10 August 2015

Hon Tim Groser
Minister of Trade
C/- Parliament Buildings
Wellington
via Email

CC to: **Rt Hon John Key**, Prime Minister

Hon Steven Joyce, Economic Development

Hon Amy Adams, Communications

Re: TPP negotiations and impact on IT sector

Kia Ora Mr Groser,

The Institute of IT Professionals NZ (IITP) is the largest IT representative body in New Zealand with thousands of members across the country. We represent practicing technology professionals and work directly with 54 similar organisations across the globe, collectively representing over a million IT professionals worldwide.

IITP is constitutionally independent and has a 55 year history of providing independent advice and guidance in relation to technology in New Zealand. I became President of the Institute in late 2014, and **I'm writing this letter both as IITP President and as CEO of Animation Research Ltd**, an IT company servicing global contracts from our home base in Dunedin.

The IT industry is in a unique position, in that it is not simply an industry of itself. These days it is at the core of almost everything we do – it is the driver behind much of the innovation occurring in all of the industries you are representing in your current negotiations. IT has changed the face of those industries; perhaps none more so than those at the heart of our economy such as wool, meat and dairy. Real time monitoring, tracking, performance analysis; these are no longer the domain of sports codes. They are now essential tools supporting innovation and growth across all our key industries.

I recently presented a keynote address to 22,000 delegates at the IBM Interconnect Conference in the US. The subject was "The Internet of Things". Here I saw case study after case study of how technology was changing the face of business. Supermarkets, concrete production, crop growing, meat production, airlines, fisheries, poultry, wine – the list goes on.

Given the importance of IT as a driver of innovation and growth across the entire spectrum of business, we are concerned at the apparent lack of ongoing consultation with our industry as to how the Trans Pacific Partnership (TPP) might affect this sector's ability to contribute to the growth of the New Zealand

economy. While we are meeting with senior MBIE and MFAT officials next week to discuss TPP at our request, we believe this engagement should be at ministerial level as well.

Of equal concern were recent comments made suggesting that those questioning the TPP negotiation process were *naïve and motivated by ideology* rather than the good of the country. I believe that observation was both unfortunate and unproductive. This should not be a "them and us" debate; it is far too important.

Whilst you may have a point that you are fighting your fight with "one arm tied behind your back" those of us on the outside looking in, who have genuine concerns that something might get missed in the fine print, are in the position of fighting our fight with both arms tied behind our backs.

We share your view that free trade is essential for a prosperous export-driven economy. However our industry is fast-moving and changing rapidly, and what you might perceive as a minor concession in TPP negotiations could have a major and significant impact on our sector. I'm writing to ensure that you're aware of the possible implications for the software industry if, for example, NZ agrees to trade away our country's exclusion of software patents.

In relation to this issue, we seek your assurance that nothing in the TPP (as currently negotiated) will impact on New Zealand's legislative and policy position in relation to software patents.

We also seek the opportunity for our industry, through IITP and other representative bodies, to meet with you and negotiators again on this potential impact and be briefed on TPP progress.

New Zealand's technology industry

As you are no doubt aware, New Zealand's software, IT and broader technology sector is growing at a phenomenal pace – faster than any other sector in New Zealand. Depending on how you measure it, the hi-tech industry is now **either the third or fourth largest export sector** and if the current pace is continued, will likely end up as the largest export sector of New Zealand in just a few years.

Our sector is weightless, and doesn't rely on shipping goods around the world. Tech companies in New Zealand routinely make their products and services available to a global audience at the click of a button, and global leaders such as Xero, Orion Health, Wynyard Group, Jade Software, ADInstruments and others choose to base their headquarters here, **significantly contributing to New Zealand's economic growth and export performance**.

In recent years our industry has enjoyed the strong support of the NZ Government through R&D grants and various Government policies, not least of which was the Government's decision to remove the ability of software to be patentable in New Zealand during the Patents Act review back in 2012 and 2013. This move was supported by 81% of practicing IT professionals (via a poll of IITP members) and over 1024 companies and representatives from software exporters publicly backed the move to remove the patentability of software at the time. This included the two largest NZ software exporters Orion Health and Jade Software, together responsible for over 50% of software exported from New Zealand. This now

means that kiwi technology companies are at least safe in their home markets, albeit still subjected to the risk of *patent trolls* in overseas markets for the time being.

The position taken in New Zealand received massive support from the international technology community, with an article released by IITP at the time being shared over a million times worldwide and receiving thousands of positive messages from technologists everywhere.

There are a number of reasons for the strong support for the removal of patentability of software. Patents threaten our industry in the same way that allowing the patenting of plot concepts in books or movies would soon grind those industries to a halt. Software patents provide a significant weapon against fair competition and have also led to *patent trolls* who attempt to obtain patents for early computing concepts, then sue software companies that have built a product with similar concepts.

As a personal example, Animation Research Ltd (ARL) created the award-winning Virtual Eye software, initially tracking America's Cup boats and creating integrated graphics showing the race on TV in real time. This was entirely our own idea, however at the time we were threatened by a legal firm who had obtained a patent for tracking tug boats in a harbour. They were attempting to use the patent to either force us out of business or have us pay an exorbitant sum, even though our technology was truly innovative and completely unrelated to their business or patent.

Almost every major software exporter in New Zealand has stories such as this, where they've been attacked by competitors or patent trolls in overseas markets. According to the *American Intellectual Property Law Association*, the cost of an average patent lawsuit is $USD1.6 million ($2.42 Million NZD) through to the end of discovery and $USD2.8 million ($4.24 Million NZD) through to final disposition – regardless of whether infringement actually occurred, or there were reasonable grounds to proceed. **This is sufficient to kill most smaller technology companies and these are the kind of companies that are the future of our industry in New Zealand.**

We simply cannot afford to be dragged into the litigious environment that is such a feature of the US software industry. The consequences won't just be felt by the IT companies themselves, they will impact on our ability to create truly kiwi inovative solutions across all businesses.

We are seriously concerned that New Zealand might be prepared to trade away this position, imposing significant risk on our industry, for concessions in other export areas. I want you to be aware that doing so would have a drastic impact on our industry and as industry representatives, we implore you to resist any such change in policy and law.

In short, please don't trade away the future of our sector. No level of concession in dairy or elsewhere would justify bringing back software patents in New Zealand. Doing so could put the future of New Zealand's technology industry in jeopardy and remove a significant benefit of developing software in and from New Zealand.

Secrecy

The secrecy around the TPP negotiations make it hard to get a clear idea of what changes are being proposed and potentially agreed to on our behalf, and the impact this could have on New Zealand.

We, the IITP, are in a somewhat unique position of being able to provide Government free and frank independent advice on matters in relation to technology, and I understand we have done so in the past, both with you personally and with TPP negotiators. Unfortunately the dialogue has ceased of late, and recent comments give us cause for concern. We greatly appreciate the TPP negotiators agreeing to meet with us in the last couple of days and hope this will be extended to yourself as well.

We appreciate that the NZ Government can't release the current TPP text without agreement of the other negotiating partners, but surely that does not preclude the sharing of your position on matters that are of concern to us. It gave us some encouragement to see that you had included a senior executive from Fonterra in your last round of presentations in Hawaii.

In summary

In closing let me summarise three possibilities **that could have serious implications for the IT sector** if this occurred as a result of TPP. There are more but these would provide a solid basis to explore the potential consequences of the TPP on our industry:

1. If the TPP saw the re-introduction of software patents in New Zealand (by removing the ability for a country to exclude software from patentability);

2. If a requirement was introduced that overseas software patents be recognised in NZ, especially those of the United States. This would have a major and immediate impact on our industry;

3. If the TPP contained Copyright provisions that significantly impact on the public's ability to freely use and interact with technology, or created an environment that doesn't balance the ability of creators to protect their work with the public's ability to live and thrive in a digital world.

As mentioned above, we would like to request a meeting with you at your convenience to discuss these matters in detail so we can convey to you the importance of these issues to our industry. In the last few days we have been in touch with some of your officials and have planned a meeting between them and representatives of the IT community, but we think it is important to raise this with you, as Trade Minister, as well.

Your government has previously given assurances that a change to New Zealand's position on software patents was "off the table" in negotiations. We seek your assurance that this is still the Government's position, given the importance of this point to New Zealand's tech community.

Lastly, given the strong interest in this matter, we note our intention to notify our members and the public that we have raised these concerns with you again, as well as your response.

We thank you for the work you and the team have put into negotiating this and other trade agreements on New Zealand's behalf. I've been assured by the IITP team that every time they've met with the TPP negotiators in the past they've been impressed with their dedication to achieving a good outcome for New Zealand.

I hope we are able to re-engage in a constructive manner and be able to report to our members that our and their concerns are unwarranted and nothing in the TPP will impact on the spectacular growth of our industry and its contribution to the New Zealand economy.

Kind regards,

Ian Taylor CNZM, LLB, HFIITP
President
Institute of IT Professionals NZ