

# Ai GROUP SUBMISSION

to the Productivity Commission's  
Inquiry into Intellectual Property  
Arrangements

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**Ai**  
GROUP

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## **About Australian Industry Group**

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with more than 50 other employer groups in Australia alone and directly manages a number of those organisations.

## **Australian Industry Group contact for this submission**

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## 1. Summary of Recommendations

- IP arrangements in Australia should continue to treat disparate rights under separate schemes such as the Patents Act 1990 for inventions and the Copyright Act 1968 for literary and artistic creations.
- We encourage the Productivity Commission to examine the resourcing of Customs and assess the strong claims from business that it is inadequately resourced to undertake its responsibilities in preventing the importation of counterfeit goods.
- The Productivity Commission should explore the option of introducing an IP Tribunal to resolve IP disputes akin to the United Kingdom system. The PC should also give consideration to caps on costs and damages introduced in the UK.
- Suitable “use it or lose it” provisions should remain part of IP laws including to guard against the rise of patent trolling.
- Australia should have a competitive IP system with low compliance costs and without unnecessary inconsistencies to international practices to ensure an attractive environment exists for innovation in Australia.
- Bilateral and multilateral agreements should not introduce unnecessary complexity to IP arrangements and should be negotiated transparently to allow greater input by industry to ensure the full ramifications of the agreements are considered prior to their finalisation including in relation to Investor-State Dispute Settlement provisions.
- That the Productivity Commission considers whether the recommendations of the Australian Council on Intellectual Property (ACIP) on innovative patents should be revisited and clarifies if this is outside the scope of the inquiry. Consideration should also be given to alternatives to the ACIP’s recommendation of abolishing the innovation patent system.
- That the Productivity Commission considers whether the recommendations of the ALRC on copyright law and the digital economy should be revisited and clarifies whether this is outside the scope of the inquiry and whether consideration should be given to alternatives to the ALRC’s recommendations.
- The Productivity Commission should consider whether the recommendations of the ALRC on the introduction of fair use, as well as extending the safe-harbour provision to online service providers, should be revisited; and consideration should be given to alternatives to the ALRC’s recommendations.
- That the Productivity Commission considers available empirical evidence about the expected costs and benefits of removing the parallel import restrictions on books.

## 2. Overview

Ai Group welcomes the opportunity to make a submission to the Productivity Commission's inquiry into Intellectual Property (IP).

A sound IP framework is an important facilitator of the innovation that Australia needs to build a more diverse and resilient economy. A key to a sound IP system lies in striking the appropriate balance between rewarding past efforts and encouraging new ideas. Innovative ideas will always be undersupplied in competitive markets with no IP regime because innovators have no way to recoup costs if their ideas can be quickly copied.

IP frameworks must also be designed in a way that does not impede future innovation. In order to innovate, industry builds on existing knowledge and so flexibility is required within the IP framework. Consumers and industry are also unduly punished if an IP regime rewards inventors with monopoly profits in excess of the incentives required for innovation to occur.

Consequently, it is important that policymakers examine the regime from time to time to ensure an appropriate balance is maintained. The advances of the digital era, including the way information is shared as well as technologies like 3D printing, also necessitate an examination of the IP system to ensure it remains appropriate and does not stop Australia from adopting and building on new technologies.

Ai Group engaged with members across a broad range of industries and sizes for input into this submission. Feedback was generally high level, and many members noted they were fatigued by constant areas of review into aspects of the IP regime that led to no visible outcomes.

Ai Group also found it difficult to engage members on this initial submission given the wide scope of this inquiry, the number of inquiries currently underway as well as a sense this was not a policy priority for the Federal Government. That said, the upcoming Innovation Statement from the Turnbull Government should provide important insight into the innovation policy environment.

Recent government reviews include the Australian Law Reform Commission's (ALRC) 18-month Inquiry on Copyright and the Digital Economy, the Senate Economics References Committee's inquiry on Australia's Innovation system, the Harper Review, and the now-abolished Advisory Council on Intellectual Property's (ACIP) three-year reviews of the innovation patent system and the designs system, as well as the Productivity Commission's 2013 Inquiry into Compulsory Licensing of Patents. We encourage the Productivity Commission to look at these review processes to reduce burden on industry for further consultation.

Further, some members have criticised the constant changes to related policy settings such as the R&D Tax Incentive, and innovation policy more generally.

*"Whatever they want to do out of this review, they should just telegraph it, do it and then not chop and change. The biggest headache for us is shifting sands."*

**Large Australian company**

Therefore at this stage, there is a lack of clear guidance at the federal government level where the Government wishes to head on reforming IP. This has led members to be wary of what this review will cover and recommend, and whether indeed those recommendations will be acted upon. Consequently, we envisage members will become more engaged when the draft recommendations are available for consultation.

Broadly speaking, Ai Group members found the balance between the competing aims of reward past research efforts and encouraging new innovation to be right, except in the case of innovation patents, where a view among the membership exists that the thresholds to qualify for these patents was too low. Competing views also exist among members on whether an appropriate balance has been reached in copyright law between owners and users.

Members were also keen to ensure that IP law in Australia continued to treat disparate rights under separate schemes such as the Patents Act 1990 for inventions and the Copyright Act 1968 for literary and artistic creations.

Common feedback from businesses, large and small, was that the decision to use the IP system, such as registering a patent or design, or protecting IP they viewed as infringed, was affected by more than the design of the IP system. For example, a business may take the view that further innovation is the best defence against a patent breach, rather than time and money spent defending existing patents. Another noted that defending IP may impose a later cost in relationships with potential suppliers or customers. Furthermore, it may also be impractical to defend IP in foreign markets, such as India, where lengthy delays exist in court systems. That said, most businesses noted that Australia's enforcement of IP was too costly and complex and reform in this area would benefit industry, which is discussed in this submission.

As a net importer of IP and a small open economy, Ai Group members consider that Australia is also very affected by IP regimes in place in other countries. Consequently, it is important that our regime remains competitive and to the extent possible, consistent with IP regimes elsewhere. Bilateral trade agreements should not increase the complexity of IP laws by introducing special provisions and should be negotiated with greater transparency.

**Recommendation:**

- **IP arrangements in Australia should continue to treat disparate rights under separate schemes such as the Patents Act 1990 for inventions and the Copyright Act 1968 for literary and artistic creations.**

## 3. Enforcement of Intellectual Property in Australia

Most Ai Group members argued that enforcement of IP rights in Australia was onerous, complicated and expensive.

### 3.1. Counterfeit goods

Members noted the prevalence of imported counterfeit consumer goods in Australia that infringe IP protections. These goods enter Australia undetected by customs officials, and members have noted that it was rare for any agency, to seize or stop the sale of these goods once they are in Australia.

Members noted that remedies exist but are not applied. We encourage the Productivity Commission to examine the resourcing of Customs and assess the strong claims from business that it is inadequately resourced to undertake its responsibilities in preventing the importation of counterfeit goods.

### 3.2. Introducing to a Tribunal System

Several members raised the prospect of adopting a tribunal system for IP rather than pursuing cases through the Federal Court system. This is the approach taken in the United Kingdom (UK), through the Intellectual Property Enterprise Court, which was introduced during staged reforms between 2010 and 2013.

Businesses operating in the UK report that the new tribunal has streamlined procedures, and the presence of specialist IP judges and barristers are reported by members to have led to greater consistency in decisions and faster resolution of cases.<sup>1</sup> The experience from the reforms in the UK is that it has significantly reduced the cost of pursuing protection of IP and has also significantly levelled the playing field for SME businesses.

Members also raised the option of adopting another UK reform of placing caps on damages and on costs for all infringements. We believe this is a reform area that should be considered in this review.

### 3.3. Patent Trolls and uncompetitive behavior

“Patent trolling” by companies is far more prevalent in other countries like the United States, although it is important that discouraging this behavior is achieved under Australia’s IP regime. A patent troll refers to companies that buy up a portfolio of patents without the intent of using the patents to manufacture, but instead litigate those who breach their patents in order to gain license fees or damages.

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<sup>1</sup> Helmersa, Christina, Yassine Lefouilib and Luke McDonagh; *Evaluation of the Reforms of the Intellectual Property Enterprise Court 2010-2013*; Santa Clara University, Toulouse School of Economics, Cardiff University June 22, 2015

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One member noted that sufficient “use it or lose it” balance already exists in the system to prevent patent trolling and registrants of trademarks who do not use them. Ensuring that patents must be registered each year, along with transparent information that enable competitors to assess whether patents are being used, would prevent this behavior. Another member noted that caps on damages as well as faster resolution of patent cases under a tribunal system would discourage patent trolling.

### **Recommendations:**

- **We encourage the Productivity Commission to examine the resourcing of Customs and assess the strong claims from business that it is inadequately resourced to undertake its responsibilities in preventing the importation of counterfeit goods.**
- **The Productivity Commission should explore the option of introducing an IP Tribunal to resolve IP disputes akin to the UK system. The PC should also give consideration to caps on costs and damages introduced in the UK.**
- **Suitable “use it or lose it” provisions should remain part of IP laws including to guard against the rise of patent trolling.**

## 4. International IP environment

Australia is a net importer of IP, and so as an economy is affected greatly by foreign IP regimes. But has Australia's IP regulatory framework kept pace with overseas markets to ensure that Australian regulatory settings are internationally competitive and do not act as a barrier to domestic innovation?

### 4.1. The need for competitive IP environment

In a globally-competitive economy, accelerated through the pace of technological change, especially through digital technologies, enforcement of IP needs to be also balanced against the reality of global trade. Barriers to innovation through inhibitive IP regulation and enforcement in one state has the potential to discourage investment in that state and shift business investment opportunity to another state with less onerous IP laws.

Members did not have a strong view on the competitiveness of Australia's IP system, other than noting an international perception that it was subject to frequent policy change.

Several members also noted that other countries in the Asian-Pacific region had marketed themselves more successfully as "innovation hubs". Singapore has been notable in its success of marketing its accommodative policy settings for inventors and entrepreneurs. Singapore was ranked 2<sup>nd</sup> in the 2015-16 World Economic Forum's Global Competitiveness Index and was ranked 9<sup>th</sup> for Innovation within this index (which looks at seven measures of innovation capacity and policy settings including university-industry collaboration in R&D, and patent applications). Singapore is also ranked 7<sup>th</sup> in the World Intellectual Property Organization's 2015 Global Innovation Index, which is a measure of the attractiveness of the innovation policy settings. These are the highest rankings within Asia across all three measures.

By contrast, Australia was ranked 22<sup>nd</sup> on the Global Competitiveness Index and has a ranking of 23<sup>rd</sup> for the innovation component. Australia is ranked at 17<sup>th</sup> on the IP Global Innovation Index.<sup>2</sup> Relevant to this inquiry will be a need to consider whether the degree of IP enforcement inhibits innovation investment in Australia compared to other countries such as Singapore.

### 4.2. Trade Agreements

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) remains the basis for international IP laws. This is a good system that enables consistency across systems.

Members were generally not in favour of disparities that different bilateral or regional agreements bring given the increased complexity and compliance burdens they bring. One example was the extension to copyright under the Australia-United States Free Trade Agreement to 70 years, from the standard 50 years. This is seen as too long and complex. Members were also in the early

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<sup>2</sup> See <https://www.globalinnovationindex.org/content/page/press-release/>; <http://reports.weforum.org/global-competitiveness-report-2015-2016/>.

stages of assessing the Trans-Pacific Partnership Agreement, and were confused how this would interact with other existing agreements.

On transparency of trade agreements, Ai Group has argued in a number of forums for greater transparency and consultation to better inform the negotiation of Australia's international trade agreements. We firmly agree with the Harper Recommendation that trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions, and indeed we believe this should extend more broadly to the entire agreement. This analysis should be undertaken and published before negotiations are concluded, which would allow industry to provide a far more informed feedback to the Government.

This should also include analysis of Investor-State Dispute Settlement provisions in trade agreements which run the risk of adding uncertainty to, and reducing the effectiveness of Australia's IP system.

**Recommendations:**

- **Australia should have a competitive IP system with low compliance costs and without unnecessary inconsistencies to international practices to ensure an attractive environment exists for innovation in Australia.**
- **Bilateral and multilateral agreements should not introduce unnecessary complexity to IP arrangements and should be negotiated transparently to allow greater input by industry to ensure the full ramifications of the agreements are considered prior to their finalisation including in relation to Investor-State Dispute Settlement provisions.**

## 5. Patents

### 5.1. Overview

Many of our members create and use patents, which may occur at various stages of research and development. Some will be at the earliest stage of creation of an innovative idea where it has not reached commercial realisation (in contrast to commercial research and development). Others are able to connect between a patentable idea and commercial reality within a short period of time.

Balance will have to be given to the appropriate time in which an idea can be patented and turning this into a commercial reality versus creating an unfettered and uncertain degree of market monopoly with an unlimited or excessive time to an exclusive right. It would be expected that patent laws have the appropriate checks and balances in place to strike the right balance.

Further, we wish to highlight that the standard in Australia should be set to a level that is consistent with standards applicable to our major trading partners (namely the US, the UK and Japan). It should also strike the appropriate balance that sufficiently protects innovation while also discouraging anti-competitive behavior and barriers to innovation.

### 5.2. Innovation Patents

Members raised the appropriateness of the current innovation patent system. These patents have a shorter eight-year term, compared to 20 years for standard patents and considered to be a “second-tier patent” that protects incremental or low level inventions that do not meet the inventive threshold required for standard patent protection.

Innovation patents were introduced in the early 2000s to encourage innovation by SMEs. The now-abolished ACIP, together with input from IP Australia, made a recommendation in 2015 to abolish this type of patent. IP Australia’s analysis found that there was very low use of these patents by SMEs, especially beyond the first use, and these patents did not generate significant return to offset their regulatory cost.<sup>3</sup> IP Australia’s report noted that innovation patents account for just 5% of patent applications in Australia in 2014.

Several Ai Group members disagreed with this finding and noted innovation patents should be refined not abolished. Furthermore, the low use of these patents may reflect low levels of awareness of these patents by SMEs, together with the economic and broader policy environment facing SMEs which are likely to influence the uptake of these patents.

So we recommend the Productivity Commission consider (in addition to the option of abolishing innovation patents):

- raising the threshold for innovation protection after careful examination of the cost to the future innovation of doing so;

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<sup>3</sup> See <http://www.ipaustralia.gov.au/about-us/what-we-do/reports/The-economic-impact-of-innovation-patents>.

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- adjusting the design of this type of patent which could be through changing the period of operation of the patent; and
- the level of engagement with SMEs on IP.

#### **Recommendation:**

- **That the Productivity Commission considers whether the recommendations of the ACIP on innovative patents should be revisited and clarifies whether this is outside the scope of the inquiry. Consideration should also be given to alternatives to the ACIP's recommendation of abolishing the innovation patent system.**

## 6. Copyright

The fundamental purpose of copyright law is to provide an economic incentive to create or invent by granting a temporary monopoly on the exploitation of a work. In this way copyright law can have a positive impact on innovation. Another aim of copyright law is to promote access to copyright material and to encourage further forms of innovation that build on works afforded copyright protection.

### 6.1. Digital era

In the context of the digitally enabled economy, Australia's copyright law framework will play an important role in determining the level of innovation that can occur and the type of activities that are permitted. There may be a number of technology trends related to the digitally enabled economy that will place further pressure on the existing copyright framework, including the growth in networked devices including through the Internet of Things, the rise of cloud computing, and increased reliance on big data and analytics.

A key principle to assessing the suitability of the copyright framework is whether it is sufficiently technology neutral and therefore flexible enough to accommodate for changes in use and innovation as enabled through digital technologies in particular. Such a need for copyright law to adapt to technological and market change was also a core theme of the UK's Hargreaves Report.

As we previously recommended to the ALRC, assuming technology neutrality can be addressed as exceptions to the Copyright Act, a challenge will be for the appropriate body to identify any preferred amendments to exceptions to the Copyright Act. Once these have been identified, detailed cost and benefit analyses for any proposed amendments will then need to be undertaken. Such analyses could try to determine in more detail the impact of proposed changes on different groups and the broader community.

### 6.2. Fair Use and Safe-Harbour Provisions

We note that the ALRC recommended in its final report on its inquiry into copyright and the digital economy for the introduction of a fair use exception, or alternatively a new fair dealing exception. A key rationale for its recommendation was that it considered fair use to be technology neutral, and not confined to particular types of copyright material or to particular rights, and sufficiently versatile but not blunt.<sup>4</sup>

Another proposal raised during the ALRC inquiry was with respect to whether safe-harbour provisions against copyright infringement by the end user should not be limited to only internet service providers, but also extended to other third parties such as online service providers. However, it appears that this issue was outside the scope of the ALRC's inquiry.

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<sup>4</sup> See [http://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_alrc\\_122\\_2nd\\_december\\_2013\\_.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf).

During the ALRC's review, we noted that there are complex issues associated with these reforms, such as the ability of third parties to make copies for private and domestic use on behalf of individual users. Great care is needed to strike the right balance in allowing innovative new services and fair access to legitimately acquired content in a multi-device environment, without undermining new commercial markets.

As with our general recommendation relating to the copyright framework, we suggest that the Productivity Commission or Federal Government undertake an assessment of the impact of reforms on different stakeholders. Should the Government accept the recommendations and proceed to try and legislate them, further consultation will be needed on the drafting of the provisions.

**Recommendations:**

- **That the Productivity Commission considers whether the recommendations of the ALRC on copyright law and the digital economy should be revisited and clarifies whether this is outside the scope of the inquiry and whether consideration should be given to alternatives to the ALRC's recommendations.**
- **The Productivity Commission should consider whether the recommendations of the ALRC on the introduction of fair use, as well as extending the safe-harbour provision to online service providers, should be revisited; and consideration should be given to alternatives to the ALRC's recommendations.**

## 7. Parallel Imports

The Federal Government has made it clear in its response to the Harper Review that it plans to end restrictions against the parallel importation of books. In its final report, the Harper Panel made Recommendation 13 to end parallel importation restrictions, which they argued would allow greater competition among book sellers. The Review suggested that increased competition would remove an “implicit tax on Australian consumers and businesses” and “promote competition and potentially lower prices for consumers”.

Among our membership, some argue that the expected benefits of removing parallel importing restrictions may be more theoretical than real and that an assessment of the experience in New Zealand, where the ban on parallel imports on books was removed in 1998, and whether the expected benefits such as reduced prices for consumers were realised and if this outweighed the costs.

### **Recommendation:**

- **That the Productivity Commission considers available empirical evidence about the expected costs and benefits of removing the parallel import restrictions on books.**



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