Attachment

Trade treaties: undemocratic, anti-competitive and unbalanced?

Submission to the

Senate Standing Committee on Foreign Affairs, Defence and Trade

Inquiry into

The Commonwealth's treaty-making process

Hazel V J Moir
Adjunct Associate Professor
Centre for European Studies
College of the Arts & Social Sciences
The Australian National University
Canberra, Australia

hazel.moir@anu.edu.au

The views presented in this submission are my own and should not be taken to represent the views of any institution with which I am affiliated.

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Summary

The major benefit from free trade is from domestic reform (Section 2A). Current preferential trade treaties have large sections concerning the wide range of domestic regulation that might impede trade in agriculture or services (Section 2B). These regulatory sections are highly detailed and prescriptive – the worst form of old-fashioned heavy-handed regulation (Section 2C). They need to be replaced by modern outcome-oriented objectives, with countries free to implement these as best fits other social, cultural and economic goals.

As trade treaties receive little attention during elections a mandate cannot reasonably be claimed (Section 3A). These treaties tie the hands of both the current and future governments across a wide range of domestic regulation –open debate about these goals and the best means of achieving them is essential. Such an open agenda would re-build trust in government and better suit decision-making processes in a democracy. An important part of this would be independent evidence-based analysis by a trusted body such as the Productivity Commission (Section 3B). This would provide a factual basis for any consultations (Section 3C).

The committee has also been asked to consider what fair trade provisions might look like. The elements of a fair, balanced, patent policy are set out in Section 4A. These are assessed against our current treaties in Section 4B. There is a large gap. Many of our treaties fail the TRIPS Article 7 test of what a fair balanced patent policy should look like.

The most essential first steps in ensuring that preferential trade treaties are democratic, pro-competitive and balanced are to ensure that there is independent evidence-based assessment of the proposed content, and that the approval authority rests with parliament. Ideally there should be an active economic reform agenda, with full public debate of all the options likely to be included in trade treaties.

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1. Introduction

Because most tariffs on goods are now very low, modern trade treaties are largely oriented to improving access for agricultural products and services. Both raise a wide range of regulatory issues – from immigration policy to standards designed to protect health and safety. Some of these regulations have a direct impact on the ease and cost of international trade. Others – such as intellectual property (IP) – have no link to trade, especially free trade. Indeed the fundamental objective of most IP is to reduce competition.

This submission briefly reviews the principle economic benefits of free trade treaties. These are important in assessing the extent to which modern regulatory treaties actually enhance competition. There must be one over-riding objective for trade treaties – the benefits to Australia as a whole must outweigh the costs. Such treaties must support and contribute to increased competition in Australia.

A brief review of the content of recent Australian trade treaties demonstrates their reach. Problematically, trade treaties contain highly prescriptive and detailed regulations, substantially tying the hands of not only the signing government, but all future governments. This is undemocratic. A priority for future treaties is to abandon detailed prescriptive regulation in favour of agreed outcomes. This would leave countries free to choose the most efficient and effective form of delivery. This would not only reduce the regulatory burden on businesses, but would preserve the rights of future Australian governments.

The priorities for approval processes must be openness, a clear agenda and a sound evidence base. These features have been completely lacking in Australia's trade policies over the last 15 years. M**atters should not be included in treaties before they have been fully and openly debated within Australia.** A critical part of this is independent evidence-based evaluation. Australia has well-developed processes for reviewing and reforming domestic economic regulations. Indeed Australia's leadership in this area has been proposed as a template for other nations wishing to reap the benefits of increased competition (Thirwell et al. 2009). This analysis should also clearly identify both winners and losers, and canvass options to assisting with adjustment for losers. Such adjustment costs are an important part of these agreements and they should be clearly and openly addressed.

The committee also wishes to explore what an agreement based on fair trade principles would look like. Part 3 of this submission addresses this, in respect of patent policy. Given the role of innovation in economic growth, patent policy must be both balanced and efficiently designed. But all the key features of a balanced patent policy are substantially missing from most preferential treaties. These treaties push for lower and lower standards for patent grant – mis-calling these "high standards" – thus diverging more and more from TRIPS Article 7.

The most essential first steps in ensuring that preferential trade treaties are democratic, pro-competitive and balanced are to ensure that there is independent evidence-based assessment of the proposed content, and that the approval authority rests with parliament. Ideally there should be an active economic reform agenda, with full public debate of all the options likely to be included in trade treaties.

2. The economic goals of "free" trade

A. The importance of domestic reform

Because of the success of the GATT, most tariffs on goods are now very low.[14] The major source of benefit from "free trade" is domestic reform.[15] This is a simple matter of arithmetic. When Australia reduces tariffs, many consumers benefit and many firms find their input costs reduced. This economy-wide improvement in competitiveness contrasts sharply with the small set of beneficiaries from improved access to a particular segment of an overseas market, such as the additional hamburgers that can now be sold into the USA, phased in over a substantial period through the Australia-US free trade agreement (AUSFTA).

This point was clearly made by the Productivity Commission (PC) in its enquiry into bilateral and regional trade treaties (BRTAs):

> "Over the last four decades, Australia has gained significant economic benefits as a result of programs of unilateral reform, which entailed reducing its own trade barriers without the need for any specific international engagement. Indeed, *and contrary to mercantilist notions that focus on export promotion and market access and often cloud debates about trade policy*, the main benefits that arise from trade liberalisation result from a country purchasing its inputs and final goods from the lowest cost sources of supply, and exposing its industries to greater import competition by reducing its own trade barriers. This creates a competitive environment that drives productivity and a more efficient utilisation of resources within the economy."
>
> (Productivity Commission 2010: xxvi, emphasis added).

This fundamental principle seems often forgotten by those responsible for negotiating trade agreements. Exchanges between the Department of Foreign Affairs and Trade (DFAT) and the Productivity Commission (PC) in the context of the BRTA inquiry are enlightening. They demonstrate a vast gap between DFAT's focus on specific sectoral market access issues rather than the overall outcome for Australia. Indeed in one such exchange the PC was moved to respond to DFAT, saying "Under its Act, the Commission is required to consider the benefits and costs of policies *to the community as a whole*, rather than focussing on the effects on particular sectors." (Productivity Commission 2010: 264, emphasis added). In like vein, the European Commission's 2007 statement on Global Europe, the basis for a new EU approach to trade treaties, discusses only market access issues and intellectual property rights.[16]

B. The new content of preferential treaties

Because of the success of the GATT, most tariffs on goods are now very low.[17] Since the 1994 Marrakesh Agreement preferential trade treaties have regularly dealt with many issues beyond tariff barriers and quotas. The Marrakesh "single undertaking" meant that henceforth nations could only remain in GATT if they also agreed to the full package of agreements negotiated during the round.[18]

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[14] Average global tariffs had been reduced to approximately 5 percent by the mid 1990s (Productivity Commission 2010: 30).

[15] See, for example Armstrong 2012. Almost every economics text that deals with trade will cover this.

[16] http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134507.pdf (accessed 8 February 2015).

[17] Average global tariffs had been reduced to approximately 5 percent by the mid 1990s (Productivity Commission 2010: 30).

[18] The set of agreements that are required for World Trade Organization (WTO) membership comprises the Agreement establishing the WTO, the General Agreement on Tariffs and Trade (GATT) 1994; the Agreement on Agriculture; the Agreement on Sanitary and Phytosanitary (SPS) measures; the Agreement on Textiles and Clothing; the Agreement on Technical Barriers to Trade (TBTs); the Agreement on Trade-Related Investment Measures (TRIMS); the General Agreement on Trade in Services (GATS); and the Agreement on Trade-Related Intellectual Property Rights (TRIPS) as well as a range of other technical agreements, understandings and decisions (see ***http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#top***). Other Agreements, such as that on Government Purchasing, were not included in the Single Undertaking.

The majority of preferential agreements include chapters or provisions across the range of matters included in the Single Undertaking. Optional areas agreed in the Uruguay Round, such as government procurement, increasingly feature in these treaties. Some also include matters beyond the scope of the Uruguay Round outcomes – such as capital mobility; competition; environment; and labour (Kohl 2013). The wide array of topics included in Australia's two most recent trade treaties is shown in Table 1.

Table 1 Coverage of Australia's two most recent trade treaties

Topic	JAEPA chapters (annexes)	KAFTA chapters (annexes)
Merchandise trade	General rules (1) "Safeguard" measures Committee and reviews Rules of origin (2) Customs procedures Technical regulations Energy & mineral resources (1)	Trade in goods (4) Trade remedies (1) Rules of origin (4) Customs administration Technical barriers (incl SPS)
Agricultural trade	SPS cooperation Food supply (1)	[included with merchandise trade]
Services trade	General rules (3) Telecommunications Financial services (1) Movement of people (1) Electronic commerce	Cross-border services trade (5) Telecommunications Financial services (1) Movement of people (1) Electronic commerce
Investment	Single chapter (2)	Single chapter (9)
Dispute resolution	Single chapter (1)	Single chapter (2)
Government procurement	Single chapter (1)	Single chapter (1)
Intellectual property	Single chapter	Single chapter
Overall economic rules	Competition/consumer protection	Competition policy Transparency
General cooperation	Promotion of closer relationship Final provisions	Cooperation Institutional provisions General provisions/exceptions Final provisions
Other issues		Labour
		Environment
		4 side-letters

Note: Each row represents a chapter. The number of annexes for each chapter is shown in parentheses.

These treaties cover customs procedures, technical regulations and standards, especially sanitary and phytosanitary (SPS) measures. These measures have health and national security goals, but can also operate as trade barriers. The desire to increase trade in services raises many more issues as potential barriers to trade – many service industries regulated to achieve a broad array of social, economic and cultural outcomes. Industries such as finance, law, education, entertainment, communications, transport and health raise many issues beyond market economics. Countries have developed a variety of regulatory procedures to ensure that these industries operate to achieve critical social and cultural goals as well as operating competitively. Many services can still only be effectively delivered from a

domestic base, so such regulations include migration and visa requirements, and many "trade" treaties now include changes to immigration policy.

Treaties governing international investment used to be the subject of separate investment treaties – indeed Australia has 21 Investment Promotion and Protection Agreements (IPPAs). Now they are included as a chapter in most "trade" treaties. Since the Uruguay Round, preferential "trade" treaties have also included dispute resolution mechanisms, agreements on government procurement and "intellectual property" measures. Most recently trade treaties have been extended to include such matters as competition policy, labour standards and environmental goals.

The idea that regulations across this vast swathe of activities should be determined through secret negotiations focused almost exclusively on the export concerns of a small number of firms is not only novel, it is disturbing. It has given rise to substantial public discontent. Some topics have been hot buttons – with Investor-State Dispute Settlement (ISDS) provisions being the leading issue.[19] Not far behind come encroachments on national systems designed to ensure equal access to medicines. Next come a range of "intellectual property" issues, with the most widespread public concern being about copyright.

C. Regulation: goals and approaches

Very many of the regulatory areas now touched by preferential treaties are complex, reflecting a nation's history, legal presumptions and social goals. One cannot simply import another nation's competition laws and expect these to work in the same way in a different environment. To simply import individual elements from another nation's laws is to risk substantial unexpected consequences. Nor is it sensible to agree to mechanisms which will not apply in the country proposing the regulatory changes.[20]

A far more sensible approach is to agree on common goals and outcomes, then allow each party to reshape domestic regulation to achieve these. This would reduce the risks from importing foreign domestic regulation and would allow for a more integrated approach to improving regulations.

This lesson that has become clear from aspects of the AUSFTA. For example, importing US copyright provisions without US fair use policies has been highly contentious. US fair use provisions are far broader than Australian fair dealing provisions (ALRC 2014: chapter 4). Also contentious has been importing regulations to prevent avoidance of technological protection measures. Such laws were highly contested in the USA, and Australia simply does not have the content distribution companies that benefit from such provisions.[21] Such provisions are clearly welfare-reducing for Australia, as was the 20 year extension in the already over-long copyright term (Dee 2005).

Lawyers dominate international treaty negotiations and the manner in which specific regulations are drafted in "trade" treaties smacks of old-fashioned heavy-handed over-regulation, certainly in regard

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[19] Indeed complaints about the exclusion of civil society form ISDS discussions reach to very high levels in society. As Peter Martin commented in The Age on 21 February: "High Court Judge Robert French has complained that the judiciary is being frozen out of the decision making process. It knows more than any other branch of government about what allowing outside appeals beyond the High Court would do to the legal system, but he says as far as he knows, he hasn't been asked." Trans Pacific Partnership. What's the deal being negotiated in our name? http://www.theage.com.au/federal-politics/political-news/trans-pacific-partnership-whats-the-deal-being-negotiated-in-our-name-20150220-13jci9.html.

[20] See Gleeson et al. 2013 for a discussion of the secret annex to the secret transparency chapter of the secret TPPA. This annex, proposed by the USA, would not apply in the USA where insurance companies would continue to be allowed to run PBS-like schemes. But our PBS, New Zealand's PHARMAC and any other signatory's similar systems would have to be set aside. These would be replaced by "market" pricing systems. Given the proportion of medicines that are covered by patents, these would be monopoly prices.

[21] See Court 2013, pp25-94 for an empirical assessment of Australia's film industry, showing that the profits go to distributors not creators. When the IP Awareness Foundation (largely composed of firm distribution companies) places propaganda on DVDs saying that burning a DVD will harm Australia's film creators, this is not supported by the evidence. It will not harm creators. But it may marginally reduce the income of distributors such as Village Roadshow, the Australian Home Entertainment Distributors Association, Foxtel, etc (see http://ipaf01.voodooweb.com.au/about.

to intellectual property chapters. In "intellectual property" chapters treaty texts dot every i and cross every t. Weatherall (2014) has documented how the over-regulation of copyright in the AUSFTA has prevented Australia being able to adapt to new technologies. Such detailed regulation reduces or eliminates our ability as a nation to respond flexibly to changing technology.

Newly emerging areas in "trade" treaties – such as chapters on rules concerning competition and consumer protection – have similar potential. National economic regulatory environments are complex and, at least in common law countries, are composed of traditional norms, statute law, and doctrines developed through case law. These result in a range of checks and balances that together operate to ensure that multiple social objectives can be simultaneously optimised. Importing a piece of overseas regulation – such as data protection for clinical trial data – has quite different effects in Australia than it does in the US's large market. In the USA its negative impact is offset by the 180-day exclusive marketing privilege for the first generic entrant (Holovac 2004). In Australia there is no such offsetting provision, nor would such a provision work in our much smaller market. The consequence is that our generic pharmaceutical industry has faced additional obstacles in entering the market at the end of the original patent term, and the offsetting "benefit" is higher prices paid to overseas companies.[22]

Perhaps one of the impediments to specifying the outcome objectives for specific regulatory elements is that the objectives themselves are not clear.[23] Setting clear objectives for issues included in trade policy is essential. If we do not know where we want to go, we are unlikely to get there.

Setting clear and specific objectives for each key element covered in a trade treaty would do much to overcome the secrecy and suspicion which currently surrounds these negotiations. Unlike WTO trade negotiations, regional and bilateral negotiations are conducted with strong secrecy rules.[24] The only segment of civil society allowed behind these doors is the large business sector. But if government engaged in a public debate to determine the key objectives for trade policy, citizens might develop more confidence in their ability to reach welfare-enhancing outcomes, even behind closed doors.[25] More importantly, such debate would involve elected representatives who have to take responsibility for ensuring the necessary legislative support.

Indeed, for the wide range of regulatory areas targeted by our trading partners, Australia could develop an active domestic reform agenda, which could inform and strengthen our "trade" negotiations. The Productivity Commission has identified issues directly related to trade – such as trade facilitation, mutual recognition of standards and so on and suggested that these:

> "could potentially be addressed more productively through other arrangements. For instance, the use of mutual recognition agreements and bilateral investment treaties could

[22] See submissions to the 2012-13 Pharmaceutical Patent Review, particularly those from Alphapharm and the Generic Medicines Industry Association (GMiA). Submissions on the original issues paper are now available at http://web.archive.org/web/20130425142849/https://pharmapatentsreview.govspace.gov.au/submissions/ as IP Australia has dismantled the Pharmaceutical Patent Review website and sent all the public submissions to an inaccessible archive. Unfortunately the wayback machine did not capture the website at the point where all the public submissions responding to the draft report had been lodged. I can provide copies if these are needed.

[23] There is also the possibility that they are embarrassing. For example, many of the detailed patent provisions in the draft TPPA are clearly designed not only to maintain the current very low inventiveness standard, but to reduce it further. The underlying goal can only be to delay the entry of generic medicines into the market. This is not a sensible goal for a country with a large generic industry and an innovator industry based on the subsidiaries of foreign companies. It comes at a significant cost to the taxpayers who fund the PBS.

[24] Though no-one takes responsibility for this secretive approach. Neither the USTR website nor the DFAT trade website provide any information as to the source of the secrecy, though of course one can speculate.

[25] While leading politicians often discuss trust, they rarely take action to engender any. Setting out clear priority agendas and clear policy goals would do much to improve trust between citizens and their representatives. Making policy behind closed doors, with only big business allowed access (sometimes only foreign big business), directly creates distrust and erodes support for major political parties.

> avoid the costs and complications involved with achieving a wider trade agreement involving trade-offs between various provisions associated with the negotiation of BRTAs."
>
> (Productivity Commission 2010: xxviii)

Taking this approach would allow informed public debate about goals, trade-offs and the economic and social impacts of alternative approaches. It could not only re-vitalise a domestic economic reform agenda, but it could lend power to a de-regulatory agenda. Modern, outcome-oriented regulations are far less onerous both for industry and society, and ensure that innovative approaches can be taken to meeting regulatory goals.[26] Trade treaties would be substantially improved if they took an outcome-oriented approach to regulatory issues.[27]

3. Approval processes

A. Current processes

Currently executive government develops trade policy goals in secret, negotiates the specific content in secret, signs the secret agreement and only then provides the text to parliament and the people of Australia. While treaties are considered in detail by the Joint Standing Committee on Treaties (JSCOT), the government can, and does, ignore JSCOT's advice. This was particularly evident in the government's response to JSCOT's considered report on the proposed Anti-Counterfeiting Trade Agreement (ACTA). That response was, frankly, disrespectful of parliament. Indeed one member of JSCOT was moved to respond, wondering if the government had even read the JSCOT report.[28]

Australian governments, like many others, are generally elected on narrow margins. It seems a long time since a federal government was elected on a clear overall majority. Two-party preferred margins in the range of one to five percentage points hardly constitute a mandate for anything.[29] Indeed the citizens who vote for one party in the House, often cast a different vote in the Senate, to ensure a restraint on the decisions government can make and implement. Given that there is little public debate about preferential trade treaties and their content, this raises real questions as to whether a government elected on second or lower preferences has any mandate in this policy area.

Preferential trade treaties dictate changes to substantial areas of domestic regulatory policy, and bind Australia to particular approaches, without any domestic debate or analysis. This makes domestic reform difficult if not impossible. Should there be a substantial need for reform, and the trading partner disagreed and retaliated, selected exporters would line up against the public interest to try and maintain their markets. This risk means that we should make very sure we want to tie the hands of all future governments. This is far too important a matter to be determined behind closed doors and with limited input from narrow sections of the community, mainly large business.

In the context of the Advisory Committee to the Constitutional Commission on the Distribution of Powers, Professor Lindell recommended adopting, on a trial statutory basis, a requirement for parliamentary approval before Australia entered into any international treaty. This seems eminently sensible. It replicates processes used in the USA, *but provides for a trial to see whether these suit*

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[26] See, for example, Pelkmans and Renda 2014, in respect of EU regulation and innovation.

[27] Indeed these treaties seem to be written to maximise work for lawyers not to simplify trade. The page counts for recent European Union treaties are 1,338 for Korea (2011); 2,605 for the Andean communities (Colombia and Peru, 2013); 687 for Singapore (2013) and 1,634 for Canada (2014).

[28] "What the government response reveals to me is that the government has barely even read the Treaties Committee report," Senator Scott Ludlum, *Senate Hansard*, 28 November 2012, pp. 10120.

[29] In the context of politics, the Macquarie dictionary defines mandate as "the instruction as to policy given or supposed to be given by electors to a legislative body or to one or more of its members". The Oxford English dictionary defines mandate as "The authority to carry out a policy, regarded as given by the electorate to a party or candidate that wins an election" (http://www.oxforddictionaries.com/definition/english/mandate, accessed 12 February 2015). Nethercote (1999: 25) notes that these political meanings of "mandate" have low rankings among all meanings of mandate given in dictionaries.

Australia. Such a proposal would enhance effective democracy in Australia. It would encourage more open and public discussion of policy goals and objectives for elements to be incorporated into treaties, to ensure that there was general agreement to the terms of the treaty. The current JSCOT process, welcome as it is for getting at least some issues into public debate, makes a mockery of the role of parliament in a democracy. The government has, by signing the agreement, fully committed itself to the text and is reliant on parliamentary approval only for those matters requiring the approval of new legislation or statutory regulations. As ACTA revealed, when JSCOT raises concerns, the government simply ignores them.[30]

B. Assessing the overall costs and benefits

Another approach that would improve public confidence in "trade" treaties, and ensure that parliament had access to objective date to use in assessing treaties, would be to ensure proper cost-benefit assessment of the likely outcomes. The many non-tariff elements included in trade treaties can be hard to quantify. But it is not hard to identify the agreed changes and to go further and identify who will gain and who will loose from these changes. As Dee (2005) has shown, it is possible to make at least ball-park estimates of the costs of changing domestic policy in areas such as copyright. Staying with the AUSFTA, the meat and livestock industry clearly gained from the treaty, with an increased share of US imports phased in over many years. Clearly too the users of copyrighted content lost – users ranging from private citizens through some content creators,[31] to the education system as a whole.

There is currently an active debate among economists about the most appropriate models for assessing the outcomes of the trade elements of proposed trade treaties. Capaldo (2014a, 2014b) has analysed the proposed Trans-Atlantic Trade and Investment Partnership (TTIP) using the United Nations Global Policy model. Unlike the World Bank-style Computable General Equilibrium (CGE) models used in the officially-commissioned studies, the Global Policy model has more realistic assumptions both about the trajectory of adjustments consequent on opening up formerly protected industries and about the impact of third countries on the bilateral trade flows (Capaldo 2014b: 6-7). The official CGE models all demonstrate that increased trade between the US and Europe will largely be at the expense of intra-European trade. They all estimate that the net impact of the TTIP will be a small once-off increase in GDP – of the order of 0.13% to 0.49% (Capaldo 2014b:8-9). The official models estimate the impact of removing non-tariff barriers based on a range of assumptions, but all assuming a net effect of at least a 25% reduction in the cost of such barriers.

In contrast the Global Policy model indicates that the first-order impact of the proposed tariff reductions will be a net export loss leading to a fall in GDP and a loss in jobs and labour income, because of the fall in output from formerly protected sectors. The flow-on effects would be a reduction in government revenue and a further reduction in the labour share of income (Capaldo 2014a, 2014b).

Despite reservations about the value of some types of general equilibrium models in analysing the impact of trade treaties, more realistic models are available. And there are a range of data which can throw light on the magnitudes of gains and losses, and the principal groups affected. Current treaty assessments do not seem to make use of this wide range of available information and analysis. *In particular, they seem to assiduously avoid identifying losers*. Further, where analysis is undertaken, it lacks independence. Private economic consultancy groups tread a careful line in their outputs between ensuring their credibility within the economics profession and ensuring future contracts. The latter concern dominates.[32] As a result it would be sensibly to ensure that the quantitative and qualitative

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[30] See JSCOT report on ACTA and the government response: (http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/21november2011/report/fullreport.pdf) and (http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/governmentresponses/126th.pdf).

[31] Particularly those using various forms of re-mix.

[32] Indeed the officially commissioned economic evaluation of AUSFTA led to Ross Garnaut's now-famous remark that it did not pass "the laugh test." Recent analysis using the PC model but with updated data, shows that AUSFTA

assessment of trade treaties was undertaken by an entirely independent body. The Productivity Commission would seem well placed to undertake this role. Australia's Productivity Commission approach has been put forward as a template for other nations wishing to reap the benefits of increased competition (Thirwell et al. 2009).

In its BRTA, the PC identified that, at least in some quarters, there was a mindset of "agreements for agreement's sake", premised partly on the view that Australia must follow a trend in other countries. Such an attitude is also clear in the current government's "open for business" comment and its decisions to set tight time-frames for concluding long-running negotiations with Korea, Japan and China.

If there is one thing that is certain about negotiations, it is that any party strongly wanting to conclude the negotiation quickly will have to make concessions to the other party – concessions that would not have to be made if a more orderly approach was taken. Australians can and should expect their government to walk away from negotiations when the outcomes are unsatisfactory from the perspective of a net benefit to Australia. It is now clear that the AUSFTA has created a net loss for Australia.[33] Certainly it has created a lot of clean-up work, particularly in the copyright arena. It has not even been implemented properly – the safe harbours provisions for internet service providers (ISPs) in the AUSFTA have never been properly implemented. This places smaller domestic ISPs on uncertain legal grounds.[34]

Given the business focus of trade treaties, and the major role played by very large corporates in international trade, the simple slogan "open for business" is not sufficient guidance as to the government's policies. What kind of business is Australia open for? Most preferential trade agreements are drafted to meet the needs of large companies, mostly foreign. The sheer size, complexity and language of trade treaties require significant legal resources to evaluate for actual business opportunities. Certainly many of the intellectual property provisions are not drafted with Australia business interests in mind. Only about 20 percent of innovating Australian businesses actually use the patent system,[35] and the kinds of provisions Australia has agreed reduce competition further and to constitute a net welfare loss.

C. Consultation processes

Since the early 1970s the USA has had well-developed processes for ensuring that the voices of large business are heard across federal government administration. These processes, established through the 1972 Federal Advisory Committee Act provide certain business interests with inside access to government. According to the Office of the United States Trade Representative (USTR) there are currently 28 advisory committees working "to ensure that U.S. trade policy and trade negotiating objectives adequately reflect U.S. public and private sector interests."[36] The USTR site advises that there are about 700 "citizen advisor" members of these committees. This is perhaps rather a generous definition of "citizen advisor". In an analysis of the US government's refusal to support US action to investigate the use of geographical indications as a tool to build prosperity in specific agricultural regions, Bingen points to the narrow representation on these committees. Bingen investigates the membership of the Agricultural Policy Advisory Committee (APAC) for Trade, and Agricultural Technical Advisory Committees (ATACs) for Trade and concludes membership is largely restricted to large corporations. He asks:

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was clearly trade-diverting. In this analysis Armstrong concludes that his "results add to the evidence about whether or not preferential trade agreements increase net trade — with the body of evidence currently suggesting that they do not and if anything lead to a contraction." (Armstrong 2015).

[33] The pure trade flows have been trade-diverting (Armstrong 2015) and there are clear losses on non-trade issues such as copyright.

[34] Kimberlee Weatherall, "Safe harbours" presentation to Australian Digital Alliance Forum, 13 February 2015. The presentation is available at https://www.youtube.com/watch?v=XnvXIuqpiwk.

[35] Calculated from data in Australian Bureau of Statistics 2014.

[36] https://ustr.gov/about-us/advisory-committees .

> "if these largely corporate players enjoy political access through advisory committees, independent of various congressional lobbying activities, then where and how do smaller, organic, urban and others find comparable policy access?"
>
> Bingen 2012: 547

While Australia has no similar consultation committees – or to the extent that it does, has established these more on a portfolio-by-portfolio ad hoc basis – the degree of access large corporations have to key government decision-makers is well-known. Since the public service reforms of the mid 1980s, designed to increase the focus on stakeholders, the degree of capture by large well-funded, mostly corporate, interest groups has been remarkable.

While it is important that businesses are able to convey concerns to government, particularly about where there are impediments to competitive markets, there are many other interests that have different perspectives. Not that policy development should be a free-for-all between competing interest groups. Such negotiation does form part of the political landscape. *But it needs to occur after policy options have been identified*. Policy options need to focus on the benefits and costs of policies *to the community as a whole*. Without such clear analysis of options and how they impact on different groups, the lobbying that later takes place occurs in an evidence-free vacuum.

So more important than a broader consultation base, is open, transparent and independent analysis of policy options, including clear presentation of the evidence used to underpin the analysis. Without this, no amount of consultation will achieve better policy.

What "consultation" does take place with DFAT is very much one-way. Because of the secrecy around trade negotiations, DFAT provides only very high-level general information to participants in such consultations. Its "consultations" involve DFAT listening but rarely responding.

In the case of ACTA, I attended one DFAT consultation with a very broad range of interests present. DFAT appeared to listen to various views presented, but there was no evident note-taking. Important issues raised were not reflected in the text presented to JSCOT. I recollect clearly the information from freight-forwarders about the impact ACTA would have on them. Freight-forwarders and shipping agents are an essential lubricant of international trade. If even their interests cannot be taken on board, what hope is there for those representing broader community concerns, such as health?

The TPPA consultations on intellectual property and investment disputes have been similar. Participants provide information and analysis to DFAT officers. There is no two-way discussion, and what little information there is suggests that the TPPA process has been impervious to this evidence.

There has now been considerable analysis of the impact of TRIPS and TRIPS Plus patent and data protection provisions on the cost of medicines, and therefore access to them.[37] One of the new policies that became mandatory for all WTO members was the provision of patents for chemical compounds. There are now two solid empirical studies from India estimating the welfare loss from this. Both Chaudhuri, Goldberg and Jia (2006) and Dutta (2011) find that the welfare loss to India substantially exceeds the gain to producers from the new patents for pharmaceutical compounds. Using data on generic entry in the USA under the Hatch-Waxman Act, Branstetter and colleagues show similar outcomes in the USA (Branstetter et al. 2011). These three papers demonstrate that the effect of patents in this critical area is much like the effect of high tariff walls. And, like tariff walls, it would be cheaper to directly subsidise the producers than it is to provide them with the same level of income through patents. *The studies find that the gains to pharmaceutical producers are only 12 to 15 percent of the losses to consumers.* It would be far cheaper for us all to pay off the pharmaceutical industry than to grant them patents.

[37] See pp 5-13 in Moir et al. 2014 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536254).

4 Fair trade: patent policy

The Committee has been asked to explore what an agreement which incorporates fair trade principles would look like. In respect of "intellectual property" provisions, the fairest approach would be to eliminate any such legislated monopolies from all trade agreements, and to remove the TRIPS Agreement from the Single Undertaking. The objective of free trade is to maximise competition, benefitting consumers and reducing input costs for business. The objectives of patent and copyright policy are to impede competition, and trademarks can constitute a restraint on trade. Regardless of the offsets in terms of marginally improved agricultural access, these policy areas have no business being in free trade treaties, and certainly not in their current form. Given the importance of innovation and creativity to our economy, adopting unbalanced regulations in these areas is a poor exchange for more agricultural exports.

Indeed there are substantial ethical questions about many aspects of the kinds of intellectual property provisions in both multi-lateral and preferential trade agreements. When today's high-income countries were developing, intellectual property rules had were far more limited reach. This allowed lower-income countries to adopt and adapt improved technologies with few limits, allowing learning by doing and other essential steps in reaching a higher-technology environment. There is no evidence that that a global approach to patents is welfare-enhancing (Bonatti and Comino 2011; Deardorff 1992). Nor is there any rationale for global copyright systems, particularly systems that grant global copyright but do not balance this with global licensing. These statutory interventions in the market are designed to enhance innovation or creativity in a particular nation, and there is no justification for requiring consumers in foreign nation to subsidise such policies. Indeed the USA refused to join the major global copyright treaty until 1988.[38]

In response to the continually increasing demands for lower and lower "intellectual property" standards, I have been developing a proposal for a balanced patent system which would meet the terms of TRIPS Article 7:

> "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

Unfortunately TRIPS itself fails to meet this excellent fair trade objective in several respects, and the TRIPS-Plus proposals that have characterised preferential trade agreements are even less balanced. This is particularly so when one of the parties is the USA or the EU.

The remainder of this paper sets out the key elements of a balanced patent policy and demonstrates how this differs both from TRIPS and from subsequent preferential treaties. Further detail of the argument and evidence underlying these proposals is available in my second submission to DFAT on the Trans-Pacific Partnership Agreement (TPPA).[39] The key components of a balanced patent policy are set out in Box 1.

A. Balanced patent policy

The starting point for any policy is a clear statement of objectives. The principal patent objective is to encourage investment in industrial innovation *which would not otherwise occur*. It is not a reward for inventors. It is a serious intervention into the market for innovation which operates ***by preventing third parties from using a new technology for up to 20 years***.[40] So this powerful exclusive right can hinder innovation as much as it might induce it. Basic economic principles teach that interventions in the market will generally be welfare-reducing. This is reflected by Article 5.1 of the Competition Principles Agreement, which binds all Australian governments. Article 5.1 states that:

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[38] The Berne Convention for the Protection of Literary and Artistic Works.
[39] Available at http://www.dfat.gov.au/trade/agreements/tpp/submissions/Documents/tpp_sub_moir.pdf.
[40] 25 years for pharmaceutical products in Australia, the USA and some other countries.

> "legislation … should not restrict competition unless it can be demonstrated that:
> (a) the benefits of the restriction to the community as a whole outweigh the costs; and
> (b) the objectives of the legislation can only be achieved by restricting competition."[41]

This statement raises the second major element of patent objectives – that the induced innovations should create, for society as a whole, benefits that exceed the costs. For there are costs. Every granted patent carries a "powerful exclusive right",[42] as defendants in patent litigation learn to their cost.

Patent should thus be granted only for inventions which:

a) would not otherwise occur; and
b) which likely deliver dynamic benefits greater than the losses from reduced competition.

This parsimonious approach would minimise the damage done to subsequent (or simultaneous) inventors by the patent system. It would create an efficient and effective patent system aligned with Principle 5.1 of the Competition Principles Agreement. Achieving this would require two major changes to current patent policy – patents should be limited to technology-based inventions, and the inventiveness requirement should be high.

Box 1: Key elements of a balanced patent policy

1. **Clear goals:**
   Induce invention that would not otherwise occur; and
   which would provide dynamic benefits greater than static efficiency losses
2. **Limit to technological inventions**
   No patents for software (or any mathematical algorithms), methods of medical treatment, or discoveries (including genetic discoveries)
3. **A high inventive step, so that patents are only provided for genuine inventions**
   The current "marginal variation" standard should be replaced with a ***significant advance over what was known and what was available*** standard as advised to parliament in 2011.[43]
4. **Parsimonious privileges**
   The sole privilege granted by a patent should be the right of sale into the market where the patent is valid.
5. **Balanced penalties**
   Profits from invalidated patents should be repaid in full, and there should be penalties for undermining the objectives of patent policy (i.e. parallel to tax law)
6. **Collection of data and regular evidence-based evaluation**
   The patent office should be required to collect and publish data on how the many patent monopolies it grants each year are used; ABS collections on innovating companies should cover how companies use their patents and the costs imposed by patents owned by others. There should be regular independent evaluation both of patent standards and the overall welfare impact of the patent system.

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[41] See http://www.coag.gov.au/node/52. As part of the initial agenda on the Competition, Commonwealth intellectual property laws were reviewed for compliance. Unfortunately this review ***simply assumed*** both a need for patents and an inventive step (IPCRC 2000). But there is virtually no inventive step in the patent system (Moir 2013) and the empirical evidence shows that patents are actually needed only in very special circumstances (López 2009). Australia's current patent system fails the Article 5.1 test.

[42] Explanatory Memorandum, Intellectual Property Laws Amendment (Raising the Bar) Bill 2011, p.42.

[43] Ibid., p,42

It is generally presumed that a patent is granted only for an invention. This is far from the truth. Patent law has managed to exempt itself from the normal legal paradigm that words take their ordinary meaning. Inventive has a special and narrow meaning in patent law, and so too does obvious. Patent law ***presumes*** that every application is sufficiently inventive to merit a patent monopoly. Examiners are then required to demonstrate that the invention is "obvious" to an ordinary worker skilled in a narrowly defined technological area. This worker is assumed to have little imagination and there are restrictions on what existing knowledge s/he can combine. This process is like short-listing for a beauty competition by eliminating the ugly! I refer to it as the "uninventiveness" test. It is used in most major jurisdictions and explains the very many silly and obvious patents in existence.

At present Australia has the freedom to substantially reform both the technological boundaries used (or rather currently not used) in the patent system. Australia also has the freedom to introduce the inventiveness standard advised to parliament in 2011:

> "A key principle of the patent system is that protection is only given for things that are a ***significant advance over what was known and what was available to the public*** at the priority date of the patent. A granted patent can be a powerful exclusive right: as such, it is appropriate that the inventive step requirement be sufficiently stringent."[44]

This inventiveness standard has not yet been implemented. While there are no current proposals to undertake this much-needed reform, the government seems on track to agree to provisions in the TPPA that would prevent this ever happening. The provisions of the leaked intellectual property chapter of the proposed TPPA,[45] lock in all the details of current administrative processes and judicial doctrines, including the current "uninventiveness test". All future governments would be prevented from undertaking these essential reforms, unless they were willing to break this treaty.

Beyond these three elements, privileges, penalties and evaluation all need reform, The privileges granted by patents are very extensive and date from an era where local working was an essential requirement of a patent system.[46] As local working was eliminated by TRIPS, the privileges also need to be pared back. They act to extend the patent term as competitors are not allowed to *prepare* for market entry until *after* the patent has expired. Also, as the Pharmaceutical Patent Review pointed out, Australian generic manufacturers are prevented from exporting to markets where the patent has already expired (Harris et al. 2013: pp. 49-54). This policy makes as much sense as shooting oneself in the foot.

Penalties also need a substantial overhaul. If a firm is found to have infringed a valid patent, it will be required to pay compensation, often substantial. But where a company profits from the higher prices of a patented product, and the patent is then shown to be invalid, there are few mechanisms for compensation.[47] This matter was raised by several submissions to the 2012-13 Pharmaceutical Patent Review, with concrete examples of losses to taxpayers through Pharmaceutical Benefits Scheme (PBS) payments in respect of invalidated patents. There is also a long and detailed history of abuse of the patent system, principally by substituting legal semantics for technology.[48] Similar abuses of tax law

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[44] Ibid, p.42, emphasis added.

[45] The latest, May 2014, version is at https://wikileaks.org/tpp-ip2/.

[46] TRIPS Article 36 confers on patent-holders the following exclusive rights "where the subject matter of a patent is a product, [the right to] to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing6 for these purposes that product; [and] where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process."

[47] Thambisetty provides examples of doctrinal incoherence (silly outcomes) in patent law. One such involves a company which was sued in the UK for infringement. It counter-sued for lack of validity but lost. Later a different company succeeded in having the patent ruled invalid. But the first company still had to pay a penalty to the company with the invalid patent (Thambisetty 2009: 31-32). This is economic nonsense.

[48] These games are so well accepted within the patent community, that a semantic procedure for getting round the European Patent Convention's ban on patents for second medical uses of a known substance, are widely known

have been at least partially controlled by clear penalties for actions undermining tax law. Such provisions are needed for patent law.

Finally the lack of data about the impact of patents is startling. While the Australian Patent Office now hands out over 17,000 patents a year (IP Australia 2013), *it has never collected any data on how these are used*. The IPAC review recommended that, on renewal, patent owners be asked how they were using their patents (IPAC 1984). This recommendation has not yet been implemented. The Australian Bureau of Statistics (ABS) collects data on business innovation, but does not provide data on how patents are used, and whether patents owned by others act to delay or distort innovation.

There are substantial indirect data that most firms do not use patents. The most recent ABS innovation data show that *at most* one in five innovating Australian firms use patents.[49] This is entirely consistent with the vast body of evidence that shows *patents are needed only in a few narrowly defined technology areas* (López 2009). These data from industrial and innovation economists are never used in discussions of patent policy. Dominated by lawyers, and insiders from the patent community, most such discussions are entirely evidence-free. When the evidence is presented, it is ignored.

More direct evidence, of the type outlined above would be of great value in ensuring that all participants in debates on patent policy based their proposals on objective evidence.

Because patent systems are off-budget they have also escaped scrutiny. In ten years of searching, I have not yet come across a solid economic evaluation of any patent system. Yet patents are said to be essential for innovation and therefore economic growth.

Having outlined the key elements of a balanced patent system I now turn to assess the extent to which these standards are met in trade treaties.

B. Trade treaties and balanced patent standards

Objectives

Only TRIPS has clear stated objectives. The *Patent Act 1990* has no objectives.[50] Objectives in our bilateral treaties and in the draft TRIPS are variable and often internally contradictory. Some run counter to the evidence. For example our treaty with Singapore (SAFTA) states:

> "The purpose of [the intellectual property] is to increase the benefits from trade and investment through the protection and enforcement of intellectual property rights."

Whether "intellectual property rights" lead to enhanced investment is a hotly contested question. There is little, if any, empirical research on whether such instruments increase trade or are in any way related to the benefits of trade. If they do, the relationship would likely be highly contingent, with some parties gaining and others loosing. Certainly patents for pharmaceuticals lead to consumer losses far in excess of producer gains (Branstetter et al. 2011; Chaudhuri et al. 2006; Dutta 2011).

The agreement between ASEAN, Australia and New Zealand (AANZFTA) has a much lengthier objective statement:

> "Each Party confirms its commitment to reducing impediments to trade and investment by promoting deeper economic integration through effective and adequate creation, utilisation, protection and enforcement of intellectual property rights, taking into account the different levels of economic development and capacity and differences in national legal systems and the need to

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after its inventor – the Swiss Patent Office. As patent offices are the guardians of the patent system, the abysmal current state of affairs is demonstrated by the lack of shame in referring to "Swiss medical claims".

[49] Calculated from data at Australian Bureau of Statistics 2014.

[50] The advisory body to IP Australia (the Australian council on Intellectual Property) has suggested possible objectives for the Act. Their recommendation boils down to the objective of "balance competing interests" rather than "maximise net benefit for Australia". For an analysis of this see my response to the IP Australia consultation on an objects clause at http://www.ipaustralia.gov.au/pdfs/DR_HAZEL_MOIR_-_Submissions_Patentable_Subject_Matter.pdf.

> maintain an appropriate balance between the rights of intellectual property owners and the legitimate interests of users in subject matter protected by intellectual property rights." (Chapter 13, Article 1)

AANZFTA has only a short high-level section on intellectual property and has no provisions on patents. The objective statement is interesting for its complexity and the claim – based on no empirical evidence – that deeper economic integration will be achieved by "effective and adequate creation, utilisation, protection and enforcement of intellectual property rights". It is also unclear that "deeper economic integration" is a desired goal in either country. This is usually an invitation for larger companies with deeper pockets to run rings around small and medium sized enterprises.

Limit to technology

Under TRIPS there is an obligation not to discriminate between technologies. For those subject areas that are clearly not technologies – discoveries and mathematical algorithms[51] – countries are free to rule that inventions are unpatentable. Indeed TRIPS mandates copyright protection for software, indicating the general acceptance at that time that software was not, and should not be patentable (IPAC 1984; Samuelson et al. 1994).

The idea that patents are limited to technology is so fundamental that it is rarely written down. But over the last several decades courts in Australia and the USA, and the European Patent Office, have actively extended the scope of what can be patented well beyond technology. A return to the older technology limit would assist in getting rid of many thousands of patents with negligible inventive content.

TRIPS also allows countries to exclude two specified areas from patentability: diagnostic, therapeutic and surgical methods for the treatment of humans or animals; and plants and animals (Article 27).[52] While TRIPS mandates "protection" for plant varieties it leaves countries free to do this through the patent system or "by an effective *sui generis* system."

Australia already had a Plant Breeders Rights Act when TRIPS came into force. In AUSFTA Australia agreed to narrower exclusions than those in TRIPS. Although this did not change how patents worked in Australia, it provided the US with further leverage for TRIPS-Plus provisions in other treaties.[53]

Inventiveness

TRIPS requires use of novelty, inventiveness and utility concepts but does not prescribe how these be implemented, leaving room for the possibility of a high inventive step.

In AUSFTA Australia agreed to allow patents for "any new uses or methods of using a known product" (Article 17.9.1). This requirement is also repeated in KAFTA (Article 13.8). Australia has been using this very low standard for some time, but now it is locked in through the AUSFTA. Australia is one of three countries proposing the extension of this low standard through the proposed TPPA (Article QQ.E.1.4).[54] Effectively this grants permission for a second patent for the same thing, though the second patent has a narrower scope.

When a patent is granted for a product or chemical compound, the privileges are preventing ***any*** other commercial uses of that product for up to 20 years. This includes prevention of ***any methods*** of use. To require that new patents be provided for methods of using known products is a direct encouragement to evergreening – a strategy whereby companies seek additional marginally inventive

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[51] There is debate as to whether mathematics is an art or a science. But it is absolutely not a technology, though it is an essential tool in many technology fields.

[52] The plants and animals exclusion also excludes essentially biological processes for the production of plants or animals, but does not exclude micro-organisms or non-biological and microbiological processes.

[53] Article 17.19.2 of the AUSFTA provides the TRIPS exclusion for diagnostic, therapeutic and surgical methods for the treatment of humans or animals, but narrows other exclusions to "inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal, or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by law".

[54] The other two countries being the USA and Japan.

patents as a product reaches the end of its original patent life. These secondary patents over, in the case of pharmaceuticals, forms, dosages and methods of use have very low levels of inventiveness – if any – but can substantially delay generic competition.[55]

The TPPA, through a footnote to Article QQ.E.1.1, also sets in stone the current uninventiveness test, requiring that "not obvious to a person of ordinary skills" be used. In an interesting test of inventiveness in the USA, Moser and colleagues looked at patents for hybrid corns. Such patents provide data from field trials allowing an independent measure of the quality of the patented "invention". The researchers were astonished to find that, for the 315 cases, after 1993 newly patented hybrids *consistently yielded less corn* than the highest-yielding existing hybrids (Moser et al. 2013: 12-13). In fact yield improvements for these patents are fairly tightly distributed around a mean improvement of -0.814% over the full period 1986-2005 (see graphic in Attachment 1). Their queries to the US Patent Office returned the advice that "to be issued a utility patent, plants must only be different, but not better than existing plants." One might equally say they do they must only be different not more inventive. The actual standard for grant of a patent in both the USA and Australia is "trivial difference from what is known".

This standard clearly breaches TRIPS Article 7. Because the standard for grant is so low, many patents are not technologically innovative. But the "strong negative right" embodied in a patent still allows these low-quality patents to be used to impede would-be competitors. Such a low standard does not promote technological innovation but it contributes to all the static efficiency losses of the patent privilege.

Privileges

The wide range of privileges specified in TRIPS are a carry-through from when there were local working requirements. Without local working, only the privilege of selling in the domestic market should be granted. Preventing firms from preparing to enter the market the day after a patent expires is tantamount to an extension in already-long patent lives.

TRIPS Article 34 also provides owners of process patents a special privilege – except in specific circumstances it is the alleged infringer who must prove that the product they have produced is not made by the patented process. This may be the only circumstance in Australian law where the rule "innocent until proven guilty" does not apply.

Finally, TRIPS Articles 30 and 31 provide for limited exceptions to the privileges granted and certain other unauthorised uses (compulsory licenses/crown use).[56]

Because of the strength of the TRIPS privileges, subsequent treaties do not touch on this matter. They do however address limited exceptions.[57] The AUSFTA wording on limited exceptions (Article 17.9.3) is identical to TRIPS Article 30. So too is draft Article QQ.E.4. But in the TPPA there is a highly contested discussion over further prescriptive language governing the exception that allows generic companies, during the term of a patent, to use data in the patent for obtaining marketing approval for the generic version of a patented drug.

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[55] See Alphapharm and GMiA submissions to the 2012-13 Pharmaceutical Patent Review, http://web.archive.org/web/20130425142849/https://pharmapatentsreview.govspace.gov.au/submissions/. See also Burdon and Sloper on the financial advantage of using low quality patents to delay generic entry "Even where the final outcome of proceedings is that the patent is held invalid, the effect of the litigation will have been to delay the generics' entry to the market. Fighting the litigation may also have 'warned off' other generic competition. In any event, for a successful product, the benefit of even a short time of additional proprietary sales may easily outweigh the costs of patent litigation" (Burdon and Sloper 2003: 238).

[56] In fact Article 31 on compulsory licenses / crown use is one of the longest articles on patents.

[57] They also address patent revocation. TRIPS Article 32 merely requires the opportunity for judicial review. AUSFTA is more specific limiting the grounds for revocation to grounds that would have justified a refusal to grant the patent, fraud, misrepresentation, or inequitable conduct (Article 17.9.5). Earlier drafts of the TPPA IP chapter would have eliminated inequitable conduct from the grounds for patent revocation, but the latest, 2014, draft shows that this further unbalancing has been removed.

Penalties

While there is substantial attention to penalties for infringing patents most patent systems provide no clear procedures for companies who have benefited from an invalid patent to repay the profits gained from this market advantage. The incentives to challenge an invalid patent are weak – the challenging firm must take all the risks. But if successful, all competitors will have the right to enter the market. If a firm with an invalid patent was required to repay all the profits earned from this, this would substantially reduce the incentive for firms to undermine patent standards with applications for "inventions" with little inventiveness.

Trade treaties have lengthy sections on enforcement. As the provisions are complex and are written general for all forms of "intellectual property" I have not had the time to take them apart and analyse them. In general, however, IP provisions in trade treaties are drafted to meet the needs of innovator pharmaceutical companies. Certainly none of the treaties Australia has signed have created more balanced patent penalties.

Data and evaluation

The issue of patent use data and patent system economic evaluation is not addressed in any of these treaties, and as far as I can determine there are almost no use data since Canada's brief period of collecting such data following the Firestone review (Firestone 1971). Nor have there been any economic reviews. The nearest approach to one remains Machlup's 1958 report to the US Congress (Machlup 1958). In this he did a first-principles analysis of whether there would be an economic benefit in extending patent life by one year. This clearly showed that the effect would be far more likely to be negative than positive.

The first mention of data for evaluation and analysis purposes is in the proposed TRIPS – Article QQ.H.33 states:

> "Each Party recognizes the importance of collecting and analyzing statistical data and other relevant information concerning intellectual property rights infringements as well as collecting information on best practices to prevent and combat infringements."

The notable feature is the concentration solely on data about alleged infringement. Far more important are data on use – particularly on the extent to which one entity's patent impedes another entity's innovation.

5. Concluding comments

Because our trade agreements now cover so many aspects of our regulatory systems, they need far more cautious and careful analysis than they are currently getting. These regulatory systems affect important areas of not only our economy but also our society. Some, including patents, potentially affect our core competitive capabilities into the future. These issues are far too important to be negotiated in secret in close association with the interests of very large firms.

Our current processes for approving treaties are not democratic. Narrowly elected governments – of whatever persuasion – run on a mixed plank of policies. Trade policy is not often discussed in public. There is no mandate for executive government to commit Australia now and into the foreseeable future to importing a range of overseas regulations that suit neither our society nor our economy.

As shown by the example of patent policy, the regulations adopted through these trade treaties are very unbalanced, prioritising the interests of narrow sections of very large corporations over those of citizens, consumers and small and medium businesses. They are very far from any form of fair trade. Indeed many of our trade treaties, by adopting TRIPS Plus features, contravene TRIPS Article 7.

A minimum step forward would be to adopt Professor Lindell's recommendation and, on a trial statutory basis, require parliamentary approval before Australia entered into any international treaty.

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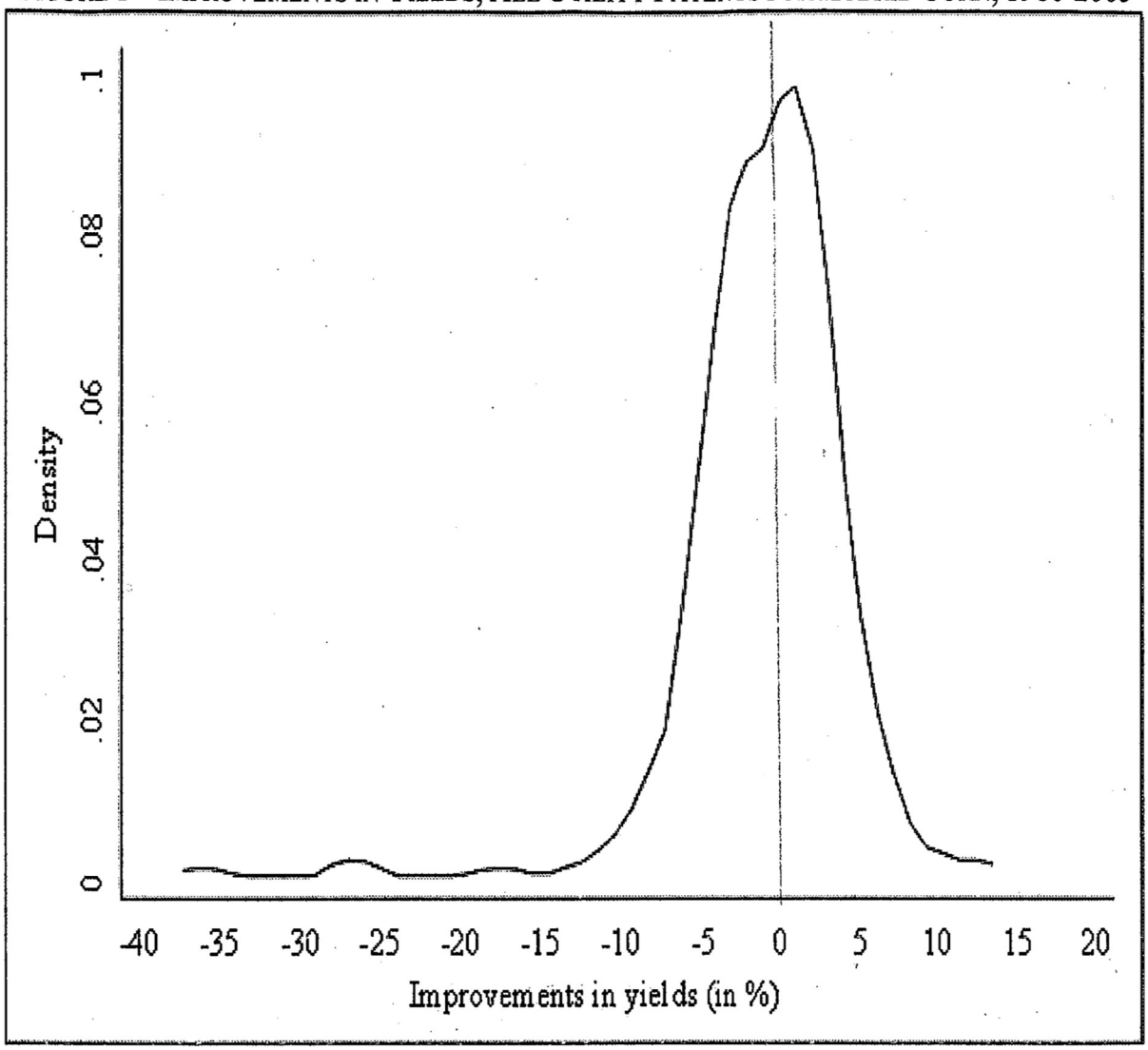
Attachment 1

FIGURE 1 – IMPROVEMENTS IN YIELDS, ALL UTILITY PATENTS FOR HYBRID CORN, 1986-2005



Notes: Improvements in corn yields for 315 patents – hybrid pairs for 269 U.S. utility patents issued between August 26, 1986 and March 8, 2005 in subclass 800/320.1 *Maize* (available at www.uspto.gov). Omitting 5 patents with more than 100 citations from the sample produces no noticeable differences in the distribution of yields; yields for these patents are listed in Table 5. Improvements in corn yields are calculated by comparing the yield of the new hybrid with the highest yield of comparison hybrids. Yields are based on field trial data, which breeders report on patent applications.

Source: Petra Moser, Joerg Ohmstedt and Paul W. Rhode, Patent Citations and the Size of Patented Inventions - Evidence from Hybrid Corn, Available at SSRN: http://ssrn.com/abstract=1888191, p. 31.