

PRODUCTIVITY COMMISSION SUBMISSION Intellectual Property Arrangements

The Issues Paper raises a number of basic fundamental points that have been covered by the research and work of many other institutions, bodies and organisations.

A considerable body of publications, such as those produced by the Intellectual Property Institute of Australia¹ (IPRIA), the Oxford Intellectual Property Research Centre², the Innovation and Intellectual Property Research Group³ and others⁴, have addressed the Effective requirement of IP. It is clear private entities would never invest in developing IP at the level required to enhance the well being of Australians without the limited exclusivity afforded by IP rights. Reduction in protection gives rise to a corresponding reduction in investment. Reduced investment by private actors would need to be replaced by Government investment to achieve the same outcomes.

Efficiency in relation to the patent system was addressed in the wide ranging consultations that were undertaken and culminated in the passage of *Raising the Bar Act* reforms, which focused on getting the balance right. The reference to trade secrets in Box 4 illustrates a mistaken understanding of IP rights and how they are used. A possible action for breach of confidentiality does not protect inventions being adopted by competitors, particularly inventions that are sold and publicly accessible. Only patents provide complete exclusivity for a defined product or process for a limited term, in return for the secrets being widely published for access by others (such as on Google Patents⁵).

The patent system has proved to be Adaptable to accommodate technological change. ACIP's Review of patentable subject⁶ wisely concluded the current test for patentable subject matter as applied by the courts in Australia is the best one available to us. This has allowed the High Court in the recent *Myriad* decision⁷ to impose limits on the patent protection available for the results of genetic research and the Full Federal Court in *Research Affiliates*⁸ to exclude patent protection for business methods.

Issues associated with Enforcing IP rights could be addressed by the introduction of a specialist IP Court with a cap on monetary relief and cost awards, such as the Intellectual Property Enterprise Court (IPEC)⁹ in the UK. This would be an additional forum to those currently available.

¹ <http://ipria.org/>

² <https://www.law.ox.ac.uk/content/oxford-intellectual-property-research-centre> and Helmers C and Rogers M, Innovation and the Survival of New Firms across British Regions, University of Oxford, Department of Economics, No. 416, December 2008

³ <http://www.ip-research.org/>

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http://www.unido.org/fileadmin/user_media/Publications/Pub_free/Role_of_intellectual_property_rights_in_technology_transfer_and_economic_growth.pdf and

<http://www.ipwatchdog.com/2014/05/02/the-economic-case-for-strong-protection-for-intellectual-property/id=49376/>

⁵ <https://patents.google.com>

⁶ <http://www.acip.gov.au/reviews/all-reviews/review-patentable-subject-matter/>

⁷ *D'Arcy v Myriad Genetics Inc* [2015] HCA 35
(<http://www.austlii.edu.au/au/cases/cth/HCA/2015/35.html>)

⁸ *Research Affiliates LLC v Commissioner of Patents* [2014] FCAFC 150
(<http://www.austlii.edu.au/au/cases/cth/FCAFC/2014/150.html>)

⁹ <https://www.gov.uk/guidance/take-a-case-to-the-intellectual-property-enterprise-court>

International obligations require Australia to maintain a prescribed level of IP rights so Australia provides the same level of protection afforded to creators within its major trading partners. Harmonised IP protection facilitates global trade, and IP owners are reluctant to invest in jurisdictions that do not provide adequate protection or respect IP rights. The Commission needs to realise countries, such as the UK, China and Singapore, are actively adopting policies to encourage IP ownership and protection, not the reverse. This is a factor that attracts more investment in those jurisdictions than Australia. The UK has maintained its successful Patent Box¹⁰ program, which reduces the tax on profits earned from patented inventions to 10%. China continues to provide subsidies¹¹ to maintain high levels of patent filings. Singapore adopted an IP Hub Master Plan¹² two years ago which has assisted in attracting both R&D investment and IP investment.

In an era where there is increasing competition amongst countries to attract innovation and facilitate growth, any indication that Australia is sceptical of or critical of robust IP protection will be to Australia's detriment.

¹⁰ <https://www.gov.uk/guidance/corporation-tax-the-patent-box>

¹¹ <http://www.ip-watch.org/2015/04/22/a-look-at-the-huge-upswing-in-china-patent-filings/>

¹² <https://www.mlaw.gov.sg/news/press-releases/IP-hub-master-plan-launched.html>