



**AUSTRALIAN ELECTRICAL & ELECTRONIC  
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Mr Ric Wells  
Chief Negotiator  
Australia-China Free Trade Agreement  
Department of Foreign Affairs and Trade  
R.G Casey Building  
John McEwen Crescent  
BARTON ACT 0221

Dear Ric

### **Re: Inaugural Meeting of the FTA Working Group for Intellectual Property**

Thankyou for providing AEEMA with the opportunity to attend your Working Group meeting on IP last Friday, 15 July. In response to your requests for further input, I would like to offer some additional suggestions, building on my earlier letter to you of 3 June 2005.

#### **National Policy Statement**

As I indicated at the Working Group meeting, to ensure delivery of substantial commercial and economic benefits from any trade negotiation, Australia must clarify its overarching objectives by specifying what it is we are trying to achieve for the national interest. An example of such a statement of national policy is evident in the document AEEMA tabled at the Working Group meeting, "Policy and Enforcement Mechanism on IPR protection for ICT Industries in Taiwan". The statement sets out in reasonably simple terms the recognition that a nation's ability to sustain ongoing development hinges on a sound IPR protection environment and the continued use of research and innovation.

Your new Working Group may benefit from trying to create a similar guiding policy statement as part of its ongoing activities. Indeed, some of the Department's current Guiding Principles for the ASEAN negotiations may be of assistance, in particular the recognition that deeper economic integration between any two nations is a key aim of Australia's trade negotiations, and that this goal can be achieved through the progressive elimination of all forms of barriers to trade (including non-tariff barriers) in goods, services and investment. In addition, Australia's objective of achieving substantial market access into centrally controlled or less developed economies characterised by lack of transparency and shifting regulatory frameworks, should be a cornerstone of any policy statement.

### WTO and TRIPs Enforcement

Much has been made of the enforcement of IP rights in economies such as China. My earlier letter to you drew attention to lax or non-existent enforcement even in jurisdictions with strict IP protection laws. This situation leaves industry with no recourse at all. That said, I would like to draw your attention to the possible risk of Australia being on the negotiating 'back foot' regarding compliance and enforcement; in so doing I will use China, and copyright, as the example.

Since its accession to the WTO in December 2001 when China became subject to TRIPs, WTO Member States have been reluctant to enforce copyright compliance under the multilateral regime's dispute settlement process, no doubt for a variety of rational reasons. In 2003 the USTR in fact listed 'tax policies, 'institutionalisation of market mechanisms' and 'barriers to soybean trade' as equal in importance with IP concerns. Since then, US copyright industries have pressured the US Government to relinquish multilateral copyright protection in favour of exporting US domestic copyright law into the bilateral trade arena. You will be aware that current US copyright law classifies commercial copyright infringement as a felony; non-commercial reproduction of as little as one copy for personal use now attracts criminal liability.

TRIPs operates as a global minimum standard; China has stated on the record that its domestic copyright law is fully compliant with requirements in TRIPs, requiring proof-of-sale and illegal gains that are either "huge" or "relatively huge". Putting aside the obvious interpretational difficulties facing a judge having to assess what is "huge", Australia perhaps needs to exercise some care in trying to negotiate a too onerous criminal regime for copyright infringement when the existing multilateral processes for compliance have not been used. China's response to such an attempt can only be imagined. In addition, at the Working Group meeting on 15 July you heard from various attendees that there may also be strategic and policy risks in assuming that a US criminal law template can readily be incorporated into Australian negotiations, such that we might be seen trying to commit China to US-style criminal provisions unsuited to China's vastly different social, educational and economic levels of development. AEEMA would warn against placing Australia in the position of being accused of trying to create a de facto global copyright standard based on specific US policy approaches. In fact, given AEEMA's current excellent relationships with kindred industry associations in China (details provided to you in my earlier letter), we again offer to draw on those relationships as input for your negotiating team in relation to appropriate levels of copyright protection.

In closing I would like to say again that AEEMA welcomes the establishment of the FTA Industry IP Working Group, and we will continue to participate and contribute as required. Positive engagement on the issue of IP protection is essential if Australian industry is to reap the trade benefits of better integration with Asian economies. This requires a balance of corporate and consumer need, as well as a recognition that appropriate, not onerous, levels of IP protection should be struck. Compliance and enforcement of onerous regimes will be no less problematic in the bilateral framework than in the multilateral.

Finally, specific examples of problems faced by our members when doing business in China and other jurisdictions may be of some assistance to you, and we will endeavour to provide that information to you either as part of the Working Group sessions or in private, for obvious commercial reasons. Please do not hesitate to call me on 02-62474655 if you wish to discuss anything raised in this letter.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Angus M Robinson', with a horizontal line extending from the end of the signature.

**Angus M Robinson**  
**Chief Executive**