Australian Digital Alliance

# Submission to the Joint Standing Committee on Treaties inquiry on Certain Aspects of the Treaty-Making Process in Australia

Submission by the Australian Digital Alliance

Friday 31 July 2020

**SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES
ON CERTAIN ASPECTS OF THE TREATY-MAKING PROCESS IN AUSTRALIA**

The Australian Digital Alliance (ADA) welcomes the chance to comment again on the treaty-making process in Australia and thanks the Joint Standing Committee on Treaties (JSCOT) for the opportunity to make a submission.

Domestic copyright laws and other areas of Intellectual Property (IP) are increasingly impacted by obligations entered into under multilateral international treaties and free trade agreements (FTAs). As a copyright advocacy group we therefore have a strong interest in the treaty making process, and in particular the degree to which it allows adequate consultation and scrutiny of the agreements to which Australia commits. This short submission highlights our principal concerns for the benefit of JSCOT, with reference to more detailed comments made previously by the ADA in other forums.

By their nature FTAs have traditionally been negotiated with a great deal of secrecy. However, a lack of transparency around IP negotiations is almost invariably contrary to the public interest. Because of the complexity of copyright law and its wide reaching impacts, even small changes to our copyright system can have significant effects, not just on trade relationships, but on the Australian community at large. The ADA therefore continues to support adopting a cautious approach to including IP in trade agreements, especially where negotiations will be kept secret.[1] Where IP matters are within the scope of a trade agreement, transparency and adequate scrutiny must be central to the treaty-making process.

In summary, this submission will reiterate our prior calls for:

- Defaulting against inclusion of IP in FTAs
- Avoiding changes to Australian law that might upset the copyright balance
- A commitment to consultation and transparency
- A greater role for Parliament in treaty-making processes
- Avoiding legislative inflexibility by 'locking in' laws
- Avoiding scope creep during implementation.

Further discussion of each of these points follows. More detailed recommendations can also be found in our submission to the 2015 Senate Standing Committees on Foreign Affairs, Defence and Trade **Inquiry into the Commonwealth's treaty-making process**[2] and the submission to this inquiry made by the Australian Fair Trade and Investment Network (AFTINET).

Should JSCOT require additional information, analysis or evidence, the ADA would welcome the opportunity to make further comments. Our principal contact with respect to this matter is our Copyright Officer, Elliott Bledsoe, who can be reached at **elliott@digital.org.au** or on **02 6262 1118**.

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1 Supported in Australian Digital Alliance and Australian Libraries Copyright Committee. (2010). Bilateral and Regional Trade Agreements: Productivity Commission Draft Research Report, pp. 15-16. Available at **https://www.pc.gov.au/inquiries/completed/trade-agreements/submissions** and **https://digital.org.au/resources/productivity-commission-trade-agreements-draft-research-report-joint-submission/**.

2 Australian Digital Alliance and Australian Libraries Copyright Committee. (2015). Senate Standing Committee on Foreign Affairs, Defence and Trade References Committee Inquiry into: The Commonwealth's treaty-making process. Available at **https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Submissions** and **https://digital.org.au/resources/fadt-treaty-making-process-joint-submission/**.

# About the Australian Digital Alliance

The Australian Digital Alliance (ADA) provides a voice for the public interest in access to knowledge, information and culture in copyright reform debates. We are a broad nonprofit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. The ADA was founded following a meeting of interested parties in Canberra in July 1998, with our first patron being retired Chief Justice Sir Anthony Mason AC KBE QC. More than 20 years later, the ADA continues to be a respected and active participant in the Australian copyright reform debates, regarded for our depth of copyright expertise and advocacy efforts on behalf of a diverse membership.

ADA **members** span various sectors, and include universities, schools, disability groups, libraries, archives, galleries, museums, research organisations, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

Committed to copyright reform that enables fair access to content and encourages innovation and growth, the ADA provides policy advice to government and its members, supports research and publications on new copyright law and policy, monitors international trade and IP developments, and facilitates forums to discuss topical copyright issues and progressive reform.

More information about the ADA is available at **digital.org.au**.

# Defaulting against inclusion of IP in FTAs

Using FTAs as a vehicle for IP policy making undermines multilateral processes like the World Intellectual Property Organisation (WIPO),[3] a specialised international and multi-stakeholder forums advancing IP services, policy, information and cooperation globally. Where WIPO multilateral agreements typically take a high-level position on IP, trade agreements tend to be more granular in their subject matter and detailed and prescriptive in their wording,[4] which may lead to a fragmentation of international law.[5]

In addition, because copyright is a complex area of law which must strike a careful balance between the competing interests of copyright owners, copyright users and the public, the articialial monopoly inherent in IP does not always sit well with the market liberalisation agenda central to many FTAs. Copyright and IP are often secondary to wider trade goals.

For these reasons the ADA continues to support the Productivity Commission's recommendation in its 2010 Research Report on bilateral and regional trade agreements (BRTAs) that the Australian Government "… avoid the inclusion of IP matters as an ordinary matter of course in future BRTAs."[6] And we continue to support the Productivity Commission's recommendation in the same report that "IP provisions should only be included [in FTAs] in cases where a rigorous economic analysis shows that the provisions would likely generate overall net benefits for the agreement partners."[7]

# Avoiding changes to Australian law that might upset the copyright balance

Australia has a long history of carefully considered copyright reform that particularly focuses on balancing the rights of creators with those of the general public. However, the inclusion of copyright and IP in the negotiation of FTAs has the potential to undermine this approach. Agreements that require change to Australian copyright law should be entered into only rarely, after full analysis of the benefits and costs.

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3 Supported in ADA and ALCC. (2010), pp. 3 and 15.

4 Supported in Australian Digital Alliance. (n.d. a) Submission by the Australian Digital Alliance to the Senate Standing Committees on Foreign Affairs and Trade Inquiry into the proposed Trans-Pacific Partnership (TPP) Agreement, p. 4. Available at **https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP** and **https://digital.org.au/resources/fadt-tpp-inquiry-submission/**.

5 Australian Digital Alliance and Australian Libraries Copyright Committee. (2012). Submission to Joint Standing Committee on Treaties addressing the Anti-Counterfeiting Trade Agreement, p. 5. Available at **https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/21november2011/subs.htm** and **https://digital.org.au/resources/jsct-acta-submission/**.

6 Productivity Commission. (2010). Bilateral and Regional Trade Agreements, Research Report, p. 285. Available at **https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf**.

7 Productivity Commission. (2010), p. 285.

Copyright is too often seen as something that can be sacrificed for gains in more traditional trade areas (such as agriculture) with little or no regard to the economic, cultural and societal impacts on Australians. The experience of negotiating the **Australia–United States Free Trade Agreement** (AUSFTA) is a case in point. In the 174-page ***US Free Trade Agreement Implementation Act 2004 (Cth)***, more than 80 pages represented changes to copyright law.

In response to the Productivity Commission's 2010 Research Report looking at bilateral and regional trade agreements, the ADA, together with the **Australian Libraries Copyright Committee** (ALCC), commented that:

> "Prior to the AUSFTA experience, the balance in Australia's copyright regime was distilled over many years with each reform of the law going through a long process of debate and consultation with the public. This consultative process acknowledged that copyright is an extremely complex area to regulate because of the fine balance that must be struck."[8]

Occurring around the same time as the negotiation of the AUSFTA was the Commonwealth Attorney-General's Department's Digital Agenda Review looking at the operation of the ***Copyright Amendment (Digital Agenda) Act 2000 (Cth)*** and whether its objectives were being met.[9] The Digital Agenda Review provides a contrast to the AUSFTA process: the Attorney-General's Department employed a wide consultation that considered the impact of the digital agenda amendments within the framework of Australian legal history and policy, whereas the negotiation of copyright matters in AUSFTA occurred largely behind closed doors. On this comparison we commented that:

> "… the closed negotiation of copyright matters in [the] AUSFTA superseded the public inquiry of the same matters in the *Digital Agenda Review*. Consequently, most of the recommendations made in the *Digital Agenda Review* suggested legislative change that can be characterised as moving in the opposite direction to that required by AUSFTA. The recommendations largely (and rightly) adhere to the underlying government policy for balanced laws, and do not recommend change in the absence of compelling evidence demonstrating a need."[10]

Any negotiations relating to copyright must set out to preserve existing law, especially where that law facilitates legitimate commercial, social, innovative and creative activities.[11] Where changes to Australian law are necessary (e.g. to meet an objective to harmonise copyright legislation and practice) Australian negotiators should be bound to ensure that these changes are of mutual advantage to all negotiating countries, are in Australia's best interests[12]

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8 ADA and ALCC. (2010), pp. 3 and 4.

9 The Digital Agenda Review commenced in April 2003 and negotiations of the AUSFTA started in March 2003. See Commonwealth of Australia. (2004). Digital Agenda Review: Report and recommendations, p. 13. Available at **https://static-copyright-com-au.s3.amazonaws.com/uploads/2015/05/R00345-FOX-Final-reportpassword.pdf**; and Westcott, T. (2005). Foreign investment issues in the Australia-United States Free Trade Agreement, Australian Government (The Treasury). Available at **https://treasury.gov.au/publication/economic-roundup-summer-2004-05/foreign-investment-issues-in-the-australia-united-states-free-trade-agreement**.

10 ADA and ALCC. (2010), p. 3.

11 Supported in ADA. (2007), pp. 3 and 4; and Internet Industry Association, et al. (n.d.) Principles for ACTA negotiations, p. 1. Available at **https://digital.org.au/resources/principles-for-acta-negotiations/**.

12 Supported in ADA. (n.d. a), p. 1.

and minimise potential risks to established user rights in Australia.[13] As we cautioned at the ratification of the AUSFTA, harmonisation in that instance equated to unilateral action to amend Australian copyright law to more closely mirror the U.S. legislation,[14] including by extending our standard copyright term by 20 years. Even at the time there was evidence that this would result in significant harm to the rights of Australian users, evidence which has been borne out.[15]

In ratifying treaties, Australia should also be mindful of the importation of foreign terminology and concepts, and the blurring of distinct legal traditions. Where Australia does import other legal concepts, the legislative drafting should seek to place these notions within the Australian jurisprudential context. Local legislative drafting should use language that has established meaning and history within the Australian context while remaining true to the spirit of a treaty.

We encourage JSCOT to consider recommending mechanisms through which policy considerations such as the balancing of copyright interests in Australia can be incorporated into the treaty-making process.

# A commitment to consultation and transparency

The treaty-making process in Australia should be one of transparency not secrecy. Australia should avoid closed or confidential treaty negotiations, such as was the case for negotiations of the AUSFTA, the **Anti-Counterfeiting Trade Agreement** (ACTA) and the **Trans-Pacific Partnership** (TPP).[16] As noted earlier, the pushing of IP agendas through such secretive FTA processes circumvents the transparency of multilateral negotiations through WIPO.[17]

To combat these issues, details of a trade agreement should be made public and wide consultation should always be undertaken prior to the conclusion of negotiations, and certainly before the decision for Australia to become a signatory or before it is authorised for signing by Cabinet.[18] This must include public access to the official version

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13 Australian Libraries Copyright Committee and Australian Digital Alliance. (2003). Submission to Department of Foreign Affairs and Trade on the Australia-United States Free Trade Agreement, p. 2. Available at **https://digital.org.au/resources/dfat-ausfta-submission/**.

14 Australian Digital Alliance. (2004). Submission to the Select Committee Australia-United States Free Trade Agreement, p. 6. Available at **https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/freetrade/submissions/sublist** and **https://digital.org.au/resources/senate-select-committee-on-ausfta-submission/**.

15 The costs and benefits of the AUSFTA are discussed in detail in Weatherall, K. G., (2015). 'The Australia-US Free Trade Agreement's Impact on Australia's Copyright Trade Policy' (Sydney Law School Research Paper No. 15/70). *Australian Journal of International Affairs*, Vol. 69, No. 5 (7 September), pp. 538–558. Available at **https://ssrn.com/abstract=2656945**.

16 See Australian Digital Alliance. (n.d. b) Submission on the Australia-European Union Free Trade Agreement, p. 2. Available at **https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/submissions/Pages/aeufta-submissions** and **https://digital.org.au/resources/dfat-aeufta-submission/**; ADA. (2004), p. 5; ADA and ALCC. (2010), p. 4; and ADA and ALCC. (2012), pp. 5 and 6.

17 Supported in ADA and ALCC. (2010), pp. 3 and 15.

18 The ADA has extensively called for greater consultation and transparency of treaty-making processes. See for example ADA. (n.d. b), pp. 1 and 2; ADA and ALCC. (2010), pp. i and 3; ADA. (2004), p. 5; and Australian Digital Alliance. (2007). Proposal for a Plurilateral Anti-Counterfeiting Trade Agreement (ACTA), pp. 2 and 4. Available at **https://digital.org.au/resources/dfat-acta-discussion-paper-submission/**. See also IIA, et al. (n.d.), p. 1..

of the agreement, and its drafts, to ensure that all stakeholders are afforded the opportunity to make informed and informative contributions to the process.[19]

In the past we have called for a more rigorous assessment process for treaties, including independent assessments of the projected costs and benefits of trade agreements, public release of Australian government proposals and discussion papers, and public release and parliamentary discussion of the final text before it is authorised for signing by Cabinet.[20] Other related materials generated as part of the treaty-making process should also be made public where possible, such as impact modeling provided to the government.[21] Public release of such documents prior to commitment are essential to ensure adequate scrutiny of the methodology and reported outcomes for our economy, copyright system and the broader Australian community.[22]

Such open consultation also helps to ensure that due consideration and weight is given to non-economic impacts of trade decisions.[23] Given the importance of balance to Australian copyright law, it is vital that public interest perspectives be given a fair opportunity to be heard in trade negotiations.[24]

We welcome and encourage the greater public consultation and transparency exhibited in the ongoing negotiations for the **Australia–European Union Free Trade Agreement** (AEUFTA). The process of these negotiations has been a vast improvement on previous FTAs, with regular stakeholder updates and opportunities for feedback to be provided directly to negotiators.[25] This consultation has been greatly assisted by additional transparency measures adopted by the EU, such as releasing drafts of the text. We strongly urge Australia to adopt similar measures as part of its own treaty-making process for future trade negotiations.[26]

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19 See Australian Digital Alliance. (2010). Anti-Counterfeiting Trade Agreement: Impact on Individuals and Intermediaries, p. 1. Available at **https://digital.org.au/resources/dfat-acta-submission/**.

20 See ADA. (n.d. b), p. 2.

21 The ADA supports Recommendation 6 of the government's Competition Policy Review (the Harper Review), which states:

> "A separate independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.
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> ...
>
> Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded": Harper, I, et al. (2015). *Competition Policy Review: Final Report*, p. 41. Available at **https://treasury.gov.au/publication/p2015-cpr-final-report**; supported in ADA. (n.d. a), p. 11.

22 Supported in ADA. (2004), p. 6 in relation to modeling of the impacts of the AUSFTA; and in ADA and ALCC. (2012), p. 5 in relation to National Interest Analyses considering implications of ratification of ACTA for the Australian community.

23 Supported in ADA and ALCC. (2010), pp. 13 and 14; and ADA. (2004), p. 6 in relation to modeling of the impacts of the AUSFTA.

24 Supported in ADA. (2010), p. i.

25 ADA. (n.d. b), pp. 1 and 2.

26 Supported in ADA. (n.d. b), p. 2.

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# A greater role for Parliament in treaty-making processes

Parliamentarians (and through them their constituents) are afforded little opportunity to exert influence over Australia's trade commitments. As we have stated before:

> "Parliament has a limited role in treaty making: it is unable to influence the negotiation process, the terms, or even the decision of ratification. The ability of Parliament to influence the implementing legislation is too little too late. It gives no ability to influence the terms of the treaty and limits public discourse to whatever flexibility may be found within the interpretation of those terms."[27]

Parliament is not brought into the process until the drafting and passage of legislation to ratify a trade agreement occurs. Important decisions during the negotiation of trade agreements are instead left to representatives of the Department of Foreign Affairs and Trade (DFAT) under a mandate from the executive government. Such officials' actions and decisions are not subject to external scrutiny despite their potential impact on the development of Australia's legal system and economy.[28]

While the establishment of JSCOT itself was intended to address this problem, the manner in which it is constituted limits its ability to make a meaningful impact. For example, the Committee is excluded from negotiations, is limited to reviewing concluded agreements, and is given only a short time to inquire and report on complex trade deals.[29] As such, we reassert two recommendations we made in earlier submissions that:

- "JSCOT, as the representative of Parliament, should be given greater powers to play an active role in the negotiation process, including but not limited to, the mandate of public servants responsible for the negotiations"[30]
- "regular independent and transparent assessments of Australia's national interests, economic and noneconomic, should be a key part of the negotiation process. An assessment should be made of early proposals, the draft text, and the final concluded text and provided to JSCOT. The Productivity Commission would be best placed to make such assessments."[31]

27 ADA and ALCC. (2010), p. 14.

28 Supported in ADA and ALCC. (2010), p. 14.

29 See ADA and ALCC. (2010), pp. 14 and 15.

30 ADA and ALCC. (2010), p. 15.

31 ADA and ALCC. (2010), p. 15.

# Avoiding legislative inflexibility caused by 'locking in' laws

Committing ourselves under trade agreements can have the consequence of entrenching copyright law, locking in provisions that are difficult to amend and may stagnate as technological developments leave them behind.[32] The issue is compounded in situations where obligations are duplicated across multiple agreements, creating an almost impenetrable barrier to future amendments.[33]

We have argued in the past that "… there are actual costs to Australia when Australia agrees even to provisions that match current Australian law – because every new agreement reduces Australia's flexibility to make changes to its domestic regime",[34] and this still rings true. Given the propensity for trade agreements to hamper future reform activities, the fact that an FTA will not result in amendments to our laws should not be viewed as sufficient grounds for committing to it.[35] As technology and consumer behaviour develops, it is necessary to update copyright law. Such updates become difficult or impossible if doing so runs contrary to obligations under an existing trade agreement.[36] Future law reform should not be hamstrung by a stance taken in the negotiation of an FTA.

There is also an increasing risk that trading partners will use provisions in international agreements to directly influence domestic lawmaking. In addition to the well known example of Investor State Dispute Settlement (ISDS) cases,[37] the currently stalled South African *Copyright Amendment Bill [B13B-2017]* serves to illustrate this point. Whilst the bill has been passed by the South African Parliament, it has stalled at the assent stage due to pressure from US and EU trade representatives relating to the introduction of enhanced rights for local users and authors.[38]

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32 Supported in ADA. (n.d. b), p 3; ADA. (2007), p. 3; and ADA. (n.d. a), p. 3.

33 See IIA, et al. (n.d.), p. 2.

34 ADA and ALCC. (2010), p. 3; and ADA and ALCC. (2012), p. 4.

35 Supported in ADA and ALCC. (2012), p. 8.

36 ADA and ALCC. (2012), p. 3.

37 For example, the suit by Philip Morris against the Australian government over plain packaging cigarette laws. In a submission to the Senate Foreign Affairs, Defence and Trade Committee we commented that the case shows that "… companies are not shy about making use of ISDS provisions to protect their IP. The TPP will only make such suits more likely, as it opens Australia up to ISDS suits by US companies, who are currently the largest users of this mechanism": ADA. (n.d. a), pp. 3 and 4. Further, "… even if the likelihood of success seems low, with the cost of ISDS suits stretching into the hundreds of millions, the mere threat of litigation could have a significant chilling effect on future copyright reform in Australia": ADA. (n.d. a), p. 4.

38 See Office of the United States Trade Representative. (2019). USTR Announces GSP Enforcement Actions and Successes for Seven Countries. Available at **https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement**; and Kayali, L. (2020). How the U.S. and European Union pressured South Africa to delay copyright reform, *POLITICO*. Available at **https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101**.

To reduce lock in, Australia should avoid overly prescriptive terms in IP chapters of trade agreements[39] that would further reduce our ability to make changes to our laws in response to technological and cultural change in the future. At a minimum Australia should ensure that agreements recognise each signatory country's right to shape their own domestic IP and technology policies, and preserve sufficient discretion for signatories to do so.[40]

# Avoiding scope creep during implementation

Finally, when implementing trade agreements, Australia must be vigilant that legislative amendments serve the stated purpose in the agreement only.[41] To the extent possible a liberal interpretation of texts should be adopted to limit unnecessary changes to domestic legislation. Implementing legislation should aim to make changes to meet only those obligations that are deemed absolutely necessary to satisfy a treaty.

39 Supported in ADA. (n.d. b), pp. 1 and 3.

40 Supported in ADA. (2007), p. 4.

41 Supported in ADA. (2007), p. 4.

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The ADA acknowledges the traditional custodians of country throughout Australia and their continuing connection to land, waters and community. We pay our respects to their cultures, country, and elders both past and present.

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