound annual growth rate (CAGR) of only 0.08%), on a GDP-weighted average basis<sup>10</sup> and in particular

<sup>1</sup>ACCC submission to the Productivity Commission Inquiry into Intellectual Property Arrangements in Australia, Australian Competition & Consumer Commission, November 2015, p. 18. Available at <http://www.accc.gov.au/system/files/ACCC%20Submission%20-%20PC%20inquiry%20into%20IP%20arrangements%20in%20Australia%20-%2030%20November.pdf>

<sup>2</sup>Burton, J., Holden, C. & Christie, D., *Submission to the Commonwealth Department of Foreign Affairs & Trade on the Trans-Pacific Partnership*, Open Source Industry Australia Ltd, 4 Oct 2013, p. 7; Forsstrom, A. & Burton, J., *Submission to the Productivity Commission's Inquiry into Intellectual Property Arrangements*, Open Source Industry Australia Ltd, 30 Nov 2015, pp. 10–11; Burton, J. & Foxworthy, P., *Submission to the Commonwealth Joint Standing Committee on Treaties regarding the Trans Pacific Partnership*, Open Source Industry Australia Ltd, 11 Mar 2016, p. 4. All available at <http://osia.com.au/drupal7/publications>

<sup>3</sup>Cth, *Proof Committee Hansard*, Joint Standing Committee on Treaties, Trans-Pacific Partnership Agreement (public), 7 Oct 2016, Melbourne, pp. 26 & 30.

<sup>4</sup>Cth, Senate, Foreign Affairs, Defence and Trade References Committee, *Blind agreement: reforming Australia's treaty-making process*, June 2015, ss. 6.23–6.24, pp. 75–76.

<sup>5</sup>Joint Standing Committee on Treaties, *Id.*, p. 30.

<sup>6</sup>Cth, Senate, Foreign Affairs, Defence and Trade References Committee, *Id.*, s. 5.54 & rec. 10, pp. 68–69; ss. 6.23–6.26, pp. 75–76.

<sup>7</sup>Burton, J. & Foxworthy, P., *Id.*; Joint Standing Committee on Treaties, *Id.*, p. 26.

<sup>8</sup>Burfisher, M. E., Dyck, J., Meade, B., Mitchell, L., Wainio, J., Zhaniser, S., Arita, S. & Beckman, J., *Agriculture in the Trans-Pacific Partnership*, ERR-176, U.S. Department of Agriculture, Economic Research Service, October 2014, Table 8, p. 21. Available at <http://www.ers.usda.gov/media/1692509/err176.pdf>

<sup>9</sup>*Potential Macroeconomic Implications of the Trans-Pacific Partnership*, Chapter 4 in World Bank Group, *Global Economic Prospects, January 2016: Spillover amid Weak Growth*, World Bank, Washington, 2016, pp. 219–236. Available at <http://www.worldbank.org/content/dam/Worldbank/GEP/GEP2016a/Global-Economic-Prospects-January-2016-Spillovers-amid-weak-growth.pdf>

<sup>10</sup>*Id.*, p. 226.

will raise Australia's GDP by only 0.7 percent (which equates to a CAGR of only 0.05%)<sup>11</sup>.

The forecasts of both the USDA and World Bank models are cause for significant concern. It would not seem prudent to sign up to a very large, very complex treaty, which limits Australia's future potential for domestic policy reform in so many areas, in exchange for a paltry 0.05% per annum additional growth in GDP—as the World Bank predicts—and even less prudent on the basis of the USDA's forecast of no measurable impact at all.

## 2.3 Free trade

As noted previously<sup>12</sup>, free trade enables stronger global competition across all industries, both facilitating entry into broader export markets for vendors and enabling greater freedom of choice for purchasers. For those reasons, OSIA supports free trade and supports the Commonwealth Government pursuing any and all genuine free trade agreements.

The purpose of a genuine free trade agreement is to eliminate (or at the very least drastically reduce) tariffs and to eliminate (or at the very least drastically increase) quotas on international trade in goods and services.

TPP consists of 30 Chapters. Only one of those (Chapter 2—*National Treatment & Market Access*) bears any resemblance to a genuine free trade agreement. OSIA would not object to Chapter 2, if re-implemented as a standalone treaty focused solely on free trade.

Rather than removing restrictions (as one would expect from any genuine free trade agreement), the purposes of each of the twenty-eight subsequent chapters are to introduce additional restrictions and/or to lock Parties into existing restrictions in perpetuity. Thus, TPP overwhelmingly seeks to *inhibit* free trade.

In particular, provisions on intellectual property do not belong in trade agreements at all, as both OSIA<sup>13</sup> and the Productivity Commission<sup>14</sup> have pointed out previously.

OSIA supports Australia entering into true free trade agreements (those whose sole purposes are to reduce or better still eliminate tariffs and to increase or better still abolish quotas) on bilateral, regional or global bases. OSIA also supports Australia entering into future iterations of global (but never bilateral or regional) treaties on each individual class of intellectual property law (e.g. in the case of copyright, any true successor to the Berne Convention).

Unfortunately, TPP is neither; presenting instead what can perhaps most accurately be described as “the worst of both worlds”.

## 3 Effect of Investor-State Dispute Settlement

As noted previously<sup>15</sup>, TPP's Investor-State Dispute Settlement (ISDS) provisions give rise to a number of serious issues.

### 3.1 Discrimination against domestic industry

Under the ISDS provisions of TPP's Investment Chapter, if in future a Party changed domestic policy to adversely affect the investment of a foreign investor from another Party, the disgruntled investor can sue the Party for compensation.

Whether or not an investor (regardless of nationality) should ever be able to sue a government simply for exercising its sovereign right to set domestic policy is debatable. OSIA takes no position on that question.

<sup>11</sup>*Id.*, Figure 4.1.6A, p. 227.

<sup>12</sup>Burton, J. & Foxworthy, P., *Ibid.*; Joint Standing Committee on Treaties, *Ibid.*

<sup>13</sup>Burton, J., Holden, C. & Christie, D., *op. cit.*, pp. 3–5; Forsstrom, A. & Burton, J., *op. cit.*, pp. 9–10; Burton, J. & Foxworthy, P., *op. cit.*, pp. 3–4, 8–9 & 11–12; Burton, J. & Foxworthy, P., *Final submission to the Productivity Commission's Inquiry into Intellectual Property Arrangements*, Open Source Industry Australia, 3 Jun 2016, pp. 19–20.

<sup>14</sup>*Bilateral and Regional Trade Agreements, Research Report*, Productivity Commission, 2010, rec. 4(b) & 4(c), p. 285.

<sup>15</sup>Burton, J. & Foxworthy, P., *Submission to the Commonwealth Joint Standing Committee on Treaties regarding the Trans Pacific Partnership*, *op cit.*, p. 6.

However, if such a right is granted to investors domiciled in other Parties, but not to those domiciled in the Party in question (and TPP quite clearly prohibits the latter), foreign investors in Australia will carry less long-term financial risk than Australian investors in Australia. The provision would effectively turn Australian companies into second class citizens in our own country.

OSIA recognises that one of the purposes of a free trade agreement is to put foreign investors in Australia on an equal footing with Australian investors in Australia (and vice-versa in the other Party). That is not in dispute.

However, it should be immediately obvious that a system that grants foreign investors in Australia rights that are not available to Australian investors can *never* be in Australia's best interest. Such an arrangement could rightly be characterised as the opposite of free trade.

### 3.2 Discrimination between industry sectors

We note that there is a long list of non-conforming measures (NCMs) in the Annexes of various Parties in relation to the Investment Chapter, each of which focus on a particular industry sector (the most publicly aired being Australia's NCM in relation to the tobacco industry).

We submit that there is little point in having an Investment Chapter when so many NCMs relating to it exist. Persisting with the Investment Chapter actively discriminates against domestic industry in those sectors not covered by NCMs.

Whilst OSIA does not support the inclusion of ISDS provisions in any trade treaty, we note that a situation in which they apply to some industry sectors but not to others is even more perverse.

### 3.3 Discrimination against SMEs

Small to medium enterprises (SMEs) have a key role to play in growing Australia's export markets. In April this year, the then Minister for Small Business, Kelly O'Dwyer said, "The Australian Government is actively encouraging our SMEs to think beyond our own borders and to consider export opportunities into major markets"<sup>16</sup>.

ISDS actions tend to be protracted, complex and expensive. As such, they are generally the province of only the largest multi-national organisations.

If the contribution of SMEs to addressing our trade deficit is so important (and OSIA agrees with the Government that it is), why then are we even considering enshrining in any treaty a risk mitigation strategy like ISDS, that will effectively be exploitable only by the largest players in the market?

Every businessman knows that there is a cost associated with risk and that that cost will depend both on the likelihood & consequences of the risk eventuating and the degree to which the risk can be mitigated. Therefore, when a business of any size assesses various competing investment options to select which one(s) warrant commitment of its finite pool of capital, a risk premium always forms part of the model.

When ISDS are introduced to the mix, that risk premium reduces for the largest, best resourced investors, but remains unchanged for the (generally less well resourced, but generally far more innovative) SMEs in the marketplace. In industries like ours, where SMEs and large corporates often compete directly, this increases the incentive for large corporates to invest off-shore, without a commensurate increase in incentive for SMEs.

Such a state of affairs appears to be directly at odds with the Commonwealth Government's stated position on the importance of SMEs to developing Australia's export markets.

### 3.4 Excessive expansion of scope

Article 9.1 defines "investment" as including "intellectual property rights". Since the term "right" is not further defined in the Investment Chapter, it seems reasonable to assume that "intellectual property rights" would include rights granted under a copyright or patent licence.

<sup>16</sup>Cth, Media release: *SME's front and centre of Australia Week in China*, 10 April 2016. Available at <http://kmo.ministers.treasury.gov.au/media-release/035-2016/>

All of our members routinely enter into copyright licensing arrangements for computer software (and assorted other forms of work) on a daily basis (both as licensors and as licensees), often with parties outside Australia. In the computer software industry, those transactions are as commonplace as the sale of goods is in the manufacturing sector. To characterise the grant of rights in those transactions as “investments” is, to be blunt, patently absurd.

Whilst our members’ own international copyright licensing transactions do not give rise to any concern for them (since our members will be under no obligation to make use of the Investment Chapter’s ISDS provisions), OSIA is concerned that the bizarre definition of “investment” as including “intellectual property rights” may give rise to a situation where the threat of ISDS actions from our members’ competitors in the closed source software industries of other TPP Parties may prevent the Commonwealth Government from enacting sensible reforms to the Copyright Act & Patents Act and/or from instituting sensible reforms in the field of software procurement (see also Section 4.2.1).

### 3.5 Mitigation tactics miss the point

On 4 February 2016, Australia and New Zealand exchanged side letters<sup>17</sup> which, amongst other things, exclude TPP’s ISDS provisions from applying as between each of those Parties and the other’s investors.

In various fora since then we have heard it argued that if Australia were to negotiate similar arrangements with the United States, Canada and Japan, the potential for harm caused by the ISDS provisions of TPP would be minimised. The argument goes that investors from those four Parties (often characterised as those where “the rule of Law is respected”) are the most likely to bring ISDS actions against Australia, whereas Australian investors are more likely to bring ISDS actions against any of the seven other TPP Parties.

Such an argument is quite offensive, as it implies both that the rule of Law is less respected by Australia than it is in the United States, Canada, New Zealand and Japan (a proposition with which all patriotic Australians should take issue) and that the rule of Law is less respected by the other seven TPP Parties than it is in Australia (about which we are sure the citizens on the majority of those Parties might have a thing or two to say<sup>18</sup>).

But more importantly, such an argument rather misses the point. In our view, ISDS provisions are always at best superfluous (and at worst outright dangerous, as described above), since they provide a complex, expensive and highly restrictive apparatus for solving a problem that is far better solved by free markets. The government of every nation that is legitimately governed<sup>19</sup> has an absolute sovereign right to set domestic policy within its borders. The manner and degree to which that right is exercised in any given nation will from time to time have an impact on the level of foreign investment in that nation. But as always, in the long term market forces will prevail: nations with demonstrably lower levels of sovereign risk will attract greater levels of foreign investment and vice-versa. That is exactly as it should be. By imposing ISDS provisions, TPP seeks to distort the natural market by encouraging greater levels of foreign investment in markets that do not deserve it and conversely removing the natural advantages in attracting foreign investment enjoyed (absent ISDS) by nations with lower levels of sovereign risk. By distorting the market for international investment, ISDS provisions take us further away from genuine free trade and therefore have no place in any trade agreement.

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<sup>17</sup>Available at <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services.PDF>

<sup>18</sup>Ten of the twelve TPP Parties are democracies. Whilst one might conceivably argue that the differences between the manner in which policy decisions are made in Brunei (an absolute monarchy) and Vietnam (a communist state) on the one hand and the remaining ten Parties on the other may give rise to an increased sovereign risk to those investing in those two Parties, one must then ask the question: if the attitudes of those Parties towards relevant matters are really so radically different, why then are they included in TPP at all? The answer of course is that both Brunei & Vietnam are actively seeking to expand their foreign trade and investment relations, just as the other ten TPP Parties are. The level of sovereign risk in those Parties is therefore unlikely to be so high as to require the extreme ISDS model embodied in TPP. If ISDS provisions are required at all (and we contend that they are not), the more traditional approach of limiting the scope to requiring fair and equitable compensation for any assets nationalised would surely have sufficed.

<sup>19</sup>We do not suggest that any of the TPP Parties are illegitimately governed, in the manner that one might credibly assert in relation to, for example, North Korea or Zimbabwe.



## 4 Rights for copyright holders

### 4.1 Unreasonable limits on rights of copyright holders

#### 4.1.1 Access to source code

Members of OSIA create, support and distribute software under open source licences<sup>20</sup>.

In TPP's Electronic Commerce Chapter, Article 14.17(1) states:

1. No Party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.

And Article 14.17(3) contains the following exception:

3. Nothing in this Article shall preclude: (a) the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts; or ...

The exception is toothless. "Inclusion" and "implementation" of terms in contracts are all very well. But the TPP is silent on enforcement if and when the terms are violated. OSIA is concerned that Article 14.17(1) could be used to justify violations of open source software licences.

Under any interpretation of that exception, where a breach of an open source software licence occurs, the copyright holder could still sue for damages. However, the notable absence of the word "enforcement" from the phrase "inclusion or implementation" leaves open to interpretation the question of whether or not specific performance (of the term requiring transfer of, or access to, source code) would remain available as a remedy in such actions for breach of licence.

It should be noted that, at least for "copyleft" licences (a class of open source software licences which require any licensees who distribute derivative works to provide their downstream licensees with access to all source code—the best known of which is the GPL<sup>21</sup>), in the vast majority of enforcement cases the copyright holder seeks specific performance, rather than damages. That is only natural, since the utility of a copyleft licence is dependent on compliance with its terms.

Clearly, the absence of specific performance as a potential remedy for breach of copyleft terms in software licences would hinder enforcement of such licences. Assuming specific performance remains as a potential remedy for breaches of non-copyleft terms in software licences, removing it solely in the case of copyleft terms would constitute active discrimination against copyright holders (including many OSIA members) who choose to distribute their works under copyleft licences.

It is far from clear whether or not the wording of the exception in Article 14.17(3)(a) would be interpreted as described above. However, that ambiguity could very easily have been avoided by the inclusion of the term "enforcement" in the exception.

### 4.2 Unreasonable extensions of rights of copyright holders

#### 4.2.1 Future domestic policy reform

The prohibition in Article 14.17(1) also gives rise to concern that it may limit the Commonwealth's ability to institute sensible domestic reforms to copyright law and/or to government procurement policy.

The exception at Article 14.2(3)(a) covers the case of government procurement, so that is not at issue here. Two other very narrow exceptions exist: the definition of "covered person" in Article 14.1 excludes any "financial institution" or "cross-border financial service supplier"; and the exception at Article 14.17(2) excludes "software used for critical infrastructure".

<sup>20</sup>Perens, B., *Open Source Definition*, Open Source Initiative, 1998. Available at <https://opensource.org/osd>

<sup>21</sup>Free Software Foundation, GNU General Public License, Version 3, 29 June 2007. Available at <http://www.gnu.org/licenses/gpl-3.0.en.html>



Nevertheless, it is not difficult to envisage sensible potential future reforms that would be prohibited by Article 14.17. For example, consider the following scenario:

At some point in the future, the Commonwealth realises that the risks associated with orphaned, unmaintained software are having a significant negative impact on productivity in Australian industry.

This risk applies only to closed source software (since with open source software, the licensee always has the right to inspect, modify and redistribute the source code<sup>22</sup> and so always has the option to maintain any orphaned or otherwise abandoned work in-house, or hire any suitably competent firm to do so on their behalf).

However, the Commonwealth cannot simply mandate that all commercially negotiated software licences must be open source (however much our members may like that idea), since such a regulation would restrict free trade.

Imagine instead then a proposed solution involving a mandate that for any software distributed under a closed source licence the source code be placed in escrow with a Commonwealth agency, not to be released publicly unless/until: (a) the copyright expires and the software enters the public domain; (b) the copyright holder ceases to distribute the software for longer than a given minimum period; or (c) the copyright holder refuses to fix documented bugs in the software, at any price—whichever occurs first.

Such a scheme would eliminate one (but by no means all) of the risks faced by licensees of closed source software, whilst still permitting all copyright holders to continue distributing their own software under licence terms of their own choosing.

Whilst the scenario above is not currently on the table in any pre-existing copyright reform process, it is not difficult to imagine such a reform being mooted during some future review.

Article 14.17(1) would prohibit such a reform ever being enacted (except to the very limited extent that it could be applied to the extremely narrow exceptions for government procurement, critical infrastructure and financial services—and such a scheme is unlikely to be cost-effective unless it could be applied across the board).

#### 4.2.2 Retrospective term extensions

Article 18.10(1) provides that the IP Chapter applies retrospectively. Art. 18.10(2) provides a exception for subject matter that has already entered the public domain by the time TPP comes into force. That exception cleanly avoids the problem of “zombie” copyrights & patents (i.e. the resurrection of copyright or patent rights on works or inventions that had already entered the public domain). However, it fails to avoid the other detrimental effects of retrospective action.

Existing works published in Australia prior to 2005 by living authors or by authors who have died since 1955 are in copyright today and will remain so until 50 years after the author’s death. TPP would extend the copyright on those existing works until 70 years after the author’s death.

Similarly, anonymous & pseudonymous works published in Australia between 1966 & 2005, works first published posthumously between 1966 & 2005 and works published by the Crown between 1966 & the present are in copyright today and will remain so until 50 years after the year of publication. TPP would also extend the copyright on those existing works until 70 years after publication.

The purpose of granting limited monopolies by way of copyright is to encourage authors to create new and useful works, by granting authors the exclusive right to exploit their works for a limited period of time. That is the only valid justification for having a system of copyright.

The system is intended to provide a suitable compromise or balance between the public interest in the wider dissemination of works (which naturally demands a shorter copyright term) and the public interest in encouraging the creation of more works (which some argue demands a longer copyright term). If one is convinced by the latter argument, the logic behind increasing copyright terms for new works is that it generates a return in the form of more, or better, works to be disseminated and eventually growth of the public domain.

Leaving aside temporarily the question of whether or not longer copyright terms motivate authors to publish more works or better works<sup>23</sup>, it should be noted that it is physically impossible for a *retrospective* extension of

<sup>22</sup>Perens, B., *op. cit.*, Criteria 1, 2 & 3.

<sup>23</sup>We will return to that question in Section 4.2.4.

copyright today to have any effect whatsoever on the level of motivation to publish an existing author may or may not have had at some point in the past.

Therefore, there can be no possible public policy justification for extending copyright terms on works that have *already* been created. On the contrary, doing so robs the commons of those works for a period of two decades, in direct contravention of the IP Chapter's own stated aim of recognising the importance of "a rich and accessible public domain"<sup>24</sup>.

#### 4.2.3 Crown copyright

In Australia today, copyright in works first published by the Commonwealth or a State subsists for 50 years after the year of publication<sup>25</sup>.

In the absence of any exception in TPP's IP Chapter for works published by the Parties themselves, presumably if TPP were ratified Art. 18.63(b)(i) would apply to Crown copyright, requiring the term of Crown copyright in Australia to be extended to 70 years after the year of publication.

Crown copyright is a strange concept in the first place. Noting the purpose of copyright (see Section 4.2.2), it is difficult to imagine that the Commonwealth has a need to motivate *itself* to produce more or better works. Furthermore, Crown copyright costs the public twice: the cost to the commons for the duration (as with all copyright) and the additional cost to the taxpayer for the development.

In some other jurisdictions (most notably the United States<sup>26</sup>) all works produced and published by the Government are placed in the public domain. OSIA has previously suggested<sup>27</sup> suitable policy reforms to reconcile the nature of Crown copyright with the need to maximise dissemination of works published by the Commonwealth.

Regardless of the efficacy or otherwise of current arrangements for Crown copyright, it is clear that there is no benefit (and at least some detriment) in extending the term of Crown copyright in new works by a further 20 years.

#### 4.2.4 Regulatory freeze

With the exception of Crown copyright (see Section 4.2.3), TPP Article 18.63 would not require any changes to the current duration provisions of the *Copyright Act 1968 (Cth)* with respect to new works (for existing works, see Section 4.2.2).

Nevertheless, the terms of copyright set by ss. 33, 34 & 81 of the Act are already 20 years in excess of the current globally agreed standard as set in Art. 12 of TRIPS.

Returning again to the purpose of copyright—to provide authors with an incentive to create more, or better, works—there is substantial doubt about whether even terms as long as those set by TRIPS may be significantly beyond the point of diminishing returns. Whilst clearly *some* authors do derive additional benefit from such long copyright terms, those works which continue to deliver substantial returns to the copyright holder beyond the 50 year mark are exceedingly few and far between. In the computer software industry, to date there have been none at all<sup>28</sup>.

However, whether or not authors derive *actual* returns 50 to 70 years on is a moot point. The more pertinent question is whether authors, prior to creating a work, have a reasonable expectation of doing so, and if so, at what point in the future the additional expected return ceases to have a significant impact on the decision to create the work.

Companies that create new works need to make informed decisions on which projects to invest in bringing to fruition. Just as in any other endeavour, those decisions are usually made on the basis of projected returns over time, approximated in today's dollars (the ubiquitous discounted cash-flow analysis). In the modern world, those returns are most often modelled over a relatively short term: 3- to 10-year NPVs are typical, although in a few capital-heavy industries, terms as long as 25 years are sometimes considered.

<sup>24</sup>Art. 18.15(1).

<sup>25</sup>*Copyright Act 1968 (Cth)*, s. 180(1)(b).

<sup>26</sup>*Copyright Act 1976 (USA)*, 17 USC 105. Although presumably if the United States ratifies TPP they will be obliged to amend their laws to remove that benefit.

<sup>27</sup>Forsstrom, A. & Burton, J., *op. cit.*, p. 8.; Burton, J. & Foxworthy, P., *Final submission to the Productivity Commission's Inquiry into Intellectual Property Arrangements*, *op. cit.*, pp. 30–31.

<sup>28</sup>Prior to 1967, software was not generally regarded as being copyrightable in any jurisdiction

OSIA is not aware of any Australian company that makes project selection decisions on the basis of 50 year or longer estimates. So the question must be asked: at what point do copyright term extensions cease to contribute any further to the public policy goal of providing an incentive for the creation of new works? We don't have a definitive answer to that, but we suspect it to be somewhere between the 25 and 50 year mark. In the past, when methods of publication and dissemination of works were orders of magnitude *slower* than today, perhaps a compelling argument for long copyright terms could have been made. However in the modern world, with all the advances in technology—particularly digital technology—at our disposal, we are certain that the copyright terms currently in force far exceed those required to provide the necessary incentive to create new works.

Although a reduction in the global minimum terms set by TRIPS may well be some years away, it is clear that, as technology continues to advance, that must be the eventual result. In the meantime, a return of Australia's copyright terms for new works to the global standard set by TRIPS is a reform far more likely to be worthy of consideration in the near future. Ratification of TPP would create a new obstacle to the Commonwealth pursuing that, or any other sensible domestic policy reform to duration of copyright.

#### 4.2.5 Judicial discretion

Judges weigh up many factors when they impose a penalty. Most legislation allows for a range of penalties so that the punishment fits the crime.

Article 18.71(5) calls for “proportionality between the seriousness of the infringement of the intellectual property right and the applicable remedies and penalties”. Yet Art. 18.74(4) & 18.75(5) seek to prescribe what damages should be applied using measures invented by a complainant. Claims for damages have been notoriously excessive and should be examined objectively and sceptically by judicial authorities.

Art. 18.74(6) goes even further, providing for pre-established damages at the election of a rights holder. Art. 18.77(6)(a) again prescribes criminal penalties when these should be at the discretion of our judges. OSIA's view is that only judges should determine a penalty case by case, without undue influence from any other party.

Art. 18.74(4), 18.74(5) 18.74(6) & 18.77(6)(a) are hostile to good legal practice and should be removed.

#### 4.2.6 Civil & criminal enforcement

The goal of civil law is to compensate an organisation or person who has been wronged, usually financially. The goal of criminal law is to protect society at large from destructive acts against social order.

Clearly breaches of intellectual property laws protecting patents, trademarks and copyright are a civil matter. OSIA opposes the application of criminal law to these matters.

Art. 18.77 seeks to apply criminal law to “wilful” breaches of intellectual property law on a “commercial scale”. These are differences of degree and not kind. Civil law should suffice.

Article 18.77(1) requires Parties to maintain criminal procedures and penalties for copyright infringement “on a commercial scale”. TPP's definition of “on a commercial scale” in Art. 18.77(1) is far broader than that provided in s. 132AC(5) of the *Copyright Act* so if implemented will undoubtedly cover acts not generally considered by Australians to be of a commercial scale.

Regardless of the scope, OSIA questions whether any need for criminal liability for copyright infringement exists. Clearly, when copyright is infringed, the principal damage is suffered by the author, so the need for authors to have access to civil remedies for copyright infringement is not in dispute. However, it is not apparent what, if any, damage the State suffers as a result of copyright infringement, so it is difficult to see how the associated criminal offences can be justified. Granted, criminal sanctions can have a deterrent effect, but then so can well implemented civil remedies. Even the Attorney-General, Sen. Brandis is on record as having asserted the status of copyright infringement as “only a civil wrong”<sup>29</sup>. OSIA supports Sen. Brandis' inference that Division 5 of Part V should be excised from the *Copyright Act*. Ratification of TPP would preclude such a reform from being enacted.

<sup>29</sup>Comment made by Sen. Brandis on *Q & A*, ABC Television, 3 Nov 2014. Given that copyright infringement *is* a criminal offence in Australia (and indeed was on 3 Nov 2014), one can only interpret Sen. Brandis' comment as expressing a view that copyright infringement *should be* “only a civil wrong”.

Article 18.77(6)(f) provides that, in cases where infringing goods that were the subject of a criminal enforcement action were not destroyed, Parties must ensure that their competent authorities have the authority to provide access to those goods and to any other evidence to the rights holder for use in civil infringement proceedings. OSIA supports that requirement: if criminal proceedings for copyright infringement must exist (and we contend they ought not—see above), it makes sense to ensure that evidence used in a criminal proceeding can be re-used subsequently in an associated civil action. However, we are concerned that Art. 18.77(6)(f) only obliges Parties to provide that authority in relation to access by plaintiffs, not by defendants. Surely, if pertinent evidence is held by the Crown, both parties to any dispute involving that evidence should have equal access to it? To provide otherwise would run the grave risk of prejudicing the civil proceeding in favour of the plaintiff.

## 5 Rights for copyright consumers

### 5.1 Technical circumvention

Article 18.88 requires Parties to prohibit the circumvention of technological protection measures (TPMs) along with the manufacture, importation, distribution and sale of products capable of circumventing TPMs, to provide various civil remedies in all cases and to provide criminal penalties where the circumvention is for the purposes of commercial advantage or financial gain.

At present, such measures are in force in Australia<sup>30</sup>. They were introduced in 2004 and made even more restrictive in 2006, during the implementation of the disastrous Australia–United States Free Trade Agreement (AUSFTA). OSIA has previously objected to those provisions both at the time<sup>31</sup> and more recently<sup>32</sup>.

The principal problem with anti-TPM-circumvention measures is that they address no possible public policy goal in their own right.

Where the circumvention is done for the purposes of infringing copyright, it is the act of infringing copyright itself that ought to be (and already is) prohibited. The addition of an extra civil wrong (or, worse still, criminal offence) simply for the *manner* in which the copyright was infringed adds nothing. Worse, the existence of anti-TPM-circumvention measures *encourages* the deployment of TPMs, which ultimately erodes the commons (as the TPM will persist, even after the copyright in the work itself has expired).

Prohibiting circumvention for non-infringing purposes is even worse: doing so has no legitimate public policy purpose, yet gives rise to a further impediment to the proliferation of useful works.

Criminal liability for TPM circumvention is the most heinous measure of all. Whilst OSIA opposes the criminalisation of copyright infringement in general (as to date the existence of the civil wrong has proved sufficient to enforce copyright), we can at least see how an argument (no matter how flawed) might exist for attaching criminal liability to the worst possible cases of infringement. However, attaching criminal liability to TPM circumvention—an act which, in itself, can do no possible harm—merely serves to create disincentives to research & development and to grant authors unprecedented additional rights of control over the *use* of their works, never envisaged in the original purpose of copyright.

Ratification of TPP would lock Australia into its present—and in OSIA’s view highly inappropriate—anti-TPM-circumvention regime, thus preventing the sensible reforms which we and others have proposed in the past and no doubt will continue to be proposed until such time as this pointless, unreasonable impost is excised from the *Copyright Act*.

<sup>30</sup> *Copyright Act 1968 (Cth)*, ss. 116AK–116AQ & 132APA–132APE.

<sup>31</sup> Scott, B., *Submission to Inquiry into Technological Protection measures (TPM) Exceptions*, Open Source Industry Australia, 2005; Scott, B., *Submission on Exposure Drafts—Copyright Amendment (Technological Protection Measures) Bill 2006 and Regulations*, Open Source Industry Australia, 2006; Scott, B., *Submission to Senate on Copyright Amendment Bill 2006*, Open Source Industry Australia, 2006; and Scott, B., *Provisions of the Copyright Amendment Bill 2006—Supplementary Submission, including Response to Question on Notice*, Open Source Industry Australia, 2006. All available at <http://osia.com.au/drupal7/publications>

<sup>32</sup> Burton, J., Holden, C. & Christie, D., *op. cit.*, s. 2.1, pp. 6–7; Forsstrom, A. & Burton, J., *op. cit.*, p. 10; Burton, J. & Foxworthy, P., *op. cit.*, pp. 9, 13, 22 & 26.

## 5.2 Government use of public domain software

Article 18.80 (Government Use of Software) states:

1. Each Party recognises the importance of promoting the adoption of measures to enhance government awareness of respect for intellectual property rights and of the detrimental effects of the infringement of intellectual property rights.
2. Each Party shall adopt or maintain appropriate laws, regulations, policies, orders, government-issued guidelines, or administrative or executive decrees that provide that its central government agencies use only non-infringing computer software protected by copyright and related rights, and, if applicable, only use that computer software in a manner authorised by the relevant licence. These measures shall apply to the acquisition and management of the software for government use.

OSIA supports the sentiment expressed in Article 18.80(1) and agrees on the importance of ensuring that any use by governments (just as with any use by other entities) of copyrighted software be non-infringing in nature, and compliant with the terms of the relevant licence.

However, the drafting of Article 18.80(2) is rather clumsy. By requiring that “central government agencies use only non-infringing computer software protected by copyright and related rights”, Article 18.80(2) effectively prohibits governments from using any software that is in the public domain (since, by definition, works in the public domain are no longer subject to copyright).

Broadly speaking, software in the public domain can be considered as falling into one of three categories: software published prior to the introduction of automatic copyright, on which copyright was never claimed (almost all software published before 1967 falls into this category); software on which the copyright has expired; and software placed in the public domain by explicit declaration of its author. We will deal with each category in turn.

In relation to the first category, pre-1967 software is unlikely to be of much use today in most fields of government endeavour. However, it has particular application in the field of preservation and archiving of digital records and other digital artefacts of that era. Standardisation of digital formats and encodings was not widespread until much more recently. As a result, access to surviving software of the era is important to aid in preservation of other digital artefacts of the era. A prohibition on government use of software that was never subject to copyright would therefore be an unreasonable impost on government agencies undertaking digital preservation and archiving tasks with pre-1967 material.

Very little software in the second category exists in 2016, since for its copyright to have expired already, it must have been published no later than 1966 (and hardly any software published prior to 1967 claimed copyright). However, from 2017 onwards<sup>33</sup> progressively more software will enter this category every year. Again, government agencies will find little if any use for software written more than half a century ago, other than in the field of digital preservation and archiving, for which the same objections apply as for the first category above (but far more dangerously, as this category will eventually apply to almost all software published since 1967).

The biggest problem though is in relation to the third category: software which is in the public domain by virtue of its author explicitly declaring it so. Although perhaps not as prolific today as copyrighted software, some authors continue to contribute their software directly to the public domain. One prominent example is Berkeley yacc (byacc), a leading parser generator<sup>34</sup> which was explicitly placed in the public domain by its author, Robert Corbett, in 1990 and remains in wide use today. Whilst byacc is not something the average user might call for, it is used heavily in computing research and development environments. It would be a tragedy indeed, for example, if implementation of TPP were to result in Australia’s public universities and research institutes such as the CSIRO being prohibited from using this indispensable tool.

These issues could easily have been avoided simply by omitting the words “protected by copyright and related rights” from Art. 18.80(2)—providing yet another example of how finalisation of trade agreements prior to broad industry review of and consultation on the text itself tends to lead to undesirable results.

<sup>33</sup>Or from 2037 onwards, if the perverse retrospective copyright term extensions called for by Art. 18.10(1) & 18.63 are implemented. See Section 4.2.2

<sup>34</sup>Parser generators, in brief, are programs used to generate other programs which parse their inputs against formal grammars, often—as is the case in compilers—to produce yet more programs.



### 5.3 End user representation

Footnote 154(a) states that a Party may comply with its obligations under Art. 18.82(3) by ensuring that “stakeholder organisations” (supposedly independent bodies responsible for verifying the validity of notices alleging copyright infringement) include representatives of both Internet Service Providers (ISPs) and rights holders.

Clearly, if such bodies are to exist (we contend they should not—see Section 5.4) it is indeed essential that both ISPs and authors be represented on them. However, it is equally essential that end users (or end user organisations) be represented on any such bodies, in order to achieve the balance called for by Art. 18.2, 18.4 & 18.66. A “stakeholder organisation” constituted with only representatives of ISPs and of authors is highly likely to be biased against the interests of end users.

### 5.4 Reversal of the presumption of innocence

Footnote 154(c) provides that an ISP must promptly remove or disable access to the disputed materials upon receipt of a verified notice.

Similarly, Article 18.82(3)(a) requires that ISPs expeditiously remove or disable access to the disputed materials in a variety of circumstances, including on receiving “a notice of alleged infringement from the right holder”.

The presumption of innocence, even in civil matters, has long been a fundamental principle of Australian law: the burden of proof lies with the party making the allegation<sup>35</sup>.

A mere allegation giving rise to a presumption of guilt (as dictated by Art. 18.82(3)(a) & Footnote 154(c)) should be regarded as repugnant to natural justice, and therefore rejected outright.

### 5.5 Automated misrepresentation & harassment

Article 18.82(5) states:

5. Each Party shall ensure that monetary remedies are available in its legal system against any person that makes a knowing material misrepresentation in a notice or counter-notice that causes injury to any interested party as a result of an Internet Service Provider relying on the misrepresentation.

If Australia is to have an extra-judicial system of notices and counter-notices for online copyright infringement allegations (and we contend that Australia ought not have such a system as such systems are inherently prejudicial—see Section 5.4), it is essential to prohibit its use for harassment and misrepresentation. However, Art. 18.82(5) does not go far enough toward that end.

Experience with these sorts of regimes overseas, in particular the regime established by the *Digital Millennium Copyright Act 1998 (USA)* (DMCA), has shown that by far the most common class of unjustified, incorrect notice has been those issued by automated devices (“DMCA-bots”) with little or no human intervention. OSIA is concerned that the phrase “knowing material misrepresentation” is unlikely to cover the case of DMCA-bots, which pose a clear and present threat to legitimate use of copyrighted material under the existing fair dealing exceptions (and the proposed fair use exception) and indeed to freedom of speech in general.

Although the majority of such cases reported overseas have resulted from DMCA-bots failing to take into account valid fair use exceptions, a concerning number have been reported where exceptions were not involved and the accused (not the owner of the DMCA-bot) was in fact the copyright-holder. To prevent such outrageous occurrences in Australia, it is essential that negligent design and/or programming of DMCA-bots be treated at least as severely as wilful fraud by a human actor.

OSIA recognises and supports the need for injunctive relief if and where infringement can be proven (preferably in a Court of Law, rather than in some DMCA-like “guilty until proven innocent” kangaroo court) and we recognise and support the need to prohibit fraudulent misuse of such a system. However, a safeguard against misrepresentation that does not specifically address the problem of inaccurate infringement notices issued by DMCA-bots is unlikely to be effective.

<sup>35</sup> *Currie v. Dempsey*, (1967) 69 SR (NSW) 116, at 125.

If the Article must remain despite OSIA's objections, at a minimum the word "knowing" should be reconsidered. The *effect* of the misrepresentation is the substantive thing. "Knowing" is difficult to prove. If a human being did not know of the misrepresentation, that implies an over-reliance on flawed automated systems. An organisation issuing these notices has an ethical responsibility to do due diligence first. The Article should ensure there is a legal responsibility too, and that nobody can dodge their responsibility by just saying "I didn't know".

## 5.6 Double standards

Article 18.82(7) requires Parties to provide copyright holders who have made legally sufficient infringement claims "to obtain expeditiously from an Internet Service Provider information in the provider's possession identifying the alleged infringer".

ISPs may find this provision, if enacted in those words, to be impossible to comply with. Any ISP should certainly be capable of identifying the *subscriber* whose service is alleged to have been used to do an infringing act (e.g. by IP address). However, the ISP cannot possibly know whether or not that subscriber is indeed the person who committed the allegedly infringing act.

Whilst the intent of Art. 18.82(7) seems reasonable, its drafting is perhaps misguided. It seems to assume that the subscriber to a communications service is the only person who can use that service for infringing purposes. That simply isn't true. In fact, infringers of commercial scale (who are, after all, the only ones worth expending significant funds on pursuing) often tend to compromise the communications services of third parties and use those to commit the infringing acts.

It is instructive to note that, whilst Art. 18.82(5) fails to provide penalties for accusers whose computers act fraudulently without their knowledge (see Section 5.5), Art. 18.82(7) seeks to facilitate the prosecution of end users whose computers may be used to commit infringing acts without their knowledge. Why is the presumption in favour of the ignorant for one class of person yet against the ignorant for another (especially when the accusers are, for the most part, far better technically and financially equipped to rectify that ignorance)? This obvious disparity shows a clear failure of the balance called for by Art. 18.2, 18.4 & 18.66.

The Article does nothing to balance the rights of the end user with those of the copyright holder. The end user is entitled to privacy and due process. ISPs should not divulge details of their customers on the basis of mere allegations. There must be *prima facie* evidence before they may do so. The Article is also silent on who might pay for this expeditious obtaining. In short, the effect of the Article and other similar proposals is to outsource copyright enforcement to ISPs. It is not surprising that very wealthy, large and powerful copyright holders keep campaigning for it.

## 6 Other related matters

### 6.1 Treaty scope & negotiation process

#### 6.1.1 Transparency & discrimination

TPP was negotiated in secret. No Australian stakeholder was permitted access to any part of the negotiating text at any point during the process.

As noted previously<sup>36</sup>, for a treaty that is being marketed as being about trade, it seems very odd indeed that industry (presumably the intended beneficiaries of such a treaty) should be completely excluded from the process.

The Department of Foreign Affairs and Trade (DFAT) did consult with industry during the course of the negotiations (and indeed OSIA lodged a submission<sup>37</sup> with DFAT as part of that consultation process). However, it is difficult to imagine that process being at all effective, when all Australian stakeholders were essentially "flying blind", relying solely on the occasional document leaked overseas.

Secrecy in negotiation has obvious negative effects on industry stakeholders such as OSIA and our members, but it also has negative effects on citizens, civil society groups and other interested stakeholders. When Australians

<sup>36</sup>Burton, J. & Foxworthy, P., *Submission to Joint Standing Committee on Treaties*, *op. cit.*, p. 5; Cth, *Proof Committee Hansard*, *op. cit.*, pp. 26–27 & 30.

<sup>37</sup>Burton, J., Holden, C. & Christie, D., *Id.*



cannot read what is being negotiated “on our behalf”, our elected representatives cannot meaningfully canvas our views on it, so cannot meaningfully represent us. In the absence of open debate in parliament, clearly it is not possible for the Minister responsible to instruct DFAT accurately in Australia’s best interest. Now that the text has been released, it has been presented to parliament, to the Australian people and to Australian industry as a *fait accompli*, without any possibility of amendment. The process was anti-democratic in the extreme and clearly designed to undermine the sovereignty of parliament (and its equivalents in most other TPP Parties).

Of particular note is that the process in the United States was very different. TPP was not negotiated, as one might expect on the basis of the Australian experience, by the US State Department. Rather, it was negotiated by the United States Trade Representative, in consultation with its 28 Advisory Committees, many of which consist of representatives from US industry. Those US industry representatives not only had access to the text, but were intimately involved with its negotiation.

So, whilst industry in Australia (and in all ten of the other Parties) were denied any meaningful participation in the process, select representatives of US industry were right at its core.

As a result, the bias in favour of a few entrenched interests in the US industry can be seen quite plainly in the final text (most obviously in the Intellectual Property Chapter).

The Committee itself has previously recommended that Australia adopt a model similar to that used in the United States<sup>38</sup>. Whilst clearly moving to such a model would be a step in the right direction, we do not see it as going far enough. No compelling justification has ever been demonstrated for secrecy in treaty making (other than for the special case of military treaties in time of war) yet such secrecy carries substantial detriment. Therefore it should be avoided as an immutable matter of principle.

Accordingly, OSIA recommends rejecting not only TPP but also rejecting any other trade agreement negotiated under a process which actively discriminates against Australian industry. Further, OSIA recommends that Australia refuse to enter into negotiations for any future trade agreement where there is any requirement for secrecy.

That does not mean that Australia should abandon its important efforts to secure broader, freer trade in the region. Transparency and free trade should go hand in hand. We see no reason why Australia could not take a leadership role in the region by initiating fresh, completely transparent negotiations with any & all willing former TPP Parties for a new treaty whose subject matter is limited to genuine free trade measures alone and indeed we urge the Commonwealth to go down that path.

### 6.1.2 Democracy & sovereignty

Domestic policy reform is a matter for the Commonwealth Parliament. It must never be regarded as acceptable for parliament’s efforts on that front to be stymied by a regional treaty that locks Australia into existing domestic regulatory regimes in any field. TPP does just that, in many fields—including most notably copyright and patent law—and in doing so seeks actively to undermine the sovereignty of parliament.

### 6.1.3 Scope of agreement

In contrast to trade in agriculture and manufactured goods, there are very few barriers to trade in intellectual property (IP). The TPP is designed to *restrict* trade in IP. The IP Chapter has almost nothing to do with trade (the sole exception being the provisions on customs measures relating to the interception of counterfeit goods).

Bilateral or regional trade agreements (BRTAs) which confine themselves solely to the matter of free trade can make sense. However, international standards on other matters—especially those relating to copyright and patents—are far better set by narrowly-focused treaties of global or near-global scope. The reasons for that are simple.

First, the utility of works and inventions can only be maximised through global dissemination. Global treaties on copyright and patents already exist and Australia is a party to those treaties. BRTAs including terms on copyright and patent law can create a divergence in global copyright and patent standards, which defeats the purpose of having negotiated global treaties on copyright and patents in the first place.

<sup>38</sup>Cth, Senate, Foreign Affairs, Defence and Trade References Committee, *op. cit.*, rec. 6, p. 54.

Second, inclusion in a trade agreement of provisions on copyright, patents and a cornucopia of other non-trade-related matters across the various chapters leads to an unnecessarily tight coupling between wildly unrelated policy domains. As a result, when in future it becomes clear that TPP's provisions in one policy domain (e.g. patents) are no longer in a Party's interests, that Party cannot withdraw from the agreement in that domain, without also withdrawing from the entire treaty, including provisions on totally unrelated domains (e.g. labour standards), which may remain acceptable.

It is difficult to imagine such "all or nothing" treaties ever serving the best interests of any nation in the long term. OSIA's contention is that in each individual policy domain, if a new international agreement is even warranted, it should be implemented as a standalone treaty, of global or near-global scope to avoid the consequences of artificial dependencies between unrelated policy domains.

At the other end of the scale, ratification of a BRTA containing substantial copyright and/or patent related terms, even in circumstances where no change to existing domestic law may be required, would lock Australia into its contemporary copyright and patent regimes in perpetuity, thus preventing any sensible domestic policy reforms in those domains from being pursued. Such an approach undermines Australia's sovereignty and the legislative mandate of the Commonwealth Parliament.

The need for domestic policy reform in the area of copyright and patent law is clear and pressing. The Commonwealth has yet to implement the recommendations of ACIP's review of the innovation patent system<sup>39</sup> or ALRC's inquiry into copyright & the digital economy<sup>40</sup>. The Productivity Commission's Inquiry into Intellectual Property Arrangements<sup>41</sup> has examined these issues and raised questions that suggest the need for a wide range of reforms (as outlined in OSIA's submissions to that Inquiry<sup>42</sup>).

All of those inquiries and reviews suggest a pressing need to introduce reforms that lead to more permissive copyright and patent regimes. Ratification of TPP would prevent the implementation of most such reforms, thereby damaging Australia's domestic policy reform agenda.

For all of those reasons, OSIA opposes Australia's participation in BRTAs which contain provisions on any matter other than free trade.

As noted previously<sup>43</sup>, the stalling of the Doha Round is often used as an excuse for pursuing BRTAs, but what is not usually mentioned is *why* the Doha Round stalled. It is clear to OSIA that the "single undertaking" premise is fundamentally flawed.

Rather than pursuing counter-productive "mini Dohas" in the form of over-reaching BRTAs, Australia should pursue *both* genuine free trade agreements (those that focus solely on elimination of tariffs and TRQs) on a bilateral & regional basis *and* sensible revisions to or replacements for IP treaties (such as TRIPS, the Berne Convention and the Rome Convention) on a global basis.

It should be noted that the Productivity Commission, after reviewing the efficacy of existing BRTAs, reached a similar conclusion in 2010, recommending against the inclusion of IP provisions (and also ISDS provisions) in future BRTAs<sup>44</sup>.

<sup>39</sup>*Review of the Innovation Patent System: Final Report*, Advisory Council on Intellectual Property, 2015. Available at [http://www.ipaustralia.gov.au/pdfs/reviews/Final\\_Report\\_for\\_Innovation\\_Patent\\_Review.pdf](http://www.ipaustralia.gov.au/pdfs/reviews/Final_Report_for_Innovation_Patent_Review.pdf)

<sup>40</sup>*Copyright and the Digital Economy: Final Report*, ALRC Report 122, Australian Law Reform Commission, 2013. Available at [http://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_alrc\\_122\\_2nd\\_december\\_2013\\_.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf)

<sup>41</sup>*Intellectual Property Arrangements: Productivity Commission Draft Report*, Productivity Commission, 2016. Available at <http://www.pc.gov.au/inquiries/completed/intellectual-property/draft>. At the time of writing the final report has been submitted to the Government and will soon be tabled in parliament.

<sup>42</sup>Forsstrom, A. & Burton, J., *op. cit.*; Burton, J. & Foxworthy, P., *Final Submission to the Productivity Commission's Inquiry into Intellectual Property Arrangements*, *op. cit.*

<sup>43</sup>Burton, J. & Foxworthy, P., *Submission to Joint Standing Committee on Treaties*, *op. cit.*, p. 32; Cth, *Proof Committee Hansard*, *op. cit.*, p. 28.

<sup>44</sup>*Bilateral and Regional Trade Agreements, Research Report*, Productivity Commission, 2010, rec. 4(b) & 4(c), p. 285. Available at <http://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf>

## 6.2 The IP Chapter

### 6.2.1 Balance & contradictions

The IP Chapter contains a number of benevolent-sounding “motherhood” statements on matters such as: the need to achieve a balance of rights and obligations as between producers and users<sup>45</sup>; the need for measures to prevent the abuse of IP rights by rights holders or “practices which unreasonably restrain trade or adversely affect the international transfer of technology”<sup>46</sup>; the need to “foster competition and open and effective markets”<sup>47</sup>; and “the importance of a rich and accessible public domain”<sup>48</sup>.

OSIA acknowledges and supports all those statements. Unfortunately, all of them are contradicted by the substantive provisions of the Chapter themselves.

The Chapter’s substantive provisions require highly restrictive copyright and patent regimes, far from the “balance” called for in the Chapter’s Objectives.

The desired “balance” in relation to preventing abuse by rights holders is conspicuously absent from the provisions of Section J relating to legal remedies and safe harbours<sup>49</sup>.

The desired prevention of unreasonable restraints of trade is conspicuously absent from the substantive provisions on technological protection measures (TPMs)<sup>50</sup>.

The need to “foster competition and open and effective markets” is not reflected in the provisions on patents<sup>51</sup>.

Finally, “the importance of a rich and accessible public domain” is not addressed to an acceptable degree by the provisions on retrospectivity<sup>52</sup>, on copyright term<sup>53</sup>, on TPMs<sup>54</sup> or on Government use of software<sup>55</sup>.

Whilst Art. 31(1) of the *Vienna Convention on the Law of Treaties* provides that the terms of a treaty are to be interpreted “in the light of its object and purpose”, that latitude seems unlikely to extend to taking into account the purpose when that purpose is contradicted by the substantive terms. We can only presume that if TPP is ratified, when implementing the IP Chapter the Commonwealth will be bound to follow its substantive terms, despite their being contrary to its stated objectives. From a public policy perspective, that is a highly undesirable outcome.

### 6.2.2 Double regulation of software

Article 18.37(1) requires that Parties make patents available “in all fields of technology”. Its wording closely follows the first half of TRIPS Art. 27(1). As OSIA has noted previously, there has been much debate globally about the correct interpretation of TRIPS Art. 27 in relation to whether or not computer software constitutes patentable subject matter. That debate centres around whether or not computer software can be regarded as “technology” or indeed as an invention—in both cases we contend that it cannot<sup>56</sup>.

It should also be noted that computer software is unique in that it is the only class of work to be subject both to copyright and to patents simultaneously. This “double regulation” has a detrimental effect on progress in the field, in stark contrast to the original purposes of both copyright and patent law.

As OSIA has pointed out previously<sup>57</sup>, both the nature of computer software itself and the nature of the software development process are such that copyright provides a far better regime for the protection of software than patents do: since software consists solely of algorithms and data, it far more closely resembles a literary work than an invention.

<sup>45</sup> Art. 18.2, 18.4 & 18.66.

<sup>46</sup> Art. 18.3(2).

<sup>47</sup> Art. 18.4(c).

<sup>48</sup> Art. 18.15(1).

<sup>49</sup> See Sections 5.5 & 5.6.

<sup>50</sup> See Section 5.1.

<sup>51</sup> See Sections 6.2.2 & 6.2.3.

<sup>52</sup> Art. 18.10. See also Section 4.2.2.

<sup>53</sup> Art. 18.63

<sup>54</sup> See Section 5.1.

<sup>55</sup> Art. 18.80(2). See also Section 5.2.

<sup>56</sup> Burton, J., Holden, C. & Christie, D., *op. cit.*, p. 8.

<sup>57</sup> Burton, J., Hideo, M., Christie, D. & Jitnah, D., *Submission to the Australian Council on Intellectual Property Review of the innovation patent system*, Open Source Industry Australia, 2013, pp. 4–5. Available at [http://www.osia.com.au/drupal7/sites/default/files/default/osia\\_sub\\_201310\\_acip.pdf](http://www.osia.com.au/drupal7/sites/default/files/default/osia_sub_201310_acip.pdf)

In the US, a recent case found “claims directed to software implemented on a generic computer are categorically not eligible for patents” and that software patents are a “deadweight loss on the nation’s economy”<sup>58</sup>.

In Australia at present a “computer-implemented invention” can be considered patentable subject matter in certain circumstances<sup>59</sup>, whilst computer software at a higher level of generality is not<sup>60</sup>. The various, rather nebulous, tests introduced in the domestic cases serve only to add further confusion to the doubt about the interpretation of TRIPS Art. 27.

All that confusion could easily be avoided, by explicitly removing computer software from the scope of patentable subject matter, as has been done in New Zealand<sup>61</sup>.

OSIA has previously recommended<sup>62</sup> that that desirable outcome could most effectively be obtained by amending the *Patents Act 1990 (Cth)* to provide that no copyrightable work may be patented.

Such a move will not affect the incentive to produce new and useful works of computer software, which is already more than adequately provided by copyright. Rather, such a move will foster innovation by removing the spectre of unjustified software patent assertions.

It is not completely clear whether or not Art. 18.37(1) of TPP precludes the removal of computer software from the scope of patentable subject matter (for the same reasons that the near-identical wording in TRIPS Art. 27(1) remains unclear). However what is abundantly clear is that entering into yet another ambiguous treaty on patents cannot be in Australia’s best interest.

### 6.2.3 New patents on old technology

Article 18.37(2) requires that Parties make patents available for “new uses of a known product, new methods of using a known product, or new processes of using a known product”.

Whilst such new uses or processes of existing known products may well be regarded as innovations, it should be abundantly clear, even to the layman, that they are not inventions.

Innovation is a necessary and useful component of progress in many fields, but it is not of the same ilk as invention. OSIA sees no public policy benefit at all in extending the monopolies granted by patent to mere innovations, as discussed in our 2013 submission to ACIP’s Review of the Innovation Patent System<sup>63</sup>. ACIP themselves evidently agree<sup>64</sup>.

Rather, we suspect that implementation of Art. 18.37(2) would *stifle* innovation through introducing the potential for new patent monopolies to be granted on *old* technology.

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<sup>58</sup>*Intellectual Ventures v. Symantec Corp.* (Fed. Cir. 2016), available at <http://www.ca9.uscourts.gov/sites/default/files/opinions-orders/15-1769.Opinion.9-28-2016.1.PDF>

<sup>59</sup>*International Business Machines Corporation’s Application* [1980] FSR 564.

<sup>60</sup>*Commissioner of Patents v. RPL Central Pty Ltd* [2015] FCAFC 177.

<sup>61</sup>*Patents Act 2013 (NZ)*.

<sup>62</sup>Burton, J. & Foxworthy, P., *op. cit.*, pp. 11–13.

<sup>63</sup>Burton, J., Hideo, M., Christie, D., & Jitnah, D., *op. cit.*, s. 2.2.2, p. 9.

<sup>64</sup>Advisory Council on Intellectual Property, *Statement by the Advisory Council on Intellectual Property (ACIP) regarding the Innovation Patent System*, May 2015. Available at [http://www.ipaustralia.gov.au/pdfs/reviews/Statement\\_for\\_web\\_release.doc](http://www.ipaustralia.gov.au/pdfs/reviews/Statement_for_web_release.doc)