Secretary
Joint Standing Committee on Treaties
Parliament House, Canberra ACT

Please accept this Submission as a contribution to JSCOT's consideration of the Anti-Counterfeiting Trade Agreement (ACTA) and register that I do not support Australia ratifying this Treaty. This submission should not be treated as confidential.

This analysis of ACTA reflects my public policy expertise as a multilateral negotiator and former ambassador 1988-2006. Specifically in relation to the ACTA Treaty: I was Director International Intellectual Property (WTO TRIPS); Dir. Information Industries and Online Trade; and for a period, Lead Negotiator (Economic Commerce/Digital Economy) Aust/US FTA negotiations; and, after leaving DFAT contributed to ACTA's - submission/ consultations/briefings. I have no financial interests in any of the subject matter dealt with in this Submission. I am currently a Chatham House associate fellow with the Centre on Global Health Security and adjunct professor, Murdoch University but **I make this submission in my personal capacity.**

I question the claim that *"No new legislative measures are required to implement obligations under ACTA in Australia*" and that the content of the National Interest Assessment (NIA) fulfills the obligation of providing a substantive assessment of Australia's national interest. Assessment should not be confined to whether IP law needs to be altered; there are other more important social and economic consequences to be assessed. Also the implementation of IP rights is not a static process: IP rights are expanded through various 'interpretive' processes and can be applied to new economic activities without parliamentary approval or the need to alter Australia's IP laws. These aspects are not in the NIA analysis but should be relevant to JSCOT's mandate.

If JCOT deliberations do not halt the ACTA process, I would strongly recommend that the process is delayed to accommodate governance reforms underway; and clear provisions (legal and guidelines) be embedded before any acceptance of ACTA to ensure that the welfare of consumers is not diluted; that citizens are not subjected to extradition for any IPR criminal offence; and, any such charges be addressed fully within Australia's domestic jurisdiction and through its' Courts.

More detailed comments are provided and several of the assessments advanced in the NIA are questioned. This should not be read as opposing IPRs – my input is intended to introduce crucial balancing factors that have effectively been missing from public policy**.** I shall be happy to clarify or provide further detail on any aspect of my submission.

Anna George

Western Australia
27 January 2012

ACTA – National Interest Assessment:

A: Elements that have not been included or require further analysis

The success of finalising this Treaty has been lauded as providing a legally binding framework that will actively enforce and harmonise TRIPS-Plus intellectual property rights (IPRs) and provide IP right holders enhanced framework to pursue their 'rights'. No rights for citizens are specifically advanced or legally accorded in this Treaty. Given that IP rights are presumed to represent a 'balance of rights and obligations' and to promote innovation none of these aspirations find meaningful form in ACTA, in many instances, the opposite is the case.

ACTA should be forensically assessed to ensure there are no intended, or unintended consequences, particularly for Australian citizens, the economy or innovation: An example of IP 'obligations' blocking high-tech investment in Australia is provided below and should be investigated to ensure that future investment opportunities are not blocked.

I also have concerns at the flow-on effects for the Australian public, especially youth, who may be exposed to: practices supported by the legal industry employed to extract payment on pain of infringement charges being implemented; extradition claims; and criminalisation. Evidence of this type of activity provided below should be examined carefully for its effect on the rule-of-law and the Australian public.

Important governance reform is underway, including key court cases that could substantially impact on Australia's IP law, policy and practice. These governance aspects should be concluded before considering ACTA ratification. It includes: copyright adjustments, particularly for fair use provision, to take account of USFTA problems; recommendations from the Senate Report on Patenting of Gene Sequences; various proposals emanating from the ALRC and ACIP Reports.

Many of these governance issues remain highly contestable and legally contentious. Policy 'negotiating space' should be left available to upgrade our IP system, before actively engaging in a harmonising and enforcement regime.

ACTA is a framework agreement which allows scope for national laws to be applied, depending on the level of commitment in the text. Unless one is fully cognisant of the reach and effect of Australia's IP laws it is not easy to interpret the level of commitment made by Australia. This level of transparency is missing from the NIA and it also does not include defendable evidence-based information to back up unsubstantiated claims of harm to Australia's industry. Key definitions, some related to criminal sanction and others that may affect Australian industry are also missing. To effectively understand the obligations in ACTA, **a plain-language guide that spells-out the meaning and effect of each element should have been prepared.**

That this was not done, questions commitment to transparency and, importantly, that ACTA may not have been properly assessed within the broader whole-of-government consultative process, including the financial implications. **There is also no acknowledgement in the NIA that IP Rights expand without altering legislation** - through incremental policy making and interpretation, including court decisions. This is an important element in any analysis of IP law, enforcement or harmonisation policy. One of the most contentious ACTA enforcement measures, 'may' apply to ISP providers (i.e. graduated response/three strikes policy). The iiNET/AFACT court case is relevant to this issue as a judgment favouring AFACT (mostly foreign IPR companies) is likely to impose such legal obligations onto Australia.

Other examples of incremental expansion of IP that did not require or seek parliamentary approval to expand IPR interpretations include: what is considered patentable subject matter altered by the Patent Office - IP Australia; the types of business and public activities that copyright 'taxes' can be applied to; the level of copyright payments extracted from business or the public, particularly when new technology is available; the expansion of signs, sounds or scents that can be captured in Trademark law. In other words, IP law is highly malleable to interpretive and incremental processes - bureaucratic, legal or judicial. And these are areas with significant consequences including financial and restrictions on innovation opportunities.

B: Australia's Economic Opportunities Dashed – IP Blocks High-Tech Industry

A U.S. generic pharmaceutical corporation was recently blocked from investing in establishing a high-tech industry in Australia because of an 'interpretation' of IP obligations. The investment involved setting up a new export production facility to produce, and to sell to overseas markets where the patent had already expired. It appears that Canada, New Zealand, Israel and India could facilitate this generic industry but the Australian interpretation of its IP commitments blocked this activity. The U.S. Corporation eventually abandoned its attempt to invest in Australia and has now shifted this production to India. The decision to block such development should be reassessed, especially to ensure that ACTA would not block future investment in Australia.

C: Claims that ACTA Enhances Security:

The structure of the ACTA Committee mimics important Security Regimes that operate to control missile, nuclear and chemical biological weapons issues. It would not be in Australia's interest to draw criticism against these regimes' specific operational frameworks that are criticised, like ACTA, for falling outside of the global multilateral treaties. 'Counterfeit' issues are already addressed in several multilateral and regional organisations. Is it appropriate that a Treaty, focused on enforcing private IP rights, should operate under the same status and framework as security regimes, managed through formal intergovernmental diplomatic structures?

The operations of the ACTA Committee will oblige Australia to respond to IP claims. ACTA facilitation could add legitimacy to foreign or domestic right owners claims and enforcement practices, some of which may be inconsistent with Australian domestic laws or antipathetic to consumers' rights. It would also be a highly inappropriate if these claims were fed through official diplomatic channels (i.e. Diplomatic Notes/embassies/cable etc.

It should also be recognised that 'safety or security' issues associated with a significant number of products that could damage or harm industry or consumers' are not covered by ACTA. ACTA obligations only include goods, services or internet activity that have intellectual property rights attached to them. Goods, services or internet activity with no IP attached - including problem behaviour on the internet -such as spamming, identity theft, bullying etc – all fall outside of ACTA. One of the relevant issues arising from this distinct set of 'problems' is that the bureaucratic, legal and technical expertise required to address both IP and non IP safety factors are basically drawn from the same resource pool. **Will this mean that other safety issues will be accorded less attention?**

I ask this question because even if the NIA statement that "compliance with ACTA has "few foreseeable additional costs" is achieved- presumably by maintaining existing levels of enforcement practice – but is this sustainable? This position does not take into account that the new treaty status accorded to IP right holders which elevates IPR enforcement claims is bound to generate a greater call on regulatory, legal and judicial resources.

ACTA Ratification: Regarding the need for early ratification, this argument 'to participate and influence the decision making process within the ACTA Committee' is not quite accurate. Australia is a Signatory so is eligible to participate in this process. See Article 36.5(a) and (b).

D: ACTA: Is it getting in the way of existing counterfeit measures?

To read the ACTA text or the briefings provided to promote ACTA one would think that it was the only means of enforcing IPRs. ACTA and other enforcement/expansion of IP measures have considerably damaged the workings of the global collaboration mechanisms (WHO/FAO health and food security issues). Even the main WHO mechanism dealing with counterfeit drugs the International Medical Products Anti-Counterfeiting Taskforce (IMPACT) has been damaged and is not now fully operational. The key Asian and Latin American countries refuse to participate because of major disagreement over IP rights. The implementation of ACTA and aggressive promotion of IPRs in FTAs (such as TPP) by Australia will not help collaboration within the multilateral system, and could damage Australia's interest in other foreign and trade policy areas.

E: Scope and Reach of the Treaty – Trade – Geographic Indications (GI)

A significant issue requiring clarification is whether the EU has successfully embedded their contentious geographic indications (GIs) into ACTA. No clarity has been provided but the substance of these claims can be found in Official EU Memos to their Member States. Claims are broad, including that infringement claims over GI (trademarks) also apply to the Internet. This issue should to be clarified to ensure that Australian business, especially food industry, are made fully aware of these developments and possible effects on domestic and o/seas markets.

F: Foreign and Trade Policy and National Interest

The official approach Australia took to negotiating ACTA, states that: "Australia sought an enhanced, practical international standard on IP rights enforcement with broad international support, to complement the existing architecture. Australia regards the extent to which ACTA can attract support from countries in our region as one important issue in determining the value of ACTA for Australia".

The underlying assumptions made on all of these claims represents a one-sided pro-IPR analysis which is prone to inflated assessments of the benefits of ACTA and the actual problems associated with IPRs. The public expects that the national interest represent a 'broad church' of views and opinions but also expects and relies heavily on the public service - that has the capacity to provide a forensic analysis of these competing objectives **- to provide that moderated and 'national interest' assessment. The NIA for ACTA does not provide that.**

This criticism is not to underestimate the difficulties faced by our negotiators; this final text is a vast improvement on the original intent of ACTA. IP negotiations are as difficult and hard-line as any confronted in the multilateral system. However, for a variety of reasons, including the lack of capacity across bureaucracies to understand the nature and scope of IPRs, IP policy is difficult to balance against broader national interests. IPRs have been actively promoted by the IP industry, including input into the key agencies and advisory boards. Australia's Productivity Commission and the Cutler Report on Innovation registered several IP related policy and economic impediments affecting Australia's innovation and development opportunities but this does not appear to have effectively filtered through the whole-of-government process, which operates to facilitate policy coherence and national interest outcomes.

In such a complex area of trade law mixed with IPR esoteric law, clarity is needed. Only when clear and unambiguous political direction (including by clarifying legislation, documenting policy positions and with political guidance) can bureaucracies provide the balance expected in developing whole-of-government policy. Political backlash generated by public outrage can also force that change. The current level of antagonism and disrespect towards IP is growing because of the perceived unbalanced nature of this monopoly right. JSCOT has a singular responsibility to

consider the national interest in its deliberations on ACTA.

I have provided documented examples and analysis to question the claims made above (see attachment). In determining the value of ACTA for Australia, the government claimed support from countries in our region as an influence on the decision to join ACTA. Participation in the Trans-Pacific Partnership by some in our region should not automatically assume support or acceptance of ACTA enforcement by those participants. Information is provided of strong criticism from India and China. There is a fundamental disjunction in our foreign policy if we simply see Australia's national interest as actively defending the rights of mostly foreign IP right holders, under the guise of protecting Australia's IP right holders. The basic assessment of whose national interest is being served becomes highly questionable.
ACTA is not the ANZUS Treaty nor will ACTA be politically acceptable to WTO Members.

G: How Extensive is the Scope and Reach? Criminal Penalties, Extradition Issues:

I am particularly concerned with the features in ACTA that, in effect, will target youth. It is well understood that the market failure created by refusal of the music industry, for many years, to enable the purchase of downloaded music over the internet, has resulted in a generation engaging in practices, which effectively undermine the rule-of-law. Significantly, this market failure has consequences that question the legitimacy of IP law. This has become a major social problem that will not be resolved easily. It is one of the very few areas where 'youthful actions that break the law' but where that behaviour now continues into adulthood. This is a societal issue now and requires a different set of actions to that proposed under ACTA.

This is no doubt a substantive problem, but it should also be recognised that, when provided with a legal means to purchase these products, the legal downloads industry now represent trade worth billions of dollars. Nevertheless, even in this area there remains a significant gap between supply and demand, particularly the timing and global use, for these IP download products that continue to be blocked by monopoly practices across these IP related industries. These competition and monopoly practices are not being addressed through ACTA provisions, which only further erodes ACTA credibility.

I wish to draw JSCOT's attention to the capacity of ACTA to promote and facilitate extradition, criminal action particularly infringements of copyright over the internet – and many of these actions will target Australia's youth. ACTA will also legitimate what can only be described as stand-over tactics – sending thousands of cease and desist letters threatening action unless a large 'infringement fine' is paid. There is plenty of evidence of these actions promoted by IP right holders and with the assistance of the legal industry, some of which has been belatedly been blocked by overseas courts after significant damage was done. Australia should be proactive in blocking such behaviour.

Claims are made repeatedly by those promoting ACTA, that it only deals with 'commercial scale counterfeiting'. How can this be the case if our existing legislation, which is claimed to be in compliance with all ACTA provisions, already enables this sort of legal response to non-commercial IP infringement? [1]

Bureaucracies with responsibility for governance of IPR policy are also well aware that when IP infringing data is shared on the internet the effect is that IP right holders' claims to infringement are calculated on the assumption that every download represents a full price sale foregone (see Art 9.2). This is a problem that was identified in the US GAO Report. The argument that only commercial scale will be caught in the ACTA 'net' requires further analysis and also substantive Parliamentary guidance that can be used in Court proceedings. The list of claims made on the ACTA Fact Sheet on – "What IS NOT the goal of ACTA" - would not provide that assurance in a court of law. This shortened report from the AGE provides evidence of extradition for a non-commercial crime with no financial benefit.

Criminal Penalties and Extradition Issues

This case "…involving one of the first extraditions for intellectual property crime — has been a triumph for US authorities, demonstrating their ability to enforce US laws protecting US companies against Australians in Australia, with the co-operation of the Australian Government.

"Our agents and prosecutors are working tirelessly to nab intellectual property thieves, even where their crimes transcend international borders," US Attorney Chuck Rosenberg said…[in] the *Australian Law Journal*, NSW Chief Judge in Equity, Peter Young, wrote: "International copyright violations are a great problem. However, there is also the consideration that a country must protect its nationals from being removed from their homeland to a foreign country merely because the commercial interests of that foreign country are claimed to have been affected by the person's behaviour in Australia and the foreign country can exercise influence over Australia."… [the accused] fought the prospect of extradition through the courts for three years, in which time he was denied bail and detained in prison. He indicated that he would be willing to plead guilty to a breach of Australian copyright law, which meant he could serve time in Australia…. On top of a possible 10-year jail term, [he] **could be fined $US500,000**. (By way of comparison, the average sentence for rape in Victoria is six years and 10 months.)

Any Australian who has pirated software worth more than $US1000 could be subject to the same extradition process…. "Should not the Commonwealth Parliament do more to protect Australians from this procedure?" Justice Young asked in his article. Others, however, argue that extradition is necessary to prevent internet crimes that transcend borders.

See http://www.theage.com.au/articles/2007/05/06/1178390140855.html

[1] Australian authorities, through ACTA obligations, are required to act upon and to implement various measures to address IPR infringement and actively promote enforcement of IPRs – Chapter III Art. 28; Section 4 Art 27.3; Ch IV Art. 33; 34 detail some of these obligations.

JSCOT may also wish to seek information on ACTA related consequences recently exposed by the UK media. It illustrates that if the internet websites that are based in the US such as the addresses that end in **.com or .net** are used for purposes related to IP infringement, the US can request extradition of the individuals concerned, even if their operation has no connection to the US:

Scope of ACTA

British website owners could face extradition to the US on piracy charges even if their operation has no connection to America and does something which is most probably legal in the UK, the official leading US web anti-piracy efforts has told the Guardian.
The US's Immigration and Customs Enforcement agency (ICE) is targeting overseas websites it believes are breaking US copyrights whether or not their servers are based in America or there is another direct US link, said Erik Barnett, the agency's assistant deputy director.

As long as a website's address ends in .com or .net, if it is implicated in the spread of pirated US-made films, TV or other media it is a legitimate target to be closed down or targeted for prosecution, Barnett said. While these web addresses are traditionally seen as global, all their connections are routed through Verisign, an internet infrastructure company based in Virginia, which the agency believes is sufficient to seek a US prosecution… As well as sites that directly host or stream pirated material, ICE is also focusing on those that simply provide links to it elsewhere The only necessary "nexus to the US" is a .com or .net web address for which Verisign acts as the official registry operator, he said…

Decisions on seeking extradition are down to the US department of justice. But Barnett said his agency – which has more than 7,000 criminal investigators – is actively pursuing those within its perceived jurisdiction: "Without wishing to get into the particulars of any case, the general goal of law enforcement is to arrest and prosecute individuals who are committing crimes.

Accessed at Guardian website http://www.guardian.co.uk/technology/2011/jul/03/us-anti-piracy-extradition-prosecution#history-link-box

As two of the largest email providers – Gmail and Hotmail - operate through the .COM and many others use .NET some explanation of this claim should be provided. Australian citizens will be primarily ignorant of the type of consequences that could flow from their use of these sites. This is not confined to music downloads, Australians are avid users of internet to purchase all types of goods. Sites such as EBay and other Internet purchase sites, including for health produces, may evoke extradition claims or perhaps, more likely, the 'cease and desist and pay this infringement fine' response.

Given the reach of foreign countries to utilise IP laws in such a ubiquitous technology, as well as its responsibility to examine the matters arising from Treaties, JSCOT, I believe, has the moral and ethical responsibility ensure the rights of Australians. If JSCOT agrees that Australia should ratify this Treaty then clear instruction/documentation that will assure the Australian public that its Government is not exposing its citizens (particularly its youth) to aggressive financial or criminal penalties, nor to extradition to third countries over IPR infringements – especially, infringements where there is no personal financial gain.

To summarise, the crux of the NIA assessment is attached to the claim that "no new legislative measures are required to implement obligations under ACTA in Australia". As a national interest analysis it simply ignores and minimises the nature of this ACTA Treaty. This is a significant legally binding **harmonising and enforcement** Treaty so our recent experience in Australia's Courts should also provide relevant and sobering examples of possible consequences of interpreting ACTA obligations.

- The recent High Court Decision on Government's capacity to act on its domestic asylum policy should clearly focus politicians' minds on how ACTA can be utilised by right-holders and interpreted by Courts against the set of legally endorsed harmonisation and enforcement Treaty obligations.

- The current Tobacco industry challenge to Australia is an example of the enforcement capacity behind IP rights and the type of actions these corporate right-holders are prepared to employ against governments, impose costs on taxpayers and block public health policy.

I will be happy to provide further information on the comments provided above. I have also provided an Attachment that supports the claims made above as well as background information.

Anna George

27 January, 2012