

3 December 2015

Intellectual Property Arrangements Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY 2601

By email

intellectual.property@pc.gov.au

Dear Sirs,

Re: Submission Issues Paper issued by the Productivity Commission in connection with its review of intellectual property arrangements

We refer to the Issues Paper issued by the Productivity Commission in connection with its review of intellectual property arrangements and make the following submissions in response to the issues identified in that Paper.

About IPTA

The Institute of Patent and Trade Mark Attorneys of Australia (IPTA) is a voluntary organization representing registered patent attorneys, registered trade marks attorneys and student members in the process of qualifying for registration as a patent or trade marks attorney in Australia. The membership of IPTA includes over 87% of registered patent attorneys located in Australia and it is believed that its members make up more than 90% of registered patent attorneys in active practice in Australia. The membership of IPTA includes registered patent attorneys in private practice as well as patent attorneys working in industry, universities, research institutes and others that practice as barristers. IPTA members represent large local and foreign corporations, SMEs, universities, research institutes and individual inventors.

IPTA members not only work with local clients to assist them in developing strategies for protecting and enforcing their intellectual property rights in Australia and overseas, but they also represent overseas individuals and companies in their efforts to obtain and enforce their intellectual property rights in Australia. For this reason, IPTA members are well placed to assist the Productivity Commission in its consideration of intellectual property arrangements in Australia.

Summary of Submission

The Issues Paper includes numerous questions relating to the intellectual property system in Australia. IPTA's comments in response to those questions are set out in the **attached** Appendix. IPTA has not provided any comments in connection with the questions raised in relation to copyright issues, since copyright protection falls outside the normal field of work of our members. While copyright issues do arise in connection with some of the work carried out by our members, the questions raised in the Issues Paper are not directed to those areas.

IPTA believes that one of the elements necessary to promote investment in innovation and commercialization of the products of innovation is predictability, particularly in relation to the legal systems according to which rights are obtained and enforced. Australian patent law has recently undergone significant changes, the impacts of which have not yet been fully felt

or realised. It will be some time before the effects of the recent changes will be fully understood, as our Courts provide the necessary guidance in interpreting the new laws. In light of these recent changes we do not believe it would be appropriate for the Productivity Commission to recommend any further substantial changes to the *Patents Act 1990*, at this time.

However, one area which was not addressed in the recent patent law reforms was the provision of an intellectual property rights enforcement regime which is more accessible to Australian SMEs. In an event jointly organised by IPTA and the University of Melbourne Law School, the Seventh Francis Gurry Lecture on Intellectual Property presented in Melbourne on 2 September 2015, Sir Colin Birss gave an inspirational lecture in which he explained the success of the Intellectual Property Enterprise Court (IPEC), which is part of the High Court of England and Wales.

By capping the maximum amount of damages and/or account of profits that can be claimed, limiting the costs that can be claimed by the successful party, and by other initiatives, including limiting the amount and nature of the evidence that can be submitted, limiting the length of the trial etc., the IPEC provides a more affordable avenue for litigants, and particularly SMEs, to enforce their intellectual property rights.

Sir Colin Birss explained in his lecture that one of the reasons the IPEC has been successful is that it is a real Court, rather than a tribunal, and that the matters are heard by a specialist IP judge.

IPTA believes there is a need in Australia for a Court of this type which would not only encourage SMEs to pursue and protect their IP rights, but give them the confidence that they could enforce their rights should the need arise. IPTA believes that the introduction of a court similar to the IPEC would contribute substantially to the effectiveness of Australia's intellectual property system and stimulate innovation in the SME sector.

A link to the recording of Sir Colin Birss' lecture is found at:

<https://events.unimelb.edu.au/recordings/183-to-boldly-reform-ip-dispute-resolution-experience-in-the-intellectual>

Conclusion

IPTA thanks the Productivity Commission for this opportunity to comment on the Issues Paper. If the Commission has any questions in relation to the observations above, or the comments set out in the Annex, please contact the undersigned.

Yours faithfully

Jeremy Dobbin
President
Institute of Patent & Trade Mark Attorneys of Australia

cc: Linda Tocchet, The Institute of Patent and Trade Mark Attorneys of Australia,

APPENDIX

Inquiry into Australia's Intellectual Property Arrangements

3 A framework for assessing IP arrangements

Effectiveness: do IP rights target additional innovation and creative output?

- Do IP rights encourage genuinely innovative and creative output that would not have otherwise occurred? If not, how could they be designed to do so? Do IP rights avoid rewarding innovation that would have occurred anyway? What evidence and criteria should be used to determine this? Are IP arrangements in other jurisdictions more effective in generating additional creative output?

IPTA strongly believes that IP rights do operate to encourage genuinely innovative and creative output that would not have otherwise occurred. For example, the availability of patent protection provides innovative firms with the confidence to invest in their technologies and develop them to a point where they can be commercially exploited. For many inventions, the cost of developing the invention to a commercial stage, including overcoming and addressing any regulatory barriers, complying with Australian and other standards requirements, addressing safety issues, overcoming any manufacturing difficulties, are so great that a company would not be prepared to invest in these activities unless they could obtain some exclusive rights in the marketplace to prevent free-riding on their efforts. Without the availability of mechanisms for protecting such IP rights, many of these inventions would remain at the conceptual stage, providing no benefit to the innovators and certainly no benefit to Australia or the Australian public through the availability of the inventions.

In answering the questions posed by the Productivity Commission, and again looking at the field of patents in particular, it is important to note that the making of an invention and the filing of a patent application is often something which occurs very early in the commercialization process. It would be of no benefit to Australia if our intellectual property protection system was only sufficient to encourage innovators to make inventions and file patent applications. What is important is for the intellectual property system to encourage the innovator, and the patentee, to make the necessary investment in their technology to give it a reasonable chance of making it to the marketplace and succeeding commercially, whether the invention is in the mechanical fields such examples being the "Hills Hoist" or "Victa" lawnmower, in the ICT field (e.g. WiFi), or in the medical field – examples being Cochlear's bionic ear and Resmed's sleep apnoea masks and CPAP equipment. Patents are necessary to protect the investment necessary to encourage the commercialization of innovations and it is the commercialization of the invention that adds value and provides the benefit of the innovation to the community. CPAP as a treatment for sleep apnoea was invented by Professor Colin Sullivan in the 1980's. It is quite possible, for example, that sleep apnoea would have remained a known medical condition treatable only in hospitals with specialized equipment, had not the founder of Resmed, Peter Farrell, seen an opportunity to commercialize sleep apnoea treatment to enable patients to treat their condition and other respiratory conditions at home. Would the investment funds have been made available to allow a start-up company such as Resmed was in 1989, had Resmed not had the ability to defend its investment using IP rights, particularly patents? Without the ability to protect its investment with patents and other IP rights, would Resmed be the successful Australian company it is today?

One area where the availability of IP rights encourages genuinely innovative and creative output more is in the pharmaceutical and biomedical sectors. While work carried out in universities and biomedical research institutes can lead to the making of important innovations, it is only through the availability of patent protection that private organizations are prepared to invest the billions of dollars necessary to take a single pharmaceutical or biomedical innovation through the clinical trial process in the hope that it may one day become a commercial product.

IPTA is not aware of IP arrangements in other jurisdictions that are more effective in generating the additional creative output, although are various systems adopted by other countries, including patent boxes and other tax concessions, which appear to encourage investment in research and development which likely leads to the generation of more innovative and creative output.

- To what extent does the IP system actively disseminate innovation and creative output? Does it do so sufficiently and what evidence is there of this? How could the diffusion of knowledge-based assets be improved, without adversely impacting the incentive to create?

The IP system works very well to encourage dissemination of information relating to innovation and creative output. It does this by requiring patent applicants to disclose full details of their inventions in their patent applications, as a condition for obtaining a patent. These patent applications are published prior to grant of the patent, generally about 18 months from the date of the original filing.

There are several areas where disclosure may be more limited in the future, for example in connection with business method inventions, software inventions and, more recently, inventions relating to nucleic acid material. The lack of certainty in relation to the availability of patent protection may act as a disincentive for innovators to file patent applications in respect of these inventions and may be more likely to encourage innovators to keep details of their inventions to themselves rather than committing them to publication through the filing of a patent application which may not result in the grant of a patent. In view of the decision by the US Patent and Trademark Office to stop granting patents in relation to isolated biological materials, including nucleic acid materials, and diagnostic methods, may result in innovators carrying out research in these areas holding off filing their patent applications until they have made something sufficiently different from the isolated biological material to qualify for patent protection. Innovators who identify correlations between biomarkers and disease states may also keep details of these correlations secret rather than filing patent applications in respect of the related isolated biological materials. There is a real risk that companies and research organisations will reduce or even discontinue investigations into these important areas of technology if sound patent protection is no longer available. It is important to note that excluding something from patent protection, particularly retrospectively as has been the case effectively with regard to business method and genetic materials as a result of Court decisions in relation to the patentability of the subject matter per se, may have a negative effect on the dissemination of information relating to innovation and creative output in respect of those fields and related fields.

- What, if any, evidence is there that parties are acting strategically to limit dissemination?

IPTA does not have any evidence that parties are acting strategically to limit dissemination.

Efficiency: getting the balance right

- Do IP rights provide rewards that are proportional to the effort to generate IP? What evidence is there to show this? How should effort be measured? Is proportionality a desirable feature of an IP system? Are there particular elements of the current IP system that give rise to any disproportionality?

In some cases the IP rights are insufficient to compensate for the effort required to generate the intellectual property, while in other cases the IP rights may provide more protection than is warranted by the effort required to generate the IP. A balance must be reached and IPTA believes that the IP system in Australia in its current form achieves the right balance. In view of the very recent changes that have been made to the patent system, particularly through commencement of the "Raising The Bar" Act, it is difficult to confirm or provide evidence that the current system achieves the correct balance. For this reason, IPTA believes it will be important to leave the patent system in its current form without substantial changes to ensure that sufficient time passes for a meaningful assessment of the impacts of the "Raising The Bar" Act to be carried out. IPTA does not believe there is any merit in measuring the effort required to generate IP, since it is not practical to include such a measurement in any system for granting IP rights.

- What are the relative costs and return to society for public, private and not for profit creators of IP? Does the public provision of IP act as a complement or substitute to other IP being generated? Are there any government programs or policies that prevent, raise or lower the costs of generating IP?

A balanced IP rights system will encourage local innovation, and stimulate and support local innovative businesses. This should contribute to local employment and general well being. An IP rights system should also encourage foreign innovators to bring their innovations to Australia for the benefit of the Australian public. While the IP rights may be associated with a temporary price premium for the related products and services, subject to the extent of competition in the marketplace this is balanced out through the benefits provided to the Australian public through access to foreign derived innovations and the associated disclosure that can act as a spur for further innovation.

- What are the merits and drawbacks of using other methods to secure a return on innovation (such as trade secrets/confidentiality agreements) relative to government afforded IP rights? What considerations do businesses/creators of IP make in order to select between options? How does Australia's use of methods besides IP rights to protect IP compare to other jurisdictions? Why might such differences arise?

While trade secrets and confidentiality agreements are important for local businesses, these can be very difficult to protect or enforce. Many innovations can also be reverse-engineered which makes these forms of protecting innovation unsuitable. However, such protection can be important for innovations where patent protection is not available, or where there is some doubt as to whether a patent will be granted. Some innovations are amenable to protection by trade secrets and confidentiality agreements and, in some cases, the protection afforded might be more extensive than available under a patent. However, a company relying on a trade secret will have very little recourse if a third party independently develops a competing product based on the same technology. The company will need to balance the relative risks and rewards in making a decision as to which form or forms of protection to rely upon. IPTA is not aware of any data comparing Australia's use of methods besides IP rights to protect IP compared to other jurisdictions.

- Are there obstacles in the IP system which limit the efficient trade of IP between creators and users? Are there particular areas where trade, licensing and use of IP could be more readily facilitated?

IPTA believes that more can be done to facilitate the efficient trade of IP between creators and users. A number of initiatives of IP Australia should assist in facilitating the trade in IP, for example "Source IP" which was launched by the assistant Minister for Innovation on 23 November 2015.

- Are there sufficient safeguards to ensure that IP rights do not lead to unduly restrictive market power? Are there ways (including examples employed overseas) to improve the dissemination of IP while preserving incentives to generate IP? Could such methods be adopted or adapted within the Australian IP system?

IPTA believes that the current IP rights systems in Australia are not designed in such a way as to lead to unduly restrictive market power. IP Rights are not indicative of, nor necessary for, market power to exist. For IP Rights to be a corollary for substantial market power, the breadth of the IP Rights would necessarily encompass the whole or substantially the whole of the goods or services in the relevant market; that is, there could be no significant substitutable product or service available in the market. While this is theoretically possible, IPTA is not aware that any goods or services protected by IP rights in Australia enjoy this position. In Australia the existence of the compulsory licensing provisions under the Patents Act would mitigate against such a position in any event.

- What are the longer term effects of the IP system on competition and innovation? What evidence is there to assess and measure these effects?

IPTA believes that the IP system in Australia strikes the right balance between competition and innovation, and includes sufficient safeguards to ensure that both are encouraged. IPTA believes that if the existence of patents were substantially lessening competition in Australia in a particular market, competitors to the patent holder, being profit maximizing entities, would take advantage of the compulsory licensing provisions of the Act. The fact that there have been extremely few applications in Australia under the provisions both prior to the latest amendments and since, suggests that there are other elements of the competitive process which are important in determining the extent to which there can be effective competitors in a market.

Adaptability: making sure IP rights are apt for the future

- How well has Australia's IP system adapted to changes in the economic, commercial and technological environment and how well placed is it to adapt to such changes in the future? What factors may make it harder for the IP system to adapt to change? What policy options are there to remedy any difficulties, and why might they be preferable?

IPTA believes that Australia's IP system is well adapted to changes in the commercial and technological environment. In fact, in the specific area of patents, in relation to patentable subject matter, Australia's approach has served the country well over many years. IPTA concedes that the rapid pace of innovation, particularly in the information technology area, may present challenges for the IP system, but it should be possible for these challenges to be addressed within the framework of our current IP rights systems. If an anomaly is encountered, leading to a negative impact in a particular area, IPTA would rather see such issues dealt with in a technologically neutral way, rather than through the introduction of specific exclusions or provisions to deal with specific areas of technology.

- Are there other ways of ensuring the IP system will be efficient, effective and robust through time, in light of structural economic changes and the importance/pervasiveness of IP? Is a principles-based approach preferable to a prescriptive approach in this regard? Are there particular parts of the IP system that should be principles-based or prescriptive?

IPTA is not aware of other ways for ensuring that the IP system remains efficient, effective and robust through time. In order to maintain the integrity of the system, and to ensure that the IP rights system remains predictable and reliable for users of the system, it is important that the various systems are not subject to radical and regular changes of the type we have seen in recent years. Any changes made to the system should only be made after detailed and further consultation and any changes should be given sufficient time for an assessment of their effectiveness to be made before further changes are made.

- What additional challenges does technological change and new methods of diffusion, including digitisation, present for the adaptability of the IP system? How should such challenges be approached?

IPTA agrees that technological changes and new methods of diffusion and digitization, as well as 3D printing technologies, will present challenges for the IP system. As mentioned above, IPTA believes that the current IP rights systems embody principles that can be adapted to deal with these challenges.

Accountability: a transparent, evidence-based system

- Ideally, what sort of information is needed to evaluate the IP system? In their absence, what alternative data or proxies are available?

The IP system is intrinsically difficult to evaluate. Information on the impact of the IP rights systems on the activities of IP rights holders and third parties is simply not available for analysis. It is impossible to know how many companies decided not to pursue an area of investigation because of the existence of an IP right. Hence, it is often not possible for IP rights owners to understand the benefit, if any, that they attained through registration of their IP rights. IPTA for many years has expressed concern in relation to reports detailing attempts to analyze IP rights systems using various proxies and data because the results of those studies are often inconsistent with what IPTA members know through their dealings with inventors, SMEs, IP rights holders and third parties in their daily work. For this reason, any such studies need to be carefully scrutinized and the results need to be carefully compared with observations of the actual behaviors of users of the system.

An example of such a report was the report of the Chief Economist of IP Australia (Economic Research Paper 05) in relation to the innovation patent system. The conclusions made in that report do not conform in any way with the observations and understanding that IPTA members have of the importance of the innovation patent system to SMEs. Responding to such studies is very difficult for IPTA, since all of IPTA's work is carried out on a voluntary basis by attorneys or partners of patent attorney firms who have full workloads in their practices. However, in view of IPTA's belief in the importance of the innovation patent system to their SME client base, considerable effort and cost was expended by IPTA to explain why some of the conclusions in the report were incorrect. IPTA understands that the Productivity Commission has been provided with copies of responses made to IP Australia's recent Consultation Paper relating to innovation patents, which will include IPTA's response. This is offered as an example of the difficulties encountered in evaluating the IP system using data and proxies, rather than based on first-hand experience.

- What factors have constrained transparent evaluation of IP rights extensions?

The lack of availability of information in relation to decision making in connection with intellectual property acts to constrain transparent evaluation of the IP rights.

- The Commission seeks submissions about how the parameters of the IP system came to be set, and on the basis of what evidence and analysis.

The Australian IP rights systems developed originally out of the old British systems, and have evolved over time in order to better suit the requirements of the Australian industry. They have also changed over time in order to accommodate international agreements which have been entered into by Australia, including the Paris Convention, the TRIPS Agreement and the AUSFTA. Australia's IP rights system is highly regarded internationally. Following commencement of the "Raising the Bar" Act, Australia's patent system now includes patentability and description requirements as onerous as those in countries such as the United States of America, Japan and Europe. For the most part, amendments made to our various IP rights Acts have been based on reports prepared by panels of experts who have carried out detailed studies and public consultation before arriving at their recommendations. In more recent times, such analysis and consultation has been carried out by IP Australia. Copies of the various reports and studies leading to the amendments which have been made to the IP rights Acts over the years are, for the most part, still publicly available.

- How were decisions to extend IP rights in the past (e.g. copyright) assessed? Is an evidence-based approach systematically used to assess changes to the IP system? How transparent have decisions to change the IP system been, including when it comes to legislation and international agreements? Is a stronger evidence base and greater transparency in the public interest, and if so, how should this be accomplished?

In general, IPTA members do not get involved in copyright matters. IPTA members do, however, generally believe that it is difficult to justify the current period of copyright protection, which seems to have been the result of a trade-off in the AUSFTA. IPTA notes that the extension of the period of patent protection from 16 years to 20 years was the result of the TRIPS Agreement, and this provided a substantially harmonised term for patent protection to be applied to inventions in all technology areas.

In the specific area of pharmaceutical patents, IPTA is also aware that a detailed study was carried out in Australia in relation to the need to provide an effective patent term for pharmaceutical related inventions which was comparable to the term provided for other inventions, taking into account the lengthy regulatory approval process required for pharmaceutical inventions. Following detailed consultation and analysis, it was considered that Australia should introduce a patent term extension regime which tried to achieve a 15 year effective patent term for pharmaceutical inventions. This period of extension is similar to that afforded to patentees in Europe. In view of the high costs associated with running clinical trials in respect of pharmaceutical products and the time required in order to evaluate these pharmaceuticals through the clinical trial process, the additional patent term, which can be as much as five years additional term, is seen as being particularly important for encouraging innovation in the pharmaceutical and biomedical fields.

- How should a context of limited information, long legacy tails and IP policy irreversibility bear on the stringency of IP rights? In particular, if a precautionary principle is applied, should it err on the side of the consumers or on the side of the IP rights holder? In a global context, which approach best suits Australia?

As mentioned above, any changes made to the IP system should be given sufficient time before they are analyzed for their effectiveness. IPTA also believes it is risky to make wholesale changes to the IP rights systems because these systems are normally finely balanced and changes made to any part of the system could have unintentional adverse impacts elsewhere in the system. Any changes to the IP rights system should only be made after detailed consideration and consultation. Ideally, expert panels should be composed to carry out these studies and these panels should be balanced to ensure that the outcome is balanced.

Bringing it all together

- Are there other principles that should be considered when assessing the IP rights system? Are there other factors relating to efficiency, effectiveness, adaptability and accountability that the Commission should consider as part of its inquiry?

Please see answers above.

4 Improving arrangements for specific forms of IP

Patents

- What evidence is there that patents have facilitated innovations that would not have otherwise occurred, or have imposed costs on the community, including by impeding follow-on innovation?

IPTA members deal every day with innovators who are seeking commercialization of their inventions, either directly or through licensing or assignment, under the protection of a patent. It is the patent which gives the innovator, licensee or assignee the confidence to pursue development of their inventions and, among the clients of IPTA members, it is unlikely that such innovations would be progressed to a commercial stage without the potential for obtaining patent protection, or without patent protection itself. It is important for these innovators to be able to commercialise their products in a manner which minimises the risk that competitors will copy and free-ride off the work they have carried out in developing their inventions. The patent gives the innovator and third party financiers the confidence to invest in new technology, often spending large sums, before being in a position to exploit their inventions commercially.

If an innovator wishes to sell its product, it must be priced at a value that the customer will bear, particularly when considered relative to the price of competing products.

Following commencement of the "Raising the Bar" Act, any activities carried out by third parties experimenting on the patented invention will not represent an infringement. Accordingly, to this extent, the existence of the patent will not impede follow-on innovation. However, the patent will prevent the manufacture and sale of products falling within the scope of the patent. Again, following commencement of the "Raising the Bar" Act, the scope of the patent should be commensurate with the contribution made by the inventor to the art, and accordingly the protected area should not be overly extensive relative to the inventor's contribution. Third parties will be free to develop and commercialise other inventions provided they do not fall within the scope of the patent. This is how the patent system works and IPTA believes that the system does not unduly impede follow-on innovation. In fact, the publication of the patent application at 18 months following filing ensures that information relating to the invention is put into public domain at a very early stage. This aspect of the patent system contributes to follow-on innovation.

In reviewing the terms of reference and the list of items that the Commission is to have regard to, we note that there is no reference to the review of pharmaceutical patents. However the review is mentioned under item 1 of the Issues Paper, and again on page 17 in connection with the term of pharmaceutical patents. IPTA notes the fact that this report has not received Government endorsement, either by the previous Government who commissioned the report, or the present Government.

It is unclear whether or not the Productivity Commission intends to have regard to the above-mentioned review. In any event in IPTA's view the pharmaceutical review panel was provided with insufficient time to conduct a balanced review of pharmaceutical patents. IPTA notes that there were serious concerns expressed at the time not only by IPTA, but also by universities, biomedical research institutes and research-based pharmaceutical companies that the short time period allotted for carrying out the review, and the specific make up of the panel, was unlikely to lead to a useful report. The Report of the Pharmaceutical Patents Review Panel should be considered in this light.

In relation to encouraging innovation in the pharmaceutical and biomedical sectors in Australia IPTA encourages the Productivity Commission to consider the recommendations contained in the February 2013 report entitled "Strategic Review of Health and Medical Research", also referred to as the "McKeon Report". This report recognises the need for strong patent protection to encourage innovation in this sector. The report also includes the following observation: "Relative to the number of papers published and patents issued, Australia lags in key global commercialisation benchmarks and in creating significant public companies, commercial products, jobs and income. This means that, in addition to not gaining health benefits from those innovations, Australia misses out on the commercial and economic benefits that would also become available." IPTA notes that the current government under the new Prime Minister appears to appreciate that Australia lags other countries in the area of commercializing innovations and looks forwards to the government putting measures in place to promote commercialization of Australian innovations.

- Are there aspects of Australia's patent system that act as a barrier to innovation and growth? If so, how could these barriers be addressed?

IPTA believes that the level of innovation required to support an innovation patent is too low, and should be raised so that it falls somewhere between its current level and the level of an inventive step. IPTA also believes that innovation patent applications should be examined before they can be called innovation patents. The present low level of inventiveness required for an innovation patent may, in some circumstances, act as a barrier to innovation. However, when these issues are remedied with the innovation patent system, IPTA believes the innovation patent system will continue to serve a very useful purpose for Australian SMEs.

- Do patents provide rewards that are proportional to the effort to generate IP? What evidence is there to show this? How should effort be measured? How does the balance of costs and benefits from patent protection compare across sectors and innovations?

The reward provided by a patent is a monopoly for a fixed period of time. Turning to one of the examples given above in section 3, "Wifi" was invented by the CSIRO's John O'Sullivan and patented in 1996, almost 20 years ago. While many licenses to use Wifi have been put in place CSIRO are still pursuing lawsuits against some infringers, almost twenty years after the patents for Wifi were originally filed.

In some areas of technology products can be developed and enter the market relatively quickly. Although as outlined above, there are many steps and hurdles to overcome

between conceiving an invention and filing a patent application, and actually getting a manufactured, safe product to market.

One area of technology where a rapid entry to market is most certainly not possible is the area of medical innovations such as medical products and medical treatments including pharmaceuticals, which have to enter, and pass through, a very lengthy safety and clinical trial process before being certified for use by the general public. This means that the IP system should ensure that there is sufficient patent term available at the end of the process to make the effort and investment in developing the product/treatment worthwhile. It is extraordinarily expensive to put a drug through medical trials and the rate of failure of candidate drugs is high. In order to encourage the investment at the level required to recompense the developer of the medical innovation, the reward at the end of the process must be commensurate with the development cost, accounting also for product failures. For pharmaceutical and biomedical innovations the reward is intimately linked with the remaining patent term and, in some cases, whether data protection is available.

To date, very few pharmaceutical products are currently the result of innovation and commercialization in Australia. However, IPTA understands that it is the availability and extended patent protection available in Australia that encourages pharmaceutical companies to bring their products to Australia. During the period these products are protected by a patent, substantial costs are borne by the Government in subsidizing these products, but these costs are offset by the improved health and wellbeing of the Australian public and improved productivity.

In the area of biotechnology, Australia has a reputation of having plenty of research, in universities, hospitals and institutes such as the Garvan Institute, however there are issues with translating that research into direct commercial outcomes and a lack of investment in the sector in general. Although there are many Australian biotech companies that have managed to list on the Australian Stock Exchange in the past 20 years or so, the high costs to develop commercial products and the lack of early success has put pressure on many companies to continue to seek further rounds of funding from the marketplace. Anything which can be done to assist the commercialization of such research will benefit not only the patients who may receive an improved treatment or diagnostic test but also benefits the Australian economy which is acknowledged as having relatively high labour costs and therefore needs to be developing products in such high tech areas as biotechnology. Implementing some of the conclusions of the government's 2013 paper "Strategic Review of Health and Medical Research" may give this vital sector of Australian industry a helping hand. Patents are vital to such research organisations and start-up companies and are particularly vital when seeking funding to commercialise research.

IPTA believes that it is critical that the patent system works for the biotechnology and pharmaceutical industries due to the significant investments made in these industries and to the need to encourage innovation in this area, not only to improve public health, but to support the prospects of the Australian biotechnology industry in particular, as this is an area of high tech manufacturing where Australia can successfully compete with lower labour cost countries.

While it is possible to argue that different innovations in different technology areas might require different levels of IP protection in order to encourage innovative and creative output that would not have otherwise occurred, this is not something which can be readily incorporated into the Australian patent system, particularly in view of the various International Agreements signed by Australia. In any event, it would place an undue burden on a Patent Office to require it to assess every innovation on its commercial merits, and decide on a particular period of patent protection that would provide the ideal reward based on the effort and investment required for that particular innovation. Since the patent

system is basically a "one size fits all" system, as required by International Agreements, the system should be designed to ensure that it encourages innovation in fields where IP protection is essential to allow or encourage innovation to occur. This will mean that the reward available for some innovations will be more extensive than possibly necessary to have encouraged those innovations to have taken place, but the system will at least have ensured that inventions where commercialization requires significant investment and carries high risk, will be made and developed for the benefit of the Australian public.

IPTA believes the patent system currently reaches the right balance.

- What scope is there to better leverage the economic benefits of patents, by taking steps to improve the diffusion of patent information?

IPTA believes the current patent system works effectively. The diffusion of patent information is not seen as a problem. IPTA believes that the economic benefit of patents is in part to be found in the launching of new or improved goods and services onto the market. What appears to be a limiting factor in this regard is the availability of the finance required to develop, manufacture and distribute the new or improved product or service. Any assistance which the Government can provide in this area is likely to leverage greater economic benefits. Taking the United States of America as an example, it appears anecdotally that US companies and investors are much less risk averse than their Australian counterparts. It may be that Australian companies and investors need some taxation advantages which are designed to produce greater investment in new technologies.

- Is the patent system sufficiently flexible to accommodate changes in technology and business practices?

IPTA believes the patent system is sufficiently flexible to accommodate changes in technology and business practices. This has been shown recently in decisions of the High Court of Australia in relation to the patenting of methods of treating humans and the patenting of nucleic acid sequences that represent biomarkers for disease states. Over the years the patent system has always been sufficiently flexible to accommodate new technologies and business practices.

- Do the criteria for patentability in the *Patents Act 1990* (Cwlth) help the patent system to meet its objectives? Would introducing economic criteria for patentability and/or gradually reducing the duration of patent protection substantially improve the efficiency and effectiveness of the patent system?

IPTA does not believe that economic criteria should be introduced into the test for patentability, and does not believe that reduction of the term of patent protection will improve the system. Quite apart from provisions contained in the TRIPS Agreement which would prevent these changes, IPTA does not believe that the patents registration system should be amended to include new patentability criteria which would complicate prosecution of patent applications before IP Australia. Gathering and presenting economic data to IP Australia in support of patentability is likely to bring the patent examination process to a standstill. We note that the Productivity Commission's question refers to the reduction of duration of patent protection but does not contemplate whether the converse - increasing the duration of patent protection - would improve the efficiency and effectiveness of the patent system. While reduction of patent term is not permitted under the TRIPS Agreement, or the AUSFTA, it is possible to provide additional patent term. In some cases, particularly in relation to some pharmaceutical and biological inventions that have been the subject of extensive and lengthy clinical trials, the current extension of term provisions may not provide sufficient duration of patent term to compensate the patent owner for its

investment. Additional patent term would also assist in encouraging innovation in the animal health and plant protection field, where regulatory approval processes also substantially reduce effective patent term.

- Is the existing coverage of patents optimal? Are there areas of innovation that should be included/excluded? Should the duration of patent protection take into account how the development of IP was funded?

Subject to IP Australia's practice changes following the Myriad decision, the existing coverage of patents is believed by IPTA to be optimal. There are some exclusions from the innovation patent system that IPTA believes should be removed, but the coverage for standard patents is believed to be optimal. The duration of the patent protection should be 20 years, subject to any pharmaceutical patent term extension. As mentioned above, consideration should also be given to providing additional patent term for patent protection for products such as animal health products that are also subject to lengthy regulatory delays.

- Are there any issues with the administrative arrangements of IP Australia for assessing and granting patents?

Any issues with IP Australia in relation to the administration of their system for assessing and granting patents are relatively minor and IP Australia has a good system for identifying and dealing with these issues as they arise. For example, commencement of the "Raising The Bar" Act prompted the filing of a number of additional patent applications which created a backlog within IP Australia, which introduced a lengthy delay between filing and grant. IP Australia has taken steps to reduce and, in many cases, eliminate this backlog, such that delays in grant are now generally acceptable.

Data protection

- How does Australia's current protection of regulatory test data affect innovation and the diffusion of new products?

Data protection can be very important for pharmaceutical companies in making decisions as to whether or not to market their pharmaceutical products in Australia. In some cases, particularly where intellectual property is licensed in from an external collaborator, a patent application has not been filed in Australia in respect of the active agent. In these circumstances, pharmaceutical companies are forced to rely on data protection and/or, in some cases, specific patents which protect formulations or uses of the pharmaceutical product. The data protection period provided by Australia is understood by IPTA to be the shortest period that Australia is able to provide that also meets the requirements of TRIPS.

- Do data protection arrangements limit the ability of parties to understand breakthroughs and build on innovation?

Australia's data protection provisions act to delay entry onto the market of a generic product if the original product is not protected by a patent and when less than five years has elapsed since a product containing the relevant active ingredient was included in the Australian Register of Therapeutic Goods. The provisions protect what is essentially commercial data relating to the pharmacological and physiological effects of a drug in human body derived from trials. IPTA's view is that the data protection arrangements should not limit the ability of parties to understand breakthroughs or build on innovation given that the active ingredient, its clinical indications and how to make it will already be in the public domain.

- Could Australia's arrangements for the protection of test data be improved?

Australia's data protection arrangements could be improved by amending the provisions so that that data provided in connection with new formulations and new methods of treatment are protected.

Designs

- What role do design rights play in fostering innovation? To what extent do design rights encourage additional innovation?

With the increasing sophistication of new manufacturing techniques such as 3D printing, copying existing products is becoming cheaper and easier. If a designer cannot protect their new designs in Australia, there is little incentive for them to invest in the design of a new or improved product if it can be copied with impunity by third parties who do not bear the costs of development. Indeed as indicated in the ALRC report 74 "Australia's designs law needs to be tailored to meet its main objective - to encourage innovation in Australian industry to Australia's net economic benefit. Designs law can do this by preventing competitors' free riding on design innovations and by providing investors in design with security for their investment."

We understand that additional innovation is innovation that would not have occurred had the ability to protect the innovation with a registered design not existed. This is not something which can easily be measured or quantified. However it is noted that China, for example, did not protect intellectual property rights until relatively recently (1979) has had a culture of, and reputation for, copying rather than innovation. Even though IP rights have now existed in China for some time, it is fair to say that they are not enforced or respected to the same degree as they are in innovative countries with a long history of continuous IP protection such as USA, Germany, Japan, and Singapore to name but a few. For a country such as China which was in the process of modernising and had a low cost workforce, copying products and making them cheaply might well have been an appropriate strategy for modernisation and growth. However product innovation in China has been somewhat limited, possibly because it is easier to copy an existing product than innovate and design a better product. It is not a model that would suit a country such as Australia with a high cost workforce and a relatively small population/marketplace which clearly needs to concentrate on higher margin innovative value added products which can be sold at a premium.

If there is no protection for additional innovation, what incentive is there for an innovator to improve on the design of a product, or design a new innovative product, if that improved design can be copied with impunity by a competitor free riding on their innovation? Indeed as reported in the Australian Newspaper (Thursday 26th November, page 23, columns 7 and 8) Bill Ferris, the Turnbull government's new chair of innovation Australia is reported as saying that Australia risks squandering jobs and exports because of a failure to commercialize local research. The Australian Innovation System report indicates that lack of access to funds and lack of skilled people were the two main barriers. In terms of the former, clearly investors would be reluctant to invest in design innovation where there is no protection of their investment from copying.

- Are there continuing issues with the overlap between design rights and copyright or other forms of protection?

IPTA's view is that this is a complex area of law that is very difficult to understand, even for experienced practitioners working in this particular area of law. IPTA's view is that the

basic principle that there should be no overlap with copyright for 3D products which have been commercialized is appropriate however the legislation could possibly be made clearer. It is however noted that a number of efforts have been made over the years to clarify the legislation with varying degrees of success and perhaps the task of clarifying the legislation may be a very difficult one, with limited benefit to Australia.

- Are the protections afforded under design rights proportional to the efforts of innovators? Is the design rights system cost effective for users?

IPTA notes that the scope of protection afforded under the Designs Act 2003, is limited to the appearance of a product (such as shape, configuration, pattern or ornamentation) to which the design has been applied. Hence the rights afforded by a Registered Design are considerably more limited in scope than, say a patent. The maximum term of an Australian Registered Design is also much shorter than that of a patent being 10 years rather than 20 years. That maximum term is also much shorter than that of a number of Australia's major trading partners such as the USA (now 15 years) and Europe (25 years).

Since the scope of protection is limited to the appearance of the product which arises from the design effort put in by the innovator, it would appear that the scope of protection which is limited to a product embodying that design or a design, which is substantially similar in overall appearance to the Registered Design (see Designs Act 2003: Section 71 (1)a) is commensurate with the effort.

It is understood by IPTA that certain areas of design, such as the clothing fashion industry, may not find the system cost effective due to the short lifespan of their products which may only be on sale for a short period of a few months. However particularly in the area of industrial design and consumer products with more longevity such as furniture, the designs rights system appears to be cost effective. Indeed one of the largest filers of industrial designs in Australia is sofa and furniture manufacturer King Furniture Australia Pty Ltd.

Although the cost of designing new products is gradually reducing with improvements in prototyping, including 3D printing, to design a product well either for appearance or performance is still expensive. Having a longer maximum term for designs, as recommended by ACIP in the Designs Review, would improve the cost effectiveness of the system for users enabling them to amortise the filing and design costs over a longer period.

Trade marks

- Are trade marks operating as an effective and efficient method for firms to protect their brand and reputation?

Yes, IPTA considers that the current regime of trade mark registration by way of the Trade Marks Act 1995 (Cth) combined with the protection of reputation at common law operate effectively and efficiently.

- Is the cost of preparing an objection or defending a trade mark infringement reasonable?

IPTA interprets this question as being in relation to the costs for initiating a trade mark infringement action as well as the costs for defending the action. A trade mark infringement action is usually initiated in the Federal Court of Australia. Costs for doing so are high and thus may be prohibitive for both applicant and respondent. Even if a respondent had an arguable case for not infringing, the respondent could be bullied into submission and agree to settle the case on terms unfavourable to it. The system is thus open to abuse by larger companies against smaller parties. The Federal Circuit Court is available as a nominally

cheaper alternative but litigants face the problem that judges are not necessarily IP specialists which may affect the outcome of the case leading to appeals and further costs for litigants.

IPTA believes that consideration should be given to setting up the equivalent of the UK Intellectual Property Enterprise Court (IPEC) staffed by specialist IP judges. There is also a cap on the length of the hearing as well as on damages and costs recovery. Trade mark and patent attorneys have standing to appear before the Court. Such a court, if adopted in Australia, would make it more affordable for the enforcement and defence of trade mark infringement actions.

- How could the system for registering and using trade marks be improved?

IPTA considers that the current system in place for registering trade marks is presently working well. However, IPTA considers improvements could be made to make IP Australia administrative procedures more efficient. For example, to reduce lengthy delays in the examination process as well administrative requests. In addition, many users of the system consider that the whole registration process takes too long. IPTA also strongly believes it would be beneficial for a more common sense approach to be adopted by Examiners in the examination process in order to avoid ill-conceived and pedantic objections from being raised in the first instance and thus reduce unnecessary costs associated with registration.

- Where should the line be drawn between defending a firm's branding through trade marks to the benefit of both consumers and producers and attempts to use trade marks to inhibit competition?

IPTA considers that a line needs to be drawn between marks that are registered for the purpose of distinguishing goods or services from those of other traders and where a mark is registered solely for defensive purposes, namely, in classes of goods and services when in respect of which it will never be used. The only exception to the above is that of "well-known" trade marks which acquire a unique reputation that allows them to be protected more broadly than other marks.

IPTA considers that in the case of trade marks which are regarded as being not sufficiently capable of distinguishing or non-distinctive, for example, descriptive words, common surnames or colour marks, the Trade Marks Act 1995 (Cth) provides a mechanism for registration of such marks. Section 41 requires trade mark owners to prove that they have a reputation in the non-distinctive mark in order to achieve registration and the amount of evidence required to prove the reputation is generally quite high, especially in the case of non-traditional marks such as colour or shape marks. So the Act does provide a filter for the registration of non-distinctive marks which if registered may have the potential to block or inhibit competition by other traders. Further, the Act also provides for the removal of a trade mark for non-use if the marks is not being used for the all or any of the goods or services so registered. This can act as another filter to help weed out marks that may have been registered to inhibit competition.

- What sort of tests could be used to identify when trade marks are being used in anticompetitive ways?

IPTA believes that a useful test could be that in the case of alleged infringement the owner should have to prove actual loss or damage or that loss or damage is likely to occur. Loss and damage can include loss and damage to business reputation as well as financial loss.

- Are trade marks working effectively and fairly when it comes to competing claims to similar or identical branding?

Under the Trade Marks Act 1995 (Cth), a registered trade mark provides a monopoly to the use of the trade mark to the exclusion of others subject to pre-existing rights. Under section 44 of the Act, identical or very similar trade marks can be registered by proving a reputation and use either on an honest concurrent or prior use basis or if consent from the pre-existing trade mark owner can be obtained. As such, IPTA is satisfied that there is a suitable mechanism in place.

- Are there changes that could improve how trade marks operate in this regard?

IPTA considers that although the current Act is working well in this regard, it may be improved by the requirement for clearer and more precise specifications of goods or services when filing and to discourage the practice of filing for broad specifications in order to allow similar marks to co-exist more easily without the need for having to provide use or obtaining consent which is usually costly and time consuming.

Further, in the case of removal of a trade mark from the Register on the grounds of non-use after registration, consideration might be given to reducing the period from five years after the date of registration before a non-use action can be filed to three years, thus reducing the extent of an unreasonable monopoly.

- The Commission welcomes submissions in relation to the costs and benefits of changing the way that trade marks are administered to allow for parallel importation.

IPTA wishes to bring to the Commission's attention that Section 123 of the Trade Marks Act 1995 (Cth), already allows parallel importation where the trade mark was applied by or with the consent of the registered trade mark owner.

Plant breeder's rights

- The Commission seeks evidence from plant breeders and other stakeholders (particularly farmers and farmer representatives) on whether the introduction of PBRs has led to a more productive and profitable agriculture sector in Australia than would have been the case under general IP protections.

IPTA does not consider the protections afforded to grantees to be proportional to the efforts of breeders. Actions for infringement can only be brought by the grantee itself, and the pecuniary relief available for infringement is minimal compared to the breeding and application costs and to the costs of pursuing an infringement action. IPTA understands that all of these costs are in fact a disincentive to pursuing PBR protection.

- Is there quantitative evidence to show that the introduction of PBRs led to an increase in the quality and quantity of new plant varieties, and an increase in the role of the private sector in plant breeding?

Such evidence is not available to IPTA.

- Are the protections afforded under PBRs proportional to the efforts of breeders?

IPTA is not able to comment.

- Is there evidence the introduction of PBRs has contributed to the development of Australia's seed export industry? *Such evidence is not available to IPTA.*

- Is this a suitable role for IP policy?

IPTA is not able to comment.

- How adaptable is the system of PBRs to technological change?
Should PBR legislation be amended in light of technological developments, or can new high-value plant varieties (however they are developed) be adequately supported by patent laws?

The current Australian statutory regime for PBR does not take advantage of the available technology. In particular, the availability of affordable DNA tests would make determinations of distinctiveness of an allegedly "new plant variety" simpler and more determinative and would be a straightforward way to confirm the asserted breeding of the new plant variety. IPTA understands that whilst these procedures have been adopted as standard by National Herbaria in the process of identification of specimen submitted by members of the public, it is not the case for PBR applications lodged with IP Australia, and where it is thought it would be of greater relevance to do so. Adopting this and any other relevant technology would not conflict with any provisions of UPOV. Rather, it would give greater support to Australia's participation and increased clarity and certainty to Australia's adoption of UPOV. This could all be achieved by suitable amendments to the relevant PBR Regulations and to the Guidelines issued by IP Australia. The developments in technology in general should not of itself call for any changes to what is otherwise "PBR-able" under the PBR legislation. On the premise that IP Australia will issue patent examination guidelines along the lines proposed for comment following the High Court decision in D'Arcy vs Myriad Genetics, current patent laws should provide protection for new high-value plant varieties developed through biological and artificial manipulation technologies.

Circuit layout rights

- What is the economic justification for a specific system of rights covering circuit layouts? In particular, the Commission seeks evidence from integrated circuit developers and other stakeholders in Australia regarding:

- a. the extent to which circuit layout rights are utilised in Australia

IPTA is not in a position to comment, except to make the observation that to the best of IPTA's knowledge, Australia does not have any large scale manufacturer of circuits or semi-conductor chips.

- b. the efficiency and effectiveness of circuit layout rights (as opposed to other related protections, such as patents or trade secrets or being first to market) in reducing piracy and encouraging innovation.

IPTA is not able to comment

- What costs would be incurred if such rights were abolished?

IPTA is not able to comment

Geographical Indications

- The Commission welcomes submissions on how effective and efficient Geographical Indications are in terms of protecting IP, including on a firm's branding and reputation.

Submissions on how Geographical Indications may help or hinder competition and consumer outcomes are also welcomed.

IPTA does not consider that Geographical Indications can hinder competition as the purpose in indicating the geographical source of products is to assist consumers in making a purchasing decision. Geographical Indications may help competition by allowing traders to legitimately use a name of a place on the branding of their products; which depending on the location may help boost sales. Geographical Indications would also prevent the registration of such geographical locations as trade marks by one party to order to inhibit competition.

5 The broader intellectual property landscape

Institutions play an important role in the IP system

- Are there reforms to public institutions involved in defining, allocating and enforcing IP rights in Australia that would provide net benefits to the community?

IPTA believes that Australia could benefit from the introduction of a specialist IP Court modelled on the Intellectual Property Enterprise Court (IPEC) in the United Kingdom. In this regard, the cost of enforcing intellectual property rights in Australia under the current systems can be prohibitively expensive for SMEs, and this limits the ability of SMEs to take full advantage of their intellectual property rights. In some cases it may discourage SMEs from pursuing protection for their intellectual property which, in turn, reduces the incentive for development of these innovations.

One area which was not addressed in the recent patent law reforms was providing an intellectual property rights enforcement regime which is accessible to Australian SMEs. In an event jointly organised by IPTA and the University Of Melbourne Law School, the Seventh Francis Gurry Lecture on Intellectual Property presented in Melbourne on 2 September 2015, Sir Colin Birss gave an inspirational lecture in which he explained the success of the Intellectual Property Enterprise Court (IPEC), which is part of the High Court of England and Wales.

By capping the maximum amount of damages and/or an account of profits that can be claimed, and limiting the costs that can be claimed by the successful party, and by other initiatives, including limiting the nature of the evidence that can be submitted, limiting discovery, limiting the length of the trial etc., the IPEC allows SMEs to enforce their intellectual property rights at a predictable and limited cost. Sir Colin Birss explained that one of the reasons the IPEC has been successful is that it is a real Court, rather than a tribunal, and the matters are heard by a real judge. IPTA believes there is a need in Australia for a Court of this type which would not only encourage SMEs to pursue and protect their IP rights, but give them the confidence that they could enforce their rights should the need arise. IPTA believes that the introduction of a Court similar to the IPEC would contribute substantially to the effectiveness of Australia's intellectual property system and stimulate innovation in the SME sector.

Enforcement of IP rights would continue to be available through the Federal Court system, particularly for higher value innovations or more complicated technologies.

- How can processes for formulating IP policy — be it ultimately embodied in domestic law or an international agreement — better harness available evidence? How can the tradeoffs implicit in IP policy be more comprehensively accounted for in policy making processes?

IPTA believes that care must be taken to ensure that IP policy development is not confined to IP Australia. IP Australia plays an important role in administering the IP rights registration system. In this role, IP Australia has a great interest in developing efficient systems for the processing of applications for IP rights through to grant. However, although IP Australia does consult extensively with users of the system, because IP Australia is in the role of the administrator of the IP rights registration system, it is not best placed to appreciate how the IP rights systems work in practice, and how IP rights are used in the marketplace. While IP Australia should play an important role in the development of IP policy, IPTA favors the establishment of independent expert panels with a broad range of expertise, for the development of IP policy in particular areas. While the recently disbanded Advisory Counsel for Intellectual Property (ACIP) performed this function to some extent, IPTA believes it may be preferable to establish panels of experts containing particular expertise relevant to the policy area being investigated. IPTA believes that together with IP Australia, better policy outcomes would be realised through the utilization of such expert panels.

In negotiating international agreements, it is important that IP issues, such as copyright term, are not traded off for benefits in areas outside intellectual property. This approach to negotiating international agreements could leave IP Australia with a sub-optimal IP rights system.

- How does Australia formulate its position on IP policy in the context of international agreements? What evidence and analysis informs decision-making and negotiating positions along the way and is this adequate and sufficiently transparent?

IPTA is not clear how Australia formulates its position on IP policy in the context of international agreements. In connection with the recent TPP Agreement, IPTA contacted the Department of Foreign Affairs and Trade (DFAT) and indicated an interest in being involved in working with DFAT to help analyze the consequences of any IP rights provisions in the agreement. However, IPTA was not consulted. IPTA understands that there were consultations in relation to provisions in TPP with other groups and individuals, but it is far from clear who, how and why these particular individuals and groups were identified for consultation. IPTA believes there should be more transparency associated with the negotiation of IP provisions in international agreements and, if such transparency is not permitted, that negotiators should at least consult with bodies representing the patent and trade mark attorney profession in Australia, of which IPTA is the peak body.

- To what extent does the work of WIPO and the WTO impact on Australian policy settings?

The work of WIPO and the WTO has a large impact on Australia policy settings. The vast majority of patent applications filed in Australia by domestic and foreign applicants are filed through the Patent Cooperation Treaty, a treaty administered by WIPO. Changes in the PCT system can have a marked impact on the patent system in Australia. Australia plays an important role in meetings within WIPO, providing a suitable balance between countries such as United States of America and Japan which are dominated by large corporations, and developing countries that struggle to see the benefit of the patent system. Australia also plays an important role in WIPO's Standing Committee on Patents, which also often has difficulties because of the competing interests of the countries dominated by large corporations on the one hand, and the developing countries on the other hand.

- Are international institutions being sidelined or marginalised in an increasingly pluralateral or bilateral negotiating process?

Unfortunately, since countries such as the United States of America, Japan and Europe have not been able to realise their objectives within the WIPO setting, primarily through

difficulties in dealing with the developing country representatives, they have begun negotiating a series of plurilateral and bilateral agreements. There are also a number of groups, such as Group B+, the IP5 and the Tegernsee Group, which have begun discussions centered around harmonization of patent laws and the introduction of systems which will benefit the major patent offices. Unfortunately, discussions in these groups often take place without input from those representing the interests of smaller users of the system, such as SMEs, and the proposals and policies developed by these groups are sometimes not ones that would suit Australian innovators. It will be important for Australia to monitor carefully what is going on within these country groups and do whatever can be done to minimise negative impacts on Australia. Australia's interest would seem to be best served by bringing negotiations back into WIPO and the WTO.

Enforcing IP rights

- Are IP rights too easy or hard to enforce in Australia, and if so, why?

The ability of IP rights holders to enforce their IP rights in Australia is generally very well balanced.

However, for certain rights holders (e.g. small to medium sized organisations) it may be beneficial to implement a faster and more streamlined system for enforcing IP rights in circumstances where the issues in dispute are comparatively straight forward. With IPEC, for example, trials are streamlined with the aim to last no more than two days. The implementation of a specialist IP court similar to the IPEC would provide a quick, streamlined and efficient system of enforcement in addition to the existing systems.

- To what extent can Australian firms enforce their IP rights internationally? Does this differ across regions and/or countries?

Assuming that an Australian firm has taken the necessary steps to have its IP rights recognised in a foreign jurisdiction, for example, by obtaining a patent for their invention in that jurisdiction, Australian firms can and do enforce their IP Rights internationally. There is substantial international harmonisation of IP law brought about by the various international agreements relating to IP rights, to which the vast majority of Australia's international trading partners, such as the United States and Europe, are also members. There are however substantial differences in the law from jurisdiction to jurisdiction, such as, for example, the difference between the common law system and the civil law system.

- Which features of the current enforcement system work well, and which could be improved?

Australian Federal Court Judges hearing intellectual property cases are of an extremely high standard. They are very well educated in intellectual property law and they deliver fair and well-reasoned judgments. Due to the number of IP cases being brought however, the specialist IP Judges have very high workloads.

A quick and streamlined system such as IPEC would increase the efficiency of the existing courts by allowing Judges to deal with more complex matters, with the less complex matters being dealt with more quickly by IPEC.

- Is the role expected of ISPs a practical option?

IPTA's members do not, in general, practice in this area of law, so IPTA is unable to comment.

- Are there particular issues relating to IP enforcement that are different from the general community's ability to access Australia's justice system, and if so, what are they?

The ability to access Australia's justice system is no different for IP rights holders than it is for the general public. In our experience, Courts do not treat IP rights holders any differently to any other member of the public seeking to ventilate a legal issue.

- Is Australia's enforcement system well balanced, or weighted in favour of one group?

Australia's IP enforcement system is well balanced. The Courts successfully balance the entitlement of IP rights holders to enforce their rights with the public interest, particularly the interests of consumers.

- What improvements could Australia adopt from overseas approaches?

As stated above, Australia should consider whether to adopt a specialist IP court similar to the IPEC in the UK, and IPTA would be very much in favour of such an approach.

International obligations constrain domestic flexibility

- The Commission seeks input on the impact of Australia's international IP obligations on domestic innovation, production, trade and consumption. Has a move towards stronger IP rights served Australia's economic interests? Is there a case for Australia to pursue stronger IP rights in excess of minimum standards for particular types of rights or specific technologies?

IPTA believes that Australia's strong IP rights systems have served Australia well, and have not only encouraged local innovation, but also encouraged foreign innovators to bring their technologies to Australia. There is an argument to be made for providing additional patent term for pharmaceutical inventions to compensate for delays in the regulatory process. IPTA believes that consideration should also be given to providing additional protection, in the form of additional patent term, for patents relating to animal health products or plant protection products. As with pharmaceutical inventions, these products are subject to extensive and lengthy regulatory processes which decrease the effective patent term available to the patentee. Such provisions would balance out the non-pharmaceutical regulatory exemptions which were introduced with the "Raising the Bar" Act.

The Australian innovation patent system, although mirrored by the provision of largely equivalent utility models in many European countries, including Germany, and in many other countries around the world, including major trading partners such as China is one system which Australia is not obliged to provide under its International obligations. Nevertheless since the system is overwhelmingly used by Australian SMEs, as opposed to overseas companies, IPTA is strongly in favour of maintaining the system but with a raised level of innovative step to encourage innovation by Australian SMEs. It is understood that the Productivity Commission has access to IPTA the detailed submissions provided jointly by IPTA and FICPI in response to the recent Innovation Patent Review.

- What are the main constraints on IP policy imposed by the TRIPS Agreement and other international agreements? What scope is there to adjust Australia's domestic IP legislation without violating the provisions of TRIPS and other international agreements?

Following the recent changes to the patent system introduced by the "Raising The Bar" Act, IPTA does not believe there is much further scope for substantial adjustments to domestic IP legislation without running the risk of violating provisions of TRIPS or other international agreements.

- What mechanisms other than adjusting the scope and duration of IP rights could be used to more effectively influence domestic IP settings?

IPTA believes that the Government should consider introducing appropriate grants, or tax relief, for example a patent box system, for encouraging local innovation. IPTA also believes that the introduction of a Court modelled on the United Kingdom IPEC would provide a substantial incentive to SMEs to protect innovations using the patent or innovation patent systems, and to enforce those patents where necessary. IPTA believes this could provide a substantial incentive to SMEs to innovate, if they are confident that they can protect those innovations from being copied.

IPTA would like the Government to give serious consideration to the recommendations contained in the report published in 2013 on The Strategic Review of Health and Medical Research, discussed above, with the aim of assisting in the development and commercialization of Australia's medical research in the area of medical products, biotechnology and pharmaceuticals in particular.

- To what extent do investor state dispute settlement provisions impede or prevent changes to domestic IP legislation?

IPTA does not have a view on whether investor state dispute settlement provisions would impede or prevent changes to domestic IP legislation.

- What principles should guide decision making for future international negotiations on IP rights?

In any future international negotiations on IP rights, Australian negotiators should ensure that the agreed IP provisions are in the best interests of Australia, when considered as a whole. IPTA does not believe that IP rights provisions should be traded off for other benefits in international agreement.