

The National Interest Analysis

Introduction

- 3.1 The Committee's examination of treaties is generally guided by an assessment of a particular treaty's benefits contained in the NIA, which is tabled in Parliament along with the treaty.
- 3.2 The ACTA NIA has been the subject of extensive criticism by participants in the inquiry. The most significant criticism relates to the lack of evidence to support the claims made in the NIA, and the fact that the NIA, and on a number of occasions, Government witnesses, claimed that no legislative change would be required to implement ACTA. This chapter will examine these criticisms.

Evidence of the problem

- 3.3 The purpose of ACTA is to help counter the problem of counterfeiting and IP infringement. Critics claim, however, that the NIA does little to demonstrate the scale of the problem as it affects Australia and therefore the need for Australia to sign a new treaty.
- 3.4 The NIA does refer to statistics from the Organisation for Economic Co-operation and Development (OECD) that international trade in counterfeit and 'pirated' materials is growing and that the global value of this in 2007 was A\$250 billion.¹

1 NIA, para 6.

- 3.5 The study cited found that the share of counterfeit goods in world trade is estimated to have increased from 1.85% in 2000 to 1.95% in 2007.² Critiques of this study point out that this increase was largely accounted for by the average growth in trade in the types of goods and exports from countries most likely to generate counterfeit goods.³
- 3.6 The NIA also notes that the value of border seizures in Australia of alleged counterfeit products was A\$26 million in the 2009-10 financial year.⁴ However, as pointed out by a submitter to the Committee's inquiry, this amount represents only 0.01% of the A\$258,655 million value of all imports into Australia for the same period.⁵
- 3.7 Other submitters told the Committee that:
- ...the National Interest Analysis contains no independent analysis of the costs and benefits of ACTA nor does it contain evidence of the IP enforcement issues currently experienced by Australian IP owners in the countries negotiating ACTA to justify the [Agreement]...⁶
- 3.8 And:
- ... transparency is missing from the NIA and it also does not include defensible evidence-based information to back up unsubstantiated claims of harm to Australia's industry. Key definitions, some related to criminal sanction and others that may affect Australian industry are also missing.⁷
- 3.9 The problem of reliable evidence is not limited to Australia. The United States Government Accountability Office (GAO) Report to Congressional Committees on Intellectual Property (*Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*) of April 2010 identified that statistical evidence for the size of the counterfeiting problem arose from unsubstantiated estimates.⁸

2 The OECD statistics are examined in greater detail by Dr Hazel Moir, *Submission 4*, p. 2.

3 Dr Hazel Moir, *Submission 4*, p. 2.

4 NIA, para 10.

5 Dr Hazel Moir, *Submission 4*, p. 2.

6 Ms Ellen Broad, Executive Officer, Australian Libraries Copyright Committee and Australian Digital Alliance, *Committee Hansard*, 19 March 2012, p. 1.

7 Ms Anna George, *Submission 10*, pp. 2-3.

8 Discussed by Dr Hazel Moir, *Submission 4.1*, p. 2.

- 3.10 The paucity of evidence for the size of the problem listed in the NIA weakens the case for signing ACTA, leading critics to claim that the justification for the treaty is an article of faith rather than evidence.⁹
- 3.11 On several occasions, Committee members asked Government witnesses why no assessment of the economic benefits of ACTA had been made. The Government's response can be summarised with the following quote:
- There were some questions put to the committee about the need for a cost-benefit study. We can again confirm that the Office of Best Practice Regulation was consulted on the issue of a regulation impact statement and had determined that such an examination was not appropriate given there was no regulatory change involved.¹⁰

Exporting domestic standards

- 3.12 Another benefit of ACTA identified in the NIA without supporting evidence is the claim that the internationalisation of Australia's domestic IP regime will benefit Australian IP holders.¹¹ Whether Australia's present domestic standards are appropriate was contested by some witnesses.
- 3.13 Australia's current domestic IP regime is based on Australia's obligations under the 2004 Australian United States Free Trade Agreement (AUSFTA). According to the Australia Digital Alliance and the Australian Libraries Copyright Committee the IP standards implemented under AUSFTA have generated net costs on Australia:

In 2004, the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America cited concerns that the AUSFTA 'prevents Australia from retreating from this position in future and implementing policies and laws which do not accord with the provisions of AUSFTA' The entrenchment of these IP standards in subsequent

9 Dr Matthew Rimmer, *Submission No 1.1*, p 6; The Pirate Party, *Submission 2*, p. 11; and Ms Kimberlee Weatherall, *Submission 3*, p. 8.

10 Mr George Mina, Assistant Secretary, Trade Policy Issues and Industrials Branch, Office of Trade Negotiations, Department of Foreign Affairs and Trade, *Committee Hansard*, 7 May 2012, p. 34.

11 NIA, para. 11.

negotiations of the ACTA ... further restricts Australia's ability to implement flexible IP reform.¹²

- 3.14 The Australian Department of Foreign Affairs and Trade's (DFAT) negotiating position simply assumes that existing Australian standards are appropriate for an international agreement.¹³
- 3.15 In its 2010 report, the Productivity Commission cautioned against adopting IP provisions that are of main interest to other parties. According to the Australia Digital Alliance and the Australian Libraries Copyright Committee, the main beneficiaries of ACTA's IP enforcement standards will be in net IP exporting countries.¹⁴
- 3.16 Australia's ability to make legislative changes based on recommendations by bodies like the Australian Law Reform Commission, with due consideration of the benefits and costs inherent in Australia's existing IP regime, may be diminished by a negotiating stance that assumes existing IP standards in Australia are suitable.¹⁵

Evidentiary issues – Committee view

- 3.17 The NIA was inadequate in providing an economic assessment of the agreement and this hindered the Committee's assessment of ACTA's costs and benefits for Australia.
- 3.18 The Committee recommends that, in future, NIAs of treaties clearly intended to have an economic impact include an assessment of the economic benefits of the treaty, or, if no assessment of the economic benefit of a treaty has been undertaken, a statement to that effect, along with an explanation as to why it was not necessary.

12 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 9*, p. 4.

13 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 9*, p. 4.

14 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 9*, p. 4.

15 Australian Digital Alliance/ Australian Libraries Copyright Committee, *Submission 9*, p. 4.

Recommendation 1

That National Interest Analyses of treaties clearly intended to have an economic impact include an assessment of the economic benefits and costs of the treaty, or, if no assessment of the economic benefit of a treaty has been undertaken, a statement to that effect, along with an explanation as to why it was not necessary or unable to be undertaken.

- 3.19 The problem presented by the lack of evidence is succinctly put by Dr Moir:

It is not possible to comment sensibly on ACTA without first reviewing the extent of the alleged problem with respect to counterfeit trademarks and unauthorised use of copyright.¹⁶

- 3.20 While the Committee believes that the problem ACTA seeks to address is real, it is not possible to reach an evidence based decision as to whether the agreement is in Australia's interests or not using the information provided by DFAT and other Government witnesses.

- 3.21 The ACTA NIA illustrates a flaw in the process of developing NIAs. Clearly, ACTA is an agreement intended to provide an economic benefit to Australians, yet, because it does not require a Regulation Impact Statement, no effort has been made to develop the economic case for the Agreement.

Recommendation 2

That the Australian Government commissions an independent and transparent assessment of the economic and social benefits and costs of the *Anti-Counterfeiting Trade Agreement*.

Legislative change

- 3.22 The most consistent charge levelled at the NIA is that its claim of 'no new legislative measures are required to implement obligations under ACTA in Australia' is misleading and, according to some submitters, incorrect.

16 Dr Hazel Moir, *Submission 4*, p. 1.

- 3.23 Alphapharm expressed a number of concerns about the NIA specifically the 'no new legislative measures...' claim:

Alphapharm disagrees. An analysis undertaken at its request by Dr Luigi Palombi from the Regulatory Institutions Network at the Australian National University advises that significant changes will need to be made to Australia's patent laws if ACTA is ratified and is complied with.¹⁷

Alphapharm also sought the independent advice of eminent senior counsel, the Hon. Mr Robert Ellicott Q.C., a former Commonwealth Solicitor-General, Attorney-General and Judge of the Federal Court of Australia.¹⁸

- 3.24 Alphapharm's criticisms are particularly pertinent as Alphapharm supports the treaty's intent but has difficulty accepting it in its current form.¹⁹

- 3.25 Dr Luigi Palombi, too, questioned the veracity of this claim arguing that it presented a contradiction:

The NIA contains an inherent contradiction which, if true, undermines both the credibility of ACTA and the process employed throughout its negotiation. At para 7 the NIA states: "No new legislative measures are required to implement obligations under ACTA in Australia." Yet at para 6 it states: "ACTA is an important initiative, as existing IP enforcement standards in the World Trade Organization (WTO) have been insufficient to diminish the growth in international trade in counterfeit and pirated materials." One might ask: "how can it be that 'existing IP enforcement standards' have been ineffective in dealing with the 'international trade in counterfeit and pirated materials' and yet there be no need for 'new legislative measures'?"²⁰

- 3.26 Ms Anna George also questioned the 'no new legislative measures...' claim:

To summarise, the crux of the NIA assessment is attached to the claim that 'no new legislative measures are required to implement

17 Alphapharm, *Submission 5*, pp. 3-4.

18 Alphapharm, *Submission 5*, pp. 3-4. These opinions were included in the Alphapharm Submission.

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

20 Dr Luigi Palombi, *Submission 7*, p. 2.

obligations under ACTA in Australia'. As a National Interest Analysis it simply ignores and minimises the nature of this ACTA Treaty.²¹

I question th[is] claim ... and that the content of the NIA fulfils the obligation of providing a substantive assessment of Australia's national interest...²²

3.27 Moreover:

The key NIA assessment: 'No new legislative measures are required to implement obligations under ACTA in Australia' - this is too narrow a basis, by itself, for assessing national interest.

- The NIA adopts a very blinkered approach to how IP - a rights-based economic monopoly - actually operates. Unlike other property rights, IP has a long tail of legal and financial consequences affecting economic and social policy and intrudes, in complex ways, into private lives.
- By actively supporting the development of ACTA, a particular policy position has been pursued. This IP policy has an effect on Australia's other foreign, trade and security priorities. Nowhere are these issues addressed in the NIA.²³

3.28 The Committee is concerned that the absolute nature of DFAT's statement may be misconstrued as being a broader statement than it actually is. In particular, the Committee is concerned that the statement may be construed as extending to the scope of enforcement activities.

3.29 The two key issues from the Committee's point of view are the scope of operational circumstances, and the role of the ACTA Committee in the interpretation of the Agreement.

Operational circumstances

3.30 The fact that ACTA might not require new legislation does not mean it will not lead to changes in operational policies that will impact on such parties.²⁴

3.31 An example examined in some detail during the evidence gathering process relates to the process for seizing alleged counterfeit shipments by the Australian Customs and Border Protection Service.²⁵

21 Ms Anna George, *Submission 10*, p. 9.

22 Ms Anna George, *Submission 10*, p. 1.

23 Ms Anna George, *Submission 10.1*, p. 2.

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

- 3.32 According to the Australian Customs and Border Protection Service the process for seizing alleged counterfeit shipments ‘begins with an IP holder advising ... that they suspect a particular shipment contains counterfeit goods.’ The Australian Customs and Border Protection Service then holds the shipment pending an analysis of its contents.²⁶
- 3.33 According to the Australian Customs and Border Protection Service, the number of notifications of this sort is rising steadily, but the Department does not expect ACTA to have an impact on the number of notifications.²⁷
- 3.34 Once again, there is no detailed modelling on which to base this assumption. It is possible for a dispassionate observer to reach the opposite conclusion in relation to a number of the enforcement aspects of ACTA. In other words, DFAT’s commitment in relation to legislation would not prevent a noticeable change in the operational approach to its enforcement. While this would not be a legislative change, it would be a change in the regulatory environment resulting from the implementation of ACTA.

The ACTA Committee

- 3.35 Article 36 of ACTA requires the establishment of an ACTA Committee comprising a representative of each party to the Agreement, the functions of which include reviewing the Agreement, assisting with its implementation, and considering amendments to the Agreement.
- 3.36 A number of participants in the inquiry noted that the Article permits the ACTA Committee, in performing its functions, to make recommendations regarding the implementation and operation of this Agreement.²⁸
- 3.37 Participants expressed concern that less well defined provisions of ACTA could be fleshed out through guidelines on an ongoing basis, with possible amendments in the longer term. To reinforce this concern, other functions of the ACTA Committee, such as promoting cooperation, where appropriate, among competent authorities, and the regular meetings and exchange of information about enforcement practices envisioned for the

25 Mrs Sharon Nyakuengama, Senior Trade Advisor, Cargo and Trade Division, Australian Customs and Border Protection Service, *Committee Hansard*, 19 March 2012, p. 25.

26 Mrs Sharon Nyakuengama, Senior Trade Advisor, Cargo and Trade Division, Australian Customs and Border Protection Service, *Committee Hansard*, 19 March 2012, p. 25.

27 Mrs Sharon Nyakuengama, Senior Trade Advisor, Cargo and Trade Division, Australian Customs and Border Protection Service, *Committee Hansard*, 19 March 2012, p. 25.

28 ACTA, Article 36.

ACTA Committee, creates the basic framework within which more detailed enforcement mechanisms can be developed over time.²⁹

- 3.38 It is possible for a circumstance to arise in which the development and entrenchment of guidelines that qualify provisions of ACTA could lead to a requirement for legislative change in Australia without amendments to the underlying treaty. Such changes would consequently occur without the benefit of public scrutiny required by a treaty making process.

Legislative change – Committee view

- 3.39 The fact that Australia is already fully compliant with ACTA has been portrayed in the NIA as a distinct advantage to Australia. As was the case with the economic advantages of ACTA, this fact is not substantiated with evidence. Participants in the inquiry have contested this statement.
- 3.40 In addition, participants in the inquiry have pointed out that Australia's compliance with ACTA does not by any means guarantee that regulatory activity in Australia will remain unchanged by ACTA. The Committee is of the view that witnesses have identified at least two mechanisms by which Australia's approach to enforcement of copyright and IP could be changed. While such changes would not be legislative, they would still have an impact on the people concerned.
- 3.41 A principal focus of this Committee in assessing treaties has been the effect a treaty has on members of the community, regardless of whether those effects are caused by legislative change or not. The Committee would like NIAs to reflect on all possible effects on members of the community, including those that occur for reasons other than legislative change.
- 3.42 Consequently, the Committee urges that in future, NIAs identify potential changes to the domestic administration of issues dealt with in a treaty, regardless of whether the treaty requires legislative change.

29 Ms Kimberlee Weatherall, *Submission 3*, p. 17.

