



Amplifying the voice of the Australian open source software industry

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DFAT “myth busters” document mostly propaganda *OSIA renews call for independent modelling of CPTPP by Productivity Commission*

Open Source Industry Australia Ltd
10 March 2018

The “Comprehensive & Progressive Agreement for Trans Pacific Partnership” (CPTPP) was signed yesterday in Chile by representatives of the 11 remaining Parties, including Australia’s Minister for Trade, Tourism & Investment, Steve Ciobo, *without* the Commonwealth Government having commissioned any independent analysis or economic modelling of the treaty whatsoever.

On 21 February, DFAT released briefing material around CPTPP, including a TPP-11 background document entitled “Myth Busters: FACTS vs FICTION”¹. Despite its attention-grabbing title, that document is anything but an objective analysis of CPTPP.

‘The DFAT “Myth Busters” document is mostly a propaganda piece,’ said OSIA Company Secretary Jack Burton, ‘whilst there are some facts in it, they have been very carefully presented in a manner likely to mislead the reader on the true nature of the treaty’.

On four previous occasions^{2, 3, 4, 5}, OSIA has called for the Commonwealth Government to commission *independent* analysis of TPP and modelling of its economic impact on Australia, by the Productivity Commission or any other suitable arms-length body.

In the past the ACCC⁶, the Productivity Commission themselves⁷ and even the Senate Standing Committee⁸ have also called for the same thing. Those calls have all fallen on deaf ears.

¹ <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Documents/tpp-11-myth-busters.pdf>

² Burton, J., Holden, C. & Christie, D., *Submission to the Commonwealth Department of Foreign Affairs & Trade on the Trans-Pacific Partnership*, Open Source Industry Australia, 24 Jun 2013. Available at http://www.osia.com.au/drupal7/sites/default/files/default/osia_trans_pacific_partnership_submission_0.pdf

³ Burton, J. & Foxworthy, P., *Submission to the Commonwealth Joint Standing Committee on Treaties regarding the Trans Pacific Partnership*, Open Source Industry Australia, 11 Mar 2016. Available at http://www.osia.com.au/drupal7/sites/default/files/default/osia_sub_201603_jscot.pdf

⁴ Burton, J., *Evidence before the Joint Standing Committee on Treaties’ Inquiry into the Trans-Pacific Partnership Agreement*, Melbourne, 7 Oct 2016. Reproduced in C’t’h, *Official Committee Hansard*, Joint Standing Committee on Treaties, Trans-Pacific Partnership (public), 2016, pp. 26–30. Available at http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/a6fa4bc7-9c2e-4788-9378-e676fc0a3f53/toc_pdf/Joint%20Standing%20Committee%20on%20Treaties_2016_10_07_4491_Official.pdf;fileType=application%2Fpdf

⁵ Burton, J. & Foxworthy, P., *Submission to the Senate Standing Committee on Foreign Affairs, Defence & Trade regarding the Trans Pacific Partnership*, Open Source Industry Australia, 26 Oct 2016. Available at http://www.osia.com.au/drupal7/sites/default/files/default/osia_sub_201610_sscfadt.pdf

⁶ *ACCC submission to the Productivity Commission Inquiry into Intellectual Property Arrangement in Australia*, Australian Competition & Consumer Commission, November 2015, p. 18.

⁷ *Bilateral and Regional Trade Agreements, Research Report*, Productivity Commission, 2010.

⁸ C’t’h, Senate, Foreign Affairs, Defence and Trade References Committee, *Blind agreement: reforming Australia’s treaty-making process*, June 2015, ss. 6.22–6.24, pp. 75–76.

‘Following the signing of CPTPP today we renew that call,’ Burton continued, ‘in the hope the Commonwealth Government will commission that critical, independent analysis & modelling prior to referring the revised treaty back to JSCOT & to the Senate Standing Committee. The highly partisan nature of the propaganda about CPTPP we are now seeing released by DFAT makes it even more crucial that Parliament and its various Committees be informed by objective analysis & modelling undertaken by a credible, independent Australian body, before making decisions on CPTPP.’

Interestingly, the first “myth buster” in the DFAT document seems to anticipate that very call. It begins by touting the Peterson Institute’s forecast⁹ of 0.5% growth in Australia’s national income by 2030. The PIIIE forecast seems extremely optimistic, given that in 2014 & 2016 (when the USA was still part of TPP so the potential export markets involved were far greater) the United States Department of Agriculture¹⁰ forecast that TPP would have no measurable impact on Australia’s GDP by 2025 and the World Bank¹¹ forecast TPP yielding only 0.7% growth in Australia’s GDP by 2030.

Even if one accepts the most generous PIIIE forecast of 0.5% growth by 2030, it is important to note that that 0.5% is a gross figure. Annualised, that equates to a CAGR of only 0.042%.

‘Such meagre growth forecasts lie well within the usual margins allowed for error, so effectively CPTPP delivers no positive economic impact at all,’ said OSIA Chairman Mark Phillips, ‘the numbers just don’t add up’.

What is far more concerning about the first “myth buster” though is that it claims that the PIIIE forecast “underestimates the potential benefits of the TPP-11 because it mainly focused on tariff reductions”, implying that the non-tariff measures in CPTPP were of greater economic benefit to Australia. In fact, the tariff reductions of Chapter 2 are the *only* part of TPP that is about free trade.

‘With the exception of Chapter 2, TPP seeks to proliferate a wide range of *restrictions* on trade and on all sorts of matters unrelated to trade, as we’ve pointed out many times before’, said Burton. ‘We cannot understand how DFAT could believe that such restrictions could possibly help “break down trade barriers” when such restrictions are in effect the exact opposite of free trade.’

⁹<https://piie.com/publications/working-papers/going-it-alone-asia-pacific-regional-trade-agreements-without-united>

¹⁰Burfisher, M. E., Dyck, J., Meade, B., Mitchell, L., Wainio, J., Zhaniser, S., Arita, S. & Beckman, J., *Agriculture in the Trans-Pacific Partnership*, ERR-176, US Department of Agriculture, Economic Research Service, October 2014, Table 8, p. 21. Available at <http://www.ers.usda.gov/media/1692509/err176.pdf>

¹¹*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>






About Open Source Industry Australia Ltd

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Dangers of ISDS provisions in CPTPP are not a myth

DFAT “myth busters” document ignored the main risks

Open Source Industry Australia Ltd
11 March 2018

Following yesterday’s comments on the excuses made in DFAT’s “Myth Busters” document¹ for CPTPP’s lack of independent analysis, economic modelling or real economic benefit², today OSIA has criticised the document’s dismissive treatment of the risks of Investor-State dispute settlement (ISDS) provisions.

The “myth buster” in question focuses on “mere loss of profits” as a mooted cause for an arbitration claim. DFAT’s document correctly asserts that loss of profits alone does not meet the criteria for arbitration claims in Chapter 9 of TPP: such losses form one criterion of Art. 9.19, but the aggrieved investor must also show that the loss resulted from a breach of an obligation under Section A.

However, in presenting that “myth buster”, DFAT carefully cherry-picked as examples the *least* controversial Section A obligations—the prohibition on nationalisation without compensation & the requirement to provide due process (Art. 9.6–9.8)—completely ignoring the far more controversial provisions of Section A, such as Art. 9.10 (“Performance Requirements”), which prohibits a cornucopia of policy measures, many of which would seem desirable from an economic & industry development perspective.

‘Most Australians realise that everyone deserves due process of the law and that any investor whose assets have been nationalised deserves fair compensation’, said OSIA Chairman Mark Phillips, ‘but far fewer would see any benefit for Australia in prohibiting our Government from making sensible policies around technology transfer, domestic content, technology regulation or royalty arrangements.’

Likewise, DFAT is technically correct in asserting that the Australian Government will remain free to determine laws & policies. Under CPTPP, the Government can indeed continue to make laws as it sees fit, even where those laws breach TPP obligations, so long as the Government is willing to run the risk of having to compensate those foreign investors who suffer losses as a result.

‘DFAT has failed to recognise regulatory chill as the inevitable result of such broad ISDS provisions,’ said OSIA Company Secretary Jack Burton, ‘Most telling is the complete omission from that “myth buster” of any answer at all to the serious charge that the ISDS provisions will turn Australian companies

¹ <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Documents/tpp-11-myth-busters.pdf>

² http://osia.com.au/f/osia_cptpp_pr2a.pdf

such as OSIA's members into second class citizens in our own market: the new right of action against the Commonwealth that CPTPP creates is only available to foreign investors, *not* to Australian companies.'

OSIA has warned of the dangers of including ISDS provisions in TPP before^{3,4,5,6}, as has the Productivity Commission⁷ amongst many others.

'Given that industry are at least in theory supposed to be the intended beneficiaries when Australia enters into trade agreements', said Burton, 'it is disappointing to see DFAT publish a document dismissing off-hand the concerns around ISDS provisions that Australian industry—particularly innovative industries like the open source software sector—have raised so often over the years.'

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³s. 1.2, Item 7, p.5 in http://osia.com.au/f/osia_trans_pacific_partnership_submission_0.pdf

⁴s. 3.1, p. 6 in http://osia.com.au/f/osia_sub_201603_jscot.pdf

⁵p. 26 in

http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/a6fa4bc7-9c2e-4788-9378-e676fc0a3f53/toc_pdf/Joint%20Standing%20Committee%20on%20Treaties_2016_10_07_4491_Official.pdf;fileType=application%2Fpdf

⁶s. 3, pp. 5–7 in http://osia.com.au/f/osia_sub_201610_sscfadt.pdf

⁷pp. 274–277 in

<https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf>



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OSIA slams DFAT's brazen denial of TPP secrecy

Open Source Industry Australia Ltd
12 March 2018

DFAT's CPTPP "Myth Busters" document¹ attracted further scrutiny today when OSIA criticised the document's brazen denial—despite a widely publicised history to the contrary—of the secrecy employed throughout the TPP (and subsequently CPTPP) negotiations. This follows hot on the heels of OSIA's criticism of the document's comments on economic modelling² and ISDS³ as biased and misleading.

The DFAT document described as a myth that "The Government negotiated the deal in secret". This belies a long and well documented history of the process's near complete lack of public transparency. Indeed DFAT themselves have said the exact opposite about TPP negotiations before: in 2013 DFAT Acting First Assistant Secretary Ms Elizabeth Bowes, stated in Senate Estimates "...in fact the process whereby the negotiating texts remain confidential is consistent with standard international treaty negotiating practice so that applies across the board."⁴

The Attorney-General's Department's response to an FOI request during TPP negotiations stated: "At the start of the TPP process it was agreed that ... all participants would maintain the confidentiality of ... *the negotiating texts, proposals of each government, accompanying explanatory material, emails related to the substance of the negotiations* ... Australia has signed a letter to this effect"⁵.

Such comments directly contradict DFAT's current claim that the negotiations did not take place in secret and only strengthen the common understanding this was a secret deal, the details of which were agreed without input or review from the Australian public.

"DFAT and the government understand how deeply unpopular secret trade deals are, particularly ones containing as many questionable elements as CPTPP, but are no longer willing to admit that this is exactly how they agreed to undertake these proceedings", said OSIA Director Josh Stewart, "The

¹ <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Documents/tpp-11-myth-busters.pdf>

² http://osia.com.au/f/osia_cptpp_pr2a.pdf

³ http://osia.com.au/f/osia_cptpp_pr2b.pdf

⁴ <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F5978688-d9d0-4d41-8457-a1e7edec2726%2F0002;query=Id%3A%22committees%2Festimate%2F5978688-d9d0-4d41-8457-a1e7edec2726%2F0001%22>

⁵ <https://www.righttoknow.org.au/request/107/response/666/attach/13/Decision%20letter.pdf>

Australian public should not be locked out of the room for negotiations such as these, only permitted to see and contribute to the results after the terms are final.”

None of the five bullet points given by DFAT under this “myth” disprove it. Instead they merely assert that versions of the TPP text were released at various points. Whilst true, in each case that did not happen until after the negotiations had concluded.

During negotiations, the only industry consultation in Australia was an infrequent series of very general briefings. Without any access to draft text, such “consultation” is little more than a sham; it does not counteract the secrecy. OSIA has warned of the dangers of secret negotiation previously^{6, 7, 8}.

“We understand the original TPP secrecy was forced upon the other eleven Parties by the USTR,” said OSIA Company Secretary Jack Burton, “What we find doubly egregious is that once the US withdrawal from TPP had removed the source of that constraint, DFAT failed to insist upon genuine transparency in negotiating the new CPTPP. Negotiating these sorts of treaties in secret is outright anti-democratic.”






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http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/a6fa4bc7-9c2e-4788-9378-e676fc0a3f53/toc_pdf/Joint%20Standing%20Committee%20on%20Treaties_2016_10_07_4491_Official.pdf;fileType=application%2Fpdf