



Australian Government
Department of Foreign Affairs and Trade

18 April 2013

Mr Nick Champion MP
Chair
Standing Committee on Infrastructure and Communications
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Mr Champion

I refer to your letter of 27 March 2013 raising a number of follow-up questions for the Department of Foreign Affairs and Trade (DFAT) since our appearance at the Committee's public hearing on 28 November 2012.

By way of background, DFAT is responsible for leading Australia's engagement in a range of international intellectual property (IP) negotiations. DFAT works closely with other government agencies with portfolio responsibility for IP issues. This ensures that Australia's pursuit of its international interests is coordinated effectively on a whole of government basis and is consistent with Australia's domestic policy settings, and existing international obligations. The relevant agencies include: the Attorney-General's Department (AGD), IP Australia, the Department of Agriculture, Fisheries and Forestry, the Department of Health and Ageing and the Department of Industry, Innovation, Science, Research and Tertiary Education. DFAT also receives specialist advice from other agencies including AusAID, the Australian Federal Police (AFP), the Australian Customs and Border Protection Service (Customs), the Department of Sustainability, Environment, Water, Population and Communities, the Director of Public Prosecutions (DPP) and the Treasury.

Set out below are DFAT's responses to the Committee's questions.

The Trans-Pacific Partnership

Can DFAT update the Committee on the progress of its undertaking to raise IT pricing at the TPP negotiations? When was the matter raised? What outcomes can the Department report as a consequence?

At the most recent round of Trans-Pacific Partnership (TPP) negotiations in Singapore from 4-13 March 2013, Australia led a discussion in the e-commerce working group on the issues faced by Australian consumers on IT pricing, particularly geoblocking of electronic content. The Australian delegation sought negotiating partners' views, but discussions are at a very preliminary stage.

Has the Department undertaken research on the net economic impact of the TPP's IP chapter on Australian consumers and businesses?

DFAT takes advice from relevant agencies and stakeholders on the potential economic impact of IP provisions as they are being negotiated. However, an analysis of the net economic impact of the IP chapter can only be undertaken once the text is finalised.

If so, how is such research taken into account when DFAT negotiates IP related international agreements like ACTA and the TPP? If no, however, how are determinations made as to whether an agreement is in Australia's economic interest.

The Government's position on economic modelling is set out in its April 2011 Trade Policy Statement.

Prior to commencing negotiations the Government makes a careful determination of whether the proposed agreement will be in Australia's interests. In the case of the TPP, the Government called for public submissions on Australia's participation and these submissions, including those addressing the proposed IP chapter, were taken into account in the decision to participate.

In leading the TPP negotiations, DFAT has an open consultation process and stakeholders are encouraged to make submissions and engage directly with the TPP negotiation team as the negotiations progress.

After the conclusion of negotiations, proposed new international agreements are tabled in Parliament together with a National Interest Analysis which examines the potential benefits of the agreement as a whole for consideration by the Joint Standing Committee on Treaties (JSCOT). This provides a further opportunity for comments to be provided on the completed text before any decision is made on ratification. This process is expected to be followed for the TPP.

In the case of the Anti-Counterfeiting Trade Agreement (ACTA), the final text did not require any changes to Australian legislation or administrative procedures, and costs were assessed to be minimal. However, at the recommendation of JSCOT, DFAT commissioned a cost benefit analysis of ACTA. This analysis is now being considered by the Minister for Trade and Competitiveness.

Evidence before the Committee indicates that the department may be advocating a maximalist copyright agenda in tandem with the US in TPP negotiations.

This is incorrect. In the TPP negotiations, Australia supports balanced commitments on copyright that are consistent with Australia's domestic policy settings and existing international obligations. We are seeking commitments that allow us to retain the flexibilities we currently have to respond to developments in IP.

When determining what actions should be taken in relation to copyright breaches, what sort of consultation does DFAT enter into?

In negotiating copyright and related rights and enforcement provisions, DFAT works with the government agencies with portfolio responsibility for these issues, including AGD, Customs, the AFP and the DPP. DFAT and AGD also consult with interested stakeholders and take their views into account in developing Australia's positions.

As copyright is a private property right, it is a matter for the copyright owner to decide whether or not to take action in relation to infringement of their rights. DFAT does not have a role in relation to the enforcement of copyright in Australia.

It has been suggested to the Committee that as Australia is a net importer of IP, it is not in the national interest to negotiate international agreements that may affect Australia's ability to implement or change national copyright policies. These suggestions have arisen from considerations about parallel importation. Do you have any views?

Australia is a party to many international agreements which provide for the protection and enforcement of IP rights. DFAT negotiates to achieve outcomes on IP that are strongly in Australia's interests. The Government takes into account a range of factors in determining the national interest. As mentioned above, in the TPP negotiations, Australia is seeking commitments that allow us to retain the flexibilities we currently have to respond to developments in IP.

Geoblocking

Is the department aware of any impediments in law or in Australia's international agreements that would prevent Australia from enacting a general prohibition on geoblocking (that is the use of any device, technology or system that functions to enforce geographic market segmentation)?

In the letter of 5 October 2012 from Mr McCormick (First Assistance Secretary, Office of Trade Negotiations, DFAT), he identified the scope for parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to prevent the abuse of IP rights and noted that this is preserved under the Australia-United States Free Trade Agreement. His letter also attached a list of international obligations potentially relevant to geoblocking. Whether these obligations act as a barrier to addressing geoblocking will depend on how geoblocking is implemented. Another consideration would be whether a prohibition operated in a manner inconsistent with the exclusive rights of IP owners recognised and protected under the relevant international agreements.

In circumstances where geoblocking applied by IP rights owners in Australia constitutes anti-competitive behaviour, the Treasury would be best able to advise the Committee as to the legislative options for addressing this behaviour.

International warranties

The Australian Communications Consumer Action Network recommends that that Australian Government encourage the development of international warranties, repair and replacement rights etc. through international agreements and discussions with global IT companies. What practical steps could the government take in this direction? Are there any practical or legal impediments to the creation of such arrangements?

Consumer protection issues, including on international warranties, are the portfolio responsibility of the Treasury.

Questions on Notice

Questions arising from DFAT's appearance at the 28 November public hearing and our responses are set out below.

1. *To what extent do the exceptions under s.51 (3) of the Trade Practices Act, or its equivalent exempt anti-competitive behaviour.*

DFAT notes that from 1 January 2011 the *Trade Practices Act 1974* was replaced by the *Competition and Consumer Act 2010*. The Treasury has portfolio responsibility for the Competition and Consumer Act and is best placed to answer the Committee's question regarding the status and operation of the exceptions previously recognised under s.51 (3) of the Trade Practices Act.

2. *Whether there could be an arrangement for electronic equipment the same as for pharmaceuticals to allow electronic products to be manufactured generically after a period of time.*

Australian patent law is technology neutral. Like pharmaceutical patents, patents for electronic equipment are granted for a 20 year period. There is nothing to prevent patent protected electronic equipment from being manufactured generically after all relevant patents have expired. IP Australia is the agency best placed to answer questions concerning patents.

I trust this information is of assistance to the Committee.

Yours sincerely

Ravi Kewalram
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Office of Trade Negotiations