Submission to the Senate Standing Committee on Foreign Affairs, Defence & Trade regarding the "Comprehensive & Progressive agreement for Trans Pacific Partnership"

Open Source Industry Australia Ltd

Amplifying the voice of the Australian open source software industry

Lodged 31 May 2018

About OSIA

OSIA represents & promotes the Australian open source software 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 software 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

1 Executive summary

OSIA welcomes this further opportunity to comment on the "Comprehensive & Progressive agreement for Trans Pacific Partnership" (CPTPP) and we thank the Committee for that opportunity. As we have said publicly already[1], we trust that the present inquiry will bring much needed perspective on this controversial & divisive treaty.

OSIA represents Australia's free[2] and open source[3] software (FOSS) industry. Our members have grave concerns about the consequences ratifying CPTPP would have for our industry sector, for the Commonwealth and for the Australian public at large. We have closely followed the development of TPP through to its current form as CPTPP and whilst we welcome the suspension of some of the most objectionable provisions of TPP, there remains much in the text that is contrary to the interests of our members and Australia in general.

We question the motivations behind suspending certain provisions from the TPP rather than providing certainty by removing them. The failure to remove these only casts doubts upon the future of the agreement and creates uncertainty for investment by Australia businesses. Two years on from our last submission to the Committee, it beggars belief that the Commonwealth has still not referred the treaty to the Productivity Commission for independent Australian economic analysis & modelling.

The economic modelling performed overseas to date suggests that TPP would have had somewhere between no measurable impact (0.00%) and negligible difference (0.05% CAGR) to the Australian economy. Without the United States, the economic benefit of CPTPP (if indeed there is any) will no doubt be even less. OSIA cannot support an agreement that enforces new obligations on Australia and Australian businesses without returning any demonstrable benefit. Surely Australia's sovereignty must be worth a great deal more than that.

The investor-state dispute settlement (ISDS) provisions turn Australian companies into second class citizens in our markets and mischaracterise "investment" to include the vast majority of everyday operational transactions undertaken in our industry. The risk of having to defend or settle ISDS actions seems likely to deter the Commonwealth from pursuing sensible future domestic policy reform initiatives in a range of areas.

Many of the provisions that remain in the Electronic Commerce Chapter will not only stifle future Australian legislation in critical areas of technology law, but risk making Australian businesses uncompetitive in a global market consisting of countries without such restrictions. The Intellectual Property Chapter contradicts its own stated aims and includes such ludicrous provisions as prohibiting the Commonwealth from using software that is already in the public domain.

Both TPP and CPTPP were negotiated in secret, with neither industry nor Parliament having access to the text until the deal had already been sealed and was no longer open to amendment.

To add insult to injury, the Department of Foreign Affairs & Trade (DFAT) have put out propaganda material which mischaracterises many of our (and many other stakeholders') criticism of TPP as "myths", without providing any evidence & logical arguments that prove those criticisms false. This is the same agency that produces the supposedly objective National Interest Analyses (NIAs): the conflict of interest is obvious.

All this is very sad, because TPP could—and we believe should—have presented a golden opportunity for the 11 or 12 Parties to negotiate a *genuine* free trade agreement: one whose sole purpose is the reciprocal elimination of all tariffs & quotas. Our members would have been strong supporters of such a treaty: just as we are great proponents of freedom in software, so too most of the FOSS industry supports freedom in other worthy endeavours, including international trade. But TPP is manifestly not about free trade: whilst Chapter 2 speaks to free trade, the remaining 93%–97% of the deal is about imposing *restrictions* on trade and restrictions on many other endeavours (whether related to trade or not).

For all those reasons we find CPTPP, like TPP before it, to be wholly unsuitable. Accordingly, we offer the recommendations set out in the next section.

1.1 Recommendations

OSIA recommends today regarding CPTPP exactly what we recommended on TPP in 2016, namely that:

1. Australia should not ratify TPP[4].

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).

[1] OSIA press release, *OSIA welcomes Senate inquiry into CPTPP*, 29 March 2018: http://osia.com/au/f/osia_cptpp_pr4.pdf

[2] "Free software" has nothing to do with price. In this context, "Free" refers to *freedom*, specifically, four essential freedoms that a software licence must bestow on the licensee, as described in the Free Software Definition. See Stallman, R., *What is Free Software?*, Free Software Foundation. Available at http://www.gnu.org/philosophy/free-sw.en.html

[3] Perens, B., *Open Source Definition*, Open Source Initiative, 1998. Available at http://opensource.org/osd

[4] nor any derivative thereof.

2 Impact on Australia's economy & trade

2.1 Free trade (or lack thereof)

Free trade means the absence of restrictions on trade. The point of a free trade agreement is to remove restrictions on trade between its Parties and to prohibit reinstatement of any restrictions on trade between the Parties in future.

Free trade is good for business, good for consumers and good for markets in general: it provides consumers with greater choice; it fosters competition in the market, which in turns tends to drive up efficiency, drive down prices and foster innovation; and it allows businesses to sell into larger markets, thereby helping them grow more rapidly.

Tariffs & quotas are anathema to free trade. Tariffs restrict international trade by pricing overseas players out of the market (or at least making them far less competitive that they would be otherwise). From a free market perspective, quotas are even worse: a direct manipulation of the market by governments restricting the volume or value of goods & services traded.

Therefore, the removal of tariffs & quotas and the prohibition of their future reinstatement constitute the purpose of any genuine free trade agreement.

OSIA's members overwhelmingly support Australia entering into genuine free trade agreements with any & all comers and we also commend the Commonwealth on the programme of *unilateral* tariff reduction/elimination it has enacted over the past few decades.

However, our members do not and will never support Australia entering into treaties designed to *restrict* trade or other endeavours. Furthermore, we condemn as fundamentally dishonest any treaty designed to restrict trade which has the gall to masquerade as a free trade agreement. Sadly, CPTPP is such a treaty.

Chapter 2 ("National treatment & market access") and its associated annexes do indeed contain free trade measures, so naturally we support those.

The remainder—indeed the overwhelming majority, at least 93%—of the treaty proposes measures designed to restrict trade and to restrict other endeavours (some of which are not even related to trade).

As such, we see CPTPP, like TPP before it, as almost exclusively the *opposite* of free trade. Therefore we call upon the Committee to recommend against ratifying CPTPP.

This is not a new call. We made the same recommendation to DFAT in 2013[5], to the Productivity Commission in 2015[6] & June 2016[7] (twice[8]), to JSCOT in March 2016[9], June 2016[10] & April 2018[11], to this Committee in 2016[12] and in various other public statements[13] and we reiterate it now.

[5] 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 June 2013 (hereafter "Burton, Holden & Christie"), pp. 3–5. Available at: http://osia.com.au/f/osia_trans_pacific_partnership_submission_0.pdf

[6] Forsstrom, A. & Burton, J., *Submission to the Productivity Commission's inquiry into intellectual property arrangements*, Open Source Industry Australia, 30 November 2015 (hereafter "Forsstrom & Burton"), pp. 9–10. Available at: http://osia.com.au/f/productivitycommisionreport.pdf

[7] Burton, J. & Foxworthy, P., *Final submission to the Productivity Commission's inquiry into intellectual property arrangements*, Open Source Industry Australia, 3 June 2016. (hereafter "Burton & Foxworthy, PC/IP submission"), pp. 19–20. Available at: http://osia.com.au/fd/osia_sub_201605_pc_ip.pdf

[8] Burton, J., Foxworthy, P. & Jitnah, D., Appearance before the Productivity Commission's public hearing of its Inquiry into Intellectual Property Arrangements, Melbourne, 23 June 2016. Reproduced in Koppel, J. & Chester, K., *Productivity Commission—Inquiry into intellectual property arrangements—transcript of proceedings at Productivity Commission, Melbourne on Thursday, 23 June 2016 at 8.49AM*, Productivity Commission, 2016 (hereafter "2016 PC/IP testimony"), pp. 452–453. Available at: http://www.pc.gov.au/inquiries/current/intellectual-property/public-hearings/20160623-melbourne-intellectual-property.pdf

[9] Burton, J. & Foxworthy, P., *Submission to the Commonwealth Joint Standing Committee on Treaties regarding the Trans Pacific Partnership*, Open Source Industry Australia, 11 March 2016 (hereafter "Burton & Foxworthy, 2016 JSCOT submission"), p. 4. Available at: http://osia.com.au/f/osia_sub_201603_jscot.pdf,

[10] Burton, J., Appearance before the Joint Standing Committee on Treaties' pubic hearing of its Inquiry into Trans-Pacific Partnership Agreement, Melbourne, 7 October 2016. Reproduced in Cth, *Official Committee Hansard*, Joint Standing Committee on Treaties, Trans-Pacific Partnership Agreement (public), 2016 (hereafter "2016 JSCOT testimony"), 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.

[11] Burton, J. & Phillips, M., *Submission to the Commonwealth Joint Standing Committee on Treaties regarding the "Comprehensive & Progressive agreement for Trans Pacific Partnership"*, Open Source Industry Australia, 20 April 2018 (hereafter, "Burton & Phillips, 2018 JSCOT submission"), pp. 4 & 8. Available at: http://osia.com.au/f/osia_sub_201804_jscot.pdf

[12] 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 October 2016 (hereafter, "Burton & Foxworthy, 2016 Senate submission"), p. 5. Available at: http://osia.com.au/f/osia_sub_201610_sscfadt.pdf

[13] e.g. OSIA press release, *CPTPP is a ticking time bomb*, 23 February 2018: http://osia.com.au/f/osia_cptpp_pr1_0.pdf and OSIA press release, *OSIA calls for genuine free trade instead of 'Byzantine' CPTPP*, 2 May 2018: http://osia.com.au/f/osia_cptpp_pr5_0.pdf.

2.2 Economic benefit (or lack thereof)

2.2.1 Failure to commission independent Australian modelling

As noted previously[14] and in Section 6.2.4, it is concerning that after all this time the Commonwealth has still not commissioned any independent Australian economic analysis & modelling of the impact ratifying TPP (neither TPP-11 nor TPP-12 before it) would have on Australia's economy, a task we note again that the Productivity Commission would seem ideally placed to undertake.

We note and agree with the comments made by the ACCC[15] calling for a comprehensive & robust analysis of the actual impacts of TPP's IP Chapter.

OSIA contends that in the absence of credible Australian economic analysis & modelling of the treaty as a whole showing substantial benefit to Australia, the Commonwealth should not enter into any broad-ranging treaty like CPTPP.

Our view would be different if CPTPP had been a genuine free trade agreement. But as the vast majority of the deal consists of restrictive measures unrelated to free trade, "blind agreement", as the Committee itself once so aptly put it[16] strikes us as wholly inappropriate.

2.2.2 Failure to create economic benefit

By their very nature, trade agreements are intended to provide economic benefit to all Parties and CPTPP ought to be no different in this regard. Concerningly however, economic modelling by the USDA showed that TPP would have no measurable impact (0.00%) on Australia's GDP by 2025. Economic modelling by the World Bank showed only a 0.7% total (0.05% CAGR) by 2030—well within the margins usually allowed for error in this type of study.

With the TPP Party having the best export prospects for Australian companies (the United States) having withdrawn from the deal, it can only be guessed (in the absence of any independent modelling undertaken since the CPTPP text was released) that the impact of CPTPP on Australia's GDP would likely be even less—given that the US withdrawal caused TPP's scope to shrink from 40% of global trade to only 13.4%—potentially even negative over the next 10 to 15 years.

If the Commonwealth has its own modelling that is counter to those performed by the USDA and World Bank, this has not been made public. That it is not a core component of the Senate's inquiry implies that no credible positive modelling exists, which raises significant "red flags" as to the value this trade agreement will have for Australia. If CPTPP cannot be demonstrated, through detailed modelling, to have substantial economic value, clearly it should not be considered for ratification.

Whilst OSIA acknowledges the significant investment of time that has gone into the negotiations of both TPP and CPTPP, we urge caution that this should not be mistaken for a valid argument to ratify the agreement in the absence of any evidence of its benefit. Whilst individual fields may (or may not) see benefits, the Senate must consider the agreement holistically. If it cannot demonstrate a net positive impact for the nation's economy, Australia should not proceed with such a long term, wide reaching commitment. Even the most generous TPP-12 forecast—a paltry 0.05% CAGR—is not a sufficient price at whch to sell off Australia's sovereignty.

2.3 Economic & investment uncertainty

One of the core aims of any trade agreement is to help provide certainty around future direction, legislation and public sector decisions. Such certainty helps the private sector in determining medium and long term investments that benefit our economy, our workforce and our overall prosperity.

Unfortunately, by failing to remove problematic provisions and instead electing merely to suspend them, CPTPP has done just the opposite of this. Whilst it may not be the current government's intention to activate any of the suspended provisions, that they remain in the text at all indicates that their reinstatement is a genuine possibility that is at least open to consideration for future changes. Concerningly, the text of CPTPP Art. 2 does not define the process for how these suspensions are to be reviewed at any point in the future, nor how they can ever be made an active part of the agreement. Such ambiguity should not be a part of any trade agreement. Therefore OSIA calls upon the Committee to recommend against the Commonwealth ratifying CPTPP.

Combined, these concerns demonstrate how, contrary to the desired outcomes of a trade agreement, CPTPP has created further doubt around the areas of intellectual property and investment (amongst others). The shadow that these

[14] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 2.3, p. 5; also: Burton, Holden & Christie, *op. cit.*, p. 7; Forsstrom & Burton, *op. cit.*, pp. 10-11; Burton & Foxworthy, 2016 JSCOT submission, *op. cit.*, p. 4; 2016 JSCOT testimony, pp. 26 & 30.; OSIA press release, *DFAT "myth busters" document mostly propaganda*, 10 March 2018: http://osia.com.au/f/osia_cptpp_pr2a.pdf; OSIA press release, 29 March 2018, *op. cit.*; and OSIA press release, 2 May 2018, *op. cit.*

[15] *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

[16] Cth, Senate, Foreign Affairs, Defence & Trade References Committee, *Blind agreement: reforming Australia's treaty-making process*, June 2015, ss. 6.23–6.24, pp. 75–76.

doubts cast over some of the most concerning areas of TPP (albeit presently suspended under CPTPP) is something that should be of major concern to any government considering this trade agreement.

3 Effect of Investor-State Dispute Settlement

The CPTPP suspensions of a few provisions in TPP Chapter 9 ("Investment") relate only to two specific types of instrument—"investment agreements" and "investment authorisation" (both defined in Art. 9.1)—neither of which were of great concern to OSIA, as our members were unlikely to have been affected by those specific provisions.

Much to our chagrin, the balance of the Chapter 9, including the highly controversial investor-state dispute settlement (ISDS) provisions, remains unchanged.

OSIA views the ISDS provisions as unnecessary, inappropriate, discriminatory, overly risky and in general unacceptable, as we have noted on multiple occasions over the last five years[17], for all the reasons outlined in the remainder of this section.

It is a view that is also shared by many other stakeholders, most notably the Productivity Commission[18] who have also repeatedly recommended against including ISDS provisions in any trade agreement.

ISDS provisions operate by granting a new right of action against the Commonwealth to foreign investors whose Australian investments suffer as a result of some future domestic policy or regulatory change (other than in a few very narrow prescribed areas) contrary to some provision or other of Section A.

Proponents of ISDS provisions often argue that they are only put in place to ensure that investors receive adequate compensation if their investments are nationalised or otherwise compulsorily acquired by government. However, that simply isn't true: the Section A provisions are far broader than that, covering loss occasioned by almost any policy change, not merely those involving compulsory acquisition.

3.1 Discrimination against domestic industry

TPP explicitly forbids the Commonwealth from granting that same right of action to domestic investors. As a result, if Australia ratifies CPTPP, Australian companies will carry far greater risk on their domestic operations than our foreign competitors (from other CPTPP Parties) operating in Australia.

That will effectively turn Australian companies, including OSIA's members, into second class citizens in our own market, as we've pointed out before, both to this Committee[19] and in numerous other public statements[20].

Our members recognise that putting domestic & foreign companies on an equal footing, both here in Australia and abroad, is beneficial in terms of fostering effective competition. However, putting foreign companies *at an advantage* over domestic companies in Australia cannot ever be in Australia's best interest.

Since Chapter 9's ISDS provisions do exactly that, we contend that the Committee should recommend against ratifying CPTPP.

3.2 Discrimination between industry sectors

We noted previously[21] that TPP had a long list of non-conforming measures (NCMs) in the Annexes and side-letters in relation to the Investment Chapter. There seems little point in having an Investment Chapter (and ISDS provisions specifically) in CPTPP if so many NCMs are to be allowed.

Australia has sought only one such measure, in relation to the tobacco industry.

It is clearly discriminatory (and indeed quite bizarre, given the Commonwealth's professed dislike of that industry) that under CPTPP the tobacco industry will end up as the only industry in which domestic and foreign investors are on equal footing with one another, whilst in every other industry (including of course the software industry), Australian companies will be disadvantaged by new rights of action being granted exclusively to their foreign competitors.

[17] beginning with Burton, Holden & Christie, *op. cit.*, p. 5.

[18] Productivity Commission, *Bilateral & regional trade agreements: research report*, 2010, ch. 14, pp. 274–277. Available at https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf; and Productivity Commission, *Trade & Assistance Review 2014–15*, Annual report series, July 2016. Available at: http://www.pc.gov.au/research/ongoing/trade-assistance/2014-15/trade-assistance-review-2014-15.pdf

[19] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 3.1, pp. 5–6

[20] Burton & Foxworthy, 2016 JSCOT submission, *op. cit.*, s. 3.1, p. 6; 2016 JSCOT testimony, *op. cit.*, p. 26; Burton & Phillips, 2018 JSCOT submission, *op. cit.*, s. 5.2.1, pp. 10–11; OSIA press release, *Dangers of ISDS provisions in CPTPP are not a myth*, 11 March 2018: http://osia.com.au/f/osia_cptpp_pr2b.pdf; and OSIA press release, 2 May 2018, *op. cit.*.

[21] Burton & Foxworthy, 2016 JSCOT submission, *op. cit.*, s. 3.2, p. 6; Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 3.2, p. 6; and Burton & Phillips, 2016 JSCOT submission, *op. cit.*, s. 5.2.2, p. 11.

3.3 Excessive expansion of scope

As noted previously[22], the definition of investment in TPP Art. 9.1 remains far too broad in CPTPP. It still includes:

> "...(f) intellectual property rights;
> (g) licences, authorisations, permits and similar rights conferred pursuant to the Party's law; and
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges."

OSIA has raised TPP's mischaracterisation of "investments" for ISDS purposes before, both with this Committee and with JSCOT[23]. Disappointingly, it has not been fixed in CPTPP.

As we pointed out then, our members enter into copyright licensing arrangements with overseas parties (both as licensors and as licensees) on a daily basis—it is quite absurd to characterise those agreements as "investments".

But it is not our own members' licensing arrangements that concern us here. Rather, we are concerned that the threat of ISDS claims by our members' closed-source overseas competitors may prevent the Commonwealth from enacting sensible reforms to the *Copyright Act 1968* & to the *Patents Act 1990* and/or from instituting sensible reforms in the field of public software procurement.

3.4 Retrospective application

As noted in our recent submission to JSCOT[24], the definition of "covered investment" (in Art. 9.1) includes not just investments made after CPTPP comes into force, but also investments "in existence as of the date of entry into force of this Agreement".

That's retrospective action—an aggrieved investor could make an ISDS claim under CPTPP in relation to a new policy change affecting his investment, even if that investment predates TPP (perhaps even by a century or more...).

Retrospective provisions should be avoided in general. In our view, this Committee (and JSCOT) should apply the same test to retrospective provisions in treaties (other than in treaties entered into for the purpose of ending specific wars, for obvious reasons) that the High Court established for retrospective provisions in legislation: namely that a presumption against retrospectivity should apply whenever the provision in question confers or divests substantive rights (as opposed to being merely procedural in nature).[25]

The ISDS provisions of TPP clearly confer new rights on foreign investors. In our view the retrospective application of those new rights should constitute sufficient cause for the Committee to recommend against ratifying CPTPP.

3.5 Discouraging technology transfer

As noted in our recent submission to JSCOT[26], Art. 9.10(1) ("Performance requirements, technology transfer & preference") provides that:

> "1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impost or enforce any requirement, or enforce any commitment or undertaking:
> ...
> (f) to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory;
> ...
> (h) (i) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party; or
> (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a particular technology; ..."

We realise that, although much of the above is couched in the same language as used for procurement policy, none of the above applies to government procurement, by virtue of Art. 9.10(3)(f). Rather, our concerns here revolve around what happens when domestic policy changes in Australia to the detriment of an investment of a foreign investor.

As an aside, we note also the rather incongruous "...or of a non-Party..." towards the beginning of that provision. We suspect that may be yet another drafting mistake, as it appears to apply Art. 9.10 to investments made by investors from non-TPP countries too, which makes no sense at all in a preferential trade agreement.

[22] Burton & Phillips, 2018 JSCOT submission, *op. cit.*, s. 5.2.3, p. 11.
[23] *id.*; also Burton & Foxworthy, 2016 JSCOT submission, *op. cit.*, s. 3.3, p. 6.; and Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 3.4, pp. 6–7.
[24] Burton & Phillips, 2018 JSCOT submission, s. 5.2.4, p. 11.
[25] *Yrttiaho v. Public Curator (Queensland)* (1971) 125 CLR 228.
[26] Burton & Phillips, 2018 JSCOT submission, s. 5.2.5, p. 12.

Now, knowing that an "investment" by CPTPP's bizarre definition can mean mere IP, or even just a licence, and knowing that "transfer a particular technology ... or other proprietary knowledge" could well apply to the source code of computer programs, it strikes us that the existence of Art. 9.10(1)(f) might encourage certain Commonwealth agencies to dismiss any future proposals of regulating the software market that might be of benefit to the Australian FOSS sector with a blanket "no, because of CPTPP" excuse.

The wording comes across as quite dangerous, especially when read in conjunction with the domestic content provisions of Art. 9.10(4), which state that the above shall not prevent a Party from "imposing or enforcing a requirement, or enforcing a commitment or undertaking, to employ or train workers in its territory provided that the employment or training does not require the transfer of a particular technology, production process or other proprietary knowledge to a person in its territory".

The message we get from that is effectively "buy our technology and we'll let you hire locals to use it, so long as none of them ever try to understand it...".

We can understand why the USTR might have drafted such provisions, as whilst the USA remained a Party they would indeed have given an unfair advantage to certain sectors of US industry. But we cannot understand why, after the US withdrew from TPP, the TPP-11 Parties did not remove (or at the very least "suspend") those harmful provisions from CPTPP.

Whilst it is true that Art 9.10(3)(b)(i) provides that Art. 9.10(1)(f), 9.10(1)(h) & 9.10(1)(i) will not apply to use of IP in accordance with TRIPS Art. 31 (allowable patent exceptions) or disclosure of proprietary information within the scope of TRIPS Art. 39 (protection of undisclosed information) and Art. 9.10(3)(b)(ii) contains a competition policy exception, those are drafted as very narrow exceptions indeed, which fall well short of the mark.

One must ask what possible reasons there can be for retaining those highly US-centric provisions in CPTPP now that the USA is no longer a Party?

3.6 Other concerns

In our 2016 submission to this Committee, we noted that TPP's ISDS regime (like most other ISDS regimes) put SMEs at a disadvantage to their larger competitors[27]. We also noted that the limited scope of using side-letters to exclude ISDS as between only some of the TPP Parties makes that approach unacceptable as a substitute for omitting ISDS provisions from the treaty in the first place[28] (as OSIA have maintained should have been done all along).

Nothing in the CPTPP suspensions or new side-letters changes our views on those matters at all, so we refer the Committee to our 2016 comments on them.

4 Impact on Australia's domestic policies & regulation

4.1 Barriers to digital growth & legislation

The suspensions in CPTPP do not change anything in Chapter 14 ("Electronic Commerce") of TPP. It deals with (at Art. 14.17) the treatment of source code and restricts what actions a member government may perform. Specifically:

> 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.

Whilst the intent of this article was likely otherwise, the text as written will have significant detrimental consequences for Australia's growing open government and digital standards programmes.

If Australia ratifies CPTPP, much will depend on how the Courts decide to interpret the exception in Art. 14.17(3), which allows "the inclusion of terms and conditions related to the provision of source code in commercially negotiated contracts".

The question for the Courts to determine will be whether FOSS licences constitute "commercially negotiated contracts". Art. 14.17 gives rise to significant issues regardless of the answer to that question, but the nature of those issues depends of its answer. We consider each possibility in turn.

4.1.1 Worst case scenario

We have not raised these specific concerns before, as it has only just come to our attention that Art. 14.17(3)(a) might be interpreted by the Courts in this manner.

[27] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 3.3, p. 6.
[28] *ibid.*, s. 3.5, p. 7.

Our industry may be destroyed altogether

If the Courts consider FOSS licences not to be commercially negotiated contracts, Art. 14.17 will effectively render FOSS licences unenforceable against licensees from CPTPP Parties, in which case our entire industry may well simply cease to exist, or at the very least would shrink substantially. The ramifications of this go beyond just our members though.

Existing Commonwealth initiatives will be hamstrung

For example, the Australian Government's Digital Transformation Office (DTO) has defined a standard for digital services that includes amongst its criteria: "Make all new source code open and reusable where appropriate"[29]. We strongly commend the approach of the DTO in this area. The current text of Art. 14.17 however means that, if FOSS licences are considered not to be commercially negotiated contracts, no Australian government agency would be able to enforce its copyrights on any open source software against a company or person from another CPTPP nation.

Policy options will be limited

Under this interpretation, none of the subsequent clauses in this section would change the above. This includes Art. 14.17(3)(a) if licences such as those commonly used in open source software—e.g. the GNU GPL[30]—are deemed not to be "commercially negotiated contracts". Additionally, this clause will prevent the government from legislating a requirement to provide source code of a given product or service, even in cases where it is needed to ensure consumer or community safety.

Public trust will be eroded further

As has recently been demonstrated in cases such as the Volkswagen emissions scandal, software is now affecting every aspect of our lives. The Australian public have always relied upon the Government to ensure that the products and services we use, be they automotive, medical, industrial etc. meet high benchmarks for public safety. Maintaining such standards will become—and arguably has already become—impossible whilst the internal workings of devices remain hidden from inspection and improvement. Open source software licensing at its core ensures transparency and leads to greater software quality as bugs and defects become "shallow" to transparent review. Adoption of Art. 14.17 however not only prevents the government from mandating open source, but forbids it from requesting the source code to ensure product safety, security, environmental compliance etc.

4.1.2 Best case scenario

Even if the Courts determine FOSS licences to be commercially negotiated contracts, Art. 14.17 as drafted still poses substantial risk. Under this interpretation, the exception in Art. 14.17(3) would at least prevent the bizarre outcome (see Section 4.1.1) of rendering all FOSS licences effectively toothless.

Licence enforcement may still be hindered

However, as noted in our recent submission to JSCOT[31], by listing only "inclusion or implementation" without any reference to "enforcement", this rather sloppily drafted exception leaves open the additional question of whether specific performance of a term requiring transfer of or access to source code could still be available as a remedy for copyright infringement in a case where the licence that was infringed carried terms requiring such transfer or access.

"Copyleft" licences are a class of FOSS licence which require licensees who distribute derivative works to provide their downstream licensees with access to all source code. The most widely used such licence is the GNU GPL[32], which for example is used by the Linux kernel (as found in every Android phone and tablet), the Drupal content management system (which runs the Commonwealth's *GovCMS* platform) and of course the GNU operating system itself, amongst tens of thousands of other free & open source programs. Many of OSIA's members licence the software they produce under copyleft terms.

When licensors of such software bring copyright infringement actions, they almost always seek specific performance, since the utility of a copyleft licence is directly dependent on compliance with its terms.

If the Courts interpret Art. 14.17 as prohibiting them from making orders for specific performance in cases where a copyleft licence has been infringed, a large section of the Australian FOSS industry (cf. the entire Australian FOSS industry, under the interpretation in Section 4.1.1) will be disadvantaged.

OSIA has raised this concern previously both with this Committee and with JSCOT[33].

[29] https://www.dto.gov.au/standard/

[30] Free Software Foundation, *GNU General Public License*, version 3, 29 June 2007. Available at: http://www.gnu.org/licenses/gpl-3.0.en.html

[31] Burton & Phillips, 2018 JSCOT submission, *op. cit.*, s. 6.1, p. 13.

[32] Free Software Foundation, *op. cit.*

[33] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 4.1.1, p. 8; and Burton & Foxworthy, 2016 JSCOT submission, *op. cit.*, s. 5.1, pp. 7–8.

Policy options will still be limited

Even under the more favourable interpretation of Art. 14.17(3), as noted in our recent submission to JSCOT[34], Art. 14.17(1) will still limit the Commonwealth's scope to institute sensible domestic reforms to copyright law[35]. Whilst exceptions are provided for government procurement[36] and for critical infrastructure software[37] and the definition of "covered person" excludes financial institutions[38], those exceptions are far too narrow to deliver much solace.

One must ask, what possible public policy purpose Art. 14.17(1) could serve?

We live today in a world where the privacy and security of individuals, corporations and governments alike is under constant attack. The recent public revelations about Cambridge Analytica, Facebook et al.[39] are still fresh in everyone's minds. But online service providers are not the only vector for such attacks on our privacy and security.

For example, the current release of the world's most common desktop operating system exfiltrates user data by default[40]. In that case the vendor in question admitted (rather belatedly) the offending feature and eventually (only after investigations into it were launched by multiple regulators in Europe) agreed to remove some (but by no means all) of the built-in spyware. But other closed source software vendors who are not of sufficient scale to attract so much attention continue to ship similar privacy-destroying software.

To those of us in the FOSS sector, the answer is obvious: a user should not (indeed cannot) trust any software that does not come with the right to inspect and modify its source code (either directly, or by engaging a suitably capable information security firm to do so). All FOSS comes with that right, by definition[41].

In other words, in computer software, access to source code is a necessary pre-requisite for trust. Unfortunately, Art. 14.17 will prevent governments from taking any meaningful steps to act on that realisation for the benefit of their citizens.

By allowing Art. 14.17 to stand, the Commonwealth will be preventing itself from taking steps to address that attack vector—something which is going to become very important in the near future to the security of computing systems for the public sector (including in some military applications), for Australian industry and indeed for the general public. An inability to audit at a sufficiently deep level the hardware and software comprising third party systems exacerbates the risk of malware remaining undiscovered (whether introduced knowingly or unknowingly) in those systems.

We have raised some of these issues before, both with this Committee and with JSCOT[42].

4.1.3 Conclusion

In short, regardless of how the Courts determine the question of interpreting the exception Art. 14.17(3), Art. 14.17 spells bad news for the Australian FOSS industry, for the Commonwealth itself and for the general public at large. The question of interpretation is only one of degree.

Accordingly, OSIA once again calls upon the Committee to recommend that the Commonwealth does not ratify CPTPP.

4.2 Democracy & sovereignty

As noted previously[43], domestic policy reform should be a matter for the Commonwealth Parliament. It must never be regarded as acceptable for parliament's efforts to be stymied by a regional treaty that locks Australia into existing domestic regulatory regimes in any field. TPP threatened to do just that in many fields and in doing so sought actively to undermine the sovereignty of parliament.

Whilst the suspensions in CPTPP temporarily address many of our members concerns in relation to copyright, CPTPP still seeks to undermine parliament's sovereignty in a variety of other regulatory domains (including most notably patent law) and of course due to the weak nature of the suspension process, if CPTPP comes into force those egregious provisions on copyright presently suspended may well end up coming back to haunt us at some indeterminate future time.

[34] Burton & Phillips, 2018 JSCOT submission, *op. cit.*, s. 6.2, p. 14.

[35] For an example of one such reform which Art. 14.17 would block outright, see Burton & Foxworthy, 2016 Senate submission, s. 4.2.1, pp. 8–9; for several others, see Blemings, H. & Stewart, J., *Submission to the Joint Standing Committee on Treaties – Trans-Pacific Partnership Agreement (TPP)*, Linux Australia, 10 March 2016. Available at https://www.aph.gov.au/DocumentStore.ashx?id=38187468-9761-4e05-84f1-281ba68e65a8&subId=410396

[36] Art. 14.2(3)(a).

[37] Art. 14.17(2).

[38] Art. 14.1.

[39] http://www.abc.net.au/news/2018-04-18/cambridge-analytica-employee-testifies-before-uk-committee/9670192

[40] See for example, https://www.zdnet.com/article/windows-10-privacy-youre-happy-for-us-to-collect-your-data-says-microsoft, https://www.gnu.org/proprietary/malware-microsoft.en.html#surveillance and https://www.forbes.com/sites/gordonkelly/2015/11/02/microsoft-confirms-unstoppable-windows-10-tracking/

[41] Perens, B., *Open Source Definition*, Open Source Initiative, 1998, criteria 2 & 3. Available at http://opensource.org/osd

[42] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 4.2.1, pp. 8–9; Burton & Foxworthy, 2016 JSCOT submission, *op. cit.*, s. 5.2, p. 8.

[43] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 6.1.2, p. 16.

5 Rights for consumers

5.1 Rights for copyright consumers

5.1.1 Provisions relating to all copyright consumers

In our 2016 submission to the Committee we wrote at length about the adverse impact which a wide range of copyright provisions in TPP would have on Australian consumer rights. Most of those issues have been temporarily addressed by the suspensions in CPTPP. However, we must stress that our members have strong concerns about the uncertain longevity of those suspensions[44].

In the event that the suspended provisions relating to copyright were ever to be "unsuspended", those same adverse effects would still apply. For brevity, we do not repeat those detailed concerns here, but rather we refer the Committee to our 2016 comments on those provisions, specifically regarding: anti-TPM-circumvention measures[45]; the lack of end user representation in "stakeholder organisations"[46]; the reversal of the presumption of innocence[47]; the potential for automated misrepresentation & harassment[48]; and the clear application of double standards[49].

5.1.2 Provisions relating to government as a consumer

In 2016 we also warned this Committee about the threat that TPP posed to government use of public domain software[50]. Unlike the other copyright issues referenced in the preceding section, this issue has not been resolved at all (not even temporarily) in CPTPP.

As noted in our recent submission to JSCOT[51], Art. 18.80(2) provides that:

> "Each party shall adopt or maintain 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."

That provision contains a serious drafting error, which OSIA have brought to the attention of this Committee and of JSCOT before[52]: software that is already in the public domain (either by virtue of its copyright having expired or, more commonly, by explicit declaration of its author) by definition is *not* "protected by copyright". So, by requiring that Parties permit their governments to "use only ... computer software protected by copyright", Art. 18.80(2) serves to prohibit governments from using software that is already in the public domain—an utterly ridiculous outcome.

In fact, everything after the word "software" in the first sentence of Art. 18.80(2) is either superfluous or counter-productive. A far better way to draft Art. 18.80(2) would have been:

> "Each party shall adopt or maintain laws, regulations, policies, orders, government-issued guidelines, or administrative or executive decrees that provide that its central government agencies never infringe the copyright of computer software. These measures shall apply to the acquisition and maintenance of the software for government use."

Note that, in addition to removing the offending clause we have also changed "management" to "maintenance" (since the former is insufficient to cover infringement of copyleft terms where the agency opts to modify & redistribute the software). The simpler construction of a direct prohibition "never infringe", rather than the clumsy 'use only ... protected by", removes all ambiguity.

If the TPP Parties had taken the far more sensible approach of involving industry bodies throughout the negotiating process, right down to the drafting level, no doubt OSIA or an equivalent from another TPP nation would have suggested something along similar lines.

Thus Art. 18.80(2) in its own right provides two compelling reasons why the Commonwealth should not ratify CPTPP: firstly, it is clearly unacceptable to prohibit the government from using software that is already in the public domain; and secondly Art. 18.80(2) provides a textbook example of why the Australian Government should *never* negotiate a treaty that's supposedly about trade without providing all interested industry bodies with the opportunity to review, comment on and suggest improvements to the draft text, while it is being negotiated.

[44] see our comments in Section 2.3.
[45] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 5.1, p. 12 and all the documents referenced in the footnotes there.
[46] *ibid.*, s. 5.3, p. 14.
[47] *ibid.*, s. 5.4, p. 14.
[48] *ibid.*, s. 5.5, pp. 14–15.
[49] *ibid.*, s. 5.6, p. 15.
[50] *ibid.*, s. 5.2, p. 13.
[51] Burton & Phillips, 2018 JSCOT submission, *op. cit.*, s. 7.3.4, p. 19.
[52] Burton & Foxworthy, 2016 JSCOT submission, *op. cit.*, s. 6.11, p. 15; and Burton & Foxworthy, 2016 Senate submission, *loc. cit.*

6 Other related matters

6.1 Other unresolved IP Chapter issues

6.1.1 Scope of agreement

As noted in our recent submission to JSCOT[53], whilst CPTPP suspends a wide range of IP provisions (roughly half the provisions suspended by CPTPP were from the IP Chapter), the fact remains that the presence of a Chapter on IP—a field of law which by definition involves the bestowing of limited monopolies—at all in a treaty which ostensibly claims (see Section 2.1) to be about free trade is totally incongruous.

Even leaving aside that incongruousness, deliberately partitioning the market for IP-related services & goods by setting different standards in bilateral or regional "trade" treaties than those set in the global or near-global treaties on copyright or patents runs directly counter both to the purpose of copyright & patent law (to promote the creation and broad dissemination of useful works & inventions) and to the espoused goal of free trade.

OSIA has pointed this inconsistency out on multiple previous occasions (including in our 2016 submission to this Committee)[54], as has the Productivity Commission[55].

6.1.2 Balance & contradiction

As we pointed out in our recent submission to JSCOT[56], if one were to read only the purposive provisions[57] of the IP Chapter, ignoring altogether its substantive provisions, one would get a far rosier picture of what the Chapter seeks to achieve. It almost seems as if those purposive provisions were drafted as marketing copy, to divert public attention away from the highly restrictive (and as a result, generally unpopular) substantive provisions in the rest of the Chapter.

As noted previously[58], the espoused need to "foster competition and open and effective markets" is conspicuously absent from the Chapter's provisions on patents.

Likewise, the "importance of a rich and accessible public domain" is ignored completely by the provisions on retrospectivity and on Government use of software.

Admittedly, the hypocrisy of the benevolent-sounding motherhood statements in the Chapter's purposive provisions was far greater before the original provisions on copyright (including TPMs) and ISP enforcement were suspended. Nevertheless, even whilst those especially egregious provisions remain suspended, the remainder of the Chapter still exhibits a profound lack of the "balance" called for by Art. 18.2, 18.4 & 18.66.

OSIA has raised this issue with the Committee before[59].

6.1.3 Rights for copyright holders

In our 2016 submission to the Committee we wrote at length about the adverse impact which TPP's wide range of unreasonable extensions to the rights of copyright holders would have if Australia were to ratify TPP (in addition to the adverse effects on rights of copyright consumers—see Section 5.1).

Of those, the one of most immediate concern today relates to the restrictions placed on future domestic copyright reform[60] arising from Art. 14.17. For that, see Section 4.

The remainder have all been temporarily addressed by the suspensions in CPTPP. However, we must stress here, just as we did in relation to rights for copyright consumers in Section 5.1, that our members have strong concerns about the uncertain longevity of those suspensions[61].

In the event that the suspended provisions relating to copyright were ever to be "unsuspended", those same adverse effects would still apply. For brevity, we do not repeat those detailed concerns here, but rather we refer the Committee to our 2016 comments on those provisions, specifically regarding: retrospective term extensions[62]; Crown copyright[63]; and regulatory freeze[64].

[53] Burton & Phillips, 2018 JSCOT submission, *op. cit.*, s. 7.2.1, p. 17.

[54] Burton, Holden & Christie, *op. cit.*, s. 1.2, pp. 4–5; Forsstrom & Burton, *op. cit.*, pp. 9–10; Burton & Foxworthy, 2016 JSCOT submission, *op. cit.*, s. 6.1, p. 9; and Burton & Foxworthy, PC/IP submission *op. cit.*, ss. 2.15 & 4.9, pp. 19–20 & 32.

[55] *Bilateral and Regional Trade Agreements, Research Report*, Productivity Commission, 2010, rec. 4, p. 285. Available at http://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf

[56] Burton & Phillips, 2018 JSCOT submission, *op. cit.*, s. 7.2.2, p. 17.

[57] Art. 18.2, 18.3(2), 18.4, 18.15(1) & 18.66.

[58] Burton & Foxworthy, 2016 JSCOT submission *op. cit.*, s. 6.2, p. 10.

[59] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 6.2.1, p 18.

[60] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 4.2.1, pp 8–9.

[61] again, see also our comments in Section 2.3.

[62] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 4.2.2, pp. 9–10.

[63] *ibid.*, s. 4.2.3, p. 10; and the two references in the footnotes there to prior submissions to the Productivity Commission.

[64] *ibid.*, s. 4.2.4, pp. 10–11.

6.1.4 Patents & the double regulation of software

As noted in our recent submission to JSCOT[65], software more closely resembles literary works than physical objects or a physical process requiring human intervention; thus it is more suited to copyright than patents.

In the US, a court 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"[66]. In Australia at present a "computer-implemented invention" can be considered patentable subject matter in certain circumstances[67], whilst computer software at a higher level of generality is not.[68]

Art. 18.37(1) requires that Parties make patents available "in all fields of technology". Thus we have an ambiguity as to whether software can be subject to patents.

It is this "double regulation" that has a profound detrimental effect on progress in the software field due to this ambiguity that allows software to be considered as both patentable and subject to copyright, regardless of the original purposes of both copyright and patent law and the fundamental distinction between the two. Entering into an treaty where the definitions are not clear cut can only lead to further confusion.

OSIA has raised this matter before many times, both in relation to TPP specifically[69] and in far greater detail in general terms[70].

6.1.5 Restricting judicial discretion

As noted in our recent submission to JSCOT[71], Art. 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. It must be remembered in this case that these measures have been influenced by the industry bodies within the United States of America. These self same bodies have already failed at introducing large damages for illegal downloading in Australia due to the judicial discretion. In Australia, while there are legislative upper limits on civil damages, the compensation must fit the degree of damage incurred. These articles remove any pretence at having to justify a complainant's actual damages.

For this reason alone judicial discretion must not be compromised! 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.

OSIA has raised this issue with the Commitee before[72].

6.1.6 Misuse of criminal law

As noted in our recent submission to JSCOT[73], there is a very strong distinction between civil and criminal law. 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. They are not an affront to society.

Intellectual property is mostly a social mechanism in order to reward innovation and design. Breaches against a social mechanism are not criminal and should never be classed as criminal. Clearly, when copyright is infringed, the principal damage is suffered by the author, so there is a need for authors to have access to civil remedies for copyright infringement. As such it is the claimant that may or may not, at their discretion, proceed to make a claim for damages.

Thus it is not apparent what, if any, damage the State, rather than the individual, suffers as a result of copyright infringement. So it is difficult to see how the associated criminal offences can be justified. Further by relegating Intellectual Property infringement to being a criminal violation, it then becomes necessary for the State to monitor and prosecute what is essential a civil complaint, rather than the complainant.

OSIA has raised this issue with the Committee before[74].

[65] Burton & Phillips, 2018 JSCOT submission, *op. cit.*, s. 7.3.1, p. 18.

[66] *Intellectual Ventures v. Symantec Corp* 838 F.3d 1307, (Fed. Cir. 2016)

[67] *International Business Machines Corporation's Application* [1980] FSR 564.

[68] *Commissioner of Patents v. RPL Central Pty Ltd* [2015] FCAFC 177.

[69] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 6.2.2, p. 18; Burton & Foxworthy, 2016 JSCOT submission, *op. cit.*, s. 6.6, p. 12; and Burton, Holden & Christie, *op. cit.*, s. 2.2.1, pp. 8–9.

[70] Burton, J., Hideo, M., Christie, D. & Jitnah, D., *Submission to ACIP review of the innovation patent system*, OSIA, 4 Oct 2013, s. 2.1, pp. 4–8. Available at http://osia.com.au/f/osia_sub_201310_acip.pdf; Burton, J., *Submission to IP Australia regarding ACIP's revised recommendation on the innovation patent system*, OSIA, 25 September 2015, s. 3, p. 4. Available at http://osia.com.au/f/osia_sub_201508_ip_au.pdf; Forsstrom & Burton, *op. cit.*, s. 3, p. 4; and Burton & Foxworthy, PC/IP submission, *op. cit.*, ss. 2.6 & 4.6, pp. 11–13 & 29. The 2013 ACIP & 2016 PC/IP submissions probably provide the most complete treatments of the topic.

[71] Burton & Phillips, 2018 JSCOT submission, *op. cit.*, s. 7.3.2, p. 18.

[72] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 4.2.5, p. 11.

[73] Burton & Phillips, 2018 JSCOT submission, *op. cit.*, s. 7.3.3, p. 18.

[74] Burton & Foxworthy, 2016 Senate submission, *op. cit.*, s. 4.2.6, pp. 11–12.

6.2 Secrecy, bias & propaganda

6.2.1 TPP-12 negotiations in TPP-11 Parties

TPP was negotiated in secret. Australian industry representatives, civil society groups and even Parliament itself were denied access to negotiating drafts, with no text at all made available through official channels[75] until after the treaty had already been signed.

Industry, including our members, were hamstrung. If a trade agreement is meant to foster increased trade, surely Australian industry, who engage in the vast majority of Australia's trade, should have the opportunity to examine and assess what is being proposed and suggest amendments to its provisions long before it is finalised? Our members certainly think so.

DFAT did consult with industry. OSIA representatives attended all bar one of the DFAT briefings on TPP since we first became aware of the matter, we lodged a formal submission with DFAT in 2013[76] and we met privately with DFAT representatives at their invitation once in 2014. But those consultations can never be an acceptable substitute for access to draft text and the ability to analyse & feed comments on that text back to Australia's negotiators. It simply is not possible for DFAT to form an accurate assessment of Australian industry views on subject matter which they are prohibited from letting us see.

If the treaty were merely about trade, that may have been the extent of our concerns around the unnecessary secrecy. However, at noted in Section 2.1, TPP is overwhelmingly *not* about free trade, but rather about requiring Parties to implement a cornucopia of *restrictions* on trade and on other related & unrelated endeavours—in other words, regulation.

Whilst industry might be alone in our belief in the importance of involving industry in the formulation of policies affecting trade, we're sure almost *every Australian* would agree that it is essential for Parliament to be involved in the formulation of policies affecting regulation. But Parliament for the most part were kept in the dark too.

Parliament are to be presented with an artificial all-or-nothing choice: to ratify or not to ratify, with no opportunity whatsoever to seek any amendments to the text. Frankly it is unfathomable that any astute individual, let alone a whole Parliament representing a diverse array of political views, could ever be sufficiently confident in a treaty almost five times the length of Tolstoy's *War and Peace* to be willing to ratify it without having had any direct input whatsoever into its text.

Accordingly, we call upon the Committee to recommend that Australia should never negotiate treaties affecting either trade or domestic regulation in secret and to recommend against ratifying any such treaty, including TPP-12 or any derivative thereof.

6.2.2 TPP-12 negotiations in the USA

Things were somewhat different in the United States. There, by virtue of an instrument known as the Trade Promotion Authority, treaties like TPP are negotiated not as one might expect by the US State Department, but rather by the United States Trade Representative (USTR), which is a non-government body built around 28 committees, each representing select US industry (or in a few cases government) interests.

So whilst in Australia (and in the ten other TPP-11 Parties), industry was shut out completely, certain elements (all representing entrenched interests) in US industry were intimately involved in the negotiations.

It is hardly surprising therefore that the final TPP-12 text (the vast majority of which remains in TPP-11) was clearly biased in favour of those select US industry interests and against the interest of much of industry in the other 11 Parties.

We contend that such blatant discrimination against Australian industry could never be in Australia's best interests. Therefore, we call upon the Committee to recommend against ratifying (and indeed against entering into any future negotiations of) any treaty the negotiations of which do not grant Australia's industry representatives a level of involvement equal to that of industry in the Party with the most favourable industry involvement arrangements.

6.2.3 The missed opportunity of TPP-11

The whole TPP process from woe to go could be characterised accurately as a tale of lost opportunities[77]. One such missed opportunity is of particular relevance here.

It is a widely held view that the secrecy in the original TPP-12 negotiations was instituted largely at the behest of the USA. It's a view that makes perfect sense, since those arrangements ensured that select elements of US industry were at an immense advantage over their competitors in all 11 other Parties.

The withdrawal of the USA from TPP presented an ideal opportunity for Australia to right that wrong, by opening fresh and completely transparent negotiations for a genuine free trade agreements between the remaining Parties, just as

[75] A small number of negotiating drafts were leaked overseas which naturally, in the absence of any authoritative information, we were forced to rely on during the negotiating period. However, whenever we made an assertion or asked a question based on those, DFAT's stock reply was always "we do not comment on leaked information", like an emu sticking its head in the sand.

[76] Burton, Holden & Christie, *op. cit.*

[77] OSIA have made that case before. See *CPTPP's history: a tale of lost opportunities*, s. 2 in Burton & Phillips, 2018 JSCOT submission, *op. cit.*, pp. 4–6

OSIA had recommended in 2016 to JSCOT & to this Committee[78]. Unfortunately, for reasons undisclosed, the remaining Parties decided instead to continue the unwarranted secrecy of the TPP-12 throughout the TPP-11 negotiations.

DFAT have claimed that "Additional consultations and engagement occurred in relation to TPP-12's provisions that will be suspended in the TPP-11"[79]. Yet despite our extensive engagement during the TPP-12 negotiating process, OSIA was not invited to participate in any such consultations on TPP-11 and we were not aware of any public consultation process on TPP-11 either. We are not saying that those consultations did not happen—we couldn't possibly be certain of that—but it does strike us as incredibly odd that OSIA heard or saw nothing of any DFAT consultation process re TPP between the signing of TPP-12 and the signing of TPP-11.

In short, it strikes us that the transition from TPP-12 to TPP-11 was mismanaged. What should have been a prime opportunity for substantial improvement ended up as just more of the same old broken process.

6.2.4 Propaganda is not helpful

Speaking of the DFAT "Myth busters" document, it is worth noting that in that same propaganda piece, DFAT claimed that the assertion that "The Government negotiated the deal in secret" was a "myth"[80]. Whilst the dot points under that "myth" all appear to be true, none of them justify describing the proposition as a myth. Four of those five dot points describe the publication of information *after* the relevant negotiations had been concluded, with no opportunity for change; the third alludes to the alleged post-TPP-12 consultations of which we have already noted we were not aware.

In other words, the assertion that the secrecy was a myth, without any actual evidence to show the secrecy to have been false, is pure propaganda. OSIA sees no place in public discourse for such Orwellian revisionist history, particularly in a free & democratic nation like Australia.

Accordingly, we call upon the Committee to recommend that DFAT be instructed to cease issuing propaganda and to recommend that Parliament adopt a policy of never ratifying any treaty (including the present one) affecting trade or domestic regulation if that treaty was negotiated in secret.

We note also that that document came from the same agency that is tasked with producing Australia's National Interest Analyses (NIAs). Given the highly partisan nature of the "Myth busters" document, our members are concerned about the agency's ability to produce objective analysis in the NIAs. It does not seem credible that a single agency could produce both biased and unbiased analyses on the same matter.

Therefore, we renew our call for the Committee to recommend that CPTPP and all future treaties affecting trade or domestic regulation be referred to the Productivity Commission for independent analysis & modelling *prior to* consideration by Parliament.

[78] Burton & Foxworthy, 2016 JSCOT submission, *op. cit.*, rec. 2, p. 3; and Burton & Foxworthy, 2016 Senate submission, *op. cit.*, rec. 2, p. 3.

[79] Department of Foreign Affairs & Trade, *Comprehensive and progressive agreements for trans-pacific partnership (TPP-11) background document, Myth Busters: FACTS vs FICTION*, 21 February 2018, p. 3. Available at: http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Documents/tpp-11-myth-busters.pdf

[80] *Id.*