

Conclusion

Current status of ACTA

- 8.1 Growing public awareness of ACTA amongst the nations involved in the negotiations has resulted in an increased level of disquiet about its potential impact.¹ These public concerns have prompted a number of countries which were originally signatories to the Agreement, to indicate they will either postpone ratification or not ratify ACTA at all.²
- 8.2 The focus of opposition to ACTA at present is the European Parliament. The European Parliament deals with international treaties by referring them to a relevant committee to prepare a recommendation. Recommendations are then presented to a plenary of the Parliament for a final decision.³ ACTA stands referred to that Parliament's Committee on International Trade for a recommendation. The process of consideration by that Committee is nearly complete, and the Committee's Rapporteur, Mr David Martin, prepared a draft Recommendation that was intended for consideration at the Committee's 25 April 2012 meeting. The draft Recommendation is that the European Parliament should reject ACTA.

1 'Protests erupt across Europe against web piracy treaty', Reuters, 11 February 2012, <http://www.reuters.com/article/2012/02/11/us-europe-protest-acta-idUSTRE81A0I120120211>, accessed 20 June 2012.

2 'ACTA: EU court to rule on anti-piracy agreement', BBC News, <http://www.bbc.com/news/technology-17125469> accessed 17 April 2012.

3 European Parliament, *Organisation and Work*, <http://www.europarl.europa.eu/aboutparliament/en/0025729351/Organisation-and-work.html>, accessed 6 May 2012.

- 8.3 At the meeting on 25 April, the Committee deferred the final vote on the draft recommendation until the Committee's next meeting to provide other European Parliament committees an opportunity to comment on the Agreement.⁴
- 8.4 On 31 May 2012, the committees concerned, the Committee on Legal Affairs, the Committee on Civil Liberties, and the Committee on Industry, Research and Energy, voted against ACTA ratification.⁵
- 8.5 While the Committee on International Trade's draft Recommendation has no formal standing at this stage, it is likely to indicate the views of Committee Members. Should the Committee on International Trade recommend that ACTA be rejected, and the plenary of the European Parliament adopt that recommendation, the European Union (EU) would be prevented from ratifying the Agreement.
- 8.6 The Explanatory Statement included with the draft Recommendation by the Committee on International Trade summarises many of the concerns that have been expressed in relation to ACTA since it became public. The concerns focus principally on the lack of clarity in ACTA, particularly in relation to individual freedoms, and the potential consequences of the lack of clarity in ACTA's text.
- 8.7 In the United States (US) ratification of ACTA appears to have stalled amidst a debate about the constitutional validity of the way in which the Office of the United States Trade Representative negotiated ACTA.⁶ At issue is whether the Executive Branch (the President) alone has authority alone to ratify ACTA on behalf of the US or whether the US Senate or alternatively both chambers of Congress need to give consent.⁷
- 8.8 The response by officials from the Australian Department of Foreign Affairs and Trade (DFAT) when questioned on the apparent difficulties faced by ACTA in other countries has been to characterise the difficulties

4 European Parliament, 'ACTA: Reject or Renegotiate, says European Parliament Rapporteur,' <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+IM-PRESS+20120423IPR43742+0+DOC+PDF+V0//EN&language=EN>, accessed 6 May 2012.

5 BBC News, 'Acta: Piracy treaty dealt critical blows in EU votes,' 19 May 2012, <http://www.bbc.com/news/technology-18264856>, accessed 6 June 2012.

6 Ms Margot Kaminski, *Time To Realize That The Obama Administration Doesn't Even Have The Authority To Commit The US To ACTA Or TPP,* <http://www.techdirt.com/articles/20120508/17174518835/time-to-realize-that-obama-administration-doesnt-even-have-authority-to-commit-us-to-acta-tpp.shtml>, accessed on 6 June 2012.

7 See: Open letter, Law Professors to the United States Senate Committee on Finance, dated 16 May 2012, <http://infojustice.org/senatefinance-may2012>, accessed 6 June 2012.

as part of a 'very vigorous debate', but that 'no country has indicated that it will not ratify ACTA.'⁸

8.9 In a rapidly changing situation, media and other reports also indicate that:

- Poland has suspended consideration of ratification of ACTA until at least the end of 2012;⁹
- Bulgaria has suspended consideration of ratification until European Union member states elaborate a joint position on ACTA.¹⁰ It is not clear whether this means the position elaborated by the European Union or each EU country individually;
- Germany has not signed ACTA, and will not do so until the European Parliament has expressed an opinion;¹¹
- The Czech Republic has suspended the ratification process until further notice;¹²
- A motion passed the Dutch Lower House recommending rejection of ACTA;¹³
- The Slovak Republic has suspended the ratification process until further notice;¹⁴ and
- Switzerland has postponed signed ACTA until issues relating to personal freedoms have been clarified.¹⁵

8 Mr George Mina, Assistant Secretary, Trade Policy Issues and Industrials Branch, Office of Trade Negotiations, Department of Foreign Affairs and Trade, *Committee Hansard*, 7 May 2012, p. 46.

9 Warsaw Business Journal, 'Poland suspends ACTA ratification,' <http://www.wbj.pl/article-57880-poland-suspends-acta-ratification.html>, accessed 29 May 2012.

10 Forbes, 'Bulgaria withdraws from ACTA,' <http://www.forbes.com/sites/davidthier/2012/02/14/bulgaria-withdraws-from-acta/>, accessed 29 May 2012.

11 Forbes, 'Germany won't sign ACTA,' <http://www.forbes.com/sites/davidthier/2012/02/10/germany-wont-sign-acta/>, accessed 29 May 2012.

12 Ceskenoviny, Czech Government suspends process of ratification of ACTA,' <http://www.ceskenoviny.cz/news/zpravy/czech-government-suspends-process-of-ratification-of-acta-pm/751437>, accessed 29 May 2012.

13 Pirate Party Australia, *Submission 2.1*, p. 3.

14 AFP, 'Czech Republic, Slovakia freeze anti-piracy pact,' <http://www.google.com/hostednews/afp/article/ALeqM5gguBSrXtQKnr0famyhxMINK2plDQ?docId=CNG.956cc047c755305c8ad4580183554bcc.71>, accessed 29 May 2012.

15 Techdirt, 'Now its Switzerland's turn to call ACTA into question,' <http://www.techdirt.com/articles/20120509/05525418846/now-its-switzerlands-turn-to-call-acta-into-question.shtml>, accessed 29 May 2012.

- 8.10 Despite DFAT's optimistic outlook, there appears a very real possibility that ACTA will not be ratified by sufficient countries in order to come into existence.

Final comments

- 8.11 As has been stated in the previous chapters, the Committee is concerned about the lack of clarity in the text, the exclusion of provisions protecting the rights of individuals, and ACTA's potential to shift the balance in the interpretation of copyright law, intellectual property law and patent law. The international reaction to ACTA, which, without exception, comes from countries which the Committee considers would have the same interests as Australia, must be taken into consideration.
- 8.12 The Committee is aware of the significant support for this treaty from the performing arts community. The Committee strongly supports protecting their rights.
- 8.13 The Committee also notes that the Australian Law Reform Commission (ALRC) is currently conducting an inquiry into Copyright and the Digital Economy.¹⁶ The draft terms of reference have clear relevance to ACTA and the issues discussed in this report. The ALRC's draft terms of reference include:
- Having regard to:
- ...Australia's international obligations, including any existing or proposed international obligations...
- In undertaking this reference, the Commission should:
- take into account the impact of any proposed legislative solutions on other areas of law and their consistency with Australia's international obligations...¹⁷
- 8.14 The Committee notes that the ALRC is to report no later than 30 November 2013 and believes that it is prudent to await the outcomes of this inquiry as they will better inform the Committee's future deliberations on ACTA's ratification.
- 8.15 The Committee considers that it would be wise to adopt a conservative approach to ratification of this treaty. If this is the future of copyright and

16 <http://www.alrc.gov.au/inquiries/copyright>, accessed 20 June 2012.

17 'Draft Terms of Reference Copyright and the Digital economy', <http://www.ag.gov.au/Consultationsreformsandreviews/Documents/Final%20-%20Revised%20draft%20terms%20of%20reference%20ALRC%20review.pdf>, accessed 20 June 2012.

IP regulation, then potential parties to the treaty, like the EU, will, after consideration, ratify this treaty. However, copyright and IP holders in Australia will not be best served if the treaty is ratified by Australia and a handful of others, but is not compatible with the copyright and IP regimes applicable in major creative centres as the United States and Europe.

- 8.16 It is prudent, therefore, that ACTA not be ratified by Australia until this Committee has received and considered the assessment of the economic and social benefits and costs of the Agreement, the Australian Government has issued the notice of clarification in relation to the terms of the treaty as recommended in this report and the ALRC has reported on its inquiry into Copyright and the Digital Economy. In considering its recommendation to ratify ACTA, a future Joint Standing Committee on Treaties should have regard to events related to ACTA in other relevant jurisdictions, including the EU and the US.

Recommendation 8

That the *Anti-Counterfeiting Trade Agreement* not be ratified by Australia until the:

- **Joint Standing Committee on Treaties has received and considered the independent and transparent assessment of the economic and social benefits and costs of the Agreement referred to in Recommendation 2;**
- **Australian Law Reform Commission has reported on its Inquiry into Copyright and the Digital Economy; and the**
- **Australian Government has issued notices of clarification in relation to the terms of the Agreement as recommended in the other recommendations of this report.**

Recommendation 9

In considering its recommendation on whether or not to ratify the *Anti-Counterfeiting Trade Agreement (ACTA)*, a future Joint Standing Committee on Treaties have regard to events related to ACTA in other relevant jurisdictions including the European Union and the United States of America.

Kelvin Thomson MP

Chair