

Submission to the
Joint Standing Committee on Treaties on
the
Korea-Australia Free Trade Agreement

Pirate Party Australia

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Introduction

Pirate Party Australia thanks the Joint Standing Committee on Treaties for the opportunity to submit on the *Korea-Australia Free Trade Agreement*. The Pirate Party's submission has focused on issues relating to the investor-state dispute settlement and intellectual property rights provisions, as well as ongoing concerns surrounding the opacity of free trade agreement negotiations. The Pirate Party encourages the Committee to recommend against ratifying the Agreement.

About Pirate Party Australia

Pirate Party Australia is a political party based around the core tenets of freedom of information and culture, civil and digital liberties, privacy and anonymity, and government transparency. It formed in 2008, and is part of an international movement that began in Sweden in 2006. Pirate Parties have been elected to all levels of government worldwide.

Definitions

These definitions are provided for the benefit of the Committee and other readers.

ACTA	<i>Anti-Counterfeiting Trade Agreement</i>
ALRC	Australian Law Reform Commission
AUSFTA	<i>Australia-United States Free Trade Agreement</i>
BRTA	bilateral/regional trade agreement
FTA	free trade agreement
DFAT	Department of Foreign Affairs and Trade
IPCRC	Intellectual Property and Competition Review Committee
IPR	intellectual property rights
ISDS	investor-state dispute settlement
JSCOT	Joint Standing Committee on Treaties
KAFTA	<i>Korea-Australia Free Trade Agreement</i>
KORUSFTA	<i>Korea-United States Free Trade Agreement</i>
SAFTA	<i>Singapore-Australia Free Trade Agreement</i>
TPP	<i>Trans-Pacific Partnership</i>

1 Investment

At the time of writing, Pirate Party Australia notes 63 submissions have been received by JSCOT. Of those 63 submissions, 22 address ISDS provisions, only four of which are in favour of their inclusion in FTAs.¹

Substantial criticisms of ISDS provisions were submitted by Dr Kyla Tienhaara,² Dr Romaine Rutnam,³ and Dr Matthew Rimmer.⁴ Pirate Party Australia is opposed to the inclusion of ISDS provisions in FTAs and is therefore supportive of all submissions to that effect. The Pirate Party would like to thank especially those named for their thorough submissions. Pirate Party Australia urges JSCOT to give great attention to the issues raised in those submissions, and believes that JSCOT should recommend non-ratification of *KAFTA* on those grounds.

The Pirate Party would also like to draw JSCOT's attention to the following criticisms of ISDS provisions from the Productivity Commission:

1. ISDS provisions are additional to a country's regular legal system for settling disputes, and are not available to domestic citizens or investors.⁵
2. ISDS provisions typically lack definition with regard to 'indirect expropriation' and 'fair and equitable treatment,' with limited success at defining these terms.⁶
3. ISDS provisions lead to legal and settlement costs that are a drain on public funds.⁷
4. There does not appear to be any sound economic justification for the inclusion of ISDS provisions within agreements.⁸
5. ISDS provisions can give foreign businesses an advantage over domestic businesses.⁹
6. 'Regulatory chilling' can occur, where a government chooses not to undertake regulatory action due to possible arbitration or compensation claims.¹⁰

¹Submissions in favour of ISDS provisions are Submissions No 4, 25, 36, 63.

²Submission No 1.

³Submission No 2.

⁴Submission No 45.

⁵Productivity Commission, *Bilateral and Regional Trade Agreements Research Report*, Research Report 2010, 265, 272 <http://www.pc.gov.au/_data/assets/pdf_file/0010/104203/trade-agreements-report.pdf>.

⁶Ibid 268, 274.

⁷Ibid 268.

⁸Ibid 271.

⁹Ibid 269, 271-272.

¹⁰Ibid 271.

7. Foreign investors do not, in the absence of a treaty, face greater political risk than domestic businesses.¹¹
8. Arbitration tribunals have a high degree of freedom when determining the amount of compensation to be paid.¹²
9. There is concern regarding institutional bias and conflicts of interest in ISDS arbitration that favours investors.¹³
10. There is a general lack of binding precedent regarding determinations by ISDS arbitration bodies.¹⁴
11. ISDS disputes do not lend themselves to transparency and there are concerns that high costs make ISDS arbitration only accessible to larger investors.¹⁵
12. 'Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions'.¹⁶

Pirate Party Australia acknowledges that despite there being significant industry support, almost all submissions from industry bodies are supportive of *KAFTA* purely on the basis of tariff reductions.¹⁷ Pirate Party Australia rejects this as appropriate grounds for ratification, and suggests that tariff reductions are the sole benefit for the majority of interested Australian stakeholders, a reciprocal tariff reduction agreement would be far more beneficial. Other submissions in favour of *KAFTA* addressed what could be considered 'general business advantages' including but not limited to tariffs.¹⁸ The Pirate Party is therefore skeptical that such a broad agreement is necessary to provide advantages to Australian businesses if the predominant (and in many instances, sole) concern is tariffs.

2 Intellectual Property Rights

Pirate Party Australia urges JSCOT to recommend *KAFTA* not be ratified due to the following concerns regarding IPR provisions:

1. The Productivity Commission recommended in 2010 that Australia should generally seek to exclude IPR provisions from BRTAs. No action has been taken on this recommendation in more than

¹¹Ibid 272.

¹²Ibid.

¹³Ibid 272-273.

¹⁴Ibid 273.

¹⁵Ibid.

¹⁶Ibid 274.

¹⁷Submissions No 5, 7-8, 10, 13-14, 20-22, 24, 26-28, 31, 35, 38-40, 44, 46, 55.

¹⁸Submissions No 18-19, 25, 33, 35, 37.

three years.

2. Further layering of IPR obligations substantially hinders future domestic law reform, while changes to Australia's intellectual property legislation as a result of international obligations have in the past imposed a net cost on Australia.
3. *KAFTA* will require legislative change which, aside from previous negative experience, may be an attempt to avoid proper legislative debate in order to introduce controversial copyright amendments.
4. There is insufficient evidence that Australia's own requirements and motivations have been taken into account in developing the IPR provisions of *KAFTA*.

Each of these will be further explained separately below.

The Pirate Party would also like to draw JSCOT's attention to the substantial submissions of the Australian Fair Trade and Investment Network (AFTINET),¹⁹ Dr Matthew Rimmer,²⁰ Kimberlee Weatherall,²¹ Electronic Frontiers Australia,²² and the Australian Digital Alliance.²³ Some of the issues raised by Pirate Party Australia are also covered in those submissions with greater detail.

2.1 Exclusion of IPRs from treaties

In the 1990s several jurisdictions extended their copyright term to life + 70 years for works.²⁴ The IPCRC produced a report in 2000 in response to these extensions, and recommended against extending Australia's copyright term on the grounds that it would likely impose a net cost on Australia due to Australia being primarily an importer of copyrighted materials.²⁵ Despite this recommendation, Australia extended its copyright term to life + 70 years under *AUSFTA* in 2004,²⁶

¹⁹Submission No 42.

²⁰Submission No 45.

²¹Submission No 49.

²²Submission No 54.

²³Submission No 56.

²⁴See eg *Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights* [1993] OJ L290/9; *Copyright Term Extension Act*, 17 USC §§ 108, 203(a)(2), 301(c), 302-303, 304(c)(2) (1998).

²⁵Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement*, Commonwealth, Canberra, 2000, 80-84.

²⁶*Australia-United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) art 17.4; *US Free Trade Agreement Implementation Act 2004* (Cth) sch 9 pt 6.

but did *not* adopt aspects of the United States' copyright system that give the US system its flexibility.²⁷ In particular there has been no introduction of a flexible defence to alleged copyright infringement that is genuinely comparable to the US' 'fair use' provisions. Despite the ALRC recommending the introduction of fair use in its report *Copyright and the Digital Economy*²⁸ the Commonwealth Attorney-General, Senator George Brandis, has stated that he 'remain[s] to be persuaded that this is the best direction for Australian law.'²⁹

This point illustrates that copyright reform in Australia seems predominantly driven towards the aim of providing greater rights to copyright holders, with limited consideration of 'public' or 'consumer rights,' and this is especially true of intellectual property provisions in FTAs: Australia's FTAs since *SAFTA* (2003) have invariably included IPR chapters that at the very least merely restate to varying degrees existing Australian law, but in some cases have required legislative change to strengthen the position of rights holders.³⁰ The Pirate Party wishes to emphasise that intellectual property provisions in FTAs focus on harmonising and strengthening the positions of rights holders but have generally provided no provisions for the interests of consumers and the broader public, while domestic law reform has, particularly in relation to copyright, avoided compensating for this approach. Interestingly, the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) was not the product of an obligation arising under a FTA, but was a domestic initiative to improve intellectual property standards in Australia compared to other jurisdictions with regard to patents — there was no need for a FTA for these reforms to occur.

²⁷Andrew Stewart et al, *Intellectual Property in Australia* (LexisNexis Butterworths, 5th ed, 2014) 182, 242.

²⁸Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 13–15.

²⁹Senator George Brandis, Attorney-General, 'Address at the Opening of the Australian Digital Alliance Fair Use for the Future — A Practical Look at Copyright Reform Forum' (Speech delivered at the Australian Digital Alliance Forum, National Library of Australia (Canberra), 14 February 2014) <<http://www.attorneygeneral.gov.au/Speeches/Pages/2014/First%20Quarter%202014/14February2014-openingoftheAustralianDigitalAllianceForum.aspx>>.

³⁰See *Singapore-Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003) ch 13; *Australia-United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ch 17; *Thailand-Australia Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005) ch 13; *Australia-Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009) ch 17; *Malaysia-Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013) ch 13. See also *Japan-Australia Free Trade Agreement*, unsigned, concluded 7 April 2014 (not yet in force). No doubt future FTAs being discussed or negotiated will also include IPR chapters.

In 2010 the Productivity Commission recommended that Australia be cautious of including IPR in future BRTAs.³¹ The Commission stated it was

not convinced ... that the approach adopted by Australia in relation to IP in trade agreements has always been in the best interests of either Australia or (most of) its trading partners.

[T]here does not appear to have been any economic analysis of the specific provisions in AUSFTA undertaken prior to the finalisation of negotiations, nor incorporated in the government's supporting documentation to the parliament. As noted above, *the AUSFTA changes to copyright imposed net costs on Australia*, and extending these changes to other countries would be expected to impose net costs on them, principally to the benefit of third parties.

The Commission considers that Australia should not generally seek to include IP provisions in further BRTAs, and that any IP provisions that are proposed for a particular agreement should only be included after an economic assessment of the impacts, including on consumers, in Australia and partner countries.³²

It is interesting to note that the IPCRC's misgivings about net costs being imposed on Australia were confirmed by the Productivity Commission a decade later.

Although the Productivity Commission indicated it was critical of the practice of including IPR provisions in BRTAs, both bilateral FTAs signed or concluded by Australia since 2010 have included IPR provisions,³³ as will the regional *TPP Agreement* currently under negotiation.³⁴ Pirate Party Australia is generally dissatisfied with the inaction in relation to the Productivity Commission's recommendation, and is in favour of excluding intellectual property provisions from BRTAs such as *KAFTA*.

³¹Productivity Commission, *Bilateral and Regional Trade Agreements Research Report*, Research Report 2010, 257-264 <http://www.pc.gov.au/_data/assets/pdf_file/0010/104203/trade-agreements-report.pdf>.

³²Ibid 263-264 (emphasis added).

³³*Malaysia-Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013) ch 13. See also *Japan-Australia Free Trade Agreement*, unsigned, concluded 7 April 2014 (not yet in force).

³⁴Department of Foreign Affairs and Trade, Australian Government, *Trans-Pacific Partnership Agreement negotiations Frequently Asked Questions on Intellectual Property and Public Health Issues* <<http://www.dfat.gov.au/fta/tpp/faq.html>>.

The Pirate Party prefers the approach suggested by the Productivity Commission that 'Australia's participation in international negotiations in relation to IP laws should focus on plurilateral or multilateral settings'.³⁵ It is preferable in the Party's opinion to include IPR provisions in treaties exclusively intended to deal with that subject matter.

2.2 Opposition to vertical integration

Pirate Party Australia recognises legitimacy in the desire for consistent IPR legislation across jurisdictions, and that treaties are an effective way of achieving this. However, the Pirate Party opposes the practice of 'vertical integration' through the layering of provisions across a multitude of bilateral, multilateral and regional agreements. The inclusion of provisions requiring parties to remain party to or accede to other agreements builds layers of agreements that serve to make domestic law reform virtually impossible.

AUSFTA requires Australia to be or remain party to no less than 13 other agreements relating to intellectual property.³⁶ *KAFTA* contains a much broader range of obligations: 'Each Party affirms its rights and obligations under the TRIPS Agreement, the agreements administered by the WIPO and any other multilateral agreement related to intellectual property to which the Parties are party.'³⁷ A particular concern for Pirate Party Australia is that effective IPR reform becomes increasingly elusive with every FTA Australia signs containing IPR provisions.

Pirate Party Australia opposes the practice of vertical integration of intellectual property agreements on the basis that it merely provides layers of obligation with no practical benefit and hinders domestic law reform as a result.

³⁵Productivity Commission, *Bilateral and Regional Trade Agreements Research Report*, Research Report 2010, 264 <http://www.pc.gov.au/_data/assets/pdf_file/0010/104203/trade-agreements-report.pdf>.

³⁶*Australia-United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) art 17.1.

³⁷*Korea-Australia Free Trade Agreement*, signed 8 April 2014, [2014] ATNIF 4 (not yet in force) art 13.1.

2.3 Requirements for implementation

Pirate Party Australia wishes to express its concern with regard to a passage from *KAFTA's* accompanying NIA:

Consistent with Australia's existing obligations in the Australia-US and Australia-Singapore FTAs, and to fully implement its obligations under KAFTA, the *Copyright Act 1968* will require amendment in due course to provide a legal incentive for online service providers to cooperate with copyright owners in preventing infringement due to the High Court's decision in *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (20 April 2012), which found that ISPs are not liable for authorising the infringements of subscribers.³⁸

Paragraph 17 is, the Pirate Party understands, referring to article 13.9(29)(a) ('Limitations on Liability for Online Service Providers') of the Agreement which states:

29. In accordance with Article 41 of the TRIPS Agreement, for the purpose of providing enforcement procedures that permit effective action against any act of copyright infringement covered by this Chapter, each Party shall provide:

(a) legal incentives for online service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials ...

Pirate Party Australia is concerned that this is a situation comparable to that of *AUSFTA*, where, despite the recommendations of the IPCRC, Australia extended its copyright term as a result of taking on an obligation (see above). Pirate Party Australia notes that IP Australia stated to the Productivity Commission in a 2010 submission that it 'does not seek provisions that ... require legislative change' in BRTAs.³⁹

The Pirate Party contemplates that this may be a tactical move by the Federal Government to place an obligation on Australia so as to promote the introduction of either or both a graduated response

³⁸*National Interest Assessment: Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea* [2014] ATNIA 8 [17] (footnote included in quote).

³⁹IP Australia, Submission No 24 to the Productivity Commission, *Bilateral and Regional Trade Agreements Study*, 2010, 1 quoted in Productivity Commission, *Bilateral and Regional Trade Agreements Research Report*, Research Report 2010, 259 <http://www.pc.gov.au/_data/assets/pdf_file/0010/104203/trade-agreements-report.pdf>.

(‘three strikes’) scheme or an Internet filtering regime, administered by Internet service providers. Pirate Party Australia has grave concerns about the Government’s policy direction on this area, which seems predominantly led by consultations with industry bodies, but with no consumer representatives or special interest groups.⁴⁰ It has been reported by several outlets that the Government intends to pursue these policy directions, and it is clear that the Government, contrary to the decision in *Roadshow Films Pty Ltd v iiNet Ltd*,⁴¹ believes ISPs should take responsibility for the alleged infringement of their subscribers.⁴²

Although it is obviously not the position of JSCOT to criticise Government policy per se, JSCOT should not encourage the bypassing of Parliamentary debate on what would be substantial changes to Australian Copyright Law and have significant impact on service providers. By taking on obligations under international law, this would provide significant support for legislation implementing graduated response and filtering in Australia. Pirate Party Australia is particularly suspicious of the comments made by Attorney-General, Senator George Brandis, that ‘[i]t should also be noted that Australia has international obligations on this point, and that the government will not be seeking to burden ISPs beyond what is reasonably necessary to comply [with] appropriate domestic and international obligations’,⁴³ especially considering there has been no legislative action taken since *Roadshow Films Pty Ltd v iiNet Ltd* was decided more than two years ago. Pirate Party Australia questions the existence of the obligations that are claimed to exist; so far there has been no indication that the High Court’s decision is contrary to any FTA currently in force to which Australia is a party.

JSCOT may dismiss the suggestion that the Federal Government would include this provision as a means to impose future legislation as cynicism. Regardless of this, the Pirate Party is dissatisfied with the ambiguity of the provision. The phrases ‘legal incentives’ and ‘cooperate with copyright owners in preventing infringement’ are unclear. It is not immediately apparent what a ‘legal incentive’ would be. There is also

⁴⁰See eg Renai LeMay, ‘Consumer groups again excluded from piracy talks’, *Delimiter* (online), 6 June 2014 <<http://delimiter.com.au/2014/06/02/consumer-groups-excluded-piracy-talks/>>; Josh Taylor, ‘Film lobby emails detail persistence for copyright crackdown’, *ZDNet* (online), 11 April 2014 <<http://www.zdnet.com/film-lobby-emails-detail-persistence-for-copyright-crackdown-7000028324/>>; Renai LeMay, ‘Anti-piracy lobbyist enjoys cozy email chats with AGD Secretary’, *Delimiter* (online), 17 April 2014 <<http://delimiter.com.au/2014/04/17/anti-piracy-lobbyist-enjoys-cozy-email-chats-agd-secretary/>>.

⁴¹[2012] HCA 16 (20 April 2012).

⁴²Josh Taylor, ‘Stop the torrents: Australian government eyes copyright crackdown’, *ZDNet* (online), 14 February 2014 <<http://www.zdnet.com/au/stop-the-torrents-australian-government-eyes-copyright-crackdown-7000026339/>>.

⁴³*Ibid.*

concern that this may, depending on how it is implemented, place an increased burden on service providers. There is no certainty for consumers, special interest groups and, perhaps most importantly, the service providers themselves as to what this will entail.

Pirate Party Australia notes that in *Report 126* regarding ACTA, JSCOT recommended that the Australian Government 'clarify and publish' the meaning of 'aiding and abetting' and 'commercial scale' within the context of that Agreement, and further that ACTA 'not be ratified by Australia until 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.'⁴⁴ The Pirate Party urges JSCOT to contemplate this course of action to ensure KAFTA's terms meet requisite levels of certainty with regard to 'legal incentives for online service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials'.

2.4 Australia's motivations unrepresented

As one particularly important example of the lack of Australia's specific interests being assessed as part of a real treaty negotiation, Pirate Party Australia would like to direct attention to article 13.9(29). There is a distinct similarity between the service provider liability section of KAFTA, quoted above, and the equivalent passage from KORUSFTA:

30. For the purpose of providing enforcement procedures that permit effective action against any act of copyright infringement covered by this Chapter, including expeditious remedies to prevent infringements and criminal and civil remedies that constitute a deterrent to further infringements, each Party shall provide, consistent with the framework set out in this Article

(a) legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials ...⁴⁵

This passage appears in both KAFTA and KORUSFTA with just the word 'online' to distinguish them, but, seemingly in contradiction to Article

⁴⁴Joint Standing Committee on Treaties, Parliament of Australia, *Report 126* (2012) x (recommendations 5–6, 8).

⁴⁵*Korea-United States Free Trade Agreement*, signed 10 February 2011, USTR (entered into force 15 March 2012) chapter 18.1, s30(a).

13.9 of *KAFTA*, does not actually appear in Article 41 of *TRIPS*. The inference to be drawn from this is that the parties to *KORUSFTA*, or some earlier treaty that first established that wording, may have negotiated based on their real national priorities. It may have been assumed that Australia's national priorities are in line with other countries' without actually assessing whether or not this is the case.

3 Lack of transparency

An overarching concern Pirate Party Australia maintains with regard to international agreements is the culture of secrecy in which negotiations are conducted. According to an article by Dr Matthew Rimmer (Australian National University): 'On the 28th May 2014, a petition signed by 1.8 million people worldwide was delivered to the Australian Parliament to protest against the radical secrecy surrounding the *Trans-Pacific Partnership*.⁴⁶ The text of *KAFTA* was not made public until after it was signed. Pirate Party Australia opposes the secret negotiation of all international agreements. Sham consultations between representatives from the responsible departments that provide the appearance of stakeholder and interested party engagement do not serve to reassure anyone of what will or will not be included in the final agreement. At minimum, the completed text should be made public *prior* to signing, and should be subject to Parliamentary debate before Australia takes on any obligations. Pirate Party Australia urges JSCOT to reject *KAFTA* and any future agreements that have been negotiated behind closed doors, and to encourage a culture that promotes transparency and genuine democratic engagement when drafting agreements.

4 Lack of current economic impact assessments

Pirate Party Australia wishes to draw attention to the lack of current economic impact assessments with regard to Australia's FTAs, in particular *AUSFTA*. Despite a number of independent reports commissioned by DFAT during and shortly after the negotiation period predicting

⁴⁶Matthew Rimmer, 'Open for Litigation: Australia, and the Trans-Pacific Partnership', *Medium* (online), 28 May 2014 <<https://medium.com/@DrRimmer/open-for-litigation-australia-and-the-trans-pacific-partnership-d96a8e012cea>>.

economic benefits for Australia,⁴⁷ there does not appear to have been any similar studies commissioned to determine whether or not those predictions were accurate, and whether or not *AUSFTA* provided significant economic gains. *AUSFTA*, a comprehensive agreement with similar characteristics to subsequent FTAs, has been in force for nearly a decade and its effect on the Australian economy ought to be assessed before Australia continues pursuing Agreements like it.

⁴⁷See eg Monash University APEC Study Centre, *An Australia-United States Free Trade Agreement – Issues and Implications* (2001) <http://www.dfat.gov.au/publications/aus_us_fta_mon/>; Centre for International Economics, *Economic analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States* (2004) <http://www.thecie.com.au/content/publications/CIE-economic_analysis_ausfta.pdf>.