



Amplifying the voice of the Australian open source software industry

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CPTPP could still destroy the Australian FOSS industry

OSIA urges Senate Committee to ditch the dud deal

Open Source Industry Australia Ltd

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In its latest submission¹ to the Senate Standing Committee on Foreign Affairs, Defence & Trade's inquiry into the 'Comprehensive & Progressive agreement for Trans Pacific Partnership' (CPTPP), OSIA has again called on the government to scrap the controversial treaty and to open fresh negotiations for a genuine free trade agreement between former TPP parties. This time OSIA raised new questions in relation to the Electronic Commerce Chapter, the provisions of which may have the potential to destroy the Australian free & open source software (FOSS) sector altogether, in addition to reiterating the many other defects in CPTPP it has raised before.

Article 14.17 of CPTPP prohibits requirements for transfer or access to the source code of computer software. Whilst it does contain some exceptions, those are very narrow and appear rather carelessly worded in places. The exception that has OSIA up in arms² covers "the inclusion of terms and conditions related to the provision of source code in commercially negotiated contracts". If Australia ratifies CPTPP, much will turn on whether the Courts interpret the term "commercially negotiated contracts" as including FOSS licences all the time, some of the time or none of the time.

If the Courts rule that FOSS licences are not "commercially negotiated contracts", those licences will no longer be enforceable in Australia. "If that happens, our entire industry may well cease to exist," said OSIA Director (public policy) Josh Stewart, "but others will feel the pain as well. Existing government policies like the DTO's highly regarded Digital Service Standard also depend on the enforceability of FOSS licences. Consumers too would miss out on all the benefits associated with FOSS."

Even if the Courts find that FOSS licences are always considered "commercially negotiated contracts", government policies supportive of FOSS would still be hampered and a substantial section of the Australian FOSS industry (those who distribute their software under "copyleft" licences, such as the well known GNU GPL) could still suffer considerable damage. The wording of Art. 14.17 makes it

¹Burton, J., Stewart, J. & Phillips, M., *Submission to Senate Standing Committee on Foreign Affairs, Defence & Trade re CPTPP*, OSIA, 31 May 2018. Available at http://osia.com.au/f/osia_sub_201805_sscfadt.pdf and at <https://www.aph.gov.au/DocumentStore.ashx?id=b5a4cb7e-6be1-47db-b50b-bfa898cb7f9d&subId=566533>

²*ibid.*, s. 4.1, pp. 8–10.

unclear whether authors could still seek injunctions to enforce compliance with licence terms requiring transfer of source code in cases where their copyright has been infringed.

“When FOSS authors sue for copyright infringement and the licence contains copyleft terms, they almost always seek an injunction for specific performance,” said OSIA Company Secretary Jack Burton, “That’s because the utility of a copyleft licence depends entirely on compliance with its terms. In such cases a simple award of damages seldom suffices.”

“So we have a situation where the most favourable interpretation could decimate our industry, whereas the least favourable could destroy it,” continued Burton, “Understandably, our members would be unhappy either way. The only solution we see is for the government to reject this highly restrictive treaty.”

In addition to the Electronic Commerce Chapter, OSIA’s submission also criticised TPP’s provisions on investor-state dispute settlement (ISDS) and on intellectual property, the lack of credible independent Australian economic modelling, the lack of demonstrable economic benefit, the secrecy under which the treaty was negotiated and the propaganda put out by Department as well as the treaty’s lack of focus on genuine free trade measures. “93–97% of the text is about imposing restrictions, the opposite of free trade,” said Burton, “that’s not what we’d call a free trade agreement.”

About Open Source Industry Australia Ltd

Open Source Industry Australia Ltd (OSIA) represents & promotes the Australian open source software industry by:

- Ensuring that the Australian business, government and education sectors derive sustainable financial and competitive advantage through the adoption of open source and open standards;
- Helping Australian Governments to achieve world leadership in providing a policy framework supportive of open standards and of the growth and success of the Australian open source industry; and
- Ensuring Australia’s global standing as the preferred location from which to procure open source services & products.

OSIA’s members are organisations in Australia who invest in or build their future on the unique advantages of open source software.

✉ <http://osia.com.au>

👤 Jack Burton
✉ PO Box 617, Marden SA 5070
☎ 08 8121 3075
☎ 04 3828 7866
✉ secretary@osia.com.au

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