

# FINANCIAL REVIEW

## TPP hits business thieves

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The theft of business secrets will be punishable by criminal law for the first time in an international trade agreement, under a surprise inclusion in the Trans-Pacific Partnership revealed by a detailed review of the text.

Corporate thieves and cyber hackers misappropriating "trade secrets" like advanced manufacturing methods, drug making processes and the formula used to make Coca Cola will face criminal sanctions in the 12 TPP countries including Australia.

Trade analysts said the measure was pushed heavily by the United States business sector to counteract pilfering of its intellectual property (IP) not covered by patents, copyright and trademarks.

Australia does not have a specific criminal law for trade secret theft. The government believes because the Criminal Code Act 1995 already provides penalties for unauthorised access to data held in a computer, it will not have to make any legislative or policy change.

However, the influential US Chamber of Commerce has previously criticised Australia's trade secret rules as "insufficient", citing soft penalties imposed on a former Spotless Group employee for leaking sensitive commercial information to the catering company's competitor.

American trade secret experts say countries including Australia, Brunei, Canada, Malaysia, New Zealand and Singapore that predominantly rely on common law or civil remedies for trade secret theft should bolster criminal laws to reflect the TPP.

Seyfarth Shaw partner Robert Milligan, a leading US trade secrets lawyer for major corporations, said the TPP was meant to have "real teeth and consequences for violations" of trade secret theft.

"I think those countries including Australia would need to enact some kind of trade secrets misappropriation criminal law," he said.

However, some anti-IP groups have warned tougher laws could cause censorship, by impinging on whistle blowing by company insiders about wrongdoing.

China is a particular aim of the unprecedented insertion of a criminal law clause for trade secrets in a cross-border trade pact. Even though China is not a TPP member, it may join the trade group in future and the US hopes the trade secrets section will set a benchmark for future trade deals.

"These provisions will be helpful in regards not only to the current TPP members but also, and especially, to China if it someday joins the agreement," said Michael Smart, a former

international trade counsel to the US Congress and now vice president at Rock Creek Global Advisors.

US firms are worried foreign employees in offshore factories and offices can currently sell or pass on secret business information to competitors without retribution. Corporate cyber espionage is also causing rising angst for multinationals.

In TPP markets, Australian businesses will have a stronger legal recourse if confidential business information is stolen.

Trade secret laws are effectively an alternative to other monopoly patents. Trade experts picked up the previously little noticed clause in reviewing the 5600 page TPP text since it was publicly released on November 5.

"Personally I don't think we should be doing criminal law in trade agreements," said Bill Watson, a trade policy analyst at the free market Cato Institute think tank in Washington.

The drafting of the TPP is not overly prescriptive and gives countries significant latitude on interpretation and implementation.

"Even if it's weak, it's still moving the bar in having trade secrets in trade agreements," Mr Watson said.

At a minimum, the unauthorised access to and theft of trade secrets in computer systems must be prohibited and punishable under criminal law, though countries can choose to go further for broader non-computer offences.

A government source said Australia was not intending to introduce any additional criminal penalties as a result of the TPP. The status quo is likely to disappoint the US Chamber of Commerce, which declined to comment because it is still reviewing the TPP text.

In an earlier TPP policy document, the US Chamber cited the 2010 lawsuit by Spotless Group against a worker who provided rival Blanco Catering with customer and supplier information, and financial data, while the firms were bidding for an Adelaide Zoo catering contract.

Spotless lost the contract. The Federal Court of Australia found the ex-employee guilty of breach of duties but not of misappropriating confidential information. Spotless was awarded \$100,000, not more than \$1 million it was seeking.

"This case illustrates the difficulty in proving lost profits and recovering damages sufficient to deter misconduct even when there is a clear case of misappropriation of trade secrets, and helps underscore the need for potential criminal enforcement of trade secrets to complement civil enforcement," the Chamber said.