



Australian Government
IP Australia

Submission to the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements

30 November 2015



Delivering a world leading IP system

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Introduction and Summary

IP Australia is pleased to make this submission to the Productivity Commission's inquiry into Australia's intellectual property (IP) arrangements, following the release of the Issues Paper on 7 October 2015. The structure of this submission broadly follows the structure of the Issues Paper. In this submission, references to "IP" and the "IP system" are generally directed at the rights administered by IP Australia (patents, trade marks, designs, and plant breeder's rights), unless otherwise indicated.

IP Australia supports the goals of the inquiry and acknowledges the potential value of broad principles to help guide the future strategic direction of IP arrangements in Australia. It has been some 15 years since the last major review by the Ergas Committee (2000). In the meantime, there have been a significant number of issue-based prescriptive reviews in relation to IP. IP Australia also notes recent major reforms to the IP rights system under the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cwlth) (the Raising the Bar reforms). The full impact of these particular reforms is still to be seen, making it pre-emptive at this time to evaluate in detail. Noting the above, IP Australia endorses the Commission's intention to use this inquiry as 'an opportunity for a high-level and holistic consideration of Australia's IP arrangements.'

As the value of IP in business, trade and investment grows, the importance of a high-performing IP system that is integrated into the global system of IP rights increases. Australia's IP system continues to rank highly in global ratings. In the most recent Global IP Index, Australia ranked fifth globally and was in the top tier across the major rankings (Taylor Wessing 2013). On innovation, the 2015 Global Innovation Index ranked Australia 17th globally (Cornell University, INSEAD and the World Intellectual Property Organization (WIPO) 2015). IP Australia is committed to delivering ongoing improvements in our effectiveness, efficiency and customer service to contribute to increasing the performance of Australia's IP system and national competitiveness. These opportunities for improvement include ensuring IP right holders, particularly small businesses, are able to effectively make use of IP enforcement mechanisms. There is also a potential opportunity, as highlighted by a recent Australian Public Service Commission (APSC) Capability Review, for IP Australia to play a broader role in supporting innovation (APSC 2014). We highlight several international examples in these areas that the Commission may wish to consider.

IP Australia

IP Australia is the Australian Government agency responsible for administering Australia's patents, trade marks, designs and plant breeder's rights (PBR) systems. IP Australia operates as a listed entity within the Industry, Innovation and Science portfolio and is primarily funded by the fees it charges for administering registered rights.

As well as granting exclusive rights under the statutes it administers, IP Australia works closely with the Department of Industry, Innovation and Science to advise the Australian Government on IP policy; provides IP information and education services to business and the broader community to increase understanding of the important role IP plays in innovation; regulates the IP attorney profession; and contributes to bilateral and multilateral negotiations and development cooperation programs to promote a more harmonised global IP system.

IP Australia's corporate vision is for *a world leading IP system building prosperity for Australia*. The vision is supported by a new Strategic Plan, launched in March 2015 (IP Australia 2015a).

IP Australia's primary objective under this plan is to continue to administer the IP system efficiently and ensure its continued relevance for Australia's economic growth. The APSC's recent Capability Review found that IP Australia delivers its core business effectively, is well regarded by stakeholders, both domestically and internationally, and has a capable and committed workforce (APSC 2014).

IP Australia achieved consistently good outcomes and showed high performance in all categories of quality standards for 2014-15 (IP Australia 2015b). IP Australia maintains a quality management system which is ISO 9001:2008 certified. This system includes commitments to meeting acceptable quality levels against those quality standards for our services and products (e.g. examination reports on IP right applications) and timeliness targets for the delivery of our products and services.¹ Through our quality review process we are able to continually monitor, maintain and improve the quality of our products and services.

IP Australia works with professional bodies, business groups and other government agencies and holds regular meetings with our national stakeholder groups to ensure the continuing effectiveness and ongoing improvement of Australia's IP system. IP Australia also works with key groups such as CPA Australia, Engineers Australia and the Export Council of Australia to promote key messages about the value of IP in business decisions and strategy.

Major changes were implemented in 2013 through the Raising the Bar reforms. These reforms sought to strike an appropriate balance between public and private interests and to provide Australia's IP system with a more robust framework to support and encourage innovation. Key areas it addressed were raising standards for patentability; ensuring free access to patented inventions for regulatory approvals and research; simplifying and reducing delays in the patent and trade mark examination and opposition processes; and improving mechanisms for trade mark and copyright enforcement.²

The Raising the Bar reforms also allowed for the incorporation of patent and trade mark attorneys, who provide a valuable service to innovators in assisting and advising on IP protection matters. This change provides attorneys with greater flexibility to practice through a corporate structure, opening up potential efficiencies. Indeed, structural changes have been recently seen in the industry.³ IP Australia is also working with New Zealand on a trans-Tasman patent attorney regime for the qualification, registration and discipline of patent attorneys in Australia and New Zealand. These changes seek to cut red tape and standardise regulation for attorneys, many of whom are already registered in both Australia and New Zealand.

Other recent reforms have included the *Intellectual Property Laws Amendment Act 2015* (Cwlth). This Act provides for the implementation of the Protocol Amending the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property (the TRIPS Protocol) and Australia–New Zealand Single Economic Market IP initiatives. In 2015, IP Australia also consulted on 22 further proposed legislative amendments designed to reduce red tape, by making the

¹ See <http://www.ipaustralia.gov.au/about-us/what-we-do/quality/quality-review-system/> and <http://www.ipaustralia.gov.au/about-us/doing-business-with-us/customer-service-charter/> for further information.

² See <http://www.ipaustralia.gov.au/about-us/ip-legislation/ip-legislation-changes/ip-laws-amendment-act-2012/> for further information.

³ See, for example, Malpass (2015).

Australian patents, trade marks, designs and PBR systems more streamlined, efficient and user-friendly for customers, and to support small business.⁴

IP Australia also engages closely with WIPO to promote streamlined international IP rights administration and the adoption of global standards. Such developments can assist Australian exporters and facilitate trade and investment. Australia is a leading member of the IP community regionally, particularly in relation to the cooperation and technical assistance we provide to other IP offices in the region. These programs aim to build and strengthen the IP systems of Australia's key regional trading partners. Strengthening regional IP systems contributes to efforts that ensure Australian innovators and businesses are afforded strong, consistent and transparent IP protection in export markets in our region.

IP Australia also works with IP offices in other countries and with international and regional organisations to support the development of IP systems and processes around the world. IP Australia continues to be active in multilateral and bilateral IP forums. We support relevant trade negotiations, including the China-Australia Free Trade Agreement (FTA), the Regional Comprehensive Economic Partnership (RCEP) and the Trans-Pacific Partnership Agreement. Looking ahead, the European Commission (EC) recently announced its intention to seek authorisation to negotiate an FTA with Australia (EC 2015a, p. 32).

The growing importance of the IP system

The IP system provides a framework to encourage, reward and protect innovation and creativity. A well-functioning and effective IP system is important to underpin Australia's innovation, trade and investment efforts and the Australian Government's Industry Innovation and Competitiveness Agenda. The IP rights administered by IP Australia support innovation by:

- providing an effective legal framework for protection of innovative products and brands to create a secure environment for investment;
- providing incentives for undertaking research and development;
- promoting the disclosure of innovations and the follow-on generation of ideas; and
- enabling firms to build brand value and business reputation, which in turn contributes to improved consumer confidence.

Australia's IP system is part of the international IP system, an increasingly important component of international trade. IP Australia is contributing to on-going reform of the global IP environment, through normative and non-normative initiatives, to foster global opportunities for Australian innovation.

It is important to recognise the increased focus on the value of IP rights in driving investment and firm growth. This is impacting both commercial practice and the work of government. IP rights are increasingly embedded in the products and services that we use daily. World trade in licences and royalties from IP rights has grown and outpaced world gross domestic product growth over the last two decades (WTO 2014). Another clear indication is that policy makers around the world are dealing with more and more IP issues.

⁴ See http://www.ipaustralia.gov.au/about-us/public-consultations/Consulting_on_proposals_to_streamline_IP_processes_and_support_small_business/ for further information.

The world is changing and, as firms invest in IP, the rights that protect this property are becoming increasingly important. The Organization for Economic Co-operation and Development (OECD) reports that private companies in the United Kingdom (UK) and the United States of America (USA) now invest more in knowledge-based capital than in tangible capital, while countries like Sweden, the Netherlands and Denmark are on that trajectory (OECD 2015, p. 65). Moreover, collateralising commercial loans and bank financing by granting a security interest in IP is a growing practice globally (WIPO n.d. a). Countries such as Singapore, Malaysia, and Denmark have introduced schemes supporting firms to use their IP rights as an additional source of collateral to obtain funding.

The Australian IP system is highly developed and is consistent with the standards provided for in international agreements.⁵ In the context of trade across borders, internationally harmonised approaches to IP protection are beneficial for Australian businesses as harmonisation drives down the transaction costs inherent in seeking IP protection in all necessary markets. This assists Australian firms to engage in global value chain opportunities, noting that the most valuable parts of the chain can often involve IP (Frankel 2014).

While a range of domestic and international factors contribute to demand for IP rights in Australia, the overall trend has been growth. Australian residents file more patents overseas than they do domestically. This reflects the jurisdictional nature of the IP rights system and the size of the Australian market. The *Australian Intellectual Property Report 2015* provides the latest IP statistics and further information (IP Australia 2015c). For countries that are net importers of IP, such as Australia (Department of Industry 2013, p.46), it is especially important that the IP system encourages the flow of innovation, technology and knowledge into the country, giving Australians access to new technology and helping Australian businesses which rely on foreign technology to remain competitive.⁶

⁵ In the 2015 Global Innovation Index, Australia ranked 7th globally for 'Regulatory Quality' (Cornell University, INSEAD and WIPO 2015, p. 167).

⁶ See the discussion in WIPO (2009, ch. 2).

A framework for assessing IP arrangements

IP Australia broadly supports the approach proposed by the Commission. It is consistent with the inquiry's scope to evaluate whether the IP system provides appropriate incentives for innovation and investment whilst minimising the societal costs. IP Australia supports the Commission's high-level and holistic approach to this inquiry to help inform and guide policy making. IP Australia also supports the use of a set of principles to guide investigation and analysis in the inquiry. However, IP Australia suggests an additional principle on strategic use of the IP system for the assessment framework, as outlined below.

The proposed principles of Effectiveness, Efficiency, Adaptability and Accountability in the Issues Paper appear to address a wide range of the costs and benefits associated with the IP system in Australia. The proposed economic approach also appears broadly consistent with the Ergas Committee (2000) review in Australia, and the Gowers (2006) and Hargreaves (2011) reviews in the UK. These reviews generally advocated the importance of an evidence-based approach to policy and the importance of the interaction between IP rights, competition and incentives.

IP Australia acknowledges the need for the IP system to be Effective and maintain an appropriate balance between providing incentives to innovators and the inherent monopoly costs that IP rights bring. The costs and benefits of IP rights are inherently complex and accrue both publicly and privately. The distributional impacts of patent monopolies may differ between different industrial sectors, different sizes of firms (Arora, Ceccagnoli and Cohen 2008) and different socio-economic groups – all of whom may respond to policy variations in fashions difficult to anticipate. For instance, policy decisions that affect the enforceability and accessibility of patents may impact:

- IP product investments in Australia, where approximately one in every nine dollars invested by Australian firms is invested in IP products, of which IP rights protect a proportion (Australian Bureau of Statistics (ABS) 2014; ABS 2015a);
- the number of goods and services attached to IP throughout the Australian marketplace, as well as associated consumer costs that come through a monopoly (Haskel, Goodridge and Wallis 2014; Corrado et al. 2013);
- investment in business expenditure on research and development (R&D), as well as government costs tied to the R&D tax incentive scheme (Arora, Ceccagnoli and Cohen 2008);
- the creation of new goods and services and expansions to industry productivity (Eaton and Kortum 1996);
- the diffusion of technology, both in terms of trading in IP (Eaton and Kortum 1999) and the dissemination of knowledge (Harhoff 2015); and
- other factors which go towards making a market in IP possible.

In its attempt to balance these issues, IP Australia seeks to provide informed advice to government through appropriate stakeholder consultation, marshalling the knowledge and understanding of subject matter experts and conducting econometric analysis on the effects of various IP rights on Australian businesses and the wider economy.

IP Australia also agrees that an Efficient IP system should facilitate trade in IP rights. For example, we have recently launched the *Source IP*⁷ digital marketplace, which is a one-stop-shop for

⁷ <http://www.ipaustralia.gov.au/understanding-intellectual-property/commercialise-your-ip/source-ip-site/>

information sharing, licensing preferences and facilitating contact for IP generated by the public research sector in Australia. This initiative seeks to address a current barrier to collaboration and commercialisation through making information about available public sector IP more accessible.

IP Australia agrees that appropriate Adaptability is an important ingredient for the IP system. The system has been evolving for over 100 years in Australia and will continue to evolve as it is driven by both domestic and international stakeholders, and global technological development. As noted by WIPO, since the onset of the industrial revolution, the IP system has continuously adapted to the demands and challenges of newly emerging technology (WIPO 2015, p. 16). That is, despite the initial high level of potential concern that can occur with the introduction of a new technology, the issues associated with such a technology are usually managed through mechanisms already in place. It is also important to acknowledge that there is an inherent trade-off between adaptability and certainty. Adaptability is further discussed later in relation to some specific types of IP rights and in the international context.

IP Australia agrees that Accountability is an important principle. IP Australia is a strong proponent of evidence-based policy and is committed to open data, econometric analysis⁸ and active stakeholder engagement.

IP Australia conducts extensive consultation as part of its evidence-based policy development process. For example, the Raising the Bar reforms were preceded by an extensive consultation process, commencing in 2009. Seven consultation papers were released, to which IP Australia received over 120 submissions. Additionally, IP Australia conducted face-to-face meetings with stakeholders in each of the mainland capital cities over an eight week period. IP Australia also recently consulted on 22 further proposed legislative amendments designed to reduce regulatory red tape, by making the Australian patents, trade marks, designs and PBR systems more streamlined, efficient and user-friendly for customers, and to support small business. IP Australia received over 20 submissions. This process will also include public consultation on an exposure draft of the legislation and the explanatory memorandum. IP Australia consults with a wide range of stakeholders, including other government departments, academics and researchers, the business community, and the IP attorney profession.

In September 2014, IP Australia published the Intellectual Property Government Open Data (IPGOD), including over 300 million points of administrative data. This data is freely available under a Creative Commons licence. The open data program is continually evolving with further improvements pending, including expanding the data made available and affording greater accessibility to the data by third-parties. IPGOD opens up new opportunities for researchers, policy makers, IP professionals and innovative businesses by enabling a wide range of new research and analysis of IP and innovative activity.

IP Australia is also a consumer of its own data in performing economic research and informing policy. Recent examples of this research include: estimating the value-add of a patent for different industrial sectors in Australia; forecasting the volume of trade mark applications and analysing their import; the impact of grace periods on the incentive value and informational costs of patents; the role of patents in technological diffusion in pharmaceuticals; the role trade marks play in influencing consumer choice; and the drivers, sensitivities and impacts of university-industry collaboration.

⁸ See, for instance, Johnson et al. (2015).

As indicated by this broad and active research program, IP Australia notes that considerable complexity and uncertainties exist in the IP economic research space.⁹ There are a number of factors that can provide indications of the effects an IP rights system may have, and IP Australia would welcome new research and insight to guide policy development.

A proposed fifth principle: Strategic

The Issues Paper asks whether there are other principles that should be considered beyond Efficiency, Effectiveness, Adaptability and Accountability. IP Australia proposes that a complementary and equally important principle is that decisions about the IP system should be Strategic.

The Adaptability principle is similar, but distinct from the proposed Strategic principle. Adaptability, in our reading of the principles, relates to the current settings of the IP system adapting to and absorbing changes. That may be as a response to changing technology or changing social preferences.

The Strategic principle is different to Adaptability in that it asks how IP policy should be framed to achieve the goal of prosperity for Australia. It is proactive in setting the direction of travel. In some areas it may be preferable to create scope for changes (emphasising Adaptability), in other areas we may want a set of principles or rules which we and others follow (as they are more Effective or Efficient for Australia). A Strategic principle would set out the reason as to why and how the Australian Government goes about making changes.

Countries like Singapore and the UK have IP strategies which set out the principles for how the IP system should be organised. They use strategic principles for how IP and IP rights are developed, through domestic activity¹⁰ and their approach to international negotiations.¹¹

The Strategic principle is consistent with the inquiry's overarching objective of maximising the wellbeing of Australians. It is also consistent with IP Australia's corporate vision to have *a world-leading IP system that builds prosperity for Australia* (IP Australia 2015a). We would suggest that the Commission incorporate this principle into its approach to the inquiry.

⁹ See the theoretical discussion and analysis in Stiglitz (2008) and an introduction to the empirical complexities in WIPO (2009, ch. 1).

¹⁰ See, for example, IP Steering Committee (2013, p. 2).

¹¹ See, for example, Hargreaves (2011, p. 25).

Improving Arrangements for Specific Forms of IP

Innovation Patents

IP Australia notes that the Commission has been asked to include the findings and recommendations of the former Advisory Council on Intellectual Property's (ACIP) *Review of the Innovation Patent System*.

The innovation patent system is a second tier patent system introduced in Australia in 2001 to provide patent protection for less inventive and incremental innovations (that would not meet the inventive threshold requirements of the standard patent system). It was specifically targeted at small to medium enterprises (SMEs), whose innovations are often directed at improving, adapting and refining existing technology, rather than generating more substantial innovations.

The policy objective of the innovation patent is to stimulate innovation in Australian SMEs, and in a manner not possible through a standard patent or petty patent (the predecessor of the innovation patent). The innovation patent aims to do this by offering a relatively quick and inexpensive form of IP protection for lower-level inventions when compared to standard patents. The intention is to help encourage SMEs to develop and market these lower-level inventions in Australia.

One of ACIP's chief considerations in its review was whether the system is effective in achieving its stated objective of stimulating innovation in Australian SMEs.

In September 2012, IP Australia conducted a separate consultation asking whether the inventive step standard for innovation patents should be the same as for standard patents. Stakeholder input into this consultation was fed into the ACIP review.

ACIP was unable to find sufficient empirical evidence to enable an assessment of the effectiveness of the innovation patent, and was therefore unable to make a recommendation to support the retention or abolition of the innovation patent system (ACIP 2014). The EC concurrently undertook a study of second-tier patents in the European Union (EU) and came to a similar conclusion to ACIP, in that there was no evidence to indicate the system's impact on innovation in developed countries (EC 2015b).

IP Australia's Office of the Chief Economist, using the new data capabilities of the IPGOD, undertook a comprehensive economic analysis of the innovation patent system (Johnson et al. 2015). This analysis concludes that the innovation patent system is failing to incentivise SMEs to innovate and is imposing an overall net cost on SMEs.

The evidence casts doubt on whether the innovation patent is meeting its policy objectives and suggests that the majority of Australian SMEs gain little value from the innovation patent system, or at least not enough value for repeat use.

ACIP gave this new evidence and findings consideration. In May 2015, ACIP released a statement as a corrigendum to its *Review of the Innovation Patent System* in which ACIP advised the then Minister for Industry and Science that it considers it likely that the innovation patent is not achieving its objective of effectively stimulating innovation among SMEs and the Australian Government should therefore consider abolishing the system (ACIP 2015).

The then Minister for Industry and Science asked IP Australia to consult further on ACIP's recommendation that the government should consider abolishing the innovation patent system. IP Australia has recently sought views from interested stakeholders on:

- the ACIP recommendation that the government should consider abolishing the innovation patent system; and
- any alternative suggestions to encourage innovation amongst SMEs.

Given the increasingly globalised nature of the world economy, the Commission may wish to consider the role a wholly domestic system, like the innovation patent, plays. The Commission may also wish to have regard to the submissions received from IP Australia's recent consultation process.¹² For example, IP Australia would note that some stakeholders consider that the innovation patent system remains a vital part of the economic framework to develop and enhance innovation in Australia (including as an enforcement tool of choice for Australian SME patentees), while also acknowledging the need for amendment of the current requirements for certification and validity.¹³

Standard Patents

In order to be effective and efficient in meeting its objective of supporting innovation, the patent system must strike a balance. It must provide sufficient protection to reward innovation, but not so much protection as to block future or follow-on innovation (cf. Heller 2010). The patent system should also be sufficiently adaptable to accommodate economic and technological change. The patent system has demonstrated considerable adaptability. It has been in operation in Australia for over 100 years and regular updates through legislation and case law, coupled with a technology neutral and largely principles-based approach, has arguably served Australia well.

The Raising the Bar reforms have contributed to the effectiveness and efficiency of the patent system. These amendments raised the standards for patentability including raising the standard set for inventiveness and disclosure of an invention, bolstering the requirement that a patented invention be useful, and increasing certainty in the validity of granted patents. These changes importantly aligned Australia's patent system more closely with those of its major trading partners. As noted above, the full impact and value of these reforms will take some years to be seen. This is particularly so in the case of patents where the legislation allows an applicant to wait up to five years after filing an application to request examination.¹⁴

As noted by the Ergas Committee (2000, p. 16), patentability standards must be accompanied by rigorous examination to ensure that granted patents are strong and hence ultimately enforceable. IP Australia has a strong focus on quality management and the quality of IP rights examination decisions. IP Australia's approach to quality includes the combination of an ISO 9001 certified quality management system, a quality review system and a proactive approach to customer feedback. IP Australia continues to be actively involved in international engagement initiatives that

¹² Available from <<http://www.ipaustralia.gov.au/about-us/public-consultations/Consultation-on-the-ACIP-recommendation-on-the-innovation-patent-system/>>.

¹³ See, for example, Institute of Patent and Trade Mark Attorneys of Australia (IPTA) and International Federation of Intellectual Property Attorneys (FICPI) Australia (2015).

¹⁴ IP Australia also directs applicants to request examination sooner than 5 years after filing under certain circumstances. See <http://www.ipaustralia.gov.au/about-us/what-we-do/facts-and-stats/> for further information.

allow IP offices to share examination work with the aim of increasing the efficiency and quality of patent examination and reducing time and costs for applicants.

When concerns arise around access to patented technology, IP Australia would suggest that these may be addressed through technology-neutral safeguards. By remaining technology neutral, the patent system remains more adaptable to advances in technology. The Ergas Committee (2000, p. 16) concluded that “Australia has on the whole benefited from the adaptiveness and flexibility that has characterised the ‘manner of manufacture’ test”. This test, which considers the eligibility of the subject matter of a patent, has been applied to a wide range of inventions across all technologies.

The *Patents Act 1990* (Cwlth) includes a number of flexibilities and safeguards to ensure access to patented technologies. These include Crown use provisions that enable governments to step in where a patent prevents access to a service provided by the government, and compulsory licensing provisions that prevent a patent owner unreasonably denying access to their invention. These provisions allow the government to intervene if patent rights are being inappropriately exercised to prevent access to a technology. While these provisions have been rarely invoked, their presence is considered to provide an incentive for patentees to provide reasonable access to their inventions.

As part of the Raising the Bar reforms, the Patents Act now includes a statutory exemption to infringement for research activities. The exemption is designed to clarify that research and experimental activities relating to patented inventions are exempt from infringement, whereas commercial activities are not. The intent is to give broad and clear protection to research and experimental activities in order to maximise the potential for research in Australia and encourage follow-on innovation.

IP Australia notes that there may be scope to improve the existing safeguards. For example, the Commission has previously recommended that amendments be made to the Crown use and compulsory licensing provisions of the Patents Act (Productivity Commission 2013).

High Court’s decision in *D’Arcy v Myriad Genetics*

On 7 October 2015, the High Court of Australia handed down its decision in *D’Arcy v Myriad Genetics* [2015] HCA 36 concerning Patent No. 686004.

IP Australia has put a hold on examination of patent applications claiming isolated gene sequences while the full implications of the High Court decision are assessed. Public consultation is underway to ensure that the revised patent examination guidelines appropriately reflect the decision.

IP Australia issued a proposed practice note on 16 October 2015 setting out the Commissioner of Patents’ interpretation of the scope of the Court’s decision (IP Australia 2015d). Revised examination practices and guidelines will be finalised and published in 2015, after which examination of patent applications claiming isolated gene sequences will resume.

Pharmaceutical patents

On 15 October 2012, the then Parliamentary Secretary for Innovation, the Hon Mark Dreyfus QC MP, announced a review of pharmaceutical patents. The final report was published in 2013 (Harris, Nicol and Gruen 2013). The current Government noted the report, and that information in the report may be taken into account when considering future policy. The review raised questions

about the cost and benefits of Australia's extension of term provisions and current restrictions around manufacture for export (MFE)¹⁵. The review also highlighted Australia's obligations under the Australia – United States FTA and the TRIPS Agreement, and that these obligations are relevant to implementation of MFE in Australia. In this context, IP Australia would highlight the use overseas of supplementary protection certificates (SPC) within Europe and, in the future, Canada (as per the EU-Canada FTA). Moreover, IP Australia would highlight that the EC is reportedly giving consideration to an "SPC manufacturing waiver for export purposes to non-EU countries with no SPC protection [that] could allow the EU generics and biosimilars industries both to create thousands of high-tech jobs in the EU and start many new companies" (EC 2015c, p. 75).

Designs

Modern design features such as ergonomics, safety, convenience and visual or aesthetic value, can help manufacturers gain a competitive edge. These features can strongly influence consumer choice in products where aesthetic input is significant (sunglasses, textiles) or where the appearance suggests better function (engineering tools or components). Australia's current designs system provides incentives to produce products that incorporate new and original designs that represent true advances product design. The public benefit is requiring the disclosure of these innovations in a register that is publicly available.

A number of reviews of Australia's designs system have been conducted in recent years. The most recent was ACIP's *Review of the Designs System*, which was published on 31 March 2015.

ACIP's recommendations covered issues such as expanding the duration and scope of design protection, investigating the implications of Australia joining the Hague Agreement, maintaining some aspects of the system in its current form, and technical changes intended to streamline and improve the designs system.

ACIP concluded that it did not have sufficient evidence to suggest a wholesale revision of the role of the designs system in the Australian economy. However, it did report that its review had raised some broader questions in relation to unregistered designs, scope, and impact of technological developments like 3D printing.

IP Australia is presently coordinating the Government's response to ACIP's review. Other agencies being consulted include the Department of the Prime Minister and Cabinet, Treasury, the Department of Immigration and Border Protection, the Department of Foreign Affairs and Trade, and the Department of Communications and the Arts. The Government response is expected to be finalised in early 2016.

IP Australia would also highlight to the Commission that Lim, O'Sullivan and Falk (2014) found that the broader design industry lacked an understanding of IP in general and this informed their opinion of the utility of design rights. Most designers were found to have no knowledge of what aspects of their work was covered by patents, copyright, designs and confidential information. Consequently, ACIP concluded that there was no need to review the underlying rationale for design scope or protection and that general IP education and awareness raising would be potentially more beneficial in this sector.

¹⁵ We note MFE has also been considered previously by the Productivity Commission (2003).

Trade Marks

IP Australia notes that the Commission has been asked to include consideration of the parallel import defence in the *Trade Marks Act 1995* (Cwlth) in its inquiry.

Parallel imports are legitimately produced goods that were manufactured in another country with the authorisation or consent of the IP owner and subsequently imported into Australia by an unauthorised distributor. Unlike pirated or counterfeit goods, parallel imports are genuine goods that were manufactured by the IP owner, or a licensee of the owner. The goods can be sold in Australia in competition with other genuine goods and it is widely accepted that parallel imports increase competition and reduce price discrimination. Government policy has tended to favour allowing parallel importation, with some exceptions.

IP Australia notes that the existing law around the parallel importation of trade marked goods has led to uncertainty and confusion. It is also arguable that section 123 of the Trade Marks Act is not effectively implementing the policy intention of allowing for the parallel importation of legitimate goods.

Section 123 of the Trade Marks Act provides a defence against infringement for the parallel importation of trade marked goods or services. It was intended to provide a statutory recognition of the legality of parallel importation; however, it has been interpreted in ways that narrow its scope and limit the potential for the parallel importation of such goods.

The defence against infringement provided by section 123 only applies if the registered owner of the Australian trade mark is the same entity that applied the trade mark to the goods in the country of export, or consented to its application. Trade mark owners have been able to prevent parallel imports by assigning the Australian trade mark registration to another party, such as their local distributor, or by enacting geographically limited licensing arrangements that bring into question the issue of whether the Australian trade mark owner consented to the application of the trade mark to the goods.

Several independent reviews have considered this issue and recommended clarification or amendment of the Trade Marks Act. For example, the Ergas Committee (2000) recommended that 'the Trade Marks Act be amended to ensure that the assignment provisions are not used to circumvent the intent to allow the parallel importation of legitimately trade marked goods' (Ergas Committee 2000, p. 18). Similarly, the House of Representatives Standing Committee on Infrastructure and Communications recommended 'that the parallel importation defence in the *Trade Marks Act 1995* (Cwlth) be reviewed and broadened to ensure it is effective in allowing the importation of genuine goods' (House of Representatives Standing Committee on Infrastructure and Communications 2013, p. 106).

IP Australia notes that the complexity and uncertainty existing in this area makes it more difficult for potential parallel importers to operate with confidence that their activities will not lead to infringement of a trade mark.

Plant Breeder's Rights

The Commission seeks evidence whether the introduction of PBRs have led to a more profitable agriculture sector in Australia. A primary means of identifying and quantifying the financial benefits associated with PBRs are end-point royalties (EPRs). These are a type of levy on the total grain produced from seeds protected by PBRs. Traditionally, royalties were collected at the point of seed sale, but many breeders now apply EPRs on newly released cereal varieties, calculated on the tonnage harvested by growers. Prior to 2000, 98 per cent of wheat breeding was conducted by the public sector (\$18m per year). In 2015, the majority of wheat breeding is undertaken by the private sector, funded by EPRs, estimated at \$45m per year and growing (Fogden 2015). EPRs are now the primary source of funding for wheat-breeding activities in Australia and, as of 2012, were sufficient to cover breeding costs (Alston and Gray 2013).

IP Australia also notes that the distributional costs and benefits of this specific IP right should also fall into consideration. Notably, Australian agricultural activity is primarily concentrated in rural and regional areas, leading to PBR-based opportunities for regional communities.

In terms of Australia's integration with international agreements, EPRs are consistent with the International Union for the Protection of New Varieties of Plants (UPOV) 1991 Convention. However, the majority of Australia's regional partners are not currently compliant with this Convention. Trade and other benefits are likely to accrue if greater take-up of such schemes occurred in South East Asia.

Australia is currently a considerable net exporter of potential PBR goods, with imports from countries involved in negotiation of the RCEP valued at \$2.8b in 2013 compared with exports of \$10.7b, exceeding exports in manufactured goods, machinery and transport (including all automobiles), and chemicals. This may indicate a strong comparative advantage in Australia's production of potential PBR goods.¹⁶

IP Australia notes that the Commission has taken a view of PBRs, in regard to adaptability to technological change, which is not entirely in line with current practice and the legislation. PBRs are granted for new varieties of plants that are new, distinct and stable: that is, they are granted for the plant variety (i.e. the expression), not the underlying breeding process. As such, the current PBR system does not explicitly preclude any anticipated methods of plant breeding. IP Australia notes that molecular plant breeding techniques (referred to in the Issues Paper, p.24) have existed for at least 30 years – longer than the formal codification of specific PBRs in Australia.

IP Australia also notes that PBRs offer various protections to the rights owner, but do not prevent third parties from using a protected variety to breed further plant variations. In this fashion, the implemented rights system allows innovation from an existing PBR without repercussions for follow-on varieties. This includes new varieties bred through molecular breeding techniques.

¹⁶ Trade values are sourced from the Country and Commodity Pivot Table 2013 provided by the Department of Foreign Affairs and Trade which is available at <<http://dfat.gov.au/about-us/publications/Pages/trade-statistical-pivot-tables.aspx>>. Potential PBR goods comprise goods categories where plant breeder's rights may have an impact on international trade (see Appendix B).

Geographical Indications

Australia protects geographical indications (GIs) through a framework of specific and general legislative provisions, including registration systems, unfair competition and fair trading laws, and the common law tort of passing off.

Australia's GI registration systems seek to provide for proactive, transparent and effective GI protection. Certification trade marks have been the primary mechanism of protection for GIs in Australia for many years, for all products. Many foreign GIs for goods including tea, coffee, cheese, ham and wine are protected as certification trade marks in Australia. Australia also protects GIs for wine under the *Australian Grape and Wine Authority Act* (Cwlth).¹⁷ GIs registered under these systems are published on a publicly available and searchable register, enabling interested parties to ascertain the status of relevant geographical terms in Australia.

Before GIs are protected in Australia, they are advertised for objection purposes. Any interested or affected party can object to the registration of a GI on certain specified grounds under either of the registration systems. These grounds include that the term is, or is contained in, a prior trade mark, or that the term concerned is in common use in Australia to describe the goods.

GIs can be a very effective marketing tool, with their value increasing as consumer recognition grows. They can create expectations and assurances about the quality or characteristics of products and attract a price premium. Restaurant menus and reviews along with lifestyle articles and documentaries show a burgeoning interest in regional produce in Australia across a wide range of goods. There also appear to be significant tourism opportunities associated with growth in the industry. Like other forms of IP, GIs provide a right to suppress misuse, or exclude others from inappropriate use. The action required to stop misuse of unregistered terms can be more difficult and expensive than taking infringement action against unauthorised use of a registered certification trade mark or GI.

In some cases, protection of GIs can act as a barrier to trade in relation to a particular product. Terms may be GIs in one territory but generic terms in another. An example is feta, which is a protected GI in the EU, but a generic name for a type of cheese in Australia and other jurisdictions. Australia cannot export cheese under the name of 'feta' to the EU and, as the EU concludes more trade agreements that recognise feta as a protected term, the number of markets where Australians can sell product labelled as feta continues to narrow.

The protection of generic terms as GIs leads to increased costs for consumers due to lack of competition and can damage the interests of legitimate producers and exporters. For this reason, Australia encourages trading partners to ensure that GI protection regimes are transparent, respect prior trade marks and terms in common use, and provide meaningful opportunities for interested parties to object to protection of GIs.

Copyright

Please note that a specific issue in relation to copyright material is briefly raised in Appendix A.

¹⁷ The Australian Grape and Wine Authority is a statutory authority within the Agriculture and Water portfolio.

The Broader IP Landscape

Institutional Setup

As described above, IP Australia is the agency responsible for administering four IP rights: trade marks, patents, designs and PBR. As well as granting exclusive rights under the statutes it administers, IP Australia works closely with the Department of Industry, Innovation and Science to advise the Australian Government on IP policy; provides IP information and education services to business and the broader community; regulates the IP attorney profession; and contributes to bilateral and multilateral negotiations and development cooperation programs to promote a more harmonised global IP system. As acknowledged by the APSC Capability Review, IP Australia is performing its core regulatory functions well and has contributed greatly to a range of key IP policy outcomes (APSC 2014).

IP Australia operates independently of the Department of Industry, Innovation and Science on financial matters, and with delegated authority on other matters, and recovers more than 98 per cent of its costs by charging fees for its IP rights services.¹⁸ The remaining two per cent is notional interest received on capital reserves. Notably, a significant proportion of fees are paid by international applicants seeking to protect their IP rights in Australia.

Under the Government's Regulation Reform Agenda, each portfolio conducted an audit of the regulatory cost imposed by Government on Australian business, individuals and the community. The estimated regulatory costs exclude Government fees. IP Australia completed its regulatory audit on 30 July 2014, which estimated the regulatory cost of IP Australia's existing legislation and regulation to be \$205m per year. This estimated regulatory cost comprised \$117m for patents, \$74m for trade marks, \$3m for designs; \$0.6m for PBR; and \$10m for the regulation of patent and trade mark attorneys. The employment of patent and trade mark attorneys by applicants for IP rights is a significant component of these regulatory costs. IP Australia has an active program to reduce red-tape,¹⁹ and since the audit we estimate realised regulatory savings nearing \$4m per year primarily through an increased use of electronic correspondence with customers.

Multiple agencies administering rights

As listed in Figure 5 of the Issues Paper, a range of institutions are responsible for allocating, administering and enforcing IP rights in Australia. In addition to those listed in the Issues Paper, other institutions with a role in Australia's IP system are:

- the Australian Competition and Consumer Commission, which assesses the rules for certification trade marks to ensure that they do not constrain competition or exclude legitimate users;
- the Department of Immigration and Border Protection and the Australian Federal Police, which both have an enforcement role; and
- the Department of Agriculture and Water Resources, in relation to certain aspects of PBR and GIs.

¹⁸ In 2014-15, fee revenue across the four IP rights was \$118.6m (patents), \$64.2m (trade marks), \$3.5m (designs), and \$1.3m (plant breeder's rights) (Department of Industry, Innovation and Science 2015, p. 285).

¹⁹ See http://www.ipaustralia.gov.au/about-us/public-consultations/Regulation_reform-Cutting_red_tape/ for further information.

IP Australia also highlights the recent move of copyright responsibility to the Department of Communications and the Arts, and our intention to work closely with them.

IP Australia works with the Department of Foreign Affairs and Trade, which takes the lead in many international fora and in the negotiation of plurilateral and bilateral trade agreements. IP Australia has the lead role in relation to WIPO and the IP Experts Group of the Asia-Pacific Economic Cooperation (APEC). IP Australia works closely with these institutions in administering its IP rights and providing advice to government.

IP Australia would like to highlight that in Figure 5 of the Issues Paper, IP Australia is incorrectly described as administering post-grant patent opposition proceedings. IP Australia administers pre-grant opposition proceedings for patents, as well as pre-registration opposition for trade marks and pre-grant objections for PBR.²⁰

As discussed above, IP rights in Australia are currently managed by multiple agencies. This is not an obstacle to a well-functioning IP system, but requires relevant agencies to collaborate effectively. IP Australia would note that the approach to IP rights management varies across the world. For example, in the UK, USA, and Singapore, IP rights management and policy (including copyright) is vested in one entity and managed through a national IP office.²¹ While in Canada, New Zealand, and Germany, for example, a less centralised approach is taken.

IP Australia has a demonstrated capacity for policy and delivery functions. The recent Capability Review, undertaken by the APSC, highlighted IP Australia's strength in the core objective of administering rights and its ability to deliver quality analysis and policy advice:

As rights regulator, IP Australia over recent years has established a track record of examining IP rights within set timeframes and to defined quality standards. As a policy adviser, IP Australia has helped to deliver key policy outcomes through the revision of IP legislation and the provision of IP advice to inform whole-of-government policy positions, such as during free trade agreement negotiations (APSC 2014, p. 5).

The technical nature of the subject matter, and the complex international context of IP policy work, causes policy makers to work closely with subject matter experts. This is consistent with the Commission's Accountability principle, in that it ensures IP policy is technologically-informed.

Ability to provide value-added services

The protection of IP rights can be a complicated process for many applicants and awareness of IP in the wider community is not generally high. IP Australia therefore takes a proactive approach to public education and awareness activities and we particularly target sectors that can benefit most from gaining an increased understanding of IP. For example, we publish a regular small business magazine, maintain a comprehensive and accessible website, and we have developed the Dream Shield initiative to assist indigenous communities to manage their IP (see Case Study). We also run workshops for the start-up community that help attendees to understand the benefits of patent

²⁰ For designs, opposition proceedings are not available; however, third parties may request re-examination or revocation of a certified design.

²¹ These institutions are usually located within ministries related to the economy, as with the Under-Secretary of Commerce for IP in the USA or Minister of IP in the Department of Business, Industry & Skills in the UK.

protection, research and develop a patent application and maximise their brand through the use of trade marks.

IP Australia has implemented an initiative designed to assist SMEs in filing trade mark applications, known as TM Headstart.²² This pre-application service can save the applicant time and money by giving them an early assessment of the prospects of their application's success prior to filing their trade mark application. The applicant can then make an informed decision about whether to file the application as it is, amend it or not file it at all. The majority of TM Headstart applicants are individual business owners or SMEs, who file their own applications without the assistance of an IP professional. Applications that are filed through this service typically have a better examination outcome than those filed without any assistance, since issues can be caught at an early stage.

As acknowledged by the Issues Paper, IP is increasingly important to global value chains, and by extension, international trade. To take advantage of such opportunities, Australian businesses should have access to reliable and cost-effective advice on IP. While noting the importance of professional IP advice, there may be a greater role for government to provide services and advice to business on IP. IP Offices in other countries such as the UK have a greater role in providing value-added services than IP Australia, such as advice clinics, mediation, and validity and infringement opinions (UKIPO 2014a). These services are intended to be used as a complement to professional IP advice, and are designed to be of particular value to SMEs.

Case Study: Dream Shield

IP Australia's indigenous engagement program 'Dream Shield' was launched in 2010, following consultation with an eminent indigenous expert panel to assist indigenous business owners to manage their IP. The 'Dream Shield' brand has grown to become nationally recognised as an important IP education and information resource package for indigenous businesses.

'Creative industries' based businesses account for a very large percentage of self-employed indigenous individuals and groups. The market for items such as authentic indigenous art, crafts, cultural tourism, fashion and dance is booming and along with this comes the issue of IP mismanagement and potential theft, particularly in relation to copyright and moral rights.

A recent review suggested that the inclusion of copyright and moral rights material was necessary to complete the package and to meet the specific needs of indigenous businesses particularly within the creative industries sector. This sector has been identified as being vulnerable in terms of their low levels of IP awareness resulting in economic disadvantage and lack of attribution.

Following consultation with the Attorney-General's Department and the Office of the Arts, Alison Page, a prominent and high profile indigenous media personality, was engaged as the presenter and spokesperson for this new aspect of Dream Shield.

The chosen example involved the Warlukurlangu Artists group from Yuendumu in the Northern Territory, who successfully entered into a commercial arrangement with a Melbourne-based fashion designer. This example shows the progress from creation of the copyright material through to commercial success for the Warlukurlangu community.

²² See <http://www.ipaustralia.gov.au/get-the-right-ip/trade-marks/apply-for-a-trade-mark/tm-headstart-pre-application-service/> for further information.

Revenue model

IP Australia, as a non-corporate Commonwealth entity under the *Public Governance and Public Accountability Act 2013* (Cwlth), is a cost-recovery agency subject to the Australian Government Charging Framework. The APSC Capability Review found IP Australia was 'a better practice example of how such an agency should operate' (APSC 2014, p. 31). However, the review team also considered that more flexible options for financial management, including capital planning over the four-year pricing cycle, would give management more capacity to invest in business improvements that raise the efficiency of the agency within the pricing-cycle period.

Under the Australian Government's Charging Framework, cost recovery fees should reflect the efficient unit costs of a specific product or service. Due to the unique business model that IP Australia operates within (for example, patents have a lifecycle of 20 years), it is impractical to cost recover at the activity level. Rather IP Australia recovers the full costs of each broader activity group (for example, examination) over the life cycle of the right. This approach supports the government objective of fostering innovation, while allowing costing and fee setting for a particular activity in an accurate and transparent manner.

The clearest example of this approach is the process of costing and fee setting for a patent renewal. Patent owners who wish to retain their rights over an invention must pay annual renewal fees. Processing a patent renewal is a relatively inexpensive transaction and IP Australia charges more for the renewal than the cost of processing it. However, IP Australia charges less for the application and examination than it costs and seeks to recover those costs across the total life cycle of the IP right, including in the renewal phase. This is a key innovation promotion principle of the IP system in Australia, and it is common in other international jurisdictions.

By deferring some of the total transaction cost to the renewal phase of a patent's lifecycle, fees can be kept lower in the formative years where most of the transaction costs are incurred and the applicant has generally not yet established an income stream from the patent. In addition, charging progressively higher renewal fees with increasing age of the granted right forces applicants to make an economic decision about their intention to retain their monopoly rights. This fee structure encourages inventors to continue patent protection only when economically justified, as acknowledged by the Ergas Committee (2000).

IP Australia reviews its fees every four years to ensure that we are setting fees that are consistent, transparent and cover the costs associated with administering the IP rights system. IP Australia is currently undertaking such a review,²³ with stated objectives to:

- maximise innovation in Australia through a fee structure that promotes the economic value of IP rights;
- explore options to simplify and streamline IP Australia's current fee structure;
- ensure fees remain internationally competitive and explore options to harmonise our fee structure with other IP offices globally; and
- maintain the financial sustainability of IP Australia, with a focus to delivering cost effective IP products and services.

²³ See <http://www.ipaustralia.gov.au/about-us/news-media-and-events/latest-news-listing/Have-your-say-on-our-fee-structure> for further information.

As noted in the Issues Paper, the granting of a temporary monopoly creates some private benefit to the innovator and simultaneously imposes some cost upon Australian society. However, it is difficult to compare these costs and benefits, especially the spill-overs.²⁴ The benefits received by innovators are likely to vary across technological sectors (e.g. pharmaceutical or electronics) and firm size (e.g. SME or multi-national), as do the costs imposed to society (e.g. health care compared with gambling) (Arora, Ceccagnoli and Cohen 2008; Arora and Athreye 2012; Jensen, Thomsons and Yong 2012).

Enforcement

IP Australia agrees with the description set out in the Issues Paper on the role of enforcement mechanisms in the IP system. The IP system does not operate in isolation – enforcement is a vital part of determining the effectiveness of IP rights. As suggested by questions posed in the Issues Paper, the IP enforcement regime must also take into account broader policy considerations relevant to areas such as criminal law and the judicial system.

IP Australia works to ensure that the IP enforcement regime is effective, accessible and adapts to changing conditions. For example, legislative amendments in recent years introduced changes to remedies and criminal offences for trade mark infringement. The jurisdiction of the Federal Circuit Court (FCC) has also been extended to include trade mark, design and PBR matters. The FCC was established in 2000 (previously the Federal Magistrates Court) to provide a simple and accessible alternative to litigation in the Federal Court of Australia and to relieve the workload of this court. The FCC is directed by legislation to operate informally and flexibly, and to use streamlined procedures.

Procedures under the Notice of Objection scheme for copyright and trade marks were also modified with significant results. Under this scheme, a trade mark or copyright owner can request that the Department of Immigration and Border Protection prevents infringing goods from being imported into Australia. ‘Since the new scheme was introduced, 99.9 per cent of seized goods suspected of being counterfeit have resulted in forfeiture of the goods—court ordered, voluntary or deemed. In contrast, before the changes only 25 per cent of seizures of counterfeit goods led to forfeiture’ (Australian Customs and Border Protection Service 2014, p. 38).

IP Australia also administers opposition processes that enable third parties to oppose the grant or registration of patents, trade marks and PBRs. While a large number of OECD countries employ a post-grant opposition system for patents (ACIP 2010a), recent legislative amendments were made to make the resolution of patent (and trade mark) oppositions at IP Australia quicker and less expensive. In particular, the reforms made it more difficult to obtain extensions of time during oppositions, reducing opportunities for parties to intentionally delay proceedings.

Despite the improvements outlined above, there remains a long-term issue with IP enforcement and whether IP right holders, particularly SMEs, are able to effectively make use of IP enforcement mechanisms. Anecdotal evidence indicates that smaller IP stakeholders in Australia find it too hard to enforce their IP rights due to the expense and uncertainty of IP litigation. This is particularly challenging for SMEs operating globally.

²⁴ See Griliches (1998).

If the Commission considers that evidence established through this inquiry justifies changes, there are a range of options to consider that could reduce the cost and increase the accessibility of IP enforcement (at home and abroad), particularly for SMEs.

Specialised IP Court or Tribunal

In this respect, we endorse the Commission's intention to examine international approaches including the UK Intellectual Property Enterprise Court. This court has been found to have had success in improving IP dispute resolution, particularly for SMEs (UKIPO 2015). It provides a small claims track, applies modest damages and costs caps and actively case manages IP disputes with a cost-benefit based approach.²⁵

The Issues Paper describes the potential benefits of specialised courts. The Commission could also consider the role of administrative tribunals that specialise in IP. The Copyright Tribunal of Australia is such a body with jurisdiction including copyright statutory licences and collectively managed voluntary copyright licences. The policy rationale for this tribunal is not applicable to all IP disputes and the parties in cases heard have not generally been SMEs. Nevertheless, this tribunal could be analysed and compared to similar tribunals in other countries to inform consideration of a specialist IP tribunal. ACIP has also considered the establishment of tribunals for patent and PBR matters (ACIP 2010a; ACIP 2010b).

More generally, the Commission could consider the utility of a more proactive level of case management of IP court matters. The Federal Court of Australia employs various forms of case management, including the individual docket system, assisted dispute resolution and fast tracking of less complex IP matters not involving patents.

Alternative Dispute Resolution

Referrals to Alternative Dispute Resolution (ADR) are part of the procedures of bodies such as the Federal Court of Australia. The Commission could consider whether IP Australia should have a role in providing associated services in this area. For example, IP Australia could use its expertise to assist firms through affordable access to a non-binding opinion on validity (e.g. the likelihood that a patent will be issued) and infringement of IP rights. The UK IP Office offers this service to help SMEs negotiate a settlement or decide whether to proceed with full legal proceedings (UKIPO 2014b). The UK IP Office also offers a mediation service for a range of IP disputes (UKIPO 2014c). A number of IP offices in other jurisdictions have also incorporated the option into their proceedings for parties to make use of ADR services offered by WIPO's Arbitration and Mediation Center (WIPO n.d. b). Such services also require appropriate management of any real or perceived conflicts of interest. IP Australia notes that it already has relevant experience in managing such issues, for example through the provision of both examination and opposition proceedings.

Initiatives to assist in IP enforcement abroad

Existing services such as those offered by WIPO could be further advocated to SMEs, especially for IP enforcement overseas. The WIPO Arbitration and Mediation Center services include mediation, arbitration, expedited arbitration, and expert determination to help parties settle their

²⁵ Where issues raised by a party can only be progressed if the court decides the issue is significant enough to justify the expense of proceeding to a full argument on the issue.

domestic or cross-border IP and technology disputes out of court. The Center also offers domain name dispute resolution services.

A number of other jurisdictions have introduced IP Attachés to help their local businesses operate and protect their rights in key markets. The UK Government recently conducted a review of their IP Attaché network which suggested that it is highly valued by business (UKIPO 2014d). Such a service may also be useful to assist Australian businesses when doing business overseas.

IP insurance

The expenses involved in prosecuting a trade mark or patent action in the Federal Court or FCC (taking into account the cost of legal and expert fees) can be prohibitive for SMEs. IP insurance provides a mechanism to cover legal costs of enforcing IP rights. However, these expenses are also reflected in high annual premiums of such insurance (typically 10 per cent of the contingency insured against) which can also be prohibitive for SMEs.

The International IP Landscape

International IP organisations

As the specialised United Nations agency responsible for IP, WIPO is uniquely situated to provide technical assistance and capacity building to developing and less developed countries. It also provides extensive awareness building activities. WIPO retains a central role in the international IP system.

WIPO is the pre-eminent multilateral body for IP norm-setting and is one of the most successful multilateral bodies in terms of treaty making in recent times. This is evidenced by the conclusion of major multilateral IP treaties (e.g. the Beijing Treaty on Audio-visual Performances, in 2012, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, in 2013), with several treaties under negotiation (e.g. the Design Law Treaty, the Broadcasting treaty and the work on international instruments on Genetic Resources, Traditional Knowledge and Folklore).

WIPO has many additional functions that are increasingly relevant in the globalised economy. It administers global IP systems and supporting infrastructure, which allows businesses to seek IP rights efficiently in many markets. These global IP services, including the Patent Cooperation Treaty (PCT) and the Madrid System (for the international registration of trade marks), are heavily used by Australian businesses seeking IP rights abroad and are the main routes through which new IP is imported into Australia.

Other bodies in the international IP landscape that are of particular relevance to Australia are the WTO, the Association of Southeast Asian Nations (ASEAN) which has a working group on IP cooperation, and APEC.

The area of IP administration is dotted with global agreements²⁶ and cross-national filing systems to allow offices to manage the growing number of applications for rights that are filed in multiple jurisdictions.²⁷ The practices and decisions of the five largest IP offices in the world (the 'IP5': US Patent and Trademark Office, European Patent Office, Korean IP office, Japan Patent Office and

²⁶ See, for example, <<http://www.wipo.int/treaties/en/>>.

²⁷ See, for example, <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_econstat_wp_12.pdf>.

the State IP Office of the P.R. China) have, for obvious reasons, a driving influence on what other offices do. To further our shared agendas in WIPO and other areas, IP Australia has joined with the IP Offices of Canada and the UK to form the Vancouver Group of similar mid-sized IP offices.

The work of the Vancouver Group²⁸ is to facilitate sharing of information and experiences on common issues, to inform best practice behaviour and improve the efficiency of office operations. A focus of the group has been work sharing in patent examination, which relies on access to examination reports across offices. To facilitate this, the Vancouver Group worked with WIPO to develop the WIPO Centralised Access to Search and Examination (WIPO CASE) system. Following a successful pilot stage within the Vancouver Group, WIPO CASE is now becoming a global examination tool with 19 offices participating in information sharing.²⁹

A separate, but related, initiative IP Australia has promoted is the Global Patent Prosecution Highway (GPPH). The GPPH is an initiative which allows patent applicants to request accelerated examination in one office based on the same application being granted in another office.³⁰ This allows Australian applicants to access foreign patent offices quickly and efficiently (Webster, Palangkaraya and Jensen 2014).

Australians interact with the global IP system

Over the past decade Australian private investment in IP has increased an average of seven per cent annually. In 2013–14 private investment in IP and housing grew two per cent and five per cent respectively (ABS 2015b). In comparison, private investment in machinery and equipment, and non-housing construction declined. Australian investment in IP products was \$47.8 billion (private investment was \$38.5 billion). Data from the OECD shows firms leading the way in innovation invest more in IP and have done so for many years. Typically, these leaders in innovation operate more in the international value chain (OECD 2007).

Australian entities are participating in the international value chain, innovating in Australia but outsourcing the production. Australia's amalgamation into the international value chain is represented by a net export of intermediate goods (Kelly 2014). This indicates that Australian intermediate goods are used abroad in the manufacture of goods which are then exported to other countries (and which may be imported back into Australia) (IP Australia 2015c). Global trends indicate that entities are outsourcing activities with low value add such as production and assembly, to focus on high value add such as improving efficiency and reducing costs via research and development (WIPO 2015). According to the WTO and the OECD, entities shift towards activities with increased value add as an economy transitions to a knowledge-based economy (WEF 2012).

Australian residents file more patents overseas than they do domestically, reflecting the jurisdictional nature of the IP rights system and the size of the Australian market (IP Australia 2015c). IP rights are only enforceable within the jurisdiction in which they were granted. Consequently, if an applicant wants to protect their IP in different markets then they must submit applications for multiple jurisdictions. This results in a system in which applications are submitted

²⁸ See <http://www.ipaustralia.gov.au/about-us/international-activity/vancouver-group/> for further information.

²⁹ As of October 2015 there were 19 countries sharing information. See <http://www.wipo.int/case/en/> for further information.

³⁰ See <https://www.jpo.go.jp/ppph-portal/globalpph.htm> for further information.

across multiple countries for a single invention. This is facilitated by the PCT and the Paris Convention for the Protection of Industrial Property.

This can be clearly seen in the number of patent applications filed by Australians in other jurisdictions as reported by WIPO. In 2013, Australians filed three times as many applications abroad than they filed domestically. Specifically, 9,012 patent applications were filed abroad, an increase of three per cent from 2012, compared to 3,061 domestically.

The major destinations for these applications were the USA at 41 per cent, the European Patent Office (nine per cent) and China (seven per cent). These destinations offer access to the largest markets and often receive more applications than destinations with smaller markets. In 2013, these destinations received 57 per cent of Australian applications filed abroad and 68 per cent of all filings globally.

In 2009 Australia's exports to the USA in value added terms was nearly double its share in gross terms (OECD 2013, p. 2). A large proportion of these Australian exports represent firms that invent in Australia, manufacture overseas and sell their products abroad. It is this exporting process that drives Australian firms, such as wholesale trade entities, to invest in IP.

In 2012 and 2013 trade mark applications filed abroad by Australians steadily increased,³¹ exceeding the global growth in applications reported by WIPO.³² The growth in Australian applications reflects the greater global demand for trade marks. The digital marketplace has increased the importance of brand reputation, exporting brands to a greater number of countries and increasing the need for legal protection.

The top three filing destinations for Australian trade mark applicants in 2013 were the USA, China and New Zealand. These destinations received 50 per cent of applications filed abroad by Australians.

Australia supports the global IP system

Australia's strategic goals in the international environment have an overarching focus on on-going reform of the global IP environment, in order to foster global opportunities for Australian innovation. Australia works with international partners to influence IP systems, in order to assist Australian innovators and business to make the most of their IP, to promote international competitiveness, and to facilitate trade and investment. IP Australia's international priorities and activities underpin IP Australia's corporate vision for *a world leading IP system building prosperity for Australia*.

Australia engages at the multilateral level, at a regional level and at a bilateral level to promote streamlined international IP rights administration and the adoption of global standards.

Australia is an active participant in WIPO and the WTO and has been able to influence the nature and direction of IP globally through development of multilateral IP conventions and agreements. Through its participation in WIPO, Australia has contributed significantly to norm setting, global services for protecting IP, capacity building, awareness raising of IP and its benefits, and dissemination of information on specific IP applications and granted rights. Through its membership of the WTO, Australia influenced the development of the TRIPS agreement and its

³¹ Australian trade mark applications filed abroad increased 10 per cent in 2013, to 16,267 filings.

³² In 2012 and 2013 global trade mark applications grew 6.5 per cent and 7.6 per cent respectively.

implementation and interpretation. The TRIPS agreement also includes obligations for developed countries to provide technical assistance. Australia reports on its technical assistance activities through the TRIPS Council.

Australia works to influence the design, development, coverage and quality of IP systems in partner countries and IP-related activities in multilateral fora (including WIPO, WTO, UPOV, and the APEC forums) through negotiations as well as cooperation and capacity-building activities.

Australia supports the multilateral system because multilateral norm-setting outcomes potentially have greater impact and significance for Australian businesses seeking to trade in a wide range of foreign markets. However, the negotiation of multilateral treaties is complex and can be slower than bilateral or plurilateral treaties.

In addition to norm-setting activities, IP Australia also works with WIPO and has strong partnerships with a range of other IP offices to enhance practices, procedures and quality in granting IP rights through cooperative and collaborative means. This activity enables us to influence development of the international IP system but also, through shared learning, assist in improving the efficiency and quality of our own work.

A key capacity building program is the WIPO-Australia Funds-in-Trust (FIT) program. Through the FIT program IP Australia collaborates with the Department of Foreign Affairs and Trade and WIPO to deliver a range of innovative projects to help build capacity and address gaps in IP systems in developing and least developed partner countries. The FIT program forms part of the Australian Government's broader aid-for-trade strategy, which aims to foster sustainable economic growth and prosperity and reduce poverty in the Indo-Pacific region.

Through FIT, the ASEAN–Australia–New Zealand FTA Economic Cooperation Program, and through bilateral cooperation, we work closely with IP offices in developing countries, particularly in the Indo-Pacific, to help build the capacity of their IP systems, including through examiner training (see Case Study). Examples include hosting training workshops for the examination of specific types of trade marks, administering a training program for patent examination and providing expert training to partner countries that are establishing or reviewing their IP institutions.

Cooperation activities benefit the partner countries by increasing their capacity to participate in the global economy by assisting with the development of appropriate IP legislation as well as developing the institutions, practices and procedures that form the IP system in the target market. This international engagement also provides useful insights into the operation of the partner country's system, in turn increasing certainty for Australians seeking IP rights in those countries.

Case study: Regional Patent Examination Training Program (RPET)

The ASEAN Economic Community covers a population of over 600 million with a combined market of some US\$3 trillion. The ASEAN Strategic Action Plan (2016-2025) includes a focus on improving IP services and networks and IT systems. This provides a significant opportunity for Australia to support development of IP systems in the Indo-Pacific and maintain a key role in the region. This work contributes to Australia's broader economic diplomacy efforts to support private sector growth, facilitate trade and investment, and promote international competitiveness to enable the private sector to seek out cost-effective and more profitable ways of doing business.

RPET is a modern, comprehensive and intensive competency based online training program. It is based on IP Australia's existing training framework, with a focus on search and examination under the PCT. RPET is delivered to ASEAN members under the work program of the ASEAN-Australia-New Zealand Free Trade Agreement.

The program uses various innovative learning methods such as virtual lectures, one-on-one mentoring and online communities of practice facilitated by experienced IP Australia examiners.

What does RPET aim to achieve?

RPET aims to build the patent examination capabilities of participating offices by:

- improving the competency of examiners to conduct search and examination to international standards (PCT standards);
- embedding learning into the workplace; and
- providing the ability to align domestic practices with international standards.

Helping to enhance the consistency and quality of patent examination in other offices will over time contribute to greater confidence of IP rights that are granted. This can lead to increased business confidence and in turn facilitate trade and technology transfer in our region.

Formulation of Australia's policy position for international negotiations

IP Australia contributes to the formulation of Australia's IP policy position for its multilateral, plurilateral and bilateral negotiations, including those for Australia's FTAs, in conjunction with other interested Australian Government agencies³³ and industry stakeholders.

In a similar way to that in which it develops policy within the domestic sphere, IP Australia develops its policy positions for international negotiations by considering a number of factors, including:

- the nature and importance of the problem the policy is seeking to address;
- existing domestic legislation and practice;
- the concerns, desires and priorities of all relevant stakeholders;
- Australia's obligations under its existing agreements, and its ambitions for those agreements that are under negotiation;

³³ These include: the Department of Foreign Affairs and Trade, Attorney-General's Department, Department of Agriculture and Water Resources, Department of Communications and the Arts, Department of Health, Department of Immigration and Border Protection, Department of Industry, Innovation and Science, the Treasury.

- existing obligations (multilateral, plurilateral, bilateral, FTA) for parties with which Australia is in discussions, or in negotiation; and
- consideration of the optimal policy outcome for Australia, potential constraints to achieving that outcome, and reasonable alternatives.

In undertaking its analysis, IP Australia:

- identifies the likely impact on legislation and practice and the consequent effect on stakeholders, including users of the IP system and the public;
- assesses the short, medium and long term effects of adopting, or not adopting, a particular policy position, view or perspective;
- undertakes economic modelling, where appropriate, to estimate the likely impact of policy and legislative changes that are under consideration;
- engages with relevant bodies and stakeholders to understand their sensitivities, priorities and preferences;
- considers and assesses the interplay between Australia's obligations in the multilateral, plurilateral and bilateral treaties and conventions to which it is a party;
- identifies the preferred approach to achieve its objectives (multilateral, plurilateral or bilateral); and
- assesses whether it can most effectively achieve its objectives through existing multilateral platforms.

Where appropriate, Australia seeks to align its IP arrangements with those of our major trading partners, to provide fertile ground for foreign direct investment and to make foreign markets more accessible and secure for our exporters. However, any decision about whether it is in Australia's best interest to engage on IP within an international negotiation is made on a case-by-case basis.

In making those decisions, Australia considers, amongst other things, whether:

- existing IP arrangements sufficiently serve current and potential future Australian interests;
- Australian IP rights holders have sufficient access to foreign markets, and whether they could be provided with greater certainty about their IP rights in those markets;
- the transaction costs for Australian IP rights holders seeking to enter foreign markets are an existing barrier that could be reduced through better alignment of standards and systems and the adoption of best practice;
- including an IP chapter would support achieving the overall objectives of the agreement;
- Australian intellectual capital is sufficiently captured and protected in target markets; and
- the inclusion of IP would promote an environment that would increase technology transfer and encourage two-way trade and investment.

Contemporary FTAs often comprise a broad package of trade measures. As such, it can be difficult to accurately quantify the benefits derived from the IP provisions included in FTAs in isolation from other FTA outcomes supporting increased trade and investment. IP Australia has recently increased its capacity to undertake economic work to help inform the analysis of proposed FTA provisions.

The IP chapters of FTAs that Australia has negotiated include obligations to join WIPO and its treaties, further enhancing the multilateral system. The Minister for Trade and Investment, the Hon Andrew Robb AO MP, has stated that bilateral, regional and plurilateral trade agreements, "if well-designed, encourage domestic structural change and make it easier for countries to enter multilateral agreements."

IP Australia's view is that inclusion of IP chapters in FTAs should be considered by Government on a case-by-case basis, as is currently the case. FTAs can be a useful avenue, for example to address IP standards in a regional context. IP Australia also acknowledges that FTA negotiations are just one of a number of avenues available to achieve international reforms.

Appendix A – Providing copyright material

IP Australia notes that the Commission has been asked to include consideration of the Australian Law Reform Commission's (ALRC) Copyright and the Digital Economy report in its inquiry.

As noted in the Issues Paper, IP Australia is not responsible for administering copyright. However, as part of IP Australia's role in making decisions about whether IP rights should be granted, we often need to rely on the disclosure of material subject to copyright, such as journal articles. Access to this material is important for applicants and members of the public in general to fully understand the reasons for such decisions made by IP Australia. This is important for transparency in decision-making as described in the Issues Paper in relation to the Accountability principle.

IP Australia's submission to the *Copyright and the Digital Economy* review details the issues we encounter in dealing with copyright over this material (IP Australia 2013). In its report, the ALRC considered that issues such as these should be addressed by Parliament legislating to require public access to such material if the Parliament considered it was in the public interest (ALRC 2013, p. 347).

Appendix B – Potential PBR goods

Below is a list of categories identified by IP Australia as potentially including PBR goods (numbers relate to Standard International Trade Classification (SITC) category):

SITC Category

041 Wheat

042 Rice

043 Barley

044 Maize

045 Other cereals

046 Wheat flour

047 Other cereal flours

048 Cereal preparations

054 Vegetables, f.c.f.

056 Vegetables, prepared or preserved

057 Fruit & nuts

058 Fruit, prepared or preserved

059 Fruit juices

061 Sugars, molasses & honey

062 Sugar confectionery

074 Tea & mate

075 Spices

081 Animal feed

222 Oil-seeds & oleaginous fruits, soft

223 Oil-seeds & oleaginous fruits, hard

265 Other vegetable textile fibres

292 Crude vegetable matter, n.e.s.

411 Animal oils & fats

421 Fixed vegetable oils & fats, soft

422 Fixed vegetable oils & fats, hard

431 Other animal or veg oils, fats & waxes

531 Synthetic organic colouring

532 Dyeing & tanning extracts

533 Pigments, paints & varnishes

551 Essential oils & perfumes

592 Starches, inulin & wheat gluten

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