

16 APRIL 2021

**JOINT STANDING COMMITTEE ON TREATIES
THE REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP**



DFAT (2019), Creative Commons Attribution License

DR MATTHEW RIMMER

PROFESSOR OF INTELLECTUAL PROPERTY AND INNOVATION LAW

FACULTY OF BUSINESS AND LAW

QUEENSLAND UNIVERSITY OF TECHNOLOGY

Queensland University of Technology

2 George Street GPO Box 2434

Brisbane Queensland 4001 Australia

Work Telephone Number: (07) 31381599

Executive Summary

This submission provides a critical analysis of the proposed *Regional Comprehensive Economic Partnership (RCEP)* – focusing in particular upon intellectual property and innovation policy.

There have been longstanding concerns about the secretive nature of treaty-making in Australia – with calls over the last two decades for greater transparency, accountability, and oversight. Much like the *TPP*, there have been concerns about the secret nature of the negotiations regarding *RCEP*.¹ As such, legislators, civil society, and the wider public have not had access to the negotiating texts in respect of *RCEP*. The civil society group Knowledge Ecology International sought to overcome such problems by publishing leaked drafts of the Intellectual Property Chapter and the Investment Chapter of *RCEP* in 2016.² The full text of the agreement was not made publicly available until it was finalised in 2020. Knowledge Ecology International has been concerned about the ‘power of right-holder groups to use secret trade negotiations to limit democratic decisions that impact access to knowledge, the freedom to innovate and the right to health, in negative ways.’³ Jeremy Malcolm of the Electronic Frontier Foundation laments: ‘Like the *TPP* before it, the *RCEP* is being negotiated in a secretive fashion, behind closed doors, without adequate input from Internet users or any other of the stakeholders whose lives and livelihoods it will affect.’⁴

Academics have worried that *RCEP* has escaped the scholarly scrutiny and critical analysis that other mega-trade deals have received. Professor Peter Yu has commented that the

¹ Peter Martin, ‘And You Thought the *TPP* was Secret. The *RCEP* is even Worse’, *The Sydney Morning Herald*, 5 November 2016, <http://www.smh.com.au/comment/and-you-thought-the-TPP-was-secret-the-regional-comprehensive-economic-partnership-is-even-worse-20161104-gsiaaw.html>

² Knowledge Ecology International, ‘*RCEP*: Regional Comprehensive Economic Partnership’, <http://keionline.org/RCEP>

³ Ibid.

⁴ Jeremy Malcolm, ‘*RCEP*: The Other Closed-Door Agreement to Compromise Users’ Rights’, Electronic Frontier Foundation, 20 April 2016, <https://www EFF.org/deep links/2016/04/RCEP-other-closed-door-agreement-compromise-users-rights>

agreement has unduly received less attention than the *TPP* or *TTIP*.⁵ He has emphasized: ‘In view of these immense challenges and the high stakes involved, it is high time that policymakers, commentators, activists, consumer advocates and civil society organisations paid greater attention to the *RCEP* negotiations.’⁶ In 2017, Professor Peter Yu comments: ‘Although nobody at this point can predict how the *RCEP* negotiations will play out – or whether the final agreement, once completed, will ever be ratified – one can easily anticipate three scenarios concerning the future of the *RCEP* intellectual property chapter.’⁷ The first scenario is one in which there is no intellectual property chapter – because of disagreement amongst ASEAN+6 members. The second scenario is a *TPP*-like Intellectual Property Chapter. This model presumes that Japan, South Korea, Australia, and New Zealand will prevail in the negotiations. The third scenario is a *TPP*-Lite Intellectual Property Chapter. In this scenario, China and India will be dominant in influencing the progress of the negotiations. In conclusion, Peter Yu comments:

Regardless of which future scenario one finds the most likely, the *RCEP* will raise important questions about the future of intellectual property norm-setting in the Asia-Pacific region and about the future levels of protection and enforcement that will be found in intellectual property systems across this region. That the *RCEP* negotiations have involved many different trade and trade-related areas will also drive ASEAN+6 members to think more deeply about the future directions of both their national economy and the overall regional economy.⁸

Peter Yu notes that are certainly benefits involved with the harmonization of intellectual property regimes in the Asia-Pacific: ‘Given that intellectual property will remain a crucial part of the twenty-first-century economy and that its importance can only grow with time, ASEAN+6 members will squander a major opportunity to harmonise regional intellectual property standards if the *RCEP* Agreement does not include an intellectual property chapter’.⁹ However, he also notes that there are significant risks as well: ‘If the standards in this chapter

⁵ Peter Yu, ‘The RCEP and Intellectual Property Norm-Setting in the Asia-Pacific’, Intellectual Property Rights and Mega-Regional Trade Agreements, April 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810579

⁶ Ibid.

⁷ Peter Yu, ‘The RCEP and Intellectual Property Norm-Setting in the Asia Pacific’, (2017) 50 *Vanderbilt Journal of Transnational Law* 673-740 at 720.

⁸ Ibid. at 740.

⁹ Ibid.

are set too high, however, they will also hurt themselves by impeding future development, eroding global competitiveness and jeopardising access to essential medicines, educational materials and information technology.¹⁰ Peter Yu has subsequently further developed his thoughts upon the progress of the *RCEP* negotiations.¹¹ In the end, the final text of *RCEP* does include an intellectual property chapter – with a mixture of TRIPS and TRIPS+ provisions. In the language of Professor Peter Yu, this regime constitutes a *TPP*-lite approach to intellectual property.

The electronic commerce chapter of *RCEP* seems to take a laissez faire approach to the regulation of data transfer, consumer rights, and privacy protection. Arguably, this is at odds with the push for stronger regulation of digital platforms at a domestic level in Australia – and elsewhere in the Pacific Rim.

RCEP seems to represent a regression away from the development of progressive fair trade agreements. *RCEP* does not contain a comprehensive chapter on labour rights. Moreover, there is a failure to contemplate the intersection between trade and human rights in the agreement. *RCEP* does not have a proper chapter on the environment or the protection of biodiversity or climate change. *RCEP* does not adequately consider the inter-relationship between trade and public health – which is problematic given that the region of the Asia-Pacific has been affected by the epidemic of the coronavirus. *RCEP* does not seem to have involved substantive consultations with First Nations – and does little to protect Indigenous rights.

In terms of dispute resolution, there could be state-versus-state disputes within the *RCEP* framework. After much debate and deliberation, there is not an investor-state dispute settlement regime under the *RCEP* framework.

This submission makes the following recommendations and observations:

¹⁰ Ibid.

¹¹ Peter Yu, ‘The RCEP Negotiations and Asian Intellectual Property Norm Setters’ in Liu Kung-Chung and Julien Chaisse (ed.), *The Future of Asian Trade Deals and IP*, Hart Publishing, 2019, 85-110.

Recommendation 1

RCEP has a broad membership – even with the departure of India from the negotiations. Nonetheless, there remain outstanding tensions between participating nations – most notably, Australia and China. The re-emergence of United States into trade diplomacy will also complicate the geopolitics of the Asia-Pacific.

Recommendation 2

The closed, secretive negotiations behind *RCEP* highlight the need for a reform of the treaty-making process in Australia, as well as the need for a greater supervisory role of the Australian Parliament.

Recommendation 3

In terms of intellectual property principles and objectives, *RCEP* promotes foreign investment and trade, and intellectual property protection and enforcement. The agreement needs a stronger emphasis on public policy objectives – such as access to knowledge; the protection of public health; technology transfer; and sustainable development.

Recommendation 4

RCEP establishes TRIPS-norms in respect of economic rights under copyright law.

Recommendation 5

The agreement does not though enhance copyright flexibilities and defences – particularly in terms of boosting access to knowledge, education, innovation, and sustainable development.

Recommendation 6

RCEP provides for a wide range of remedies for intellectual property enforcement – which include civil remedies, criminal offences and procedures, border

measures, technological protection measures, and electronic rights management information. Such measures could be characterised as TRIPS+ obligations.

Recommendation 7

The electronic commerce chapter of *RCEP* is outmoded and anachronistic. Its laissez-faire model for dealing with digital trade and electronic commerce is at odds with domestic pressures in Australia and elsewhere for stronger regulation of digital platforms.

Recommendation 8

RCEP provides for protection in respect of trade mark law, unfair competition, designs protection, Internet Domain names, and country names.

Recommendation 9

As well as providing safeguards against trade and investment action by tobacco companies and tobacco-friendly states, *RCEP* should do more to address the tobacco epidemic in the Asia-Pacific.

Recommendation 10

RCEP has a limited array text on geographical indications, taking a rather neutral position in the larger geopolitical debate on the topic between the European Union and the United States.

Recommendation 11

RCEP has provisions on plant breeders' rights and agricultural intellectual property. There is a debate over the impact of such measures upon farmers' rights in the Asia-Pacific.

Recommendation 12

***RCEP* does not adequately respond to the issues in respect of patent law and access to essential medicines during the COVID-19 crisis. Likewise, *RCEP* is not well prepared for future epidemics, pandemics, and public health emergencies.**

Recommendation 13

***RCEP* provides limited protection of confidential information and trade secrets – even though there has been much litigation in this field in the Asia-Pacific.**

Recommendation 14

***RCEP* is defective because it fails to consider the inter-relationship between trade, labor rights, and human rights.**

Recommendation 15

***RCEP* fails to provide substantive protection of the environment, biodiversity, or climate in the Asia-Pacific.**

Recommendation 16

***RCEP* does little to reform intellectual property in line with the sustainable development goals.**

Recommendation 17

***RCEP* does not adequately consider Indigenous rights – including those in the Asia-Pacific.**

Recommendation 18

***RCEP* does not contain an investor-state dispute settlement mechanism. However, the Investment Chapter does have a number of items, which are problematic.**

1. The Geopolitics of *RCEP*

Over the past decade, there has been a rise of mega-regional trade agreements in the Asia-Pacific.¹² Trading superpowers have pursued a variety of other bilateral and regional trade agreements. The Obama Administration promoted a trifecta of mega-regional trade regional agreements – the *Trans-Pacific Partnership (TPP)*,¹³ the *Trans-Atlantic Trade and Investment Partnership (TTIP)*,¹⁴ and the *Trade in Services Agreement (TiSA)*.¹⁵ By contrast, the Trump Administration pursued an ‘America First’ trade policy – which involved the withdrawal from the *TPP*, and revision of *NAFTA*, with the *USMCA*.¹⁶ The *Trans-Pacific Partnership* finally came into force in an attenuated form – without the participation of the United States (*TPP-11*).¹⁷ China has aggressively promoted the Belt, Road Initiative.¹⁸ Australia has also negotiated

¹² Thilo Rensmann (ed.), *Mega-Regional Agreements*, Springer, 2017; Julien Chaisse, Henry Gao and Changa-fa Lo (eds.), *Paradigm Shift in International Economic Law Rule-Making: TPP as a New Model for Trade Agreements?*, Singapore: Springer Nature, 2017; Elizabeth Siew-Kuan Ng and Graeme Austin (ed.), *International Intellectual Property and the ASEAN Way: Pathways to Interoperability*, Cambridge: Cambridge University Press, 2017; Kung-Chung Liu and Julien Chaisse (ed.), *The Future of Asian Trade Deals and IP*, Oxford: Hart Publishing, 2019; Benedict Kingsbury et al. (ed.) *Mega-Regulation Contested: Global Economic Ordering After TPP*. Oxford: Oxford University Press, 2019; and Liu Kung-Chung and Julien Chaisse (ed.), *The Future of Asian Trade Deals and IP*, Hart Publishing, 2019.

¹³ *Trans-Pacific Partnership 2015 (TPP)* <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents>

¹⁴ *Trans-Atlantic Trade and Investment Agreement (TTIP)* <http://ec.europa.eu/trade/policy/in-focus/ttip/>

¹⁵ *Trade in Services Agreement (TiSA)* <http://dfat.gov.au/trade/agreements/trade-in-services-agreement/pages/trade-in-services-agreement.aspx>

¹⁶ *United States-Mexico-Canada Agreement 2018 (USMCA)* Signed 30 November 2018 <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>

¹⁷ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership 2018* <https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf>

¹⁸ Lisa Toohey, ‘Identity, Security and Trade’, Intellectual Property and Trade in the Pacific Century’, QUT IP and Innovation Law Research Symposium, 22 June 2017, <https://www.youtube.com/watch?v=wa3jGDkBs4;> Peter Yu, ‘China, ‘Belt and Road’ and Intellectual Property Cooperation’ (2019) 14 *Global Trade and Customs Journal*, Texas A&M University School of Law Legal Studies Research Paper No. 19-04, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3332346; Jing Tao, ‘TPP and China: A Tale of Two Economic Orderings?’ in Benedict Kingsbury et al. (ed.) *Mega-Regulation Contested: Global Economic Ordering After TPP*. Oxford: Oxford University Press, 2019, 79-99; and Peter Rimmer, *China’s Global Vision and Actions: Reactions to Belt, Road and Beyond*, Cheltenham and Northampton (MA): Edward Elgar, 2020.

a bevy of bilateral trade agreements with key trading partners,¹⁹ and has been involved in the PACER-Plus regional trade agreement.²⁰ The New Biden Administration has promoted the Quad – consisting of the United States, Japan, Australia, and India.²¹ In addition to these various agreements affecting the Asia-Pacific,²² there has also been the development of the *Regional Comprehensive Economic Partnership (RCEP)*. Consequently, there is a tangled web of regional and bilateral trade agreements that Australia has been involved in across the Asia-Pacific.

A. Negotiations

The *RCEP* negotiations were launched by ASEAN Leaders and ASEAN Partners at the East Asia Summit in Phnom Penh, Cambodia, on the 20th November 2012. The proposed membership of *RCEP* is based upon ASEAN nations – including Lao People’s Democratic Republic, Myanmar, Indonesia, the Philippines, Thailand, Cambodia, Brunei, Malaysia, Singapore, and Vietnam. The negotiations involved BRICS/ BASIC nations – such as the People’s Republic of China, and India (although India would eventually withdraw). ASEAN trading partners – such as the Republic of Korea, Australia, Japan, and New Zealand – are also involved in the *RCEP* negotiations. *RCEP* does include a number of *TPP* negotiating countries

¹⁹ *Australia-United States Free Trade Agreement* 2004, <http://dfat.gov.au/trade/agreements/ausfta/pages/australia-united-states-fta.aspx> *China-Australia Free Trade Agreement* 2015 (CHAFTA), <http://dfat.gov.au/trade/agreements/chafta/pages/australia-china-fta.aspx> *Japan-Australia Economic Partnership Agreement* 2014 (JAEPA), <http://dfat.gov.au/trade/agreements/jaepa/pages/japan-australia-economic-partnership-agreement.aspx> *Korea-Australia Free Trade Agreement* 2014 (KAFTA), <http://dfat.gov.au/trade/agreements/kafta/Pages/korea-australia-fta.aspx> and *Agreement to Amend the Singapore-Australia Free Trade Agreement* 2016 <http://dfat.gov.au/trade/agreements/safta/Documents/agreement-to-amend-the-singapore-australia-free-trade-agreement.pdf>

²⁰ *Pacific Agreement on Closer Economic Relations (PACER) Plus* 2017, open signature 14 June 2017, entered into force 2019, <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/pacer/Pages/pacific-agreement-on-closer-economic-relations-pacer-plus>

²¹ The Hon. Scott Morrison, ‘Quad Leaders Joint Statement – The Spirit of the Quad’, 13 March 2021, <https://www.pm.gov.au/media/quad-leaders-joint-statement-spirit-quad>

²² Matthew Rimmer, ‘Trade War in the Pacific: ASEAN and the Trans-Pacific Partnership’, *The Conversation*, 30 November 2012, <https://theconversation.edu.au/trade-war-in-the-pacific-asean-and-the-trans-pacific-partnership-10937>

– such as Brunei, Malaysia, Singapore, Vietnam, Australia, Japan, and New Zealand. *RCEP* does not include five *TPP* negotiating countries from North America, Central America, and South America – the United States, Canada, Chile, Peru, and Mexico. There has been a debate as to whether *RCEP* is a rival trade agreement to the *TPP* – given the role of China with *RCEP*, and the Obama administration being a driving force behind the *TPP*.

According to the 2012 Guiding Principles and Objectives, *RCEP* is designed ‘to achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement among the ASEAN Member States and ASEAN’s FTA Partners’.²³ *RCEP* will be broadly framed to ‘cover trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, dispute settlement and other issues’.²⁴

Some commentators wondered whether China would play a leadership role in the design of *RCEP*.²⁵

Others suggested that China’s role as architect in respect of *RCEP* has been overstated – and attention should be paid to other key actors, such as Indonesia, and the ASEAN group. As Shiro Armstrong and Amy King observe, there are complex inter-relationships at play in respect of the geopolitics of *RCEP*.²⁶ The pair comment that the agreement should not be simply construed as an agreement crafted in China:

²³ Guiding Principles and Objectives for Negotiating the *Regional Comprehensive Economic Partnership* <https://dfat.gov.au/trade/agreements/rcep/Documents/guiding-principles-rcep.pdf>

²⁴ Ibid.

²⁵ Sanchita Basu Das, ‘The Regional Comprehensive Economic Partnership: New Paradigm or Old Wine in a New Bottle?’, Institute of Southeast Asian Studies (ISEAS), Singapore - ASEAN Studies Centre, November 2015 29 (2) *Asian-Pacific Economic Literature* 68-84; Patralekha Chatterjee, ‘Secret Regional Comprehensive Economic Partnership (RCEP) Takes Centre Stage in Asia’, *Intellectual Property Watch*, 26 June 2015, <http://www.ip-watch.org/2015/06/24/secret-regional-comprehensive-economic-partnership-RCEP-takes-centre-stage-in-asia/>; David Gantz, ‘The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim’ (2016) 33 *Arizona Journal of International and Comparative Law* 57, <https://ssrn.com/abstract=2703519>; and Peter Yu, ‘The RCEP and Intellectual Property Norm-Setting in the Asia-Pacific’, *Intellectual Property Rights and Mega-Regional Trade Agreements*, April 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810579

²⁶ Shiro Armstrong and Amy King, ‘East Asia’s Economic Agreement’, *East Asia Forum*, 19 February 2017, <http://www.eastasiaforum.org/2017/02/19/east-asias-economic-agreement/>

ASEAN centrality has also ensured that *RCEP* has incorporated Asia's other large power — Japan — and reflects Japanese preferences as much as those of China. Originally, China wanted to limit core membership of Asian cooperation to ASEAN plus China, Japan and South Korea. Japan wanted a larger membership, involving Australia, New Zealand and India, to help provide a counterweight to China. In the end, ASEAN centrality and the interests of Australia and India in the region meant the broader grouping prevailed. The fear that the demise of the *TPP* will lead to China writing the rules of trade and commerce in the Asia Pacific is therefore far-fetched. Allowing China to write the rules would require ASEAN, Australia, Japan and India to all acquiesce to China's demands.²⁷

As a result, the geopolitics of the negotiations over *RCEP* are complex, as a result of the large number of participating nations, with a range of interests.

This is especially true of the debate over the intellectual property chapter of *RCEP*. There are vast differences in development between the participating nations of *RCEP*. There have been efforts by Singapore and China to expedite the conclusion of *RCEP*.²⁸ Meanwhile, there has been discussion that India has sought to slow down the completion of *RCEP* – pending the resolution of other issues.

As with other agreements, there has been a concern about the extent to which corporate actors can play a key role in respect of the *RCEP* negotiations.

B. The Turnbull Government

For its part, the current Australian Government has been an enthusiastic participant in the regional trade negotiations around *RCEP*.

On the 3rd June 2017, the Prime Minister of Australia, Malcolm Turnbull, discussed regional trade in his keynote address at the Shangri-La Dialogue.²⁹ He highlighted Australia's history of engagement with the region:

²⁷ Ibid.

²⁸ 'China, Singapore seek to expedite RCEP Trade Talks', 12 June 2017, <http://www.reuters.com/article/us-china-singapore-trade-idUSKBN1930RR>

²⁹ Prime Minister Malcolm Turnbull, 'Keynote Address at the 16th IISS Asia Security Summit, Shangri-La Dialogue', 3rd June 2017, <https://malcolmtturnbull.com.au/media/keynote-address-at-the-16th-iiss-asia-security-summit-shangri-la-dialogue>

Since becoming ASEAN's first Dialogue Partner in 1974, Australia has worked assiduously to support the organisation's economic integration and trade liberalising activities, and we continue to do so today. During the last decade, we secured the ASEAN-Australia-New Zealand Free Trade Agreement, still ASEAN's most comprehensive trade agreement. That agreement has, in turn, inspired the drive for an even bigger prize in the form of the Regional Comprehensive Economic Partnership (*RCEP*) – which will also bring in China, Korea, Japan and India.³⁰

Turnbull noted: 'As our strategic spaces become more crowded, the challenge for ASEAN is to show that the impressive statecraft of the past can be sustained in a more complex future; to remain nimble enough in a more testing time.'³¹ He commented: 'We support a strong, united ASEAN that continues to convene and strengthen organisations such as the East Asia Summit, the region's only leaders-led forum that can help manage the region's strategic risks.'³² Moreover, Turnbull said: 'We support an ASEAN that remains committed to liberal economic values.'³³

The Prime Minister also address the departure of the United States under President Donald Trump from both the regional trade agreement, the *TPP*, and the multilateral climate talks, the Paris Agreement:

Some have been concerned that the withdrawal from the *TPP* and now from the Paris Climate Change Agreement herald a US withdrawal from global leadership. While these decisions are disappointing, we should take care not to rush to interpret an intent to engage on different terms as one not to engage at all... I am confident that this Administration and those that follow it will, and for the same reasons, recognise, as its predecessors have, that the United States' own interests in the Indo-Pacific demand more US engagement, not less.³⁴

Upset and disappointed by the departure of the United States from the *TPP*, the Australian Government has been seeking to resurrect the *TPP* with the eleven remaining countries.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

The Prime Minister also highlighted the importance of the digital economy in the region:

The Internet and the digital technologies it has enabled are breaking down national boundaries and distance. Billions of people now have in their pocket a device that potentially connects them to everyone else in the world. Not so long ago only States and large corporations had megaphones powerful enough to address a nation - now a tweet or YouTube video can reach millions, if not billions, and do so in seconds. And reflect on the pace of these changes. The first iPhone was launched in 2007, Facebook, with 1.5 billion accounts worldwide, began in a Harvard dorm in 2004 - it has 200 million accounts in India and 100 million in Indonesia alone. Technology has connected local aspirations and grievances with global movements.³⁵

Turnbull observed in his conclusion: ‘The growth has been enabled by our region’s embrace of the digital world with a sense of opportunity rather than of fear.’³⁶ This could well explain his interest in the inter-connections between intellectual property, trade, and innovation policy.

In a 2017, the Foreign Minister the Hon. Julie Bishop maintained that ‘much of the population throughout the Asian region remain strongly supportive of economic integration and view economic globalisation as an opportunity rather than a threat’.³⁷ She noted: ‘There does not seem to be anti-trade or anti-globalisation movements gaining significant strength in countries like China, Japan or Vietnam.’³⁸ She commented: ‘For advanced economies such as Australia’s, the new centres of economic activity and growth in Asia in its region have been a boon.’³⁹

In a February 2017 speech, the Hon. Julie Bishop discussed Australia’s trade policy strategies.

We are an open, export-oriented market economy of 24 million people. Our prosperity depends on our ability to sell our goods and services into the global market place. That is why the Australian government is such an avid supporter of free trade deals, like the trilemma this government has achieved with China, Japan and South Korea. It is why we have pushed so hard for the *Trans-Pacific Partnership*, and why we remain committed to looking for ways to bring its principles and standards into being. It is why we are pursuing the *Regional Comprehensive Economic Partnership*, which includes the

³⁵ Ibid.

³⁶ Ibid.

³⁷ The Hon. Julie Bishop, ‘Economic Globalisation and Elites Under Siege’, U.S. News and World Report, 9 January 2017, http://foreignminister.gov.au/articles/Pages/2017/jb_ar_170109.aspx

³⁸ Ibid.

³⁹ Ibid.

ASEAN nations and China, as a possible pathway to a free trade agreement of the Asia-Pacific. It is also why we will actively pursue future trade deals, such as bilateral negotiations with Indonesia, India, the European Union and over time with the United Kingdom. It is up to us, who understand the benefits of globalisation and an open trade and investment environment, to continue to advocate against protectionism in favour of an open trading system.⁴⁰

On the 4th August 2016, the Trade Minister the Hon. Steve Ciobo contended: ‘A successfully concluded *RCEP* will build upon the opportunities for Australian business and boost economic confidence in the region at a time when global economic growth is subdued.’⁴¹ His hope is that the agreement will build a number of recently concluded bilateral agreements with China, South Korea, and Japan, and an updated agreement with Singapore. The Australian Government has maintained that *RCEP* and *TPP* are complementary agreements, and could be integrated in a Free Trade Area of the Asia Pacific.

Meanwhile, the Treasurer Scott Morrison has adopted a somewhat different discourse about trade. Echoing Trump’s America First language, Morrison has suggested that the Australian Government is taking an ‘Australia First’ position in trade negotiations.⁴² He has stressed: ‘Australia’s a trading nation, an “Australia first” policy does embrace trade and foreign investment and all of these things.’⁴³ He insisted: ‘And so our economic interests are very much aligned with that approach.’⁴⁴

C. The Morrison Government

⁴⁰ The Hon. Julie Bishop, ‘Goldman Sachs Global Macro Conference’, 2 February 2017, http://foreignminister.gov.au/speeches/Pages/2017/jb_sp_170202.aspx

⁴¹ The Hon. Steve Ciobo, ‘ASEAN Ministerial Meetings’, the Australian Government, 4 August 2016, http://trademinister.gov.au/releases/Pages/2016/sc_mr_160804.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D

⁴² Austin Weinstein, ““Australia First” Policy Embraces Trade, Treasurer Morrison Says’, *Bloomberg*, 25 January 2017, <https://www.bloomberg.com/news/articles/2017-01-24/-australia-first-policy-embraces-trade-treasurer-morrison-says>

⁴³ Ibid.

⁴⁴ Ibid.

With the election of President Donald Trump and the withdrawal of the United States from the *TPP*, the regional trade agreement, the *RCEP*, took on a new importance and significance in the Pacific Rim.⁴⁵

India withdrew from the negotiations in November 2019. ASEAN Secretary-General Dato Lim Jock Hoi has reaffirmed that *RCEP* members intend to sign the agreement in late 2020.

In 2020, the Australian Government was delighted at the conclusion of the negotiations of *RCEP*.⁴⁶ The now Prime Minister Scott Morrison commented: ‘Our trade policy is all about supporting Australian jobs, boosting export opportunities and ensuring an open region with even stronger supply chains.’⁴⁷ He maintained: ‘*RCEP* builds on our trade successes and is good news for Australian businesses.’⁴⁸ Prime Minister Morrison said: ‘With one in five Australian jobs reliant on trade, the *RCEP* Agreement will be crucial as Australia and the region begin to rebuild from the COVID-19 pandemic.’⁴⁹ He commented: ‘This agreement covers the fastest growing region in the world and, as *RCEP* economies continue to develop and their middle classes grow, it will open up new doors for Australian farmers, businesses and investors.’⁵⁰

As Trade Minister, Simon Birmingham commented: ‘This deal will further integrate Australian exporters into a booming part of the globe, with *RCEP* countries making up nearly 30 per cent of world GDP and the world’s population.’⁵¹ He observed: ‘*RCEP* has been driven by the ten ASEAN nations, who collectively constitute Australia’s second largest two-way trading partner and have successfully brought Australia, China, Japan, New Zealand and South Korea

⁴⁵ *Regional Comprehensive Economic Partnership*, <http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx>

⁴⁶ The Hon. Scott Morrison, and the Hon. Simon Birmingham, ‘Regional trade deal to boost export opportunities for Aussie farmers and businesses’, Press Release, 15 November 2020, <https://www.trademinister.gov.au/minister/simon-birmingham/media-release/regional-trade-deal-boost-export-opportunities-aussie-farmers-and-businesses>

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

into this regional trading block with them.’⁵² Birmingham commented: ‘This agreement may have taken eight years to negotiate but it could not have come at a more important time given the scale of global economic and trade uncertainty.’⁵³ He suggested: ‘Economic cooperation of this scale sends a strong signal that our region is committed to the principles of open trade for the post COVID-19 recovery, just as we advanced them during the previous years of strong economic growth.’⁵⁴ Birmingham maintained: ‘Greater openness within our region, as well as the greater integration of value chains and more common rules of origin which this deal delivers, will make it easier for Australian businesses and investors to operate throughout our region, helping Australia to continue to grow our exports.’⁵⁵ He suggested: ‘There are particular gains for Australian providers within the financial services sector, education, health, engineering and other professional services, who can become better integrated within the region and have more access within *RCEP* countries.’⁵⁶ Birmingham commented: ‘Australia is committed to fully ratifying *RCEP* as soon as possible so Australian farmers, businesses and investors can start to access the benefits of this agreement.’⁵⁷ He also noted that the agreement was an inclusive one – which could also include other future members.

The Joint Leaders’ Statement contended that *RCEP* was a ground-breaking agreement:

We also note that the *RCEP* Agreement is the most ambitious free trade agreement initiated by ASEAN, which contributes to enhancing ASEAN centrality in regional frameworks and strengthening ASEAN cooperation with regional partners. With 20 Chapters, the *RCEP* Agreement, as a modern, comprehensive, high-quality and mutually beneficial agreement, includes areas and disciplines that were not previously covered in the existing free trade agreements between ASEAN and non-ASEAN countries participating in *RCEP*. Aside from the specific provisions that cover trade in goods and services, and investment, *RCEP* also includes chapters on intellectual property, electronic commerce, competition, small and medium enterprises (SMEs), economic and technical cooperation and government procurement. We are confident that the *RCEP* Agreement would open a vast range of

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

opportunities for businesses located in the region especially in terms of market access given the level of liberalisation for trade in goods and services and investment.⁵⁸

However, a closer inspection of the text of the agreement would suggest that *RCEP* is much more quotidian trade agreement, representing a low common denominator amongst the negotiating nations.

India declined to join *RCEP* for a variety of reasons. Patricia Ranald suggested that ‘India left the *RCEP* because of concerns about its potentially negative impact on local industry development.’⁵⁹ The Joint Leaders’ Statement expressed the hope that India would join *RCEP* at a later date:

We are committed to ensuring that *RCEP* remains an open and inclusive agreement. Further, we would highly value India’s role in *RCEP* and reiterate that the *RCEP* remains open to India. As one of the 16 original participating countries, India’s accession to the *RCEP* Agreement would be welcome in view of its participation in *RCEP* negotiations since 2012 and its strategic importance as a regional partner in creating deeper and expanded regional value chains.⁶⁰

In her submission to the New Zealand Parliament, Jane Kelsey suggests: ‘The *RCEP* is itself a reflection of the current crisis in the international trade law regime, numerous chapters that are not enforceable and the country that was intended to add value, India, walking away.’⁶¹

⁵⁸ Department of Foreign Affairs and Trade, ‘Joint Leaders’ Statement on the Regional Comprehensive Economic Partnership (RCEP)’, Press Release, 15 November 2020, <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep/news/joint-leaders-statement-regional-comprehensive-economic-partnership-rcep>

⁵⁹ Patricia Ranald, ‘We’ve just signed the world’s biggest trade deal, but what exactly is the RCEP?’, *The Conversation*, 16 November 2020, <https://theconversation.com/weve-just-signed-the-worlds-biggest-trade-deal-but-what-exactly-is-the-rcep-150082>

⁶⁰ Department of Foreign Affairs and Trade, ‘Joint Leaders’ Statement on the Regional Comprehensive Economic Partnership (RCEP)’, Press Release, 15 November 2020, <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep/news/joint-leaders-statement-regional-comprehensive-economic-partnership-rcep>

⁶¹ Jane Kelsey, ‘International treaty examination of the Regional Comprehensive Economic Partnership Agreement’, New Zealand Parliament, 11 February 2021, https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCFD_EVI_104189_FD120/jane-kelsey-supp-2

There are also remain significant tensions between trading partners within *RCEP*. The trade relationship between Australia and China has deteriorated. China has taken (undue) umbrage at Australia calling for an independent investigation of the outbreak of the coronavirus in China. China has put in place various restrictions and limitations on Australian trade – seemingly as a sanction.⁶² Australia has threatened to take China to the World Trade Organization over its various discriminatory restrictions on Australian trade.⁶³ In this context, it is not clear that the dispute settlement mechanisms within *RCEP* would resolve these ongoing state-to-state conflicts.

Another complicating factor in terms of geopolitics will be the return of the Biden Administration to trade diplomacy – after a period of isolationism under the Trump administration. The Biden Administration has sought to counteract the trade influence of China with the development of the Quad – combining the United States, Australia, Japan and India.⁶⁴ It remains to be seen whether the Biden Administration will re-engage with the TPP – after it was abandoned by the Trump Administration. Patricia Ranald notes that ‘Biden’s trade policy is likely to focus on domestic priorities such as the pandemic and climate change, about which the *RCEP* says nothing.’⁶⁵

Recommendation 1

***RCEP* has a broad membership – even with the departure of India from the negotiations. Nonetheless, there remain outstanding tensions between participating nations – most notably, Australia and China. The re-emergence of**

⁶² Josh Nicholas and Ben Butler, ‘Trade War Fallout: How Reliant is Australia’s Economy on China’, *The Guardian*, 14 March 2021, <https://www.theguardian.com/news/datablog/ng-interactive/2021/mar/14/trade-war-fallout-how-reliant-is-australias-economy-on-china>

⁶³ World Trade Organization, ‘Australia Initiates WTO Dispute Complaint against Chinese Barley Duties’, 21 December 2020, https://www.wto.org/english/news_e/news20_e/ds598rfc_21dec20_e.htm

⁶⁴ The Hon. Scott Morrison, ‘Quad Leaders Joint Statement – The Spirit of the Quad’, 13 March 2021, <https://www.pm.gov.au/media/quad-leaders-joint-statement-spirit-quad>

⁶⁵ Patricia Ranald, ‘We’ve just signed the world’s biggest trade deal, but what exactly is the RCEP?’, *The Conversation*, 16 November 2020, <https://theconversation.com/weve-just-signed-the-worlds-biggest-trade-deal-but-what-exactly-is-the-rcep-150082>

United States into trade diplomacy will also complicate the geopolitics of the Asia-Pacific.

2. COPYRIGHT LAW

Chapter 11 of *RCEP* deals with the topic of intellectual property. In its regulatory impact statement, the Australian Government contends that the intellectual property chapter of *RCEP* will boost business confidence in the Asia-Pacific:

RCEP will provide increased certainty to rights' holders and users by establishing a strong platform for the development of consistent Intellectual Property (IP) rules throughout the region, including rules that will help create an enabling environment for business to trade digitally. *RCEP* will establish balanced rules for the effective creation, utilisation, protection, and enforcement of intellectual property rights, including copyright and related rights, trademarks, geographical indications, industrial designs, patents, and protection of plant varieties, without requiring any changes to Australia's existing IP settings.⁶⁶

It is worthwhile considering how *RCEP* deals with copyright law – as well as industrial forms of property.

A. The Secrecy of Treaty-Making

There has been tensions between Australia's domestic copyright law reform process and Australia's international trade negotiations.

Much like the *TPP*, there have been concerns about the secret nature of the negotiations regarding *RCEP*.⁶⁷ As such, legislators, civil society, and the wider public have not had access to the negotiating texts in respect of *RCEP* – until the publication of the final text in 2020.

⁶⁶ Australian Government, 'Regulatory Impact Statement on the Regional Comprehensive Economic Partnership', Canberra: Australian Government, 2021, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

⁶⁷ Peter Martin, 'And You Thought the *TPP* was Secret. The *RCEP* is even Worse', *The Sydney Morning Herald*, 5 November 2016, <http://www.smh.com.au/comment/and-you-thought-the-TPP-was-secret-the-regional-comprehensive-economic-partnership-is-even-worse-20161104-gsiaaw.html>

In 2016, the civil society group Knowledge Ecology International sought to overcome such problems by publishing leaked drafts of the Intellectual Property Chapter and the Investment Chapter of *RCEP*.⁶⁸ Knowledge Ecology International has been concerned about the ‘power of right-holder groups to use secret trade negotiations to limit democratic decisions that impact access to knowledge, the freedom to innovate and the right to health, in negative ways.’⁶⁹

Jeremy Malcolm of the Electronic Frontier Foundation laments: ‘Like the *TPP* before it, the *RCEP* is being negotiated in a secretive fashion, behind closed doors, without adequate input from Internet users or any other of the stakeholders whose lives and livelihoods it will affect.’⁷⁰

Academics have worried that *RCEP* has escaped the scholarly scrutiny and critical analysis that other mega-trade deals have received. Professor Peter Yu has commented that the agreement has unduly received less attention than the *TPP* or *TTIP*.⁷¹ He has emphasized: ‘In view of these immense challenges and the high stakes involved, it is high time that policymakers, commentators, activists, consumer advocates and civil society organisations paid greater attention to the *RCEP* negotiations.’⁷²

A group of 60 copyright professors issued a declaration, expressing concern that the copyright protection standards proposed for the *RCEP* IP Chapter ‘may cause unintended effects of stifling creativity, free speech, and economic growth’.⁷³ The group urged that the new rounds of *RCEP* negotiations reconsider those standards by applying three principles. First, the copyright professors said that there was a need to integrate the public interest as a core value

⁶⁸ Knowledge Ecology International, ‘*RCEP*: Regional Comprehensive Economic Partnership’, <http://keionline.org/RCEP>

⁶⁹ Ibid.

⁷⁰ Jeremy Malcolm, ‘*RCEP*: The Other Closed-Door Agreement to Compromise Users’ Rights’, Electronic Frontier Foundation, 20 April 2016, <https://www.eff.org/deeplinks/2016/04/RCEP-other-closed-door-agreement-compromise-users-rights>

⁷¹ Peter Yu, ‘The *RCEP* and Intellectual Property Norm-Setting in the Asia-Pacific’, Intellectual Property Rights and Mega-Regional Trade Agreements, April 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810579

⁷² Ibid.

⁷³ Statement of Public Interest Principles for Copyright Protection under the Regional Comprehensive Economic Partnership (*RCEP*), Law and Technology Centre, the University of Hong Kong, https://www.eff.org/files/2017/02/23/rcep_statement_for_the_public_interest_final.pdf

for copyright negotiations. Second, the academics said that there is a demand to increase transparency of negotiations for the public interest. Third, the group of copyright professors wanted to institute changes in copyright provisions for the public interest.

In terms of procedure, the academics called for a release of information about the negotiations:

The *RCEP* should take affirmative measures to make all negotiating texts and other relevant documents publicly available as soon as possible. For this purpose, the *RCEP* should learn from the example of the World Intellectual Property Organization (WIPO), which carried out transparency measures that facilitated the successful conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. WIPO publicly released draft negotiating documents promptly. It also publicly webcast the negotiating process.

The Professors also called for greater stakeholder engagement: ‘When considering critical issues, the *RCEP* should open up channels through which the relevant stakeholders can submit their opinions’.⁷⁴ In particular, the academics wanted greater civil society involvement: ‘When necessary, the *RCEP* should organize public hearing meetings where various stakeholders can discuss the merits and demerits of draft proposals and negotiators can explain decision-making processes.’⁷⁵

The professors were idealistic and hopeful that the ‘*RCEP* negotiations would produce the largest mega-regional free trade agreement to procedurally and substantially protect the public interest in copyrighted works’.⁷⁶ In their view, ‘The *RCEP* copyright provisions, therefore, stand to benefit nearly 50% of the world’s population, who live in the sixteen *RCEP* participating countries.’⁷⁷

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

In November 2016, hundreds of civil society groups urged negotiators to reject efforts to model elements of *RCEP* on the *TPP*.⁷⁸ The letter was particularly concerned about the intellectual property measures in the agreement:

In the leaked *RCEP* intellectual property (IP) chapter, Japan, South Korea and some others are pushing many of the main substantive stronger IP provisions of the *TPP*. With the demise of the *TPP*, there is no justification for adhering to the *TPP* texts in *RCEP* because these have no mandate. This is even more irrational in the absence of the *TPP* as Asian countries (including least developed countries (LDCs)) would end up carrying the load that other rich countries in the *TPP* (US, Canada) will not have to bear any more.⁷⁹

The civil society organisations argued that there should be a new model of trade, which is ‘based on cooperation and not competition, one that puts the development needs of the region above that of corporations’.⁸⁰

AFTINET has raised concerns that *RCEP* is the *TPP* by another name.⁸¹ The civil society organization has complained: ‘But despite the *TPP*’s demise, global corporations and some governments including the Australian government are pushing to repeat the same failed model in other trade agreements.’⁸²

Nation states excluded from the scope of the *TPP* have voiced their concern about the impact of mega-regional agreements upon flexibilities in respect of intellectual property – including those relating to copyright law, education, and development. In 2017, the delegations of Brazil, China, India, South Africa, and Fiji tabled a paper to the WTO’s TRIPS Council entitled ‘Intellectual Property and the Public Interest’.⁸³ The paper complained that ‘A slew of regional

⁷⁸ IP Watch, ‘Hundreds of Civil Society Groups Urge RCEP Negotiators to Reject Imported TPP Clauses’, *IP Watch*, 30 November 2016, <https://www.ip-watch.org/2016/11/30/hundreds-civil-society-groups-urge-rcep-negotiators-reject-imported-tpp-clauses/> and <http://www.bilaterals.org/?civil-society-open-letter-to>

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ AFTINET, ‘Is the RCEP the TPP by another Name?’, 19 April 2017, <http://aftinet.org.au/cms/1612-rcep-tpp-different-name>

⁸² Ibid.

⁸³ Knowledge Ecology International, ‘WTO TRIPS Council: Brazil, China, Fiji, India, and South Africa Table Agenda Item On IP and the Public Interest’, 6 June 2017, <http://keionline.org/node/2800>

trade agreements containing "TRIPS plus" standards of IP protection and enforcement have the potential to significantly affect the policy space available for effective and full use of the TRIPS flexibilities.⁸⁴ The delegations highlighted how increased 'copyright protections create similar problems of access to knowledge goods, limiting the ability of many people around the world to access print, audio, or visual works of education or entertainment that we take for granted.'⁸⁵ Moreover, the delegations maintained: 'Investor-State disputes under regional or bilateral investment protection agreements are also emerging as significant threats to the use of TRIPS flexibilities in the public interest.'⁸⁶

In its consideration of Australia's intellectual property arrangements, the Productivity Commission in 2016 has mooted a number of possible reforms to the process of trade negotiations.⁸⁷ Chapter 18 of the final report deals with international co-operation in intellectual property.⁸⁸ The report recognized: 'International cooperation can reduce the transaction costs of seeking and licensing intellectual property (IP) in multiple jurisdictions, improve the quality of examination of applications for IP rights and facilitate trade of IP-intensive goods and services.'⁸⁹ The report also noted: 'Slow progress in multilateral forums has led to increasing reliance on IP provisions in preferential trade agreements (PTAs).'⁹⁰

The Productivity Commission warned that 'Some PTAs embody stronger standards of protection than multilateral agreements, tipping the balance in favour of rights holders and elevating the costs of IP protection.'⁹¹ The Commission commented: 'This imposes greater costs on Australia as a net importer of IP, and impedes further creation and innovation.'⁹² The Commission warned: 'IP provisions in PTAs substantially constrain domestic policy flexibility

⁸⁴ Ibid,

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Productivity Commission, *Intellectual Property Arrangements*, Productivity Commission Inquiry Report, No. 78, 23 September 2016, <http://www.pc.gov.au/inquiries/completed/intellectual-property/report>

⁸⁸ Ibid., 527-550.

⁸⁹ Ibid., 527.

⁹⁰ Ibid., 527.

⁹¹ Ibid., 527.

⁹² Ibid., 527.

and increase the complexity and costs of negotiating IP arrangements in international agreements.’

In its view, ‘Changes to standards of IP protection should be pursued in multilateral forums — where outcomes are less likely to be driven by the interests of a few — and pursued separately to efforts to align administrative processes.’⁹³ The Productivity Commission suggested: ‘In line with good practice, international IP agreements should be periodically and independently reviewed.’ It noted: ‘There is scope for the Australian Government to achieve more balanced IP arrangements within the confines of existing international obligations.’⁹⁴

In recommendation 18.2, the Productivity Commission recommended that ‘the Australian Government should play a more active role in international forums on intellectual property policy.’⁹⁵ The Productivity Commission suggested that the Australian Government should call for a review of the *TRIPS Agreement* (under Article 71.1) by the WTO.’⁹⁶ Moreover, the Productivity Commission suggested that Australia should be ‘identifying and progressing reforms that would strike a better balance in respect of copyright scope and term’.⁹⁷

Recommendation 2

The closed, secretive negotiations behind *RCEP* highlight the need for a reform of the treaty-making process in Australia, as well as the need for a greater supervisory role of the Australian Parliament.

B. Public Policy Objectives

Copyright law plays a significant role in respect of public policy objectives in respect of creativity, innovation, and competition policy. Section 2 of the Draft Intellectual Property Chapter of *RCEP* concerns copyright law and related rights. The agreement represents an ambitious effort to harmonise copyright laws across the Asia-Pacific.

⁹³ Ibid., 527.

⁹⁴ Ibid., 527.

⁹⁵ Ibid., 550.

⁹⁶ Ibid., 550.

⁹⁷ Ibid., 550.

The leaked draft text displayed a range of public policy objectives in respect of intellectual property mooted for the agreement.⁹⁸ ASEAN, India, Australia, New Zealand, and Korea called for text on general provisions and principles. Korea has called for stronger IP rights language ‘to provide certainty for rights holders and users of intellectual property over the protection and enforcement of intellectual property rights.’⁹⁹ Japan has opposed the text on general provisions and principles in this section. Japan instead called for the confirmation of the objectives and principles provided for in Article 7 and 8 of the *TRIPS Agreement* 1994. There seemed to be deep disagreements between the nation states as to the role and function of intellectual property. This perhaps speaks to very different visions of intellectual property across the ASEAN states, and the other negotiating partners in *RCEP*.

In the end, Article 11.1 of the final text of *RCEP* contains a list of objectives in respect of intellectual property law, policy, and practice.¹⁰⁰ Article 11.1 (1) provides: ‘The objective of this Chapter is to reduce distortion and impediments to trade and investment by promoting deeper economic integration and cooperation through the effective and adequate creation, utilisation, protection, and enforcement of intellectual property rights, while recognising: (a) the Parties’ different levels of economic development and capacity, and differences in national legal systems; (b) the need to promote innovation and creativity; (c) the need to maintain an appropriate balance between the rights of intellectual property right holders and the legitimate interests of users and the public interest; (d) the importance of facilitating the diffusion of information, knowledge, content, culture, and the arts; and (e) that establishing and maintaining a transparent intellectual property system and promoting and maintaining adequate and effective protection and enforcement of intellectual property rights provide confidence to right holders and users.’¹⁰¹ Article 11.1 (2) provides: ‘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

⁹⁸ Knowledge Ecology International, ‘*RCEP: Regional Comprehensive Economic Partnership*’, <http://keionline.org/RCEP>

⁹⁹ Ibid.

¹⁰⁰ Article 11.1 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁰¹ Article 11.1 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.’¹⁰²

Article 11.2 of *RCEP* concerned the Scope of Intellectual Property: ‘For the purposes of this Chapter, “intellectual property” means copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits, protection of plant varieties, and protection of undisclosed information, as referred to in Sections 1 through 7 of Part II of the *TRIPS Agreement*.’¹⁰³

Article 11.3 of *RCEP* considered the relationship to other agreements: ‘In relation to intellectual property, in the event of any inconsistency between a provision of this Chapter and a provision of the *TRIPS Agreement*, the latter shall prevail to the extent of such inconsistency.’¹⁰⁴

In its statement of Principles, Article 11.4 (1) of *RCEP* provides: ‘A Party may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to its socio-economic and technological development, provided that such measures are consistent with this Chapter.’¹⁰⁵ Article 11.4 (2) provides: ‘Appropriate measures, provided that they are consistent with this Chapter, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.’¹⁰⁶ Chapter 11.4 (3) states: ‘Further to paragraph 2, the Parties recognise the need to foster competition.’¹⁰⁷

¹⁰² Article 11.1 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁰³ Article 11.2 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁰⁴ Article 11.3 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁰⁵ Article 11.4 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁰⁶ Article 11.4 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁰⁷ Article 11.4 (3) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

Article 11.9 deals with ‘Multilateral Agreements’¹⁰⁸

Professor Peter Yu has commented that there is an effort to build upon multilateral agreements:

The draft *RCEP* intellectual property chapter includes the usual language found in free trade agreements (FTAs) requiring the accession to the two Internet treaties of the World Intellectual Property Organization (WIPO) – the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* (Draft Article 1.7.6(g)–(h)). Going beyond the terms of the *TPP* Agreement, the draft chapter also requires accession to the *Beijing Treaty on Audiovisual Performances*, the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)* and the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* (Draft Articles 1.7.6(h)–(ibis)).¹⁰⁹

The draft text of the *RCEP* represented a muddle of various copyright models. There are elements from the *TRIPS Agreement*. There are features from WIPO Internet Treaties. Some aspects resemble TRIPS + agreements. Some countries have been pushing for TRIPS++ standards in *RCEP*. There has also been a push for an investment model – in which intellectual property and investment are tied together. There has been a call for a Development Agenda in respect of *RCEP* and copyright law. There has also been a call for a flexible and differential approach to take into account the interests of least developed countries.

Iman Pambagyo, the trade negotiating committee chief for *RCEP*, has warned against turning the agreement into a new *TPP*.¹¹⁰ He has suggested that a number of developed countries will need to temper their demands in *RCEP*, and agree to compromises.

¹⁰⁸ Article 11.9 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁰⁹ Peter Yu, ‘The RCEP and Intellectual Property Norm-Setting in the Asia-Pacific’, Intellectual Property Rights and Mega-Regional Trade Agreements, April 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810579

¹¹⁰ Rosalind Mathieson, ‘Asia Trade Talks Chief Warns against Turning Pact into New TPP’, *Bloomberg*, 22 March 2017, <https://www.bloomberg.com/politics/articles/2017-03-22/asia-trade-talks-chief-warns-against-turning-pact-into-new-tpp>

The Asian Trade Centre has argued that ‘The countries negotiating *RCEP* are at the heart of the world’s most mobile-focused region, with hundreds of thousands of developers and startups building apps and Internet platforms for an increasingly global market’.¹¹¹ The Asian Trade Centre has maintained: ‘A balanced copyright framework can enable these SMEs in ASEAN and emerging markets to grow quickly and compete on an international stage with established players’.¹¹² The Asian Trade Centre has argued that ‘copyright flexibilities, limitations, and safe harbours are critical to spurring investment in startups in this region.’¹¹³

The Australian Law Reform Commission highlighted a number of framing principles for copyright law reform.¹¹⁴ The first principle was the importance of acknowledging and respective authorship and creation. The second principle focused on maintaining incentives for creation and dissemination. The third principle talked about promoting fair access to content. The fourth principle was that rules should be flexible, clear, and adaptive. The fifth principle was that there was a need that rules be consistent with international obligations.

Moreover, the Australian Law Reform Commission stressed that Australian copyright law should be contextualised in terms of the digital economy, innovation, and productivity. There was a need to contemplate the role of copyright law in the digital economy, and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies. The Australian Law Reform Commission also observed that copyright law had a key role in respect of consumer rights and competition policy. The inquiry also acknowledged that copyright law directly affects a broad range of cultural activity, and raised larger implications in respect of cultural policy.

¹¹¹ Asian Trade Centre, ‘Fostering Innovation and Growth in Asia: IP, Copyright and Digital Trade’, Working Paper, RCEP Perth Round, April 2016, <https://static1.squarespace.com/static/5393d501e4b0643446abd228/t/5752a6c2c2ea515ccf6d8f76/1465034436088/RCEP+IP+Working+Paper.pdf>

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Australian Law Reform Commission. *Copyright and the Digital Economy (ALRC Report 122)*, Sydney: The Australian Law Reform Commission, 13 February 2014, 41-56, <http://www.alrc.gov.au/publications/copyright-report-122>

The Harper Review expressed concerns that there was a lack of guiding objectives to Australia's negotiation of intellectual property in trade agreements: 'The Panel is concerned that Australia has no overarching IP policy framework or objectives guiding changes to IP protection or approaches to IP rights in the context of negotiations for international trade agreements.'¹¹⁵

The Productivity Commission was likewise dismayed by the lack of policy coherence in respect to Australia's intellectual property regime:

Clear articulation of a policy objective would help to ensure that all elements of the IP system are consistent and 'pulling in the same direction', while providing regulators, government and the judiciary a common understanding of what the IP system is meant to achieve. But the Commission has found little consensus as to what the objective of the IP system should be, beyond some broad themes.¹¹⁶

The Productivity Commission contended that 'the IP system's overarching objective should be to recognise and encourage the creation of new and valuable ideas and innovations in a way that maximises the wellbeing of all Australians.'¹¹⁷ The Productivity Commission identified four principles that were essential to a balanced and well-functioning intellectual property regime – 'effectiveness', 'efficiency', 'adaptability', and 'accountability'.

Recommendation 3

In terms of intellectual property principles and objectives, *RCEP* promotes foreign investment and trade, and intellectual property protection and enforcement. The agreement needs a stronger emphasis on public policy objectives – such as access to knowledge; the protection of public health; technology transfer; and sustainable development.

¹¹⁵ Ian Harper, Peter Anderson, Sue McCluskey and Michael O'Bryan, *Competition Policy Review: Final Report*, Canberra: the Australian Government, March 2015, 41, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf

¹¹⁶ Productivity Commission, *Intellectual Property Arrangements*, Melbourne: Productivity Commission, Report No. 78, 2016, 54, <http://www.pc.gov.au/inquiries/completed/intellectual-property/report>

¹¹⁷ Ibid., 54.

C. Economic Rights and Collective Management of Copyright

There was a discussion as to the standards and norms in *RCEP* in respect of the protection of economic rights under copyright law. Draft article 2.1 of *RCEP* dealt with economic rights.

Article 11.10 of the final text deals with ‘Exclusive Rights of Authors, Performers, and Producers of Phonograms.’¹¹⁸ Article 11.10 (1) provides: ‘Each Party shall provide to authors of works the exclusive right to authorise any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.’¹¹⁹ Article 11.10 (2) states: ‘Each Party shall provide to performers and producers of phonograms the exclusive right to authorise the making available to the public of their performances fixed in phonograms and phonograms, respectively, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.’¹²⁰ Article 11.10 (3) provides: ‘Each Party shall provide to authors, performers, and producers of phonograms the exclusive right to authorise or prohibit the reproduction of their works, performances fixed in phonograms, and phonograms in any manner or form.’¹²¹

On the question of copyright duration, *RCEP* follows the standard international norms under the *Berne Convention* for providing copyright protection for life plus 50 years. The agreement does not propose a copyright term extension like the *TPP*. Jeremy Malcolm comments:

An important change from the previous leaked text, and an important distinction from the *TPP*, is that the current text of *RCEP* contains no requirement for countries to extend the copyright term beyond the minimum specified in the *Berne Convention*, which is usually the life of the author plus 50 years. This

¹¹⁸ Article 11.10 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹¹⁹ Article 11.10 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹²⁰ Article 11.10 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹²¹ Article 11.10 (3) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

means that for countries that have not already extended their copyright term—and have not signed and ratified the *TPP—RCEP* would allow them to maintain their existing copyright term.¹²²

This is a significant and important development – given the concerns about the impact of copyright term extensions upon education, the public domain, and the cultural commons.

Domestically, in Australia, the Productivity Commission expressed concerns about the economic costs associated with copyright term extensions.¹²³

Draft Article 2.2 focuses upon collective management of copyright. Draft Article 2.2.1 proposes: ‘Each Party shall {may} foster the establishment of appropriate bodies for the collective management of copyright [JP/AU/IN/KR propose; ASN/CN/NZ oppose: and related rights] and encourage such bodies to operate in a manner that is [JP/ASN/NZ/AU/IN/KR propose; CN oppose: fair,] efficient, publicly transparent and accountable to their members [JP/AU/IN/KR propose; ASN/CN/NZ oppose: including [ASN/NZ propose: which may include] open and transparent record keeping of the collection and distribution of revenues].’¹²⁴

Draft Article 2.2.2 states: ‘[KR/AU/IN propose; ASN/NZ oppose:] 2. The Parties shall [AU propose : {may} where appropriate,] endeavour to [AU propose : foster cooperation] [AU oppose : facilitate the establishment of arrangements] between their respective collecting societies for the purposes of mutually ensuring easier [IN propose: management of rights, and] licensing of content between the Parties, [AU/IN oppose: as well as ensuring mutual transfer of royalties for use of the Parties’ works or other copyright-protected subject matters.]]’¹²⁵

There has been a long history of inquiries into the operation of copyright collecting societies in Australia, but little substantive in the way of reformation. There has been an awkward,

¹²² Jeremy Malcolm, ‘*RCEP: The Other Closed-Door Agreement to Compromise Users’ Rights*’, Electronic Frontier Foundation, 20 April 2016, <https://www.eff.org/deeplinks/2016/04/RCEP-other-closed-door-agreement-compromise-users-rights>

¹²³ Productivity Commission, *Intellectual Property Arrangements*, Productivity Commission Inquiry Report, No. 78, 23 September 2016, <http://www.pc.gov.au/inquiries/completed/intellectual-property/report>

¹²⁴ Knowledge Ecology International, ‘*RCEP: Regional Comprehensive Economic Partnership*’, <http://keionline.org/RCEP>

¹²⁵ Ibid.

fragmented oversight of the copyright collecting societies by the Australian Government, the Australian Competition and Consumer Commission, the Copyright Tribunal, and the code reviewer.

The 2016 Productivity Commission report discussed questions about the best practice regulation of copyright collecting societies.¹²⁶ In a 2017 speech, Commissioner Karen Chester expressed reservations about the transparency and accountability of Australia's network of copyright collecting societies:

Turning to copyright collecting societies. They play an important role for rights holders and they can make a meaningful difference in lowering transaction costs for authors, creators and content consumers. But they can also wield market power. This lifts the governance high bar for what we need to see from a transparency and accountability perspective from these agencies. There have been questions in this inquiry about the effectiveness of the Code of Conduct for Collecting Societies. And we learned in meetings with UK and European experts, and even their collecting societies, that they had lifted the governance code bar in a substantive way and in their view well above the down under code of conduct. So we recommended that the ACCC review arrangements for collecting societies with a view to strengthening governance and transparency, ensuring that the current code represents contemporary best practice (in substance and form), balances the interests of societies and licensees, and whether the code should be made mandatory. For at the end of the day, and as a de minimis, you need to be able to follow the money. And we couldn't and nor could rights holders or rights users.¹²⁷

Karen Chester suggested that there could be scope for further improvement in respect of the governance structures of copyright collecting societies.

There has since been significant controversy over the Copyright Agency diverting funds meant for authors to a fighting fund against the introduction of copyright reforms in Australia.¹²⁸

¹²⁶ Productivity Commission, *Intellectual Property Arrangements*, Melbourne: Productivity Commission, 2016, <https://www.pc.gov.au/inquiries/completed/intellectual-property#report>

¹²⁷ Karen Chester, 'What is Fair?', Australian Digital Alliance Forum, Canberra, 24 February 2017, <http://www.pc.gov.au/news-media/speeches/fair>

¹²⁸ Peter Martin, 'Copyright Agency Diverts Funds Meant for Authors to \$15m Fighting Fund', The Sydney Morning Herald, 24 April 2017, <http://www.smh.com.au/federal-politics/political-news/copyright-agency-diverts-funds-meant-for-authors-to-15m-fighting-fund-20170420-gvol0w.html>

Article 11.13 of the final text of *RCEP* deals with Collective Management Organisations.¹²⁹ Article 11.13 (1) provides: ‘Each Party shall endeavour to foster the establishment of appropriate organisations for the collective management of copyright and related rights.’¹³⁰ Article 11.13 (1) states: ‘Each Party shall encourage such organisations to operate in a manner that is fair, efficient, publicly transparent, and accountable to their members, which may include open and transparent record keeping of the collection and distribution of royalties’.¹³¹ Article 11.13 (2) provides: ‘The Parties recognise the importance of fostering co-operation between their respective collective management organisations for the purposes of mutually ensuring easier licensing of content among the Parties, as well as encouraging mutual transfer of royalties for use of works or other copyright-protected subject matters of the nationals of another Party’.¹³²

Ideally, there should be a better system of regulating copyright collecting societies in the Pacific Rim.

Recommendation 4

***RCEP* establishes TRIPS-norms in respect of economic rights under copyright law.**

D. Copyright Limitations and Exceptions

There are a spectrum of models of copyright exceptions in the Asia-Pacific.

Draft Article 2.5 deals with copyright limitations and exceptions. There has been a significant debate within the region as to whether to follow an English-style regime of a purpose-specific defence of a fair dealing, or a more inclusive American model of a defence of fair use. Korea

¹²⁹ Article 11.13 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹³⁰ Article 11.13 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹³¹ Article 11.13 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹³² Article 11.13 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

has adopted a hybrid model. There have been a number of inquiries in Australia – held by the parliamentary IT pricing inquiry, Australian Law Reform Commission, the Harper Review, and the Productivity Commission, amongst others - which have recommended that the government should adopt a defence of fair use. There have been recent complaints by a range of stakeholders about the limitations of Australia’s copyright exceptions. However, the Australian Government has preferred to stick with the model of the defence of fair dealing.

The draft text has suggested that there has been effort by Australia to push for stronger language on copyright limitations and exceptions beyond just the 3-step test in the *TRIPS Agreement* 1994. Australia has apparently suggested that ‘[e]ach party shall endeavour to provide an appropriate balance in its copyright and related rights system by providing limitations and exceptions ... for legitimate purposes including education, research, criticism, comment, news reporting, libraries and archives and facilitating access for persons with disability.’ Such language, though, does not necessarily prescribe a fair dealing or a flexible dealing or a fair use approach.

Ironically, while the New Zealand Government has been pushing for stronger copyright standards in regional trading agreements, the ruling National Party has embroiled in an embarrassing piece of copyright litigation over one of its election advertisements. Eminem has been suing the National Party for copyright infringement over its ‘Eminem-esque’ music during a previous election campaign.¹³³

The Asian Trade Centre – run by Deborah Elms - has made the case for a more expansive approach to copyright exceptions.¹³⁴ The Centre contends:

There are many socially and economically productive activities that Internet and other technology companies in the region seek to undertake - e.g., the caching and indexing of websites to create more

¹³³ ‘Eminem in Court Battle against New Zealand Political Party over Lose Yourself Copyright’, ABC News, 1 May 2017, <http://www.abc.net.au/news/2017-05-01/eminem-in-court-battle-with-nz-political-party/8486746>

¹³⁴ Asian Trade Centre, ‘Fostering Innovation and Growth in Asia: IP, Copyright and Digital Trade’, Working Paper, RCEP Perth Round, April 2016, <https://static1.squarespace.com/static/5393d501e4b0643446abd228/t/5752a6c2c2ea515ccf6d8f76/1465034436088/RCEP+IP+Working+Paper.pdf>

efficient search engines, text and data mining for research purposes, machine learning, and new forms of creative expression for both commercial and non-commercial purposes. Certain exceptions are critical to supporting online creativity and emerging artists as well as providing broader audiences easier access to knowledge and education. From an economic standpoint, exceptions to copyright can enable innovation and increase investment in Internet services.¹³⁵

There is significant variation within the region on copyright exceptions. The Centre comments: ‘Korea, Malaysia, the Philippines, and Singapore all have copyright exceptions with statutory factors that a court must apply to determine whether a person has used copyrighted material in a non-infringing way.’¹³⁶ The Centre observes that ‘Australia, Brunei, India, and New Zealand also have exceptions that allow a degree of flexibility’.¹³⁷ The text in *RCEP* remains unclear. Jeremy Malcolm laments that ‘the *RCEP* negotiators have failed to avail themselves of this obvious opportunity for improvement of the *TPP*’.¹³⁸

Article 11.18 of *RCEP* dealt with Copyright Limitations and Exceptions.¹³⁹ Article 11.18 (1) provides: ‘Each Party shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.’¹⁴⁰ Article 11.18 (2) provides: ‘Nothing in paragraph 1 shall reduce or extend the scope of applicability of the limitations and exceptions available to a Party as a party to the *TRIPS Agreement*, the *Berne Convention*, the *Rome Convention*, the *WCT*, or the *WPPT*’.¹⁴¹ Article 11.18 (3) observes: ‘Each Party shall endeavour to provide an appropriate balance in its

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Jeremy Malcolm, ‘*RCEP*: The Other Closed-Door Agreement to Compromise Users’ Rights’, Electronic Frontier Foundation, 20 April 2016, <https://www.eff.org/deeplinks/2016/04/RCEP-other-closed-door-agreement-compromise-users-rights>

¹³⁹ Article 11.18 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁴⁰ Article 11.18 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁴¹ Article 11.18 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

copyright and related rights system, among other things by means of limitations and exceptions consistent with paragraph 1, for legitimate purposes, which may include education, research, criticism, comment, news reporting, and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled'.¹⁴² Article 11.18 (4) elaborates: 'For greater certainty, a Party may adopt or maintain limitations or exceptions to the rights referred to in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in paragraph 1'.¹⁴³

Professor Martin Skladany has contended that there should not be a one-size fits all approach to the design of copyright regimes.¹⁴⁴ He has contended that there is a need to shape copyright limitations and exceptions to take into account sustainable development issues in particular countries. Professor Tanya Aplin and Professor Lionel Bently have argued that there should be a broader recognition of a global mandatory fair use.¹⁴⁵

Recommendation 5

The agreement does not though enhance copyright flexibilities and defences – particularly in terms of boosting access to knowledge, education, innovation, and sustainable development.

E. Technological Protection Measures and Electronic Rights Management Information

¹⁴² Article 11.18 (3) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁴³ Article 11.18 (4) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁴⁴ Martin Skladany, *Copyright's Arc*, Cambridge: Cambridge University Press, 2020.

¹⁴⁵ Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works*, Cambridge: Cambridge University Press, 2020.

There has been a concerted push over the last two decades to globalise the protection of technological protection measures and electronic rights management through bilateral trade agreements and regional trade agreements.¹⁴⁶

Under Article 2.3, the agreement also addresses technological protection measures and digital rights management information. There is deep disagreement between the negotiating parties. Japan has been pushing for extensive protection of technological protection measures. ASEAN nations have been resisting such demands. Korea has proposed an alternative, in-between model of protection for technological protection measures. Australia has complicated interests in this debate – in light of the High Court of Australia ruling in *Stevens v Sony*, and the 2006 amendments passed in the wake of the *Australia-United States Free Trade Agreement 2004*. The situation is further complicated by the constitutional challenge against the technological protection measures regime in the United States (which has been the template for countries, such as Singapore, Australia, and Korea).

Jeremy Malcolm of the Electronic Frontier Foundation reflects upon the *RCEP* provisions on digital rights management:

The *RCEP* proposals on Digital Rights Management (DRM) in Article 2.3 are a little more flexible than the equivalent Article 18.68 of the *TPP*. While *RCEP* still requires legal protection and remedies against the circumvention of DRM, this only covers DRM that constrains uses of the work that are not otherwise authorized or permitted by law. Thus under *RCEP*, it would probably not be against the law to circumvent DRM in order to view DRM-protected content on a device of your choosing, or to copy parts of it for a fair use purpose, or for other purposes that are consistent with copyright law. This is an important limitation of the scope of a DRM circumvention provision.¹⁴⁷

In contrast to the *TPP*, there are not criminal penalties for the supply of devices or services that are primarily to be used for DRM circumvention.

¹⁴⁶ Matthew Rimmer, 'Back to the Future: The Digital Millennium Copyright Act and the Trans-Pacific Partnership' (2017) 6 (3) *Laws* <http://www.mdpi.com/2075-471X/6/3/11>

¹⁴⁷ Jeremy Malcolm, 'RCEP: The Other Closed-Door Agreement to Compromise Users' Rights', Electronic Frontier Foundation, 20 April 2016, <https://www.eff.org/deeplinks/2016/04/RCEP-other-closed-door-agreement-compromise-users-rights>

Article 11.14 of *RCEP* concerns the Circumvention of Effective Technological Measures, providing that ‘Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, or producers of phonograms in connection with the exercise of their rights referred to in this Section and that restrict acts, in respect of their works, performances, or phonograms, which are not authorised by the authors, the performers, or the producers of phonograms concerned or permitted by the laws and regulations of that Party.’¹⁴⁸

There has also been debate over the regime in *RCEP* for electronic rights management information in draft Article 2.3ter.

Article 11.15 of *RCEP* concerns the Protection for Electronic Rights Management Information, providing: ‘To protect electronic rights management information (hereinafter referred to as “RMI” in this Chapter)¹⁴, each Party shall provide adequate and effective legal remedies against any person knowingly performing without authority any of the following acts knowing, or with respect to civil remedies with reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or related rights referred to in this Chapter: (a) removing or altering any electronic RMI; or (b) distributing, importing for distribution, broadcasting, communicating, or making available to the public copies of works, performances fixed in phonograms, or phonograms, knowing that electronic RMI has been removed or altered without authority.’¹⁴⁹

Article 11.16 concerns ‘Limitations and Exceptions to Providing Protection and Remedies for Technological Measures and RMI [Rights Management Information]’¹⁵⁰ Article 11.16 (1) provides: ‘Each Party may provide for appropriate limitations and exceptions to measures implementing Article 11.14 (Circumvention of Effective Technological Measures) and Article 11.15 (Protection for Electronic Rights Management Information) in accordance with its laws

¹⁴⁸ Article 11.14 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁴⁹ Article 11.15 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁵⁰ Article 11.16 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

and regulations’.¹⁵¹ Article 11.16 (2) provides: ‘The obligations set forth in Article 11.14 (Circumvention of Effective Technological Measures) and Article 11.15 (Protection for Electronic Rights Management Information) are without prejudice to the rights, limitations, exceptions, or defences to infringement of any copyright or related right under a Party’s laws and regulations’.¹⁵²

F. Broadcast Copyright and Satellite Signals

Draft article 2.6 looks at broadcast copyright. *RCEP* could provide broadcasters with a 50 year protection over the retransmission of broadcast signals, including retransmission of those signals over the Internet. This is highly controversial – especially as there has been a lack of consensus in respect of the WIPO Broadcasters Treaty.¹⁵³

Digital rights defenders such as the Electronic Frontier Foundation have been deeply concerned about such measures. Jeremy Malcolm warns that *RCEP* is ‘potentially providing broadcasters with a 50 year monopoly over the retransmission of broadcast signals, including retransmission of those signals over the Internet.’¹⁵⁴ He comments:

India's preferred language for this proposal would even provide broadcasters with a right to prohibit the reproduction of fixations (that is, recordings) of broadcasts, independent of the rights of the copyright owner over that same content. This is such an extreme proposal that it is currently considered off the table in the ongoing negotiations for a broadcasters' treaty at the World Intellectual Property Organization (WIPO).¹⁵⁵

¹⁵¹ Article 11.16 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁵² Article 11.16 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁵³ The *WIPO Treaty on the Protection of Broadcasting Organisations* 2008 http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109212

¹⁵⁴ Jeremy Malcolm, ‘*RCEP*: The Other Closed-Door Agreement to Compromise Users’ Rights’, Electronic Frontier Foundation, 20 April 2016, <https://www.eff.org/deeplinks/2016/04/RCEP-other-closed-door-agreement-compromise-users-rights>

¹⁵⁵ Ibid.

The Electronic Frontier Foundation oppose the inclusion of such measures: ‘These proposals for new monopoly powers for broadcasters are unnecessary, since broadcast content is already protected by copyright in most cases, and in those cases where it isn’t—such as the broadcast of public domain material—there are very good reasons why such content ought to be freely available for retransmission, fixation, and reuse.’¹⁵⁶

Article 11.11 of the final text of *RCEP* deals with the Right to Remuneration for Broadcasting.¹⁵⁷ The clause provides that ‘Performers and producers of phonograms shall enjoy the right to a single equitable remuneration, or alternatively the right to receive royalties, for the direct or indirect use of phonograms published for commercial purposes for broadcasting.’¹⁵⁸ Article 11.12 deals with the ‘Protection of Broadcasting Organisations and Encrypted Programme-Carrying Satellite Signals’.¹⁵⁹ Article 11.12 (1) provides: ‘Each Party shall provide to broadcasting organisations the exclusive right to prohibit the re-broadcasting of their broadcasts by at least wireless means, the fixation of their broadcasts, and the reproduction of fixations of their broadcasts.’¹⁶⁰ Article 11.12 (2) provides: ‘Each Party shall endeavour to provide measures, in accordance with its laws and regulations, against at least one of the following acts: (a) wilful reception (b) wilful distribution; or (c) wilful reception and further distribution, of a programme-carrying signal that originated as an encrypted programme-carrying satellite signal, knowing that it has been decoded without the authorisation of the lawful distributor of the signal.’¹⁶¹

¹⁵⁶ Ibid.

¹⁵⁷ Article 11.11 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁵⁸ Article 11.11 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁵⁹ Article 11.12 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁶⁰ Article 11.12 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁶¹ Article 11.12 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

G. Intermediary Liability

The intellectual property enforcement regime also looks at intermediary liability. There has been a range of proposals in respect of safe harbours and takedown-and-notice in *RCEP*.

The Asian Trade Centre makes the case for more expansive safe harbours protection in the Pacific Rim:

Internet service providers may need relief from potential liability for the infringing activities of their users if they are to invest in the development and deployment of new services. A recent survey of global investors -- covering seven *RCEP* negotiating countries -- found that 71% of investors “are uncomfortable investing in Internet businesses where the intermediaries could be held liable for third party content or actions.” Thus, safe harbours are critical to Internet services such as Internet access providers, cloud services, social media platforms, and search engines. In addition to enabling the growth of these services within *RCEP* countries, safe harbours can also protect the millions of APAC SMEs that rely on Internet services and platforms as trade lanes to reach billions of global customers in international markets.¹⁶²

The Asian Trade Centre comments that there are mixed approaches to intermediary liability across the region. The Centre noted: ‘As a result of free trade agreements, Singapore included safe harbour provisions for Internet service providers for copyright infringement in domestic law, while Australia and Korea introduced partial safe harbour provisions.’¹⁶³ The Centre commented: ‘Japan also has a safe harbour in place, although court rulings have been somewhat contradictory.’¹⁶⁴

Professor Peter Yu has noted: ‘The draft *RCEP* chapter also does not include detailed *TPP*-like provisions on Internet service providers, secondary liability for copyright infringement, and the

¹⁶² Asian Trade Centre, ‘Fostering Innovation and Growth in Asia: IP, Copyright and Digital Trade’, Working Paper, RCEP Perth Round, April 2016, <https://static1.squarespace.com/static/5393d501e4b0643446abd228/t/5752a6c2c2ea515ccf6d8f76/1465034436088/RCEP+IP+Working+Paper.pdf>

¹⁶³ Ibid.

¹⁶⁴ Ibid.

notice-and-takedown mechanism'.¹⁶⁵

South Korea proposed language requiring countries to “take effective measures to curtail repetitive infringement of copyright and related rights on the Internet or other digital network” (Draft Article 9quinquies.3).

Japan called for the disclosure of information concerning the accounts of allegedly infringing Internet subscribers (Draft Article 9quinquies.4). It also included a footnote supporting “a regime providing for limitations on the liability of, or on the remedies available against, online service providers while preserving the legitimate interests of [the] right holder” (Draft Article 9quinquies.2, fn. 43).

The final text of *RCEP* does not have an elaborate regime dealing with intermediary liability in respect of copyright law. There is instead a general provision in Article 11.75 which concerns ‘Effective Action against Infringement in the Digital Environment.’¹⁶⁶ The provision states: ‘Each Party confirms that the enforcement procedures set out in Subsection 2 (Civil Remedies) and Subsection 4 (Criminal Remedies) shall be available to the same extent with respect to acts of infringement of copyright or related rights and trademarks, in the digital environment.’¹⁶⁷

H. Government Use of Software

There has been concern about software piracy in the Asia-Pacific, particularly amongst developed nations and information technology companies. Draft Article 2.4 focused upon government use of software. Article 11.17 of *RCEP* deals with Government Use of Software, providing: ‘Each Party confirms its commitment to: (a) maintain appropriate laws, regulations, or policies that provide for its central government to use only non-infringing computer software

¹⁶⁵ Peter Yu, ‘The RCEP and Intellectual Property Norm-Setting in the Asia-Pacific’, Intellectual Property Rights and Mega-Regional Trade Agreements, April 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810579

¹⁶⁶ Article 11.75 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁶⁷ Article 11.75 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

in a manner consistent with this Chapter; and (b) encourage its regional and local governments to adopt or maintain measures similar to those referred to in subparagraph (a).¹⁶⁸

I. Copyright Enforcement

In his useful overview, Peter Yu also reflects upon the copyright enforcement measures.¹⁶⁹ He observed:

The draft *RCEP* intellectual property chapter includes the usual provisions concerning civil, criminal and administrative procedures and remedies, as well as provisional and border measures (Draft Section 9). Although a considerable portion of the draft language in the enforcement section merely reaffirms the existing rights and obligations under the TRIPS Agreement, the proposed language increases the obligations concerning the seizure and destruction of allegedly infringing goods, including the grant of authority to take ex officio action (Draft Article 9ter.5) and to seize or destroy the materials or implements used to create infringing goods (Draft Articles 9bis.5, 9bis.6, 9bis.10 and 9quater.6). The draft chapter also seeks to empower judicial authorities to determine damages for intellectual property infringement based on lost profits, the market price or the suggested retail price (Draft Article 9bis.2(i)).¹⁷⁰

Peter Yu counterpoints the text under negotiation in *RCEP* with the text on intellectual property enforcement under consideration in the *TPP*:

Like the *TPP* intellectual property chapter, the draft *RCEP* chapter calls for criminal procedures and penalties for unauthorised camcording in cinemas (Draft Article 9quinquies.5). Unlike the *TPP*, however, the draft *RCEP* provisions on criminal procedures and penalties are not extensive. They apply to neither trade secret infringement nor the circumvention of technological protection measures. The draft provisions on border measures are also less detailed and less invasive (Draft Article 9ter). At the time when the leaked draft was being negotiated, the *RCEP* negotiating parties still strongly disagreed on the appropriate standards concerning criminal liability for aiding and abetting (Draft Article

¹⁶⁸ Article 11.17 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁶⁹ Peter Yu, 'The RCEP and Intellectual Property Norm-Setting in the Asia-Pacific', Intellectual Property Rights and Mega-Regional Trade Agreements, April 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810579

¹⁷⁰ Peter Yu, 'The RCEP and Intellectual Property Norm-Setting in the Asia-Pacific', Intellectual Property Rights and Mega-Regional Trade Agreements, April 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810579

9quater.4), the award of attorneys' fees (Draft Article 9bis.4) and obligations relating to intellectual property enforcement in the digital environment (Draft Article 9quinquies). Facing strong opposition from its negotiating partners, South Korea remains the lone party calling for the provision of pre-established damages (Draft Article 9bis.3).¹⁷¹

Section J of the final text of Chapter 11 of *RCEP* focuses upon the enforcement of intellectual property rights.¹⁷² This regime could be considered to be a TRIPS-Plus system – particularly with some of the measures around criminal penalties and procedures, border measures, and search and seize procedures. Subsection 1 focuses on general obligations. Article 11.58 concerns general obligations.¹⁷³ Subsection 2 looks at civil remedies. Article 11.59 looks at fair and equitable procedures.¹⁷⁴ Article 11.60 examines damages.¹⁷⁵ Article 11.61 explores court costs and fees.¹⁷⁶ Article 11.62 considers the destruction of infringing goods and materials and implements.¹⁷⁷ Article 11.63 explores confidential information in civil judicial proceedings.¹⁷⁸ Article 11.64 deals with provisional measures.¹⁷⁹

Subsection 3 concerns border measures. The detailed focus on border measures is reminiscent of *ACTA* and the *TPP*. Article 11.65 concerns the suspension of the release of suspected pirate

¹⁷¹ Ibid.

¹⁷² Section J of Chapter 11 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁷³ Article 11.58 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁷⁴ Article 11.59 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁷⁵ Article 11.60 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁷⁶ Article 11.61 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁷⁷ Article 11.62 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁷⁸ Article 11.63 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁷⁹ Article 11.64 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

copyright goods or counterfeit trademark goods by right holder's application.¹⁸⁰ Article 11.66 deals with applications for suspension or detention.¹⁸¹ Article 11.67 relates to security or equivalent assurance.¹⁸² Article 11.68 deals with information provided by competent authorities to right holders.¹⁸³ Article 11.69 concerns the suspension of the release of suspected pirated copyright goods or counterfeit trademark goods by ex officio action.¹⁸⁴ Article 11.70 concerns information provided by rights holders to competent authorities in case of ex officio action.¹⁸⁵ Article 11.71 deals with an infringement determination within a reasonable period by competent authorities.¹⁸⁶ Article 11.72 focuses on destruction orders by competent authorities.¹⁸⁷ Article 11.73 deals with fees.¹⁸⁸

Subsection 4 addresses criminal remedies. Article 11.74 (1) provides that each party shall provide for criminal procedures and penalties in cases of wilful copyright or related rights piracy, and trademark counterfeiting on a commercial scale.¹⁸⁹ Article 11.74 (2) concerns the wilful importation of pirated copyright goods, and counterfeit trademark goods.¹⁹⁰ Article

¹⁸⁰ Article 11.65 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁸¹ Article 11.66 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁸² Article 11.67 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁸³ Article 11.68 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁸⁴ Article 11.69 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁸⁵ Article 11.70 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁸⁶ Article 11.71 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁸⁷ Article 11.72 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁸⁸ Article 11.73 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁸⁹ Article 11.74 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁹⁰ Article 11.74 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

11.74 (3) details a range of penalties – including sentences of imprisonment; monetary fines which have a deterrent effect; forfeiture and destruction.¹⁹¹ Article 11.74 (4) addresses the unauthorised copying of a film on a commercial scale from a performance in a movie theatre.¹⁹²

Recommendation 6

***RCEP* provides for a wide range of remedies for intellectual property enforcement – which include civil remedies, criminal offences and procedures, border measures, technological protection measures, and electronic rights management information. Such measures could be characterised as TRIPS+ obligations.**

3. ELECTRONIC COMMERCE

There has been a concerted effort by information technology companies, e-commerce platforms, and Big Data.¹⁹³

Chapter 12 of *RCEP* deals with the topic of electronic commerce. Article 12.1 deals with definitions.¹⁹⁴ Article 12.2 concerns Principles and Objectives.¹⁹⁵ Article 12.2 (1) provides: ‘The Parties recognise the economic growth and opportunities provided by electronic commerce, the importance of frameworks that promote consumer confidence in electronic commerce, and the importance of facilitating the development and use of electronic commerce.’¹⁹⁶ Article 12.2 (2) provides: ‘The objectives of this Chapter are to: (a) promote

¹⁹¹ Article 11.74 (3) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁹² Article 11.74 (4) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁹³ Jane Kelsey, ‘The Trojan Horse of e-Commerce’, Intellectual Property and Trade in the Pacific Century’, QUT IP and Innovation Law Research Symposium, 22 June 2017, <https://www.youtube.com/watch?v=klU1JF98GfQ>

¹⁹⁴ Article 12.1 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁹⁵ Article 12.2 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁹⁶ Article 12.2 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

electronic commerce among the Parties and the wider use of electronic commerce globally; (b) contribute to creating an environment of trust and confidence in the use of electronic commerce; and (c) enhance cooperation among the Parties regarding development of electronic commerce.¹⁹⁷

Article 12.3 deals with the scope of the regime.¹⁹⁸ Article 12.4 deals with co-operation.¹⁹⁹ Article 12.5 looks at trade facilitation through paperless trading.²⁰⁰ Article 12.6 concerns electronic authentication and electronic signature.²⁰¹ Article 12.7 has some general provisions about consumer protection.²⁰² Article 12.8 deals with online personal information protection.²⁰³ Article 12.9 focuses on unsolicited commercial electronic messages.²⁰⁴ Article 12.10 concerns the domestic regulatory framework.²⁰⁵ Article 12.11 deals with customs duties.²⁰⁶ Article 12.12 discusses transparency in relation to electronic commerce regulation.²⁰⁷ Article 12.13 concerns cyber security.²⁰⁸

¹⁹⁷ Article 12.2 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁹⁸ Article 12.3 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

¹⁹⁹ Article 12.4 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁰⁰ Article 12.5 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁰¹ Article 12.6 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁰² Article 12.7 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁰³ Article 12.8 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁰⁴ Article 12.9 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁰⁵ Article 12.10 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁰⁶ Article 12.11 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁰⁷ Article 12.12 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁰⁸ Article 12.13 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

Article 12.14 deals with the location of computing facilities.²⁰⁹ Article 12.15 looks at the cross-border transfer of information by electronic means.²¹⁰ Article 12.16 promotes a dialogue on electronic commerce.²¹¹ Article 12.17 concerns the settlement of disputes.²¹²

The Regulatory Impact Statement of the Australian Government asserts that the Electronic Commerce Chapter is novel and innovative:

Digital trade is a key element of Australia's continued economic growth. Its significance is expected to grow following the coronavirus pandemic and as increasing numbers of people around the world go online. There is great potential for the digital marketplace to expand and for Australian businesses to increase their digital trade activities, including in our region. By including commitments to support the flow of data, promote privacy and consumer protection and enable electronic authentication and electronic signature, *RCEP* will help to facilitate digital trade in the region and support consumer confidence in the online environment. The data flows and localisation articles in the agreement are the first commitments of this kind for a number of large and emerging *RCEP* countries, improving on commitments in *AANZFTA*, *MAFTA*, *ChAFTA*, *KAFTA* and the ASEAN Agreement on Electronic Commerce.²¹³

Such claims, though, are not necessarily supported by the text of the agreement. Far from being novel, the *RCEP* Chapter on Electronic Commerce seems already outdated and outmoded. The draft of the Electronic Commerce Chapter in *RCEP* follows a similar template to that seen in the *TPP-11* and drafts of the *Trade in Services Agreement (TISA)*.²¹⁴ The Electronic Commerce

²⁰⁹ Article 12.14 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²¹⁰ Article 12.15 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²¹¹ Article 12.16 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²¹² Article 12.17 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²¹³ Australian Government, 'Regulatory Impact Statement on the Regional Comprehensive Economic Partnership', Canberra: Australian Government, 2021, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²¹⁴ Matthew Rimmer, 'Chapter 4. The *Trans-Pacific Partnership* and Big Data: Consumer Rights, Privacy, Electronic Commerce, and Digital Trade', in *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 146-178.

Chapter in *RCEP* fails to reflect domestic pressures for greater regulation of electronic commerce in Australia – which can be seen in the regulatory reviews and enforcement action taken by the ACCC.

Professor Jane Kelsey observed that, during the negotiations, a number of aspects of the electronic commerce chapter were pared back:

After protracted negotiations, the agreed *RCEP* text has omitted or significantly altered several core elements of the *TPPA* e-commerce chapter and is not enforceable. This retreat from the *TPPA* template reflects a more mature understanding of the implications of its rules and the need for governments to retain effective policy space to regulate the digital domain. However, the chapter still gives rise to concerns, and leaves unanswered the fundamental objection that rules on Internet governance, data, competition and privacy should not be negotiated in secret under the guise of ‘trade’.²¹⁵

In another submission, she sought to explain this withdrawal: ‘The *RCEP* approach pulls back from the *TPPA* and DEPA, reflecting the concerns of a growing number of governments about their capacity to regulate digital corporations, activities and data.’²¹⁶ She noted: ‘While the obligations in *RCEP*’s e-commerce chapter are still binding on New Zealand at international law if we ratify the *RCEP*, at least they are not enforceable.’²¹⁷

In addition to the electronic commerce chapter, there is also a chapter on trade in services in *RCEP*. There has been a discussion as to whether this agreement will boost trade in services such as educational services.²¹⁸

²¹⁵ Jane Kelsey, ‘Important Difference between the Final RCEP Electronic Commerce Chapter and the TPPA and Lessons for E-Commerce in the WTO’, New Zealand Parliament, 11 February 2021, https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCFD_EVI_104189_FD118/jane-kelsey

²¹⁶ Jane Kelsey, ‘International Treaty Examination of the Regional Comprehensive Economic Partnership Agreement’, New Zealand Parliament, 11 February 2021, https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCFD_EVI_104189_FD120/jane-kelsey-sup-2

²¹⁷ Ibid.

²¹⁸ Judith McNamara, ‘Impact of RCEP on Higher Education in the Asia-Pacific Region’, Intellectual Property and Trade in the Pacific Century, QUT IP and Innovation Law Research Symposium, 22 June 2017, <https://youtu.be/0xL8JCFQDFA>

Recommendation 7

The electronic commerce chapter of *RCEP* is outmoded and anachronistic. Its laissez-faire model for dealing with digital trade and electronic commerce is at odds with domestic pressures in Australia and elsewhere for stronger regulation of digital platforms.

4. TRADEMARK LAW, DESIGNS LAW, AND INTERNET DOMAIN NAMES

There has been a push to expand the protection available for trade marks and related rights in the Asia-Pacific.

Amongst other things, the *TPP* was designed to enhance the rights of famous and well-known trade mark holders, and expand the range of remedies available for trade mark infringement.²¹⁹

In the consultation process over *RCEP*, the International Trademark Association made various submissions as to the design of trade mark provisions in the agreement.²²⁰ The organisation maintained: ‘INTA hopes that the agreement will deliver stronger, easier and more accessible IPRs for the benefit of businesses of all sizes, the economy and consumers.’²²¹ The Association hoped that the 16 negotiating countries would not only fully implement their obligations under the *TRIPS Agreement* 1994 – but they also wanted the adoption of TRIPS+ measures.

Section C of Chapter 11 of *RCEP* focuses upon trade mark law. Article 11.19 concerns the protection of trademarks.²²² Article 11.20 focuses on collective and certification trade marks.²²³

²¹⁹ Matthew Rimmer, ‘Chapter 5. No Logo: Nike, Labour Rights, Trade Mark Law and the *Trans-Pacific Partnership*’, in *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 180-210.

²²⁰ International Trademark Association, ‘INTA Comments and Recommendations Regarding the Negotiation of the *Regional Comprehensive Economic Partnership* (RCEP)’, <https://www.dfat.gov.au/sites/default/files/international-trademark-association-submission-to-rcep.pdf>

²²¹ Ibid.

²²² Article 11.19 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²²³ Article 11.20 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

Article 11.21 deals with the trademarks classification system.²²⁴ Article 11.22 concerns trade mark registration.²²⁵ Article 11.23 deals with trade mark rights conferred.²²⁶ Article 11.24 addresses trade mark exceptions.²²⁷ Article 11.25 focuses on the protection of trade marks, which predate geographical indications.²²⁸ Article 11.26 focuses on the protection of well-known trade marks.²²⁹ Article 11.27 deals with bad faith trade marks.²³⁰ Article 11.28 concerns ‘One and the Same Application Relating to Several Goods or Services.’²³¹

As discussed previously, there is provision for a suite of remedies for intellectual property enforcement – including criminal procedures and penalties for trademark counterfeiting on a commercial scale.²³²

Section F of Chapter 11 of *RCEP* deals with industrial designs. Article 11.49 of *RCEP* concerns the protection of industrial designs.²³³ Article 11.49 (1) of *RCEP* concerns the threshold requirements in respect of industrial designs.

²²⁴ Article 11.21 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²²⁵ Article 11.22 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²²⁶ Article 11.23 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²²⁷ Article 11.24 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²²⁸ Article 11.25 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²²⁹ Article 11.26 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²³⁰ Article 11.27 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²³¹ Article 11.28 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²³² Article 11.74 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²³³ Article 11.49 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

There is an acknowledgment in Article 11.49 (4) of *RCEP* that ‘Each Party may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.’²³⁴ Disappointingly, given the current inquiry of the Productivity Commission into the right to repair, there is no reference to the importance of the right to repair in *RCEP*.²³⁵

Section H focuses upon unfair competition. Article 11.54 of *RCEP* concerns effective protection against unfair competition.²³⁶ For its part, Australia seeks to deal with such matters under passing off and consumer law. Article 11.55 of *RCEP* focuses upon Internet Domain Names.²³⁷ The clause provides: ‘In connection with its system for the management of its country code top-level domain (ccTLD) domain names and in accordance with its laws and regulations and, if applicable, relevant administrator policies regarding protection of privacy and personal data, each Party shall make the following available: (a) an appropriate procedure for the settlement of disputes, based on, or modelled along the same lines as, the principles established in the Uniform Domain-Name Dispute-Resolution Policy, as approved by the Internet Corporation for Assigned Names and Numbers, or that: (i) is designed to resolve disputes expeditiously and at a reasonable cost; (ii) is fair and equitable; (iii) is not overly burdensome; and (iv) does not preclude resort to judicial proceedings; and (b) appropriate remedies, at least in cases in which a person registers or holds, with a bad faith intent to profit, a domain name that is identical or confusingly similar to a trademark.’²³⁸

²³⁴ Article 11.49 (4) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²³⁵ Productivity Commission, *Right to Repair*, Melbourne: Productivity Commission, 2021, <https://www.pc.gov.au/inquiries/current/repair#draft>

²³⁶ Article 11.54 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²³⁷ Article 11.55 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²³⁸ Article 11.55 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

Recommendation 8

***RCEP* provides for protection in respect of trade mark law, unfair competition, designs protection, Internet Domain names, and country names.**

5. TOBACCO CONTROL, PLAIN PACKAGING OF TOBACCO PRODUCTS, AND TOBACCO ENDGAME

During the course of the *RCEP* negotiations, Australia defended its pioneering public health initiative of plain packaging of tobacco products in a number of forums.²³⁹ The Australian Government defeated a constitutional challenge by Big Tobacco companies in the High Court of Australia.²⁴⁰ The Australian Government also triumphed against an investor-state dispute settlement action brought by Philip Morris under an investment agreement between Australia and Hong Kong.²⁴¹ The Australian Government was also successful in defending plain packaging of tobacco products against the complaints of a number of countries in the World Trade Organization – at first instance and on appeal.²⁴² It is notable that one of the complainants was Australia’s neighbour, Indonesia – a fellow member of *RCEP*.

It is striking that, though, a number of *RCEP* members have followed Australia’s lead in taking public health measures to combat the global tobacco epidemic. New Zealand and Singapore

²³⁹ Simon Chapman and Becky Freeman, *Removing the Emperor’s Clothes: Australia and Tobacco Plain Packaging*, Sydney: Sydney University Press, 2014; Matthew Rimmer (ed.), *The Plain Packaging of Tobacco Products* (2017) 17 (2) *QUT Law Review* 1-174.

²⁴⁰ *JT International SA v Commonwealth of Australia* [2012] HCA 43, High Court of Australia, Order August 15, 2012, Reasons October 5, 2012.

²⁴¹ *Philip Morris Asia Ltd v. Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015), <http://www.pcacases.com/web/view/5> Ruling <http://www.pcacases.com/web/sendAttach/1711>; and Jarrod Hepburn, and Luke Eric Peterson, ‘Australia Prevails in Arbitration with Philip Morris Over Tobacco Plain Packaging Dispute’, *Investment Arbitration Reporter*, 17 December 2015, <https://www.iareporter.com/articles/breaking-australia-prevails-in-arbitration-with-philip-morris-over-tobacco-plain-packaging-dispute/>

²⁴² *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, (28 June 2018); and *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R and WT/DS441/AB/R, (9 June 2020).

have introduced plain packaging of tobacco products. Thailand is also in an advanced stage of implementing plain packaging of tobacco products.

The final text of *RCEP* does not include an investor-state dispute settlement. (The *TPP* contained a clause excluding investor-state dispute settlement actions against tobacco control measures). However, there remains the possibility of state-versus-state disputes over tobacco control under *RCEP*. International trade and investment agreements – including *RCEP* – should ensure that tobacco control measures contemplated by the *WHO Framework Convention on Tobacco Control 2003* should not be subject to challenge under trade and investment dispute settlement mechanisms.

It is important to ensure as well that various tobacco endgame policies and strategies being initiated by countries in the Asia-Pacific are not subject to trade and investment actions.²⁴³

Recommendation 9

As well as providing safeguards against trade and investment action by tobacco companies and tobacco-friendly states, *RCEP* should do more to address the tobacco epidemic in the Asia-Pacific.

6. GEOGRAPHICAL INDICATIONS

In the Asia-Pacific, there have been tensions between competing models for the protection of geographical indications promoted by the United States and European Union.

Even though the United States departed the *TPP* negotiations, the text of the *TPP* remains firmly based upon an American approach to geographical indications.²⁴⁴

²⁴³ Coral Gartner et al., ‘CREATE a new path to a smoke-free Australia’, *Medical Journal of Australia – Insight Plus*, 2020, <https://insightplus.mja.com.au/2020/40/create-a-new-path-to-a-smoke-free-australia/>

²⁴⁴ Matthew Rimmer, ‘Chapter 7. The Prosecco Wars: Intellectual Property and Geographical Indications in the Pacific Rim’, in *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 244-276.

As Professor William van Caenegem from Bond University has noted, there is a complex range of positions of trade mark law and geographical indications in the Asia-Pacific region.²⁴⁵

In the end, *RCEP* has some limited provisions on geographical indications in Section D of Chapter 11 on Intellectual Property. Article 11.29 provides: ‘Each Party shall ensure in its laws and regulations adequate and effective means to protect geographical indications.’²⁴⁶ Article 11.29 notes: ‘Each Party recognises that such protection may be provided through a trademark system, a sui generis system, or other legal means, provided that all requirements under the *TRIPS Agreement* are fulfilled.’²⁴⁷ Article 11.30 focuses upon domestic administrative procedures for the protection of geographical indications.²⁴⁸ Article 11.31 looks at grounds for opposition and cancellation.²⁴⁹ Article 11.32 addresses multi-component terms.²⁵⁰ Article 11.33 relates to the date of protection of a geographical indication.²⁵¹ Article 11.34 addresses the protection of recognition of geographical indications pursuant to international agreements.²⁵² Article 11.35 focuses upon the protection or recognition of geographical indications under concluded international agreements.²⁵³

²⁴⁵ William van Caenegem, ‘Geographical Indications and Trademarks in the Asia-Pacific Region’, Intellectual Property and Trade in the Pacific Century’, QUT IP and Innovation Law Research Symposium, 22 June 2017, <https://www.youtube.com/watch?v=l02ZD3QmmTo>

²⁴⁶ Article 11.29 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁴⁷ Article 11.29 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁴⁸ Article 11.30 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁴⁹ Article 11.31 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁵⁰ Article 11.32 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁵¹ Article 11.33 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁵² Article 11.34 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁵³ Article 11.35 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

The New Zealand Parliamentary inquiry discussed the topic of geographical indications in the context of *RCEP*. The Committee noted: ‘MFAT observed that *RCEP* reinforces the importance of GIs, but does not offer any additional platforms for developing them’.²⁵⁴ The Committee observed:

Some submitters commented that GIs are not used very widely in New Zealand, as companies tend to use trademarks instead. One example referred to was Kāpiti Kahurangi Creamy Blue cheese, which has been trademarked by Fonterra. There were concerns that GIs could be misused to monopolise commonly known product varieties that New Zealand produces, but that could be claimed as GIs from other countries, or other geographic regions. This could have a negative economic effect on New Zealand producers in future agreements.²⁵⁵

Much like Australia, New Zealand is caught between the demands of the European Union for a stronger agenda on geographical indications for food and wine, and the preference of the United States for a reliance upon trade marks, rather than geographical indications.

Section I focuses upon country names. Article 11.57 of *RCEP* provides: ‘Each Party shall provide the legal means for interested persons to prevent commercial use of the country name of a Party in relation to a good in a manner that misleads consumers as to the origin of that good.’²⁵⁶

Recommendation 10

***RCEP* has a limited array text on geographical indications, taking a rather neutral position in the larger geopolitical debate on the topic between the European Union and the United States.**

²⁵⁴ Foreign Affairs, Defence and Trade Committee, *International Treaty Examination of the Regional Comprehensive Economic Partnership*, Wellington: New Zealand Parliament, 2021, https://www.parliament.nz/en/pb/sc/reports/document/SCR_109371/international-treaty-examination-of-the-regional-comprehensive

²⁵⁵ Ibid.

²⁵⁶ Article 11.57 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

7. PLANT BREEDERS' RIGHTS AND AGRICULTURAL INTELLECTUAL PROPERTY

In the Asia-Pacific, there have been tensions between farmers' rights, and the introduction of various forms of agricultural intellectual property.

There was extensive discussion of the norms and standards for agricultural intellectual property in the debate over the *TPP*.²⁵⁷

As observed by Professor Jay Sanderson of the Sunshine Coast University, there has been fierce debate over plant variety protection, agricultural patents, and farmers' rights during the *RCEP* negotiations.²⁵⁸ The NGO GRAIN feared: '*RCEP* will usher in a wave of corporate concentration and take over of Asia's food and agriculture sector.'²⁵⁹ Professor Christoph Antons of Newcastle Law School has charted the expansion of intellectual property in agriculture across the Asia-Pacific.²⁶⁰ He noted the divisions between parties in the *RCEP* negotiations: 'With some minor variations in the individual positions, Australia, Japan and Korea are seeking a TRIPS-plus text on plant varieties, but they are facing formidable opposition from the ASEAN countries, China, India, and New Zealand.'²⁶¹

Article 11.36 (3) (b) of *RCEP* provides that 'a Party may also exclude from patentability' 'plants and animals other than micro-organisms, and essentially biological processes for the

²⁵⁷ Matthew Rimmer, 'Chapter 8. Farmers' Rights in the Pacific Rim: Plant Breeders' Rights, Agricultural Patents, and the *Trans-Pacific Partnership*' in *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 278-311.

²⁵⁸ Jay Sanderson, 'The RCEP and plant variety rights: Is it in the interest of farmers and food?' QUT IP and Innovation Law Research Symposium, 22 June 2017, <https://www.youtube.com/watch?v=7mpNGUX-vBc&t=1s> See also Jay Sanderson, *Plants, People and Practices: The Nature and History of the UPOV Convention*, Cambridge: Cambridge University Press, 2017.

²⁵⁹ GRAIN, 'How RCEP Affects Food and Farmers', 19 June 2017, <https://grain.org/en/article/5741-how-rcep-affects-food-and-farmers>

²⁶⁰ Christoph Antons, 'Intellectual Property in Plant Material and Free Trade Agreements in Asia', in Liu Kung-Chung and Julien Chaisse (ed.), *The Future of Asian Trade Deals and IP*, Hart Publishing, 2019, 229-256.

²⁶¹ *Ibid.*, 243.

production of plants or animals other than non-biological and microbiological processes.’²⁶² Article 11.36 (3) (b) of *RCEP* states that ‘each Party shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof’.²⁶³ Article 11.36 (3) (b) of *RCEP* provides that ‘the Parties shall review this subparagraph upon any amendment to subparagraph 3(b) of Article 27 of the *TRIPS Agreement* with a view to deciding whether to adopt a similar amendment to this subparagraph.’²⁶⁴

Some civil society groups remain aggrieved about the final text of *RCEP* in respect of intellectual property and agriculture. People over Profits have argued that ‘the *RCEP* will undermine the farmers’ right to use and share farm saved seeds, as well as their right to the protection of traditional knowledge and to share in the benefits from the use of plant genetic resources for agriculture’.²⁶⁵ People over Profits has contended: ‘It is through intellectual property that the *RCEP* can also allow giant pharmaceutical companies and agro-corporations to rake in profits at the expense of people’s access to affordable healthcare and seeds.’²⁶⁶

Professor Charles Lawson of Griffith Law School and his colleagues organised a research workshop, which called for a better articulation of farmers’ rights – both in the Asia-Pacific region, and globally.²⁶⁷

Recommendation 12

***RCEP* does not adequately respond to the issues in respect of patent law and access to essential medicines during the COVID-19 crisis. Likewise, *RCEP* is not well prepared for future epidemics, pandemics, and public health emergencies.**

²⁶² Article 11.36 (3) (b) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁶³ Article 11.36 (3) (b) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁶⁴ Article 11.36 (3) (b) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁶⁵ People over Profit, ‘RCEP, a Threat to our Rights’, 17 November 2020, <https://www.bilaterals.org/?rcep-a-threat-to-our-rights-pop>

²⁶⁶ Ibid.

²⁶⁷ Kamalesh Adhikari et al., ‘What Should Farmers’ Rights Look Like? The Possible Substance of a Right’, (2021) 11 (2) *Agronomy* <https://www.mdpi.com/2073-4395/11/2/367>

8. PATENT LAW, ACCESS TO MEDICINES, AND THE CORONAVIRUS (COVID-19)

There has been concern about the impact of TRIPS+ and TRIPS ++ trade agreements upon the provision of affordable medicines.²⁶⁸ There was an intense debate over the text of the *TPP* and the *TPP-11* and its ramifications for public health.²⁶⁹

There has been prolonged discussion about the impact of *RCEP* on access to affordable medicines. Burcu Kilic has discussed the dangers for access to essential medicines in *RCEP*.²⁷⁰ There has also been concern by public health researchers about the effects of *RCEP* upon access to medicines – particularly for developing countries and least developed countries.²⁷¹

In its statement of Principles, Article 11.4 (1) of *RCEP* provides: ‘A Party may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to its socio-economic and technological development, provided that such measures are consistent with this Chapter.’²⁷² Such Principles could no doubt apply to an understanding of patent law, public health, and access to medicines.

²⁶⁸ Ruth Dreifuss, and others, *Report of the United Nations Secretary-General’s High Level Panel on Access to Medicines: Promoting Innovation and Access to Health Technologies*, September 2016, <http://static1.squarespace.com/static/562094dee4b0d00c1a3ef761/t/57d9c6ebf5e231b2f02cd3d4/1473890031320/UNSG+HLP+Report+FINAL+12+Sept+2016.pdf>

²⁶⁹ Matthew Rimmer, ‘The Trans-Pacific Partnership: Intellectual Property, Public Health, and Access to Essential Medicines’ (2017) 29 *Intellectual Property Journal* 277-332; and Matthew Rimmer, ‘Chapter 9. The Trans-Pacific Partnership and Access to Essential Medicines: Patent Law, Public Health and Pandemics’ in *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 312-348.

²⁷⁰ Burcu Kilic, ‘Dangers for Access to Affordable Medicines in RCEP’, QUT IP and Innovation Law Research Symposium, 22 June 2017, <https://www.youtube.com/watch?v=ev7TINMFhWk>

²⁷¹ Belinda Townsend, Deborah Gleeson, and Ruth Lopert, ‘The Regional Comprehensive Economic Partnership, Intellectual Property Protection, and Access to Medicines’ (2016) 28 (8) *Asia Pacific Journal of Public Health* 682-693; and Belinda Townsend, Deborah Gleeson and Ruth Lopert, ‘Japan’s Emerging Role in the Global Pharmaceutical Intellectual Property Regime: A Tale of Two Trade Agreements’, (2018) 21 (1)-(2) *The Journal of World Intellectual Property* 88-103.

²⁷² Article 11.4 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

Article 11.8 of *RCEP* deals with the *TRIPS Agreement* and Public Health.²⁷³ Article 11.8 (1) of *RCEP* provides: ‘The Parties reaffirm the *Doha Declaration on the TRIPS Agreement and Public Health* adopted on 14 November 2001.’²⁷⁴ Article 11.8 (1) of *RCEP* elaborates: ‘In particular, the Parties have reached the following understandings regarding this Chapter: (a) the Parties affirm the right to fully use the flexibilities as duly recognised in the *Doha Declaration on the TRIPS Agreement and Public Health*; (b) the Parties agree that this Chapter does not and should not prevent a Party from taking measures to protect public health; and (c) the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party’s right to protect public health and, in particular, to promote access to medicines for all.’²⁷⁵ Article 11.8 (2) of *RCEP* provides: ‘In recognition of the Parties’ commitment to access to medicines and public health, this Chapter does not and should not prevent the effective utilisation of Article 31bis of the *TRIPS Agreement*, and the Annex and Appendix to the Annex to the *TRIPS Agreement*.’²⁷⁶ Article 11.8 (3) states: ‘The Parties recognise the importance of contributing to the international efforts to implement Article 31bis of the *TRIPS Agreement*, and the Annex and Appendix to the Annex to the *TRIPS Agreement*.’²⁷⁷

The Joint Leaders’ Statement in 2020 maintained: ‘In light of the adverse impact of the pandemic on our economies, and our people’s livelihood and well-being, the signing of the *RCEP Agreement* demonstrates our strong commitment to supporting economic recovery, inclusive development, job creation and strengthening regional supply chains as well as our support for an open, inclusive, rules-based trade and investment arrangement.’²⁷⁸ The Joint

²⁷³ Article 11.8 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁷⁴ Article 11.8 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁷⁵ Article 11.8 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁷⁶ Article 11.8 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁷⁷ Article 11.8 (3) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁷⁸ Department of Foreign Affairs and Trade, ‘Joint Leaders’ Statement on the Regional Comprehensive Economic Partnership (RCEP)’, Press Release, 15 November 2020,

Leaders' Statement commented: 'We acknowledge that the *RCEP* Agreement is critical for our region's response to the COVID-19 pandemic and will play an important role in building the region's resilience through inclusive and sustainable post-pandemic economic recovery process.'²⁷⁹

The text of *RCEP*, though, does not address critical issues related to COVID-19 in the Asia-Pacific. At an international level, there has been debate over intellectual property flexibilities in the context of access to essential medicines and the coronavirus COVID-19. The World Health Organization has established the ACT-Accelerator to speed up the distribution of vaccines, therapeutics, and diagnostics. The C-TAP has been established to share intellectual property. The Medicines Patent Pool has expanded its mandate to cover technologies related to the coronavirus. There has been discussion of the options of compulsory licensing and crown use. There has been a debate around public sector licensing. The model of open licensing has also been discussed. There has been a call for a TRIPS Waiver. There has been a discussion of the need for a People's Vaccine.

In Australia, the Productivity Commission is conducting an inquiry into vulnerable supply chains, in the wake of the COVID-19 crisis.²⁸⁰

In New Zealand, Professor Jane Kelsey questions whether *RCEP* is well-adapted for a COVID-19 response and recovery: 'It's time for New Zealand to revisit the failed hyper-globalisation model of the past four decades, especially after Covid-19 has exposed our vulnerability to deeply integrated supply chains we can't control and 'services exports' that depend on international travel.'²⁸¹

<https://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep/news/joint-leaders-statement-regional-comprehensive-economic-partnership-rcep>

²⁷⁹ Ibid.

²⁸⁰ Productivity Commission, *Vulnerable Supply Chains*, Melbourne: Productivity Commission, 2021, <https://www.pc.gov.au/inquiries/current/supply-chains>

²⁸¹ Jane Kelsey, 'RCEP - A Wake Up Call To Rethink The Failed Hyperglobalisation Model', Scoop NZ, 16 November 2020, <https://www.scoop.co.nz/stories/WO2011/S00110/rcep-a-wake-up-call-to-rethink-the-failed-hyperglobalisation-model.htm>

Recommendation 12

***RCEP* does not adequately respond to the issues in respect of patent law and access to essential medicines during the COVID-19 crisis. Likewise, *RCEP* is not well prepared for future epidemics, pandemics, and public health emergencies.**

9. BIOLOGICS, DATA PROTECTION, AND TRADE SECRETS

Article 11.56 of *RCEP* concerns the Protection of Undisclosed Information.²⁸² Article 11.56 (1) of *RCEP* states: ‘Each Party shall provide protection of undisclosed information in accordance with paragraph 2 of Article 39 of the *TRIPS Agreement*.’²⁸³ Article 11.56 (2) of *RCEP* provides: ‘Further to paragraph 1, the Parties recognise the importance of protecting undisclosed information in relation to the objectives specified in paragraph 2 of Article 11.1 (Objectives).’²⁸⁴ This minimalist approach to confidential information and trade secrets in *RCEP* is a stark contrast to the maximalist approach to confidential information and trade secrets in the *TPP*.²⁸⁵ Nonetheless, it is worth reflecting that there has been much litigation of late over the breach of confidential information emanating by government and commercial entities in China. Even though *RCEP* sets a basic template for the protection of undisclosed information, there could well be further litigation in this space in the Asia-Pacific.

In stark contrast to the *TPP*,²⁸⁶ *RCEP* does not provide for any additional sui generis obligations in respect of data protection and biologics.

²⁸² Article 11.56 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁸³ Article 11.56 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁸⁴ Article 11.56 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

²⁸⁵ Matthew Rimmer, ‘Chapter 11. Secret Trade and Trade Secrets: The Trans-Pacific Partnership, Confidential Information, and Computer Crimes’ in *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 380-411.

²⁸⁶ Matthew Rimmer, ‘Chapter 10. The Trans-Pacific Partnership and Biotechnology: Intellectual Property, Gene Patents and Biologics’ in *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 349-378.

Recommendation 13

***RCEP* provides limited protection of confidential information and trade secrets – even though there has been much litigation in this field in the Asia-Pacific.**

10. LABOR RIGHTS AND HUMAN RIGHTS

In the consultation process over *RCEP*, the ACTU made a submission to the Department of Foreign Affairs and Trade.²⁸⁷ The submission noted that ‘Trade agreements are also increasingly broad – impacting on an ever broadening range of policy areas.’²⁸⁸ The submission stressed: ‘The space for government to introduce policy in the interest of working people – quality public services, affordable health, environmental regulations and so on – must also be maintained.’²⁸⁹ The ACTU emphasized that *RCEP* should include a comprehensive labour chapter:

Promotion and protection of labour rights should be a priority for all trade negotiations regardless of the trading partners negotiating an agreement. In the context of the *RCEP*, though, it is particularly important given the growing trend in trade. Respect for labour rights will assist in the distribution of the benefits of this trade in the region. Respect for labour rights will help to ensure the jobs created are decent jobs. However, the inclusion of the labour chapter is also important for developed countries including Australia, with research demonstrating that there is a risk of reduced labour standards in developed countries resulting from liberalisation.²⁹⁰

The ACTU warned: ‘Further creation of jobs that are insecure, fail to provide a living wage, do not respect the rights of workers, and ignore serious occupational health and safety risks is not a means of achieving sustainable development.’²⁹¹ As such, the ACTU emphasized that a comprehensive labour chapter was essential for *RCEP*. Disappointingly, such submissions were ignored in terms of the final construction of the text of *RCEP*.

²⁸⁷ ACTU, ‘ACTU Submission to the Department of Foreign Affairs and Trade on the proposed Regional Comprehensive Economic Partnership’, 4 April 2013, <https://www.dfat.gov.au/sites/default/files/actu-submission-to-rcep.pdf>

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

The *RCEP* lacks any proper and appropriate consideration of the relationship between trade, labor rights, and human rights. As Benny Teh notes: ‘Not only does the *RCEP* agreement have 10 chapters less than the *TPP*, it also excludes labour, environment and capacity building where people-focused issues are arguably important.’²⁹² He comments that ‘the mega trade deal is weak on human rights, environmental and social safeguards, and inputs from civil society organisations that were largely kept out of the negotiation process due in part to confidentiality.’²⁹³

Patricia Ranald observed: ‘Despite claims about the benefits of common standards, the *RCEP* has no commitments to internationally recognised labour rights... which Australia and other *RCEP* governments have endorsed through the United Nations and the International Labour Organization.’²⁹⁴ She observed: ‘Such commitments are included in some other agreements like the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* and Australia’s current trade negotiations with the EU, although there are debates about their enforceability.’²⁹⁵ Patricia Ranald warned: ‘In *RCEP* member countries like China and Myanmar, there is mounting evidence of labour rights and human rights abuses.’²⁹⁶ She lamented that ‘the *RCEP* has no provisions to deal with issues like forced labour or child labour.’²⁹⁷

There has been concern that *RCEP* does not fully engage with gender and trade as a topic, and, as such, will undermine women’s rights in the Asia-Pacific.²⁹⁸

²⁹² Benny Teh, ‘RCEP Fails To Promote A People-Centred ASEAN’, the *ASEAN Post*, 5 December 2020, <https://theaseanpost.com/article/rcep-fails-promote-people-centred-asean>

²⁹³ Ibid.

²⁹⁴ Patricia Ranald, ‘RCEP Has Limited Trade Gains and Ignores Labour and Human Rights’, Australian Institute of International Affairs, 27 November 2020, <https://www.internationalaffairs.org.au/australianoutlook/rcep-has-limited-trade-gains-and-ignores-labour-and-human-rights/>

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Kate Lappin, ‘RCEP And Women’s Rights’, *Strategic Review*, 2018, <https://apwld.org/rcep-and-womens-rights/>

There are a number of nation states involved in *RCEP*, which have faced criticism over their record on labor rights, and human rights. China has faced concerted criticism over its actions in Hong Kong, Tibet, and Xinjiang. Indeed, there have been previous calls to suspend or terminate trade agreements with China on human rights grounds.²⁹⁹ Vietnam has a poor record on labor rights and human rights. Brunei has come under criticism for its treatment of LGBTI communities. There has been much concern about the military coup of Myanmar. The negotiation of *RCEP* again raises the question of how human rights should be taken into account in trade negotiations.

Recommendation 14

***RCEP* is defective because it fails to consider the inter-relationship between trade, labor rights, and human rights.**

11. ACCESS TO GENETIC RESOURCES, THE ENVIRONMENT, AND CLIMATE CHANGE

Professor Jean-Frederic Morin from the University of Laval has been charting the treatment of the environment across various preferential bilateral and regional trade agreements.³⁰⁰ In this context, *RCEP* seems an anomaly. The regional trade agreement does not have a dedicated chapter on the environment. There are some vestiges of provisions in the text of the agreement. It is strange and peculiar that *RCEP* does not substantively address biodiversity, the protection of the environment, or climate change.

²⁹⁹ Stephen Dziedzic, 'Calls for Australia to Axe Free Trade Deal with Hong Kong amid China Crackdown', *ABC News*, 14 July 2020, <https://www.abc.net.au/news/2020-07-14/calls-axe-free-trade-agreement-hong-kong-china-crackdown/12451002>

³⁰⁰ Jean-Frédéric Morin and Corentin Bialais, *Strengthening Multilateral Environmental Governance through Bilateral Trade Deals*, CIGI Policy Brief No. 123, 28 February 2018, <https://www.cigionline.org/publications/strengthening-multilateral-environmental-governance-through-bilateral-trade-deals>; Sikina Jinnah and Jean-Frédéric Morin, *Greening through Trade: How American Trade Policy Is Linked to Environmental Protection Abroad*, Cambridge (MA) and Boston: MIT Press, 2020; Jean-Frédéric Morin, Amandine Orsini, and Sikina Jinnah, *Global Environmental Politics: Understanding the Governance of the Earth*, Oxford: Oxford University Press, 2020; and Dominique Blumer, Jean-Frédéric Morin, Clara Brandi and Axel Berger, 'Environmental Provisions in Trade Agreements: Defending Regulatory Space or Pursuing Offensive Interests?' (2020) 29 (5) *Environmental Politics* 866-889.

Article 17.10 of *RCEP* briefly refers to the *Convention on Biological Diversity* 1992, noting that ‘Each Party affirms its rights and responsibilities under the *Convention on Biological Diversity* done at Rio de Janeiro on 5 June 1992.’³⁰¹ This minimalist clause is inadequate and unenforceable. *RCEP* represents a missed opportunity to take a regional approach to the regulation of access to genetic resources.³⁰²

In the New Zealand Parliament, the Foreign Affairs, Defence, and Trade Committee considered the failure to address the environment and climate change in *RCEP*.³⁰³ The Committee observed:

Some of us noted that an environmental chapter is absent from *RCEP*. We asked whether this would have an effect on upholding New Zealand’s environmental principles. MFAT explained that it faced strong opposition from other members over including a chapter on environmental standards. We were assured that New Zealand’s environmental interests are protected throughout the agreement, despite the lack of a specific environmental chapter.³⁰⁴

The committee noted: ‘Some submitters expressed concern that joining regional agreements without enforcing environmental standards could damage New Zealand’s domestic goals in that area.’³⁰⁵ While acknowledging ‘the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)* has a legally binding environmental chapter’, the Committee said that ‘the lack of one in *RCEP* seems inconsistent with advancing New Zealand’s environmental aims.’³⁰⁶ The Committee said that there was a need to be ‘wary of smaller parties in agreements

³⁰¹ Article 17.10 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

³⁰² Matthew Rimmer, ‘The Sorcerer II Expedition: Intellectual Property and Biodiscovery’ (2009) 6 *Macquarie Journal of International and Comparative Law* 147-187.

³⁰³ Foreign Affairs, Defence and Trade Committee, *International Treaty Examination of the Regional Comprehensive Economic Partnership*, Wellington: New Zealand Parliament, 2021, https://www.parliament.nz/en/pb/sc/reports/document/SCR_109371/international-treaty-examination-of-the-regional-comprehensive

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

sacrificing principles in order to appease more dominant parties.’³⁰⁷ The Committee observed: ‘Some commented that smaller parties may feel pressured to sacrifice domestic standards in order to remain involved in negotiations of current, and future, agreements.’³⁰⁸

By contrast, the *TPP* does have an Environment Chapter, although its value has been questioned as being merely symbolic, rather than substantive.³⁰⁹

In terms of its trade policy, the European Union has been pushing for a stronger connection between trade, and the environment.

Recommendation 15

***RCEP* fails to provide substantive protection of the environment, biodiversity, or climate in the Asia-Pacific.**

12. INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT

The preamble of *RCEP* emphasizes ‘that the three pillars of sustainable development are interdependent and mutually reinforcing, and that economic partnership can play an important role in promoting sustainable development.’³¹⁰ The preamble of *RCEP* also discusses the need to take ‘account of the different levels of development among the Parties, the need for appropriate forms of flexibility, including provision for special and differential treatment, especially for Cambodia, Lao PDR, Myanmar, and Viet Nam as appropriate, and additional flexibility for Least Developed Country Parties.’³¹¹ The preamble of *RCEP* also seeks to consider ‘the need to facilitate the increasing participation of Least Developed Country Parties in this Agreement so that they can more effectively implement their obligations under this Agreement and take advantage of the benefits from this Agreement, including expansion of

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Matthew Rimmer, ‘Greenwashing the Trans-Pacific Partnership: Fossil Fuels, the Environment, and Climate Change’ (2016) 14 (2) *Santa Clara Journal of International Law* 488-542.

³¹⁰ Preamble of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

³¹¹ Ibid.

their trade and investment opportunities and participation in regional and global supply chains.’³¹² However, in spite of this aspirational language in the preamble, there is little substantive in *RCEP*, which would boost the sustainable development goals. It is notable, in the context of intellectual property, that developed countries sought to limit and restrict text on sustainable development in the negotiation of *RCEP*.

In its statement of Principles, Article 11.4 (1) of *RCEP* provides: ‘A Party may, in formulating or amending its laws and regulations, adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to its socio-economic and technological development, provided that such measures are consistent with this Chapter.’³¹³

Draft Article 12 of *RCEP* dealt with the question of whether there should be special and differential treatment – particularly for least developed countries. The leaked text provides an indication of the bargaining positions of various nations and groups.³¹⁴ ASEAN Nations, India, New Zealand and China supported a section on special and differential treatment, transitional periods, and transitional arrangements. Australia instead argued for language on additional flexibilities for least developed countries. Japan opposed the text on special and differential treatment, transitional periods, and transitional arrangements. Japan instead proposed some different exemptions in respect of least developed countries recognised by the United Nations.

There has been a concern and a complaint that *RCEP* will be disadvantageous for developing countries and least developed countries – particularly when it comes to intellectual property.³¹⁵

³¹² Ibid.

³¹³ Article 11.4 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

³¹⁴ Knowledge Ecology International, ‘*RCEP*: Regional Comprehensive Economic Partnership’, <http://keionline.org/RCEP>

³¹⁵ Catherine Saez, ‘Leaked IP Chapter of Asian FTA Reveals Tough Rules for Poorer Partners, Civil Society Says’, *Intellectual Property Watch*, 20 April 2016, <http://www.ip-watch.org/2016/04/20/leaked-ip-chapter-of-asian-fta-reveals-tough-rules-for-poorer-partners-civil-society-says/>

There is a need to ensure that international intellectual property promotes global justice.³¹⁶ Professor Anupam Chander, and Professor Madhavi Sunder are critical that *RCEP* fails to address developmental issues – such as access to education and access to essential medicines.³¹⁷ They contended that ‘the *RCEP* should create a new model of intellectual property agreement, devoted not to promoting intellectual property first and foremost and for its own sake, but to promoting health, education, and innovation’.³¹⁸ There has been concern that the *RCEP* fails to embed the new United Nations Sustainable Development Goals into the agreement.³¹⁹

Nobel Laureate Professor Joseph Stiglitz and his colleagues have called for a reformation of intellectual property law, policy, and practice in line with the United Nations Sustainable Development Goals.³²⁰ Professor Margaret Chon has highlighted the need for public-private intellectual property partnerships to accelerate the United Nations Sustainable Development Goals.³²¹ Professor Sara Bannerman has argued that there is a need to move beyond technocratic understandings of intellectual property and development, and put forward a substantive agenda for intellectual property law reform in light of the United Nations Sustainable Development Goals.³²² Professor Martin Skladany has also argued that the design

³¹⁶ Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice*, Yale University Press, 2012.

³¹⁷ Anupam Chander, and Madhavi Sunder, ‘The Battle to Define Asia’s Intellectual Property Law: *TPP* to *RCEP*’ (2018) 8 *UC Irvine Law Review* 331-361.

³¹⁸ Ibid. 360-361.

³¹⁹ United Nations Sustainable Development Goals <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>

³²⁰ Mario Cimoli, Giovanni Dosi, Keith Maskus, Ruth Okediji, Jerome Reichman, and Joseph Stiglitz (eds), *Intellectual Property Rights: Legal and Economic Challenges for Development*, Oxford: Oxford University Press, 2014; Dean Baker, Arjun Jayadev, and Joseph Stiglitz. *Innovation, Intellectual Property, and Development: A Better Set of Approaches for the 21st Century*, AccessIBSA, 2017, <http://ip-unit.org/wp-content/uploads/2017/07/IP-for-21st-Century-EN.pdf>

³²¹ Margaret Chon, Pedro Roffe and Ahmed Abdel-Latif (ed.) *The Cambridge Handbook of Public-Private Partnerships, Intellectual Property Governance, and Sustainable Development*, Cambridge: Cambridge University Press, 2018.

³²² Sara Bannerman, ‘The World Intellectual Property Organization and the Sustainable Development Agenda’ (2020) 122 *Futures* 102586.

of intellectual property regimes should vary between countries, following an arc across the development spectrum.³²³

Recommendation 16

***RCEP* does little to reform intellectual property in line with the sustainable development goals.**

13. INDIGENOUS RIGHTS AND INDIGENOUS INTELLECTUAL PROPERTY

It is problematic that *RCEP* involved little in respect of consultations and negotiations with Indigenous peoples in the Pacific Rim – falling short of the standards established by the *United Nations Declaration on the Rights of Indigenous Peoples* 2007 (*UNDRIP*).³²⁴ Moreover, it is significant that *RCEP* fails to address Indigenous rights in a substantive way. There is only aspirational text in respect of Indigenous intellectual property. Much like the *TPP*, *RCEP* has a saving clause in the general exceptions to address New Zealand, Indigenous Rights, and the *Treaty of Waitangi*.³²⁵

³²³ Martin Skladany, *Copyright's Arc*, Cambridge: Cambridge University Press, 2020.

³²⁴ *United Nations Declaration on the Rights of Indigenous Peoples* 2007, 61st sess, UN Doc A/61/L.67, adopted by the General Assembly Resolution 61/295 on 13 September 2007. For commentary, see Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, December 2015; Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples*, London: Routledge, 2016; and John Borrows, Larry Chartrand, Oonagh Fitzgerald, and Risa Schwartz (ed.) *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, Waterloo (Ontario): Centre for International Governance Innovation, 2019.

³²⁵ Matthew Rimmer, 'The Trans-Pacific Partnership and Sustainable Development: Access to Genetic Resources, Informed Consent, and Benefit-Sharing', in Charles Lawson and Kamalesh Adhikari (ed.), *Biodiversity, Genetic Resources and Intellectual Property: Developments in Access and Benefit Sharing*, Abingdon (Oxon) and New York: Routledge, 2018, 151-184; and Matthew Rimmer, 'Chapter 14. The Imperialism of the Trans-Pacific Partnership: First Nations, Traditional Knowledge and Indigenous Intellectual Property', in *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 486-524.

Article 11.53 of the final text of *RCEP* deals with ‘Genetic Resources, Traditional Knowledge, and Folklore’.³²⁶ Article 11.53 (1) states: ‘Subject to its international obligations, each Party may establish appropriate measures to protect genetic resources, traditional knowledge, and folklore.’³²⁷

Article 11.53 (2) provides: ‘Where a Party has disclosure requirements relating to the source or origin of genetic resources as part of its patent system, that Party shall endeavour to make available its laws, regulations, and procedures with respect to such requirements, including on the internet where feasible, in such a manner as to enable interested persons and other Parties to become acquainted with them’.³²⁸

Article 11.53 (3) comments: ‘Each Party shall endeavour to pursue quality patent examination, which may include: (a) that when determining prior art, relevant publicly available documented information related to traditional knowledge associated with genetic resources may be taken into account; (b) an opportunity for third parties to cite, in writing, to the competent examining authority, prior art disclosures that may have a bearing on patentability, including prior art disclosures related to traditional knowledge associated with genetic resources; and (c) if applicable and appropriate, the use of databases or digital libraries which contain relevant information on traditional knowledge associated with genetic resources.’³²⁹

These provisions follow a similar format to the discretionary language on Indigenous intellectual property in the *TPP-11*.

³²⁶ Article 11.53 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

³²⁷ Article 11.53 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

³²⁸ Article 11.53 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

³²⁹ Article 11.53 (3) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

Article 17.16 of *RCEP* considers the *Treaty of Waitangi*.³³⁰ Article 17.16 (1) of *RCEP* provides: ‘Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the *Treaty of Waitangi*.’³³¹ Article 17.16 (2) of *RCEP* provides: ‘The Parties agree that the interpretation of the *Treaty of Waitangi*, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 19 (Dispute Settlement) shall otherwise apply to this Article’.³³² Article 17.16 (2) of *RCEP* also adds: ‘A panel established under Article 19.11 (Establishment and Reconvening of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party’s rights under this Agreement.’³³³

There has been concern in the context of the *TPP-11* that such a general exceptions clause is insufficient and inadequate to deal with Indigenous rights in the context of New Zealand.³³⁴

In the New Zealand Parliament, the Foreign Affairs, Defence, and Trade Committee considered the topic of *RCEP* and the *Treaty of Waitangi*.³³⁵ The Committee discussed its misgivings about the regime:

³³⁰ Article 17.16 of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

³³¹ Article 17.16 (1) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

³³² Article 17.16 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

³³³ Article 17.16 (2) of the *Regional Comprehensive Economic Partnership* 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/RCEP/Treaty_being_considered

³³⁴ Matthew Rimmer, ‘Chapter 14. The Imperialism of the Trans-Pacific Partnership: First Nations, Traditional Knowledge and Indigenous Intellectual Property’, in *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim*, Cheltenham and Northampton (MA): Edward Elgar Publishing, 2020, 486-524.

³³⁵ Foreign Affairs, Defence and Trade Committee, *International Treaty Examination of the Regional Comprehensive Economic Partnership*, Wellington: New Zealand Parliament, 2021,

Some of us are concerned that the *Treaty of Waitangi* exception clause is outdated and no longer fit for purpose. There has been criticism that it does not accurately reflect the best interests of Māori. Some submitters expressed this view and shared their concerns about how the treaty exception would apply when it comes to implementing legislation to ratify the agreement. The treaty exception clause is present in all of New Zealand’s trade agreements. The ministry told us that it is aware of criticism about the exception, but asserted that it remains effective. The ministry added that changing it would only be necessary if a serious flaw was identified and a change would affect how the exception clause works in previous agreements.³³⁶

The committee concluded: ‘Some of us would like to see reference to different perspectives on the treaty exception included in future NIAs.’³³⁷

Moreover, there is a failure in *RCEP* to consider the matter of Indigenous rights across the Pacific-Rim – including in Australia. It is striking that there is an ongoing debate about the *Uluru Statement from the Heart* in Australia, with its trilogy of a voice, a treaty, and a truth-telling process.³³⁸ There does need to be a better institutional presence within the Australian Parliament for an Indigenous voice on the topic of international trade and investment. Given that regional trade agreements such as the *TPP* and *RCEP* impact upon Indigenous rights, there is a need to properly involve Indigenous communities in the negotiations of such agreements, and ensure that Indigenous rights are properly protected and safeguarded.

Recommendation 17

***RCEP* does not adequately consider Indigenous rights – including those in the Asia-Pacific.**

14. INVESTMENT AND INVESTOR-STATE DISPUTE SETTLEMENT

https://www.parliament.nz/en/pb/sc/reports/document/SCR_109371/international-treaty-examination-of-the-regional-comprehensive

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ *Uluru Statement from the Heart*, <https://ulurustatement.org/>

During the long negotiations over *RCEP*, there were concerns about whether the agreement would include an investor-state dispute settlement regime.

Professor Anupam Chander, and Professor Madhavi Sunder were concerned that, if there was an investor-state dispute settlement regime in *RCEP*, intellectual property owners would be able to bring investor actions against nation states.³³⁹

Chapter 10 of *RCEP* deals with the topic of investment. Although the agreement does not in the end include a full investor-state dispute settlement regime, many aspects of the Chapter remain problematic. Professor Jane Kelsey comments upon the regime:

Chapter 10: Investment retains many of the problematic investor protection rules from the *TPPA*, and expands the list of prohibited performance requirements in ways that, for example, make it difficult to restrict the use of related party royalty payments to avoid tax that are commonly used by multinationals, unless the right to use them has been expressly reserved. As noted below, the *RCEP* tax exception is of limited utility when seeking to address such tax avoidance strategies by digital corporations. Some *RCEP* countries, notably Japan, have brought a number of state-state disputes alleging breaches of the WTO agreement on Trade-Related Investment Measures that prohibit performance requirements on investments.³⁴⁰

Nonetheless, she was of the view that the exclusion of investor-state dispute settlement from the Chapter was a positive development.

It should be noted that some scholars are critical that *RCEP* lacks an investor-state dispute settlement regime: Deborah Elms, founder and executive director at the Asian Trade Centre, said she was concerned *RCEP* did not provide investment protection against government expropriation: ‘Given the size of many infrastructure projects, this may be a problem for many firms’.³⁴¹

³³⁹ Anupam Chander, and Madhavi Sunder, ‘The Battle to Define Asia's Intellectual Property Law: *TPP* to *RCEP*’ (2018) 8 *UC Irvine Law Review* 331-361.

³⁴⁰ Jane Kelsey, ‘International Treaty Examination of the Regional Comprehensive Economic Partnership Agreement’, New Zealand Parliament, 11 February 2021, https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCFD_EVI_104189_FD120/jane-kelsey-supp-2

³⁴¹ Divya Chowdhury. ‘RCEP unlikely to benefit developing members in short term: analysts’, *Reuters*, 11 February 2021, <https://www.reuters.com/article/us-asia-trade-rcep-gmf-idUSKBN2AB0VD>

Recommendation 18

***RCEP* does not contain an investor-state dispute settlement mechanism. However, the Investment Chapter does have a number of items, which are problematic.**

Biography

Dr Matthew Rimmer is a Professor in Intellectual Property and Innovation Law at the Faculty of Business and Law, at the Queensland University of Technology (QUT). He has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, plain packaging of tobacco products, intellectual property and climate change, Indigenous Intellectual Property, and intellectual property and trade. He is undertaking research on intellectual property and 3D printing; the regulation of robotics and artificial intelligence; and intellectual property and public health (particularly looking at the coronavirus COVID-19). His work is archived at [QUT ePrints](#), [SSRN Abstracts](#), [Bepress Selected Works](#), and [Open Science Framework](#).

Rimmer is a chief investigator of the NHMRC Centre of Research Excellence on Achieving the Tobacco Endgame (CREATE) (2020-2025). He is a co-director of the legal project of the research network. Rimmer is a researcher and commentator on the topic of intellectual property, public health, and tobacco control. He is the co-author of the influential article ‘[The Case for the Plain Packaging of Tobacco Products](#)’ (2008), which has been a high impact piece of research and public policy in Australia and the world. Rimmer has undertaken research on intellectual property and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic. He has edited a special issue of the *QUT Law Review* on the topic, [The Plain Packaging of Tobacco Products](#) (2017). Rimmer has considered the development and implementation of the *WHO Framework Convention on Tobacco Control* 2003. He has been an advocate of tobacco control measures – such as tobacco advertising bans, graphic health warnings, plain packaging of tobacco products, tobacco divestment, and tobacco endgame strategies.

Over the past two decades, Rimmer has investigated intellectual property and access to medicines in a range of contexts. He has considered conflicts in relation to HIV/AIDS, malaria, tuberculosis, tropical diseases, non-communicable diseases such as cancer, the SARS virus, avian influenza, ebola, and the coronavirus COVID-19. Rimmer is a co-editor of a collection on access to medicines entitled [Incentives for Global Public Health: Patent Law and Access to Essential Medicines](#) (Cambridge University Press, 2010). The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the philanthropic work of the (Red) Campaign, the Gates Foundation, and the Clinton Foundation. Rimmer is also a co-editor of [Intellectual](#)

Property and Emerging Technologies: The New Biology (Edward Elgar, 2012). Rimmer has undertaken extensive research on intellectual property and access to essential medicines. He has written about the Race to Patent the SARS Virus (*Melbourne Journal of International Law*, 2004). Rimmer has analysed Canada's pioneering regime for the export of pharmaceutical drugs (*Public Health Ethics*, 2008). He has also evaluated the system for priority review vouchers (*WIPO Journal*, 2012). Rimmer has also considered the impact of the *Trans-Pacific Partnership* on access to essential medicines (*IP Journal*, 2017). Rimmer has been providing expert commentary on intellectual property, access to essential medicines, and the coronavirus COVID-19.

Rimmer has undertaken a range of research work and public policy engagement on the relationship between intellectual property, international trade, and globalisation. He has investigated the *TRIPS Agreement* 1994, and considered its implications for various global issues – such as technology transfer, food security, public health, and climate change. Rimmer has undertaken extensive analysis of the *Australia-United States Free Trade Agreement* 2004 – particularly focusing upon its impact upon the duration of the copyright term, and the evergreening of pharmaceutical drugs. He has also considered other bilateral trade agreements – such as the *Chile-Australia Free Trade Agreement*, the *Korea-Australia Free Trade Agreement*, the *Japan-Australia Economic Partnership Agreement*, and the *China-Australia Free Trade Agreement*. Rimmer was a critic of the *Anti-Counterfeiting Trade Agreement* 2011. Rimmer has written extensively about the various iterations of the *Trans-Pacific Partnership*. He has been particularly interested in the relationship between intellectual property and investor-state dispute settlement. He is publishing a research monograph on *The Trans-Pacific Partnership: Intellectual Property and Trade in the Pacific Rim* (Edward Elgar, 2020). Rimmer has also been exploring other mega-regional trade agreements – such as the *Regional Comprehensive Economic Partnership*, the *United States-Mexico-Canada Agreement* 2020, and the *Trade in Services Agreement*.

Rimmer is currently working as a Chief Investigator on an ARC Discovery Project on 'Inventing The Future: Intellectual Property and 3D Printing' (2017-2020). This project aims to provide guidance for industry and policy-makers about intellectual property, three-dimensional (3D) printing, and innovation policy. It will consider the evolution of 3D printing, and examine its implications for the creative industries, branding and marketing, manufacturing and robotics, clean technologies, health-care and the digital economy. The project will examine how 3D printing disrupts copyright law, designs law, trade mark law, patent law and confidential information. The project expects to provide practical advice about intellectual

property management and commercialisation, and boost Australia's capacity in advanced manufacturing and materials science. Along with Dinusha Mendis and Mark Lemley, Rimmer is the editor of the collection, *3D Printing and Beyond: Intellectual Property and Regulation* (Edward Elgar, 2019). He is also engaged in fieldwork on makerspaces, fab labs, tech shops, Maker Faires, and hackerspaces; and has been conducting interviews with members of the Maker Movement.

Rimmer has also a research interest in Indigenous intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics. Rimmer is the editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015). He has focused upon the adoption and the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* 2007. Rimmer has participated in inquiries into the right of resale, inauthentic art, and the design of the Aboriginal Flag.

Rimmer was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. He is the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-Prizes. Rimmer is the editor of the collection, *Intellectual Property and Clean Energy: The Paris Agreement and Climate Justice* (Springer, 2018). He is currently working on a manuscript, looking at green branding, trade mark law, and environmental activism. Rimmer is interested in the implementation of the *Paris Agreement* 2015 and the *United Nations Sustainable Development Goals* 2015.

Rimmer is the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical

contribution to the controversial public debate over the commercialisation of biological inventions. Rimmer also edited the thematic issue of Law in Context, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). Rimmer was also a chief investigator in an Australian Research Council Discovery Project, ‘Gene Patents In Australia: Options For Reform’ (2003-2005), an Australian Research Council Linkage Grant, ‘The Protection of Botanical Inventions’ (2003), and an Australian Research Council Discovery Project, ‘Promoting Plant Innovation in Australia’ (2009-2011). Rimmer has participated in inquiries into plant breeders’ rights, gene patents, and access to genetic resources.

Rimmer is the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). Rimmer explores the significance of key judicial rulings and considers legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons. Rimmer has also participated in a number of policy debates over Film Directors’ copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2011, and the *Trans-Pacific Partnership*. He has been an advocate for Fair IT Pricing in Australia.

Rimmer is a chief investigator, and co-director of the legal program in the NHMRC Centre of Research Excellence on Achieving the Tobacco Endgame (CREATE) (2020-2025) – a transnational research network. Rimmer is a member of the QUT Centre for the Digital Economy – which is part of the QUT Centre for Future Enterprise; the QUT Digital Media Research Centre (QUT DMRC), the QUT Centre for Behavioural Economics, Society, and Technology (QUT BEST); the QUT Centre for Justice; the QUT Australian Centre for Health Law Research (QUT ACHLR); and the QUT Centre for Clean Energy Technologies and Processes (which is based in the Institute for Future Environments). Rimmer was previously the leader of the QUT Intellectual Property and Innovation Law Research Program from 2015-2020 (QUT IPIL).

Dr Matthew Rimmer holds a BA (Hons) and a University Medal in literature (1995), and a LLB (Hons) (1997) from the Australian National University. He received a PhD in law from the University of New South Wales for his dissertation on *The Pirate Bazaar: The Social Life of Copyright Law* (1998-2001). Dr Matthew Rimmer was a lecturer, senior lecturer, and

an associate professor at the ANU College of Law, and a research fellow and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA) (2001 to 2015). He was an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change from 2011 to 2015. He was a member of the ANU Climate Change Institute.

Rimmer has supervised nine students who have completed Higher Degree Research projects on the topics, *Secret Business and Business Secrets: The Hindmarsh Island Affair, Information Law, and the Public Sphere* (2007); *Intellectual Property and Applied Philosophy* (2010); *The Pharmacy of the Developing World: Indian Patent Law and Access to Essential Medicines* (2012); *Marine Bioprospecting: International Law, Indonesia and Sustainable Development* (2014); *Social Media Policies and Work: Reconciling Personal Autonomy Interests and Employer Risk* (2017), copyright law and musical sampling (2017), *True Tracks: Indigenous Cultural and Intellectual Property Principles for putting Self-Determination into Practice* (2019), *Community-Based Patent Opposition Model in India* (2020), and *The Theft of Culture and Inauthentic Art and Craft Products: Australian Consumer Law, and Indigenous Intellectual Property* (2020).