

The negotiation process and consultation

Introduction

- 7.1 This chapter will examine the negotiation and consultation process surrounding the ACTA treaty. This process received a significant amount of attention in submissions to the inquiry. Most submitters felt that the process had not been open and transparent enough.
- 7.2 Although much of the comment was negative, a number of submitters praised the consultation process conducted by DFAT. The Committee recognises the constraints placed on Government departments. There is a tension between maintaining a confidential treaty text and negotiation position on one hand and being open with the Australian public about those negotiations on the other.¹

The tension between confidentiality and democratic principle

- 7.3 The negotiating process is potentially problematic, and DFAT is at a disadvantage in terms of having to try to satisfy two different constituencies. As part of an international team negotiating a treaty, it must adhere to certain accepted processes such as maintaining

¹ The Department of Foreign Affairs and Trade (DFAT) provides an overview of the treaty making process on its website, <<http://www.dfat.gov.au/treaties/making/index.html>>, accessed 1 May 2012.

confidentiality of treaty text and the status of negotiations on particular issues. At the same time, there is an obligation to provide as much information as practicable to the public so that consultations are informed and democratic principles are honoured. This is reflected in the comment of the Australian Libraries Copyright Committee and Australian Digital Alliance:

My understanding... based on the national interest analysis, which quotes five public consultations, and also communications with other civil society groups that all civil society groups were invited to participate in the public consultations. DFAT also encouraged civil society groups and members of the public to contact them at any time. But DFAT were bound by confidentiality agreements, so they were never going to comment on substantive aspects of the treaty's text, despite the significant and ongoing concerns of the civil society members.

I understand, also speaking to other civil society groups, that DFAT were genuinely interested in what these groups had to contribute to discussions...²

Observations and criticisms

Secrecy

- 7.4 The most forthright observation and criticism on the negotiation and consultation process is that of secrecy. That is, the Government through DFAT engaged in a process that did not sufficiently share the intent and the detail of the treaty with the general public and other interested parties.
- 7.5 Despite some supportive comments, the Australian Libraries Copyright Committee and Australian Digital Alliance felt that the process was too secretive and that had the treaty been negotiated under the auspices of other international organisations, the text would have been more accessible:

This level of secrecy diminishes the legitimacy of ACTA and the democratic process. JSCOT should reject the NIA's – the national interest analysis – assertion that appropriate consultation was

2 Ms Ellen Broad, Executive Officer, Australian Libraries Copyright Committee and Australian Digital Alliance, *Committee Hansard*, 19 March 2012, p. 3

undertaken and recommend that Australia not agree to confidentiality as a condition in future negotiations.³

... when you have copyright academics and experts in intellectual property, civil society groups who advocate balanced copyright laws and members of the public who want to contribute meaningfully to the negotiations, that is not possible without access to the draft negotiating text, as would be the case in the World Intellectual Property Organisation or the World Trade Organisation.⁴

- 7.6 Ms Kimberlee Weatherall believes that ACTA did not deserve its confidential status as it was an intellectual property (IP) agreement, and not a trade treaty. Ms Weatherall argued that some groups were privileged over others with regard to information and that this was undemocratic and resulted in sub-optimum outcomes:

ACTA was negotiated outside existing fora established to address IP issues (namely, the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO)), and with an unusual degree of secrecy for an international agreement setting standards in IP law. Certain industry interest groups were given privileged access to text and negotiating positions in the US. Texts were released very late in the process and only after repeated demands and repeated leaks. While confidentiality may be common in trade negotiations, ACTA is not in fact a trade agreement, it is an IP agreement, and such confidentiality is not common or appropriate in IP negotiations which impact directly and in minute detail on domestic law and domestic innovation policy.

Such secrecy is damaging to the democratic process and to the legitimacy of the agreement. It is also harmful to Australian interests in the negotiations. It is also harmful to good and balanced policy-making. The Australian negotiators were denied the opportunity to engage meaningfully with stakeholders on the issues involved.⁵

- 7.7 Dr Matthew Rimmer was critical of what he perceived to be the secretive nature of the negotiations.
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3 Ms Ellen Broad, Executive Officer, Australian Libraries Copyright Committee and Australian Digital Alliance, *Committee Hansard*, 19 March 2012, p. 2.

4 Ms Ellen Broad, Executive Officer, Australian Libraries Copyright Committee and Australian Digital Alliance, *Committee Hansard*, 19 March 2012, p. 3

5 Ms Kimberlee Weatherall, *Submission 3*, p. 5.

The secretive origins of the [ACTA] highlights the need for greater transparency and information-sharing about treaty negotiations; the necessity of democratic participation in policy formulation and development; and the demand for evidence-based policy making informed by independent, critical research on the economic, social, and political costs of treaties.⁶

- 7.8 Dr Hazel Moir, having attended a consultation herself, observed that DFAT did not adequately respond to what she felt were legitimate concerns raised by some of the attendees:

From a civil society perspective the [ACTA] was negotiated in considerable secrecy. Why this should be so is unclear and DFAT officials gave no clear answer to questions on this matter in the one “consultation” I attended.

During that “consultation” representatives of shippers and freight forwarders made a number of very telling points in regard to the significant negative impact that the proposed treaty would have on their operations. It is surprising that the NIA does not mention these concerns nor how they have been addressed.⁷

- 7.9 Even supporters of the treaty’s intent⁸ believed that the negotiation and consultation process had been prohibitively secretive. Describing the NIA, Alphapharm observed:

The second aspect of the NIA that is unsatisfactory is in regard to its description of the “ACTA negotiation process”... The NIA refers to “extensive public consultations”, yet nowhere does the NIA make it plain that the process of negotiation, initiated by the U.S. Government in October 2007, was held under conditions of strict secrecy. Other than DFAT making it known that Australia was participating in ACTA, the actual ACTA text remained known only to the participating country officials involved...

The official public release of the draft ACTA text on April 21, 2010, is certainly acknowledged at para 41 of the NIA, but unless intimately involved in the negotiation or ‘consultation’ process, a reader of this document would be none the wiser as to the extent of the controversy surrounding the ACTA negotiation process. While the public release of the official ACTA text provided

6 Dr Matthew Rimmer, *Submission 1*, p. 39.

7 Dr Hazel Moir, *Submission 4*, p. 8.

8 Dr Martin George Cross, Managing Director, Alphapharm Pty Ltd, *Committee Hansard*, 23 March 2012, p. 1.

stakeholders with the details for all practical purposes, the draft ACTA text in treaty language made it impossible for Australian stakeholders to make any practical difference to its contents.⁹

ACTA as part of a 'club'

7.10 A few submitters argued that the participating members had taken an exclusive 'club approach' to the treaty's negotiation process. Moreover, this approach had been to the benefit of industry rather than the broader community. Dr Rimmer saw the negotiation process for ACTA as a:

... case study in establishing the conditions for effective industry capture of a lawmaking process. Instead of using the relatively transparent and inclusive multilateral processes, ACTA was launched through a closed and secretive "'club approach' in which like-minded jurisdictions define enforcement 'membership' rules and then invite other countries to join, presumably via other trade agreements." The most influential developing countries, including Brazil, India, China and Russia, were excluded. Likewise, a series of manoeuvres ensured that public knowledge about the specifics of the agreement and opportunities for input into the process were severely limited. Negotiations were held with mere hours notice to the public as to when and where they would be convened, often in countries half way around the world from where public interest groups are housed. Once there, all negotiation processes were closed to the public. Draft texts were not released before or after most negotiating rounds, and meetings with stakeholders took place only behind closed doors and off the record. A public release of draft text, in April 2010, was followed by no public or on-the-record meetings with negotiators.¹⁰

7.11 Ms Kimberlee Weatherall also argued that the ACTA had an 'exclusive club approach' and that its ratification by Australia would send a wrong signal to the rest of the world:

ACTA has been irretrievably tainted, in my view, by the lack of transparency in its negotiation and by the exclusive club approach taken. Ratification would send the message that Australia thinks this is perfectly acceptable, which it is not. It is not acceptable to civil society. It is not acceptable to our trading partners. And it should not be acceptable to parliament unless parliament has no

9 Alphapharm, *Submission 5*, pp. 4-5.

10 Dr Matthew Rimmer, *Submission 1*, p. 4.

problem with a department negotiating the details of our domestic law and policy without its input.¹¹

Nature of the ACTA treaty itself and its negotiations

7.12 Some submitters also questioned whether promoting the inclusion of IP standards that match current Australian law was appropriate:

[There should be a] question [over] DFAT's present negotiating stance on IP, which is that Australia will positively promote the inclusion of IP standards in agreements that match current Australian law. This stance is seriously problematic in my view. It is contrary to Australia's interests, and I believe it is harming our reputation in international trade negotiations... it is a critical point because DFAT is presently taking this same stance into the Trans-Pacific Partnership negotiations.¹²

7.13 Ms Anna George, a former public servant who has worked in the intellectual property rights area, also expressed doubts over this approach and questioned DFAT's lack of response to her concerns:

This is why ACTA is quite a unique treaty. It is taking intellectual property rights to a totally different area of operation. It is not within the multilateral system; it is not simply domestic or bilateral in nature; it is quite different. I have raised this issue with DFAT but I have never had a proper response to it other than: 'There is no reason for you to worry about it, Anna. It's fine.'¹³

Department of Foreign Affairs and Trade response

7.14 DFAT's broad approach to consultations is outlined on its website.

The Government's decision on whether a treaty is in the national interest is based on information obtained during consultations with relevant stakeholders. Consultation does not take place merely so that those with an interest feel included in the process. The practice is to provide information about the treaty in question and, if possible, develop a consensus within the community before

11 Ms Kimberlee Weatherall, *Committee Hansard*, 23 March 2012, p. 7.

12 Ms Kimberlee Weatherall, *Committee Hansard*, 23 March 2012, p. 7.

13 Ms Anna George, *Committee Hansard*, 23 March 2012, p. 24.

taking definitive treaty action. Inevitably, the final decision necessarily involves a balancing of competing interests.¹⁴

- 7.15 Responding to the criticisms outlined above, DFAT provided a comprehensive statement explaining the processes that had been followed over a number of years. DFAT stated:

There have been claims that ACTA negotiations were held in secret and that the public was never consulted. This is simply not correct. The Australian government worked extremely hard to ensure an inclusive, open and transparent process involving the widest range of stakeholders. DFAT held formal stakeholder consultations throughout the negotiations of ACTA, with more than 150 stakeholders participating.

The government invited public submissions from December 2007 onwards and views were sought via advertisements in national newspapers, the DFAT website and public consultations in Melbourne, Sydney and Canberra. Australia lobbied for, and was successful in, making draft texts available during the negotiations. Australia publicised, to the maximum possible extent, all negotiating papers, including a discussion paper in 2008 and three separate iterations of the ACTA negotiating text during the most intensive period of the negotiations in 2010. This was not usual practice during trade agreement negotiations but we considered it was important to ensure stakeholders were kept informed, particularly given the level of public interest in the initiative.

These efforts provided a strong foundation for interested parties to make an informed assessment of and submissions on progress in the negotiations. There have also been some concerns expressed that ACTA was negotiated by an exclusive club of countries or interest groups. ACTA was, in fact, negotiated by 37 countries that were ready to build upon international standards of IP enforcement. The agreement was carefully drafted to allow for wider membership over time, and all members of the World Trade Organisation are eligible to join if they apply these standards.¹⁵

14 The Department of Foreign Affairs and Trade (DFAT) provides an overview of the treaty making process on its website, <<http://www.dfat.gov.au/treaties/making/index.html>>, accessed 1 May 2012.

15 Mr George Mina, Assistant Secretary, Trade Policy Issues and Industrials Branch, Office of Trade Negotiations, Department of Foreign Affairs and Trade, *Committee Hansard*, 19 March 2012, p. 16.

Support for the consultation process

7.16 Notwithstanding the earlier criticisms by other submitters, a number of contributors expressed support for the process. When questioned about whether they were satisfied with the public consultation process, the Music Industry Piracy Investigations indicated that they were.¹⁶

7.17 The Australian Copyright Council also considered the consultation process adequate and remarked that the treaty itself has a commitment to transparency incorporated into its constituent articles:

The Copyright Council notes that ACTA was developed over a significant period of time, with discussions beginning as early as 2005 and has involved significant consultation. Furthermore, a commitment to transparency is included in the treaty itself, with article 30 of ACTA promoting transparency in the administration of intellectual property enforcement.¹⁷

7.18 Similarly, the Music Council of Australia was very positive about the negotiation and consultation process that was employed and suggested that it may even be used as a template for future trade negotiations:

The Music Council would like to put on record the fact that in our experience public consultation regarding ACTA has been the most open and transparent of any trade agreement of which we are aware... The negotiations for the ACTA were undertaken in a way unique in plurilateral trade agreement negotiations. Draft text was publicly released, including two drafts in the last year of negotiations in 2010, one in April and another in October. ACTA is an agreement negotiated between 37 countries and the fact that draft text was released through the course of negotiations does not appear to have in any way impeded its progress and appears to have delivered a satisfactory outcome for all parties. The Music Council understands that Australia played a leadership role in making progress on negotiations open to public scrutiny and recommends that it do so again in respect of the many other trade agreements currently under negotiation.¹⁸

7.19 Finally, the joint submission by the Australian Federation Against Copyright Theft (AFACT), the Australian Home Entertainment Distributors Association (AHEDA), the National Association of Cinema

16 Ms Vanessa Hutley, General Manager, Music Industry Piracy Investigations, *Committee Hansard*, 19 March 2012, p. 12.

17 Australian Copyright Council, *Submission 12*, p. 3.

18 Music Council of Australia, *Submission 6*, pp. 1-2.

Operators (NACO), and the Screen Producers Association of Australia (SPAA) questioned the assertion that ACTA negotiations were secretive and discouraged public involvement:

Our understanding of the negotiation process does not accord with this criticism. Internationally, the ACTA negotiations were conducted in the usual manner of an international agreement. DFAT has multiple Free Trade Agreements under current negotiation which are all undertaken, like ACTA, by way of government to government negotiations. Such agreements are not negotiated in public, and there are clear rules on how the European Parliament is to be informed of trade negotiations which were carefully adhered to.

Domestically, the draft ACTA text was released for public comment on 22 April 2010, and updates on the negotiations were posted on the DFAT website and through its RSS feed.

Throughout the negotiation process the Australian Government undertook extensive public consultation, and received submissions which informed the Government's negotiating position.¹⁹

Conclusion

- 7.20 Feedback garnered during the ACTA inquiry process indicates a significant degree of mistrust about how the ACTA negotiation and consultation processes were conducted.
- 7.21 Concerns over perceived secrecy and an 'exclusive club' approach and the nature of the treaty itself have given rise to suspicion in some of those who made submissions to the Committee. Given the amount of public protest, particularly in Europe, it appears that those suspicions are reflected not only in the broader Australian community but internationally as well.
- 7.22 The Committee is aware of the tension between democratic principle and accountability and a treaty negotiating process that requires a certain degree of confidentiality. It is this tension that has, perhaps, contributed

19 The Australian Federation Against Copyright Theft (AFACT), the Australian Home Entertainment Distributors Association (AHEDA), the National Association of Cinema Operators (NACO), and the Screen Producers Association of Australia (SPAA), *Submission 15*, p. 4.

to the perception that ACTA negotiations and consultations have been conducted 'secretly'.

- 7.23 The Committee is aware that DFAT has a dedicated 'Treaties Making' website to help inform the Australian public and accepts that it conducts its consultations with openness and goodwill. It may, however, be appropriate for DFAT to review this website and explain more thoroughly the tension between democratic accountability and the international negotiation process – in particular with regard to confidentiality.
- 7.24 Given how many treaties come before it for review, the Committee is well aware that the consultation and negotiation processes that DFAT engages in are adequate for the vast bulk of treaties – few garner a high degree of public interest. However, given the level of controversy that has surrounded this treaty, it may be appropriate for DFAT to introduce an increased level of consultation for those treaties that attract a higher level of public interest.
- 7.25 The Committee suggests that DFAT conduct initial formal or informal consultations for each treaty to determine whether the treaty is likely to attract a wide level of public interest. For the small number of treaties that are likely to attract such interest, DFAT should adopt higher profile early consultations and processes to exclude the possibility and/or perception that the Parliament and the Australian community are involved too late in the making of treaties.

Secrecy in negotiation

- 7.26 The most troubling aspect throughout the development of ACTA has been the opaque nature of the process. Whilst DFAT has stated that a certain level of confidentiality is required for trade negotiations, and while there is ground to enable a certain degree of secrecy where complex issues warrant negotiations in confidence, there is no valid rationale for the level of secrecy that DFAT has maintained for what is essentially a copyright treaty.²⁰
- 7.27 ACTA was negotiated outside existing fora established to address IP issues, the World Intellectual Property Organization (WIPO) and the

20 The Pirate Party, *Submission 2*, p. 2.

World Trade Organization (WTO), and with an unusual degree of secrecy for an international agreement setting standards in IP law.²¹

- 7.28 ACTA is not in fact a trade agreement, it is an IP agreement, and confidentiality is not common or appropriate in IP negotiations which impact directly and in minute detail on domestic law and domestic innovation policy.²²
- 7.29 The NIA attaches a comment on consultations undertaken by DFAT over the course of negotiation of the ACTA, and notes a 'perceived' lack of transparency criticised by some stakeholders. Public consultations offered by DFAT between November 2007 and April 2010 were conducted without any public access to the draft text and negotiating documents. This lack of transparency negated meaningful public consultation, and while stakeholders were invited to make inquiries to DFAT at any time, queries as to substantive aspects of the negotiating texts were not satisfactorily answered.²³

21 Ms Kimberlee Weatherall, *Submission 3*, p. 5.

22 Ms Kimberlee Weatherall, *Submission 3*, p. 5.

23 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 9*, p. 6.

