

Clarity of terms

Introduction

- 4.1 A number of submissions said that ACTA's text was ambiguous. The concern is that this ambiguity could potentially lead to unintended consequences or costly and lengthy legal proceedings as interested parties sought clarification of how the treaty would impact on their products and operations.
- 4.2 Allegations of ambiguity of terms focuses on a particular set of terms from ACTA, and in this chapter, each will be considered in turn. The terms in question are: intellectual property; piracy; commercial scale; and counterfeit.
- 4.3 Concerns have also been raised over the omission from ACTA of individual protections codified in the *Trade-Related Aspects of Intellectual Property Rights Agreement* (TRIPS), and the use of expansionary language in ACTA.

Concerns over the term 'intellectual property'

- 4.4 The use of the term 'intellectual property' in ACTA, according to some participants in the inquiry, fails to discriminate between varied aspects of IP law such as trademarks and patents, potentially resulting in complex legal proceedings.
- 4.5 Dr Moir was particularly concerned about the use of the term 'intellectual property'. According to Dr Moir:

A major problem with ACTA is the constant use of the term 'intellectual property' rather than more specific language. As the purpose of ACTA is to address issues in trademark counterfeits

and unauthorised use of copyright it should have been drafted in precisely these terms. It would then be tighter, clearer, easier to assess and less potentially dangerous to Australian economic interests.¹

- 4.6 Dr Martin Cross, representing the pharmaceutical group Alphapharm, also observed that the term 'intellectual property' made the treaty ambiguous, and that the focus should have remained on copyright and trademark:

This goes, unfortunately, to the extension from copyright and trademark into intellectual property. That is the issue. Had it just remained at trademark and copyright, there would be no issue. We absolutely support that because we are a company that has trademarks and copyright...

The issue is that as soon as you extend it beyond trademark and copyright into intellectual property, you get into the area of patents. Patents are extremely grey, and the only way this is resolved these days is through complex legal proceedings. So you open up, in effect, a Pandora's box of issues by allowing the extension of ACTA into intellectual property. Unfortunately, the drafting of that allows that to occur.²

- 4.7 With respect to patents, Dr Rimmer agrees with Alphapharm:

The Department of Foreign Affairs and Trade made repeated assurances that the [ACTA] would not deal with patents. Yet, the final text of the [ACTA] does not expressly fully exclude patent law - which could lead to future disagreement.³

- 4.8 Dr Luigi Palombi expressed the same concern:

the Agreement... seeks to cover the entire field of intellectual property without making due allowance for the fact that not all intellectual property is the same. Specifically, ACTA, despite what its name suggests, is not confined to dealing with the acts of copyright piracy and trade mark counterfeiting. This is problematic particularly when patents are taken into account because unlike copyrighted and trademarked goods, such as movies, television shows and music available in various formats

1 Dr Hazel Moir, *Submission 4*, p. 4.

2 Dr Martin George Cross, Managing Director, Alphapharm Pty Ltd, *Committee Hansard*, 23 March, p. 2.

3 Dr Matthew Rimmer, *Submission 1*, pp. 28-29.

and mediums or luxury branded goods, the validity of a patent granted by IP Australia is not guaranteed under Australian law.⁴

Concerns over the term 'piracy'

4.9 Piracy is defined in ACTA as:

'any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set forth in Chapter II (Legal Framework for Enforcement of Intellectual Property Rights) are invoked.'⁵

4.10 Dr Moir argued the term 'piracy' provided a misleading impression and was pejorative and inappropriate for this treaty:

I think it is a very nasty political ambit claim when what we are actually talking about is unauthorised use. I think it is unfortunate that otherwise reputable organisations like the OECD and DFAT are using a term like that instead of less pejorative language that makes a better balance about the actuality.⁶

4.11 Similarly, Dr Palombi argued that because the agreement's language is ambiguous, confusion will exist between goods that infringe 'intellectual property rights' and goods that are 'pirated' or 'counterfeited':

The terms 'pirate' and 'counterfeit' are open to be understood to mean more than copyright and trade mark infringement. The Agreement's preamble expressly refers to "the proliferation of counterfeit and pirated goods" in the context of "infringing material". This statement therefore blurs the line between what is understood to be a good that is an infringement of a form of an "intellectual property right", which could feasibly extend to patents, and a good that is either a pirated or counterfeited good.

This ambiguity in language is unsatisfactory because while it is possible that a good may infringe an intellectual property right, it may not be either a pirated or counterfeited good.

4 Dr Luigi Palombi, *Submission 7*, p. 1.

5 Dr Matthew Rimmer, *Submission 1*, p. 9.

6 Dr Hazel Moir, *Committee Hansard*, 23 March 2012, p. 21.

- 4.12 In addition, Dr Rimmer points out that the *Copyright Act 1968* (Cth) does not use the term 'piracy' and questions whether such an inclusion might, in fact be necessary for the implementation of ACTA.⁷

Concerns over the definition of 'commercial scale'

- 4.13 There was a further observation on the ACTA's definition of 'commercial scale'. The Australian Libraries Copyright Committee and Australian Digital Alliance expressed some concern about this definition *vis-a-vis* Australian copyright law. They stated:

Article 23.1 of ACTA provides an extremely broad definition of commercial scale, including at least those carried out as commercial activities for direct or indirect commercial or economic advantage. Currently, under Australian copyright law it requires infringement having a substantial prejudicial impact on the copyright owner or infringement undertaken for the purpose of obtaining a commercial advantage or a profit. There is no reference in Australian copyright law to indirect commercial advantage or profit. This would significantly expand our liability for copyright infringement under Australian law.⁸

Department of Foreign Affairs and Trade response

- 4.14 In response to these criticisms discussed above, DFAT stated that ACTA sets out broad parameters for legislative regimes that differ markedly around the world. This, DFAT believes, will provide suitable flexibility for different countries to abide by the agreement:

The important point here is that ACTA sets out the broad parameters for legislative regimes globally. It does not specify the way in which those regimes are to be implemented – that is a matter, properly, for national level statute and jurisprudence. As with many international treaties, the parameters are set out in a very general form, as ACTA itself acknowledges – I will quote from article 2 of the agreement:

7 Dr Matthew Rimmer, *Submission 1.1*, p. 19.

8 Ms Ellen Broad, Executive Officer, Australian Libraries Copyright Committee and Australian Digital Alliance, *Committee Hansard*, 19 March 2012, p. 4.

- Each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement within its own legal system and practice.⁹

... ACTA is written at a very general level and establishes legal parameters. There is considerable flexibility within ACTA to allow for policy evolution and change over time. That is a feature of not only intellectual property regimes but of most public policy regimes. ACTA provides for considerable flexibility in that regard.¹⁰

- 4.15 The Australian Copyright Council supported DFAT's argument stating that such flexibility would encourage broad international membership of the ACTA:

The Copyright Council observes that article 2 of ACTA gives parties a great deal of flexibility in their implementation of the treaty. This is reflected in the substantive provisions of ACTA which afford parties a high level of discretion in their domestic implementation of ACTA obligations. The Copyright Council believes that this lack of prescription will encourage broad membership, thus furthering the objective of establishing an international framework for intellectual property enforcement. In our submission, it is important that Australia be part of this framework.¹¹

Conclusion

- 4.16 ACTA's content has created a significant degree of discussion. The degree of ambiguity is of note, and given the status and background of those who have contributed to this inquiry, there would appear to be legitimate concern over the text of the agreement. Particularly of note is that even the treaty supporters – such as Alphapharm – question the treaty's wording even if they readily accept its intent.

9 Mr George Mina, Assistant Secretary, Trade Policy Issues and Industrials Branch, Office of Trade Negotiations, Department of Foreign Affairs and Trade, *Committee Hansard*, 19 March 2012, p. 17.

10 Mr George Mina, Assistant Secretary, Trade Policy Issues and Industrials Branch, Office of Trade Negotiations, Department of Foreign Affairs and Trade, *Committee Hansard*, 19 March 2012, p. 20.

11 Australian Copyright Council, *Submission 12*, pp. 3-4.

- 4.17 Loose definitions of 'intellectual property', 'commercial scale', 'counterfeiting' and 'piracy' have the potential to cause confusion and possibly result in legal proceedings given that ACTA is a legally binding document.
- 4.18 DFAT's response, that the treaty's wording provides the many and varied countries involved in ACTA the flexibility to implement the treaty's provisions without the possibility of extensive legal action, has yet to be tested as the treaty is yet to be ratified.