



**Australian
Privacy
Foundation**

<http://www.privacy.org.au>

Secretary@privacy.org.au

<http://www.privacy.org.au/About/Contacts.html>

10 March 2016

Joint Standing Committee on Treaties

Dear Committee Secretary,

Re: TRANS PACIFIC PARTNERSHIP AGREEMENT

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

This submission by the Australian Privacy Foundation responds to the Trans Pacific Partnership treaty tabled on 9 February 2016.

Summary

The Australian Privacy Foundation (APF) makes the following points in relation to the Trans Pacific Partnership:

- It is essential to protect Australians' privacy in all provisions of free trade agreements (FTAs), including the Trans Pacific Partnership Agreement (TPP) and the Trade in Services Agreement (TiSA), which is also currently being negotiated by Australia. We believe the best way to do so is to exclude personal data from the provisions of any FTA being negotiated or entered into by Australia.
- We are concerned by the lack of strong privacy protection contained within the TPP, despite certain provisions concerning the storage and processing of (personal) data.
- We oppose the TPP's cross-border data transfer provisions and data localisation provisions, and the negative effect they may have on the protection of Australians' personal data.
- We are very concerned about the TPP's dispute settlement provisions and the possibility of challenges to possible Australian government actions that may protect citizens' privacy but that may also be viewed as negatively affecting the investments and business practices of transnational corporations. Furthermore, we are very concerned about the long term effect the existence of these mechanisms may have on future enhancement of Australians' privacy protection.

Unless these areas of concern are addressed, APF does not support the Australian Parliament's ratification of the TPP.

Our detailed comments are outlined below.

General

We have previously set out our views on privacy, data protection and free trade agreements in a prior submission on the Trans Pacific Partnership.¹ In summary, we consider it essential that Australians' privacy is protected in all provisions of FTAs including the TPP, since the protection of privacy and personal data is a fundamental human right. We are concerned about the exchange, storage and processing of Australians' data in other jurisdictions, especially those with a lower protection of privacy. We consider that personal data (defined as 'any data that enables a person to be identified either directly, or after integration or linkage with other data') should be expressly excluded from the provisions of any FTA, including the TPP, in the absence of satisfactory international instruments which adequately protect personal data.

Privacy in detail

APF acknowledges that Article 14.8 of the TPP's Electronic Commerce chapter requires some positive protection of personal information of the users of electronic commerce. However, we are disappointed that this provision seems limited to the users of electronic commerce, rather than applying to all private sector activities around personal data. We are also disappointed to see that this provision envisages the use of voluntary self-regulatory codes to protect privacy, which we do not view as constituting adequate protection for Australians' personal data. In short, the APF submits that any international agreement that deals with the processing of personal information should require a high level of protection of the privacy rights of data subjects. Unfortunately, the TPP fails to meet this threshold.

APF has a number of specific concerns about other TPP provisions which relate to privacy.

Firstly, we are concerned about the provisions on the cross-border transfer of information (Art 14.11), which requires that these transfers be allowed in the context of the business activities of service suppliers based in a TPP country. Our concerns relate particularly to the narrow exceptions to this obligation to allow personal data exports, and the possibility that a country's failure to adhere to these exceptions could result in investor state dispute settlement (ISDS) proceedings. We are concerned about the negative effect these requirements and the possibility of ISDS proceedings may have on, for instance, attempts to protect Australians' privacy by not exporting personal data to other countries (sometimes known as 'data sovereignty').

We are also concerned about the prohibition on data localisation contained within Art 14.13. Data localisation is the storage and processing of certain data on local services i.e. those based geographically and jurisdictionally within a certain country. In doing so, a country can ensure that its privacy laws apply to the data, and the data is not accessed by third parties including foreign law enforcement agencies – which cannot be guaranteed if the data is stored overseas. Again, we are concerned about the narrow exceptions to the rule against data localisation, including the negative effect the threat of ISDS proceedings may have on attempts to protect citizens' privacy through data localisation.

The possibility of dispute settlement proceedings against Australia under either the investment dispute procedures in Chapter 9 or the ISDS provisions are also of great concern to APF. We are concerned about the negative effect these mechanisms may have on the strong enforcement of existing data privacy laws (especially the *Privacy Act* in Australia), and the chilling effect these mechanisms may also have on the introduction of new or stronger data privacy laws. For example, we note that recommendations for strengthening Australia's information privacy laws made by the

¹ Australian Privacy Foundation, *Submission on the Protection of Privacy and Personal Data in Relation to Free Trade Agreements*, 7 September 2012 <<https://www.privacy.org.au/Papers/DFAT-TTP-120907>>

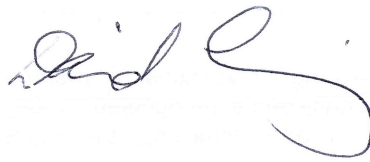
ALRC in its 2008 report, *For Your Information*, have yet to be acted upon by government. Since APF considers existing Australian data privacy laws to provide an insufficient level of privacy protection and actively campaigns for increased privacy protection, we view these mechanisms as particularly worrying.

Thank you for your consideration.

Yours sincerely



Kat Lane, Vice-Chair
0447 620 694
Kat.Lane@privacy.org.au



(Dr) David Lindsay, Vice-Chair
(03) 9905 5547
David.Lindsay@privacy.org.au



David Vaile, Vice-Chair
0414 731 249
David.Vaile@privacy.org.au

Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby and Elizabeth Evatt, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>