

Australian Government Response to the Productivity Commission  
Inquiry into Intellectual Property Arrangements

August 2017

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### Recommendation 2.1

In formulating intellectual property policy, the Australian Government should be informed by a robust evidence base and be guided by the principles of:

- *effectiveness*, which balances providing protection to encourage additional innovation (which would not have otherwise occurred) and allowing ideas to be disseminated widely
- *efficiency*, which balances returns to innovators and to the wider community
- *adaptability*, which balances providing policy certainty and having a system that is agile in response to change
- *accountability*, which balances the cost of collecting and analysing policy–relevant information against the benefits of having transparent and evidence–based policy that considers community wellbeing.

The Government **supports** this recommendation.

The Government wishes to ensure that the intellectual property (IP) system provides appropriate incentives for innovation, investment and the production of creative works while ensuring it does not unreasonably impede further innovation, competition, investment and access to goods and services.

The Government is committed to evidence-based policy making and believes that these guiding principles will provide a useful framework for the on-going assessment of the IP system and for future development of IP policy. These principles encompass key economic factors while recognising the importance of balancing the interests of innovators, investors and creators with the health, economic and social welfare of consumers and Australian society as a whole.

The principles complement the Government’s principles of Best Practice Regulation, which include a Regulation Impact Statement process that requires the assessment of economic, social and environmental costs and benefits to business and the community in determining the net benefit of a regulatory proposal.

The IP Policy Group (see recommendation 17.1) has included these principles into its Terms of Reference.

#### Recommendation 5.1

The Australian Government should amend the *Copyright Act 1968* (Cth) to:

- make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception
- permit consumers to circumvent technological protection measures for legitimate uses of copyright material.

The Government **supports in principle** this recommendation.

The Government recognises the inefficiencies and uncertainty that can arise from agreements which seek to exclude or restrict legal copyright exceptions and wants to ensure that statutory rights to fairly deal with copyright material are protected.

As outlined by the Productivity Commission, a move to restrict contracting out of exceptions is likely to have little effect if technological protection measures (TPMs) are unilaterally used to override exceptions. In line with our trade obligations, section 249 of the Copyright Act sets out a process for determining exceptions to protection under the Act for circumvention of TPMs. As part of its review of the Copyright Regulations 1969 in the second half of 2017, the Government will review whether new TPM exceptions should be created to prescribe particular legitimate uses of copyright material, where they fall within the requirements of that section. The Government will also implement a simplified process for future TPM exception reviews to ensure that it can more quickly respond to the needs of stakeholders seeking TPM exceptions and reduce the burden of the review process on all stakeholders.

Following the review of the Copyright Regulations, the Government will also consult on how best to implement the first part of this recommendation in the Copyright Act in line with reforms to the copyright exceptions.

#### Recommendation 5.2

The Australian Government should:

- amend the *Copyright Act 1968* (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology, as recommended in the House of Representatives Standing Committee on Infrastructure and Communications' report *At What Cost? IT pricing and the Australia tax*
- avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

The Government **notes** this recommendation.

The Government supports the ability for Australian consumers to affordably access copyright content in a timely manner, noting that this is a key factor in preventing copyright infringement.

In line with recommendation 5.1, the Government is open to considering whether new TPM exceptions could be created to prescribe particular uses of copyright material prevented by geoblocking, where they fall within the requirements of the Copyright Act. Section 249 of the Copyright Act sets out a process for determining exceptions to protection under the Act for

circumvention of TPMs. The Government will review whether new TPM exceptions should be created to prescribe particular uses of copyright material prevented by geoblocking, where they fall within the requirements of that section. The Government will also implement a simplified process for considering TPM exception requests to ensure that it can more quickly respond to the needs of stakeholders seeking TPM exceptions.

However, the Government notes that other measures, such as terms and conditions under consumer contracts and/or regulatory arrangements in jurisdictions outside Australia would continue to govern the circumvention of geoblocking technology. Geoblocking also spans a wide variety of technologies, some of which may and some of which may not, be captured by the TPM regime in the Copyright Act.

The Government has robust arrangements in place to ensure that domestic policies are considered in international agreement negotiations and implementation. As noted in the Government's response to Recommendation 17.2, the enhanced coordination of policy priorities and interests through the IP Policy Group will further complement and facilitate these arrangements.

#### Recommendation 5.3

The Australian Government should proceed to repeal parallel import restrictions for books to take effect no later than the end of 2017.

The Government **supports in principle** this recommendation.

As part of the Intergovernmental Agreement on Competition and Productivity-Enhancing Reforms, the Government has recently committed to ensuring that regulatory frameworks and government policies binding the public or private sectors do not unnecessarily restrict competition. Consistent with this commitment, the Government will consult with the book industry to develop a reform pathway that is in the public interest.

#### Recommendation 5.4

The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:

- The Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees.
- The review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.

The Government **supports** this recommendation.

The Government supports a review of the voluntary code for collecting societies to ensure it remains the best mechanism to promote efficient, effective and transparent administration of copyright licences. The Government considers the Department of the Communications and the Arts is best placed to undertake such a review, in close consultation with the Australian Competition and Consumer Commission.

The Department of Communications and the Arts will also continue to consider the efficiency and effectiveness of statutory licences for educational and government use of copyright material and how collecting societies administer these licences.

#### Recommendation 6.1

The Australian Government should accept and implement the Australian Law Reform Commission's final recommendations regarding a fair use exception in Australia.

The Government **notes** this recommendation and will further consult.

The Government's aim is to create a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes. There are arguments that Australia's current exceptions for fair dealing are restrictive when compared with international counterparts and may not permit some reasonable fair uses of copyright material. However, this is a complex issue and there are different approaches available to address it.

The Government will publicly consult on more flexible copyright exceptions. Consultation will occur in early 2018 following the finalisation of other copyright reform priorities, such as the Government's review of the Copyright Regulations, and the Collecting Societies' Voluntary Code of Conduct, and will align with the Government's consideration of how best to implement recommendations 5.1 and 6.2. This timeframe will also provide adequate time to properly consider the complexities of possible changes, and gather more detailed information on the regulatory impact of any changes.

#### Recommendation 6.2

The Australian Government should enact the Australian Law Reform Commission recommendations to limit liability for the use of orphan works, where a user has undertaken a diligent search to locate the relevant rights holder.

The Government **supports** this recommendation.

The Government recognises the difficulties both creators and cultural and collecting institutions face in utilising orphan works. It stifles the ability for knowledge to be shared and new content to be created. To help address this issue, the Government has enacted the Copyright Amendment (Disability and Other Measures) Act 2017 which establishes a term of protection for unpublished works including where the identity of the author is unknown.

The Government will also consult on the most appropriate way to limit liability for use of orphan works in the Copyright Act.

#### Recommendation 7.1

The Australian Government should incorporate an objects clause into the *Patents Act 1990* (Cth). The objects clause should describe the purpose of the legislation as enhancing the wellbeing of Australians by promoting technological innovation and the transfer and dissemination of technology. In so doing, the patent system should balance over time the interests of producers, owners and users of technology.

The Government **supports** this recommendation.

The Government previously accepted a similar recommendation of the former Advisory Council on Intellectual Property (ACIP) in its 2010 review of patentable subject matter, on the basis that a statement of objectives in the *Patents Act 1990* would provide a clear statement of legislative intent for the guidance of the courts in the interpretation of the Act. The Government continues to support a clear statement of legislative intent in the Patents Act.

The Government will seek amendments to the Patents Act to give effect to this recommendation, but will give further consideration to the exact wording of the objects clause. The implementing legislation will be the subject of further public consultation.

The Government notes that the Productivity Commission previously found in favour of an objects clause in its 2013 review of compulsory licensing of patents (finding 6.2 of that review). Noting the 2013 review's recommendations on Crown Use and compulsory licensing were also directed towards ensuring that there is an appropriate balance in the patents system, the Government will consult further on those recommendations during the implementation of this Government response.

#### Recommendation 7.2

The Australian Government should amend ss. 7(2) and 7(3) of the *Patents Act 1990* (Cth) such that an invention is taken to involve an inventive step if, having regard to the prior art base, it is not obvious to a person skilled in the relevant art. The Explanatory Memorandum should state:

- a 'scintilla' of invention, or a scenario where the skilled person would not 'directly be led as a matter of course', are insufficient thresholds for meeting the inventive step
- the 'obvious to try' test applied in Europe would in some instances be a suitable test.

IP Australia should update the Australian Patent Office Manual of Practice and Procedure such that it will consider the technical features of an invention for the purpose of the inventive step and novelty tests.

The Government **supports** this recommendation.

The Government accepts that Australia's patent standards should be consistent with international best practice, in accordance with the stated objectives of the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012*.

Although the *Raising the Bar* reforms made considerable improvements to the assessment of inventive step in Australia, they did not change the fundamental nature of the inventive step test in subsection 7(2) of the *Patents Act 1990*, or to the interpretation of that test developed by the

courts. Whilst the assessment of inventive step in the European Patent Office and in Australia is similar in most cases, the Productivity Commission considers that some differences still remain.

The Government therefore supports the recommendation to put beyond doubt that the assessment of inventive step in Australia is consistent with the European Patent Office. The Government will seek amendments to the Patents Act to give effect to this recommendation. The wording of the legislative change and explanatory memorandum will be the subject of further public consultation.

IP Australia will continue to monitor patent standards internationally to evaluate the effect of these reforms.

#### Recommendation 7.3

IP Australia should reform its patent filing processes to require applicants to identify the technical features of the invention in the set of claims.

The Government **supports** this recommendation.

This recommendation aligns with recommendation 7.2, which the Government has also supported. The Government will implement both of these recommendations at the same time.

#### Recommendation 7.4

The Australian Government and IP Australia should set patent fees to promote broader intellectual property policy objectives, rather than the current primary objective of achieving cost recovery. To this end, the Australian Government, with input from IP Australia, should:

- restructure patent renewal fees such that they rise each year at an increasing rate (including years in which patents receive an extension of term) — fees later in the life of a patent would well exceed current levels
- reduce the initial threshold for claim fees, and increase claim fees for applications with a large number of claims.

The Government **notes** this recommendation.

IP Australia's fees are already set to balance both innovation and cost recovery policy objectives. The Government considers that there is greater flexibility within the cost recovery framework to achieve policy outcomes than the Commission's report suggests.

Current Government policy under the Australian Government Charging Framework is that where specific demand for a government activity is created by clearly identifiable individuals or groups, those individuals should be charged for it wherever possible. Granting of IP rights is clearly within this policy statement, and as a regulatory activity is appropriate for cost recovery.

As a result, the Government is not persuaded that it is necessary for IP Australia to move away from a cost recovery framework at this time to give effect to the intentions of this recommendation. Instead, IP Australia will have regard to the recommendation when reviewing patent fees in future, including renewal and claim fees.

### Recommendation 8.1

The Australian Government should abolish the innovation patent system.

The Government **supports** this recommendation.

The Government notes that both the Productivity Commission and the former Advisory Council on Intellectual Property (ACIP) have recommended that the innovation patent system be abolished. Both found that the innovation patent system is unlikely to provide net benefits to the Australian community or to the small and medium sized enterprises (SMEs) who are the intended beneficiaries of the system. The Commission found that the majority of SMEs who use the innovation patent system do not obtain value from it, and that the system imposes significant costs on third parties and the broader Australian community.

The Government notes that the innovation patent system was established with the objective of stimulating innovation in Australian SMEs. The Government considers that more targeted assistance would better achieve this objective, while avoiding the broader costs imposed by the innovation patent system.

Along with initiatives to support SMEs introduced through the National Innovation and Science Agenda (NISA) and existing programs such as the R&D Tax incentive, the Government has already implemented a number of measures to support SMEs to better understand, secure and utilise their IP. These include the IP Toolkit for Collaboration, Source IP, the Patent Analytics Hub and aspects of the Entrepreneur's Programme, which provide grants and advisory services for businesses in certain industry sectors seeking to leverage their IP. IP Australia is continually improving its services and processes to benefit business, including the establishment of a new IP Counsellor to China, trialling the provision of Patent Analytics services under the Entrepreneur's Programme, and raising education and awareness of IP issues with start-ups.

The Government will seek legislative amendments to the *Patents Act 1990* to abolish the innovation patent system, with appropriate arrangements to maintain existing rights. The Government will continue to explore more direct mechanisms to better assist SMEs to understand and leverage their IP, secure and utilise IP Rights and access affordable enforcement.

#### Recommendation 10.1

The Australian Government should reform extensions of patent term for pharmaceuticals such that they are only:

- (i) available for patents covering an active pharmaceutical ingredient, and
- (ii) calculated based on the time taken by the Therapeutic Goods Administration for regulatory approval over and above 255 working days (one year).

The Australian Government should reform s. 76A of the *Patents Act 1990* (Cth) to improve data collection requirements for extensions of term, drawing on the model applied in Canada. Thereafter no extensions of term should be granted until data is received in a satisfactory form.

The Government **notes** this recommendation, however has no plans to proceed with this recommendation in the form proposed by the Productivity Commission. The Government will discuss ways to improve the patent term extension system with the sector.

The Government recognises the importance of patent protection to the pharmaceutical industry. The cost of bringing a new pharmaceutical product to market is substantial and involves long development lead-times. Patents provide a time-limited period of exclusivity, during which pharmaceutical patent owners can generate a reasonable return on their investment. This ensures continuing innovation in the sector and that new and more effective pharmaceutical products are brought to the Australian market.

Pharmaceutical products are subject to a regulatory approval process before they can be marketed. A pharmaceutical product can only be supplied to the Australian market after it has been assessed by the Therapeutic Goods Administration as meeting the requirements of quality, safety and efficacy and is registered in the Australian Register of Therapeutic Goods. This assessment has a statutory timeframe of 255 working days, which may exceed one calendar year as the TGA has the legislative ability to seek further information from the applicant.

The Government acknowledges that for many pharmaceutical products, the effective patent life – the period between marketing approval and patent expiry – is reduced by the time taken for companies to obtain evidence to support applications under the subsequent regulatory review process. In common with other countries, this can affect incentives to discover and develop new pharmaceutical products. The Commission questions whether providing a 15 year effective patent life is necessary to achieve a reasonable return on investment for bringing new pharmaceutical products to the Australian market, and whether the EOT provisions have had a positive impact on attracting additional R&D investment.

The Government notes the Commission's finding that extensions of patent term prolong market exclusivity and impose significant costs on consumers, Government and taxpayers. The Commission estimated that the cost to the Government (through additional costs to the Pharmaceutical Benefits Scheme) of providing extensions of patent term to pharmaceuticals is approximately \$260 million per annum.

The Government notes that the effective patent life of extended Australian patents is 12 months longer at the median than those in the United States and the average expiry date of extended Australian patents is 18 months later than those in the United States.

The Government recognises the recent Strategic Agreement with Medicines Australia will deliver savings of \$1.8 billion over five years to the Pharmaceutical Benefits Scheme.

Any consideration of changes to the extensions of term regime must strike a balance between ensuring that new pharmaceutical products are developed and that they are safe and effective, but also ensuring that they are accessible and affordable.

The Government notes the Commission's recommendation to reform section 76A of the *Patents Act 1990* (Cth) to improve data collection requirements for extensions of term. Since the scheme was introduced in 1999, the Government's ability to access and analyze relevant data increased markedly. As the Commission has not identified a convincing rationale for imposing this regulatory burden, the Government will consider repealing section 76A.

#### Recommendation 10.2

The Australian Government should introduce a system for transparent reporting and monitoring of settlements between originator and generic pharmaceutical companies to detect potential pay for delay agreements. This system should be based on the model used in the United States, administered by the Australian Competition and Consumer Commission, and include guidelines on the approach to monitoring as part of the broader guidance on the application of the *Competition and Consumer Act 2010* (Cth) to intellectual property (recommendation 15.1).

The monitoring should operate for a period of five years. Following this period, the Australian Government should review the regulation of pay for delay agreements (and other potentially anticompetitive arrangements specific to the pharmaceutical sector).

The Government **supports in principle** this recommendation.

The Government recognises that pay for delay agreements have the potential to seriously harm competition and innovation in relation to pharmaceuticals.

The Government notes the concerns raised by some stakeholders that there is presently no evidence that pay for delay activity is occurring in Australia. However, it does not follow that such activity has not occurred or that incentives to engage in such conduct do not exist. Rather, it may only confirm the difficulty of detecting such agreements, particularly where an agreement that affects the price or availability of pharmaceuticals in Australia is made overseas. In this regard, the Government is aware that pay for delay agreements reached overseas between foreign companies have the very real potential to impact markets in Australia.

The Government considers that introducing a reporting and monitoring regime for potentially anti-competitive conduct between pharmaceutical patent owners and generic pharmaceutical manufacturers would improve transparency and would better equip the ACCC to detect any anti-competitive behaviour.

A reporting obligation would deter anti-competitive agreements being struck that harm Australians. In the event that no pay for delay agreements are struck that impact upon Australia in any one year, there would be little to no burden upon pharmaceutical firms to advise the ACCC of that matter.

The Government will further consider the options for implementing this recommendation, including suitable compliance mechanisms where there is a failure by a party, or parties, to lodge relevant agreements with the ACCC. In this regard, the scheme may be informed by reporting frameworks in

other sectors, such as the breach reporting framework under the *Corporations Act 2001* applying to Australian financial services licensees. Consideration of implementation options will also include exploring effective mechanisms for capturing agreements reached overseas that impact Australian markets.

### Recommendation 12.1

The Australian Government should amend the *Trade Marks Act 1995* (Cth) to:

- (a) reduce the grace period from 5 years to 3 years before new registrations can be challenged for non-use
- (b) remove the presumption of registrability in assessing whether a mark could be misleading or confusing at application
- (c) ensure that parallel imports of marked goods do not infringe an Australian registered trade mark when the marked good has been brought to market elsewhere by the owner of the mark or its licensee. Section 97A of the *Trade Marks Act 2002 (New Zealand)* could serve as a model clause in this regard.

IP Australia should:

- (d) require those seeking trade mark protection to state whether they are using the mark or 'intending to use' the mark at application, registration and renewal, and record this on the Australian Trade Mark On line Search System (ATMOSS). It should also seek confirmation from trade mark holders that register with an 'intent to use' that their mark is actually in use following the grace period, with this information also recorded on the ATMOSS
- (e) require the Trade Marks Office to return to its previous practice of routinely challenging trade mark applications that contain contemporary geographical references (under s. 43 of the Trade Marks Act)
- (f) in conjunction with the Australian Securities and Investment Commission, link the ATMOSS database with the business registration portal, including to ensure a warning if a business registration may infringe an existing trade mark.

The Government **supports** recommendation (a) to reduce the grace period for challenging non-use of a trade mark. The Government agrees that it is desirable to effectively manage cluttering on the trade mark register and will seek amendments to the *Trade Marks Act 1995* to give effect to this recommendation, which will include further public consultation on an exposure draft of proposed legislation.

The Government **does not support** recommendation (b) to remove the presumption of registrability in assessing whether a trade mark could be misleading or confusing. The Government notes that the presumption of registrability is a fundamental principle of the Trade Marks Act, which applies to all grounds for rejecting an application. The Government does not agree with the Commission's suggestion that it is unreasonably difficult to reject a mark on the grounds that it is misleading or confusing. The presumption of registrability allows some discretion to reject a trade mark that would be misleading or confusing, but sets the level of certainty required at an appropriate level.

The Government **supports** recommendation (c) to ensure that parallel imports of marked goods do not infringe an Australian registered trade mark when the good has been brought to market elsewhere by the owner or licensee. The Government accepts that section 123 of the Trade Marks Act is not effectively implementing the policy intention of allowing for the parallel importation of legitimate goods and has led to some uncertainty and confusion. The Government will seek amendments to the Trade Marks Act to give effect to this recommendation, which will include further public consultation on an exposure draft of proposed legislation.

The Government **supports in principle** recommendation (d) to require a statement of ‘using’ or ‘intending to use’ a mark at application, registration and renewal. The Government will ask IP Australia to undertake further research and analysis to determine the sources and extent of any clutter on the trade marks register. This research will inform the development of appropriate reforms to address clutter, which may include implementation of some aspects of this recommendation.

The Government **supports** recommendation (e) to routinely challenge trade mark applications that contain contemporary geographical references, but some further work is needed to determine the scope of the practice change in the Trade Marks Office. The Government agrees that geographical terms in trade marks are a particularly contentious issue in relation to misleading and confusing connotations.

The Government **supports in principle** recommendation (f) to link the ATMOSS (now known as Australian Trade Mark Search) database with the business registration portal. The Government agrees that additional assistance for business name applicants would be desirable to help them make informed decisions. The Government is currently working to establish a single online portal for streamlined business and company registration and is continuing to develop Australian Trade Mark Search to provide additional capabilities. Linkages between these databases to better assist and streamline business decision-making are being explored.

The Government notes that the effectiveness of issuing of automatic warnings is reliant on the sophistication of available technologies, and requires further consideration. Assessing whether a business name may infringe a trade mark is a complex decision, meaning that there is a risk that an automated warning may not bring all relevant trade marks to the business name applicant’s attention.

#### Recommendation 12.2

The Australian Government should amend the *Australian Grape and Wine Authority Act 2013* (Cth) and associated regulations to allow the Geographical Indications (GIs) Committee to amend or omit existing GIs in a manner similar to existing arrangements for the determination of a GI (including preserving the avenues of appeal to the Administrative Appeals Tribunal). Any omissions or amendments to GIs determined in such a manner should only take effect after a ‘grace period’ determined by the GI Committee on a case by case basis.

The Government **supports in part** this recommendation.

The Government **supports** the recommendation that amendments should be made to the process to *omit* Australian Geographical Indications (GI). The power granted to individuals to effectively veto an omission of a GI is unnecessary and makes the omissions procedure unworkable in practice. The Government supports replacing this with a requirement that the Committee must have regard to the submissions it receives before it makes its determination.

The Government **does not support** the recommendation that amendments should be made to the process to *amend* Australian GIs. The Government notes the caution expressed by the Commission and the Authority and considers that introducing a GI amendment process creates an unnecessary risk of litigation. The Government further notes this risk was duly considered at the time of drafting the GI provisions and, for this reason, an amendment process was expressly excluded.

#### Recommendation 13.1

The Australian Government should proceed to implement the Advisory Council on Intellectual Property's 2010 recommendation to amend the *Plant Breeder's Rights Act 1994* (Cth) to enable essentially derived variety (EDV) declarations to be made in respect of any variety.

The Government **supports** this recommendation.

The Government agreed in 2011 to the former Advisory Council on Intellectual Property's 2010 recommendation to enable EDV declarations to be made in respect of any variety. The Government will seek amendments to the *Plant Breeder's Rights Act*, including public consultation, to give effect to this recommendation.

#### Recommendation 15.1

The Australian Government should repeal s. 51(3) of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) at the same time as giving effect to recommendations of the (Harper) Competition Policy Review on the per se prohibitions.

The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property.

The Government **supports** this recommendation.

The Government will seek to repeal section 51(3) of the *Competition and Consumer Act 2010*, noting that the recommendations of the Competition Policy Review relating to per se prohibitions, authorisations and notifications are already being implemented.

It is now generally agreed that there is no fundamental conflict between IP rights and competition policy; rather they share the purpose of promoting innovation and enhancing consumer welfare. However, where there is evidence of anti-competitive conduct associated with IP licensing arrangements, it is important that such conduct is appropriately regulated. If anti-competitive conduct in this space is nonetheless in the public interest, authorisation will be available under Part VII of the Competition and Consumer Act.

The immediate costs and benefits of removing the exemption under section 51(3) are finely balanced. However, looking ahead, increased cross-licensing may occur in growth industries such as pharmaceuticals and communications, which would considerably increase the benefits associated with removing the exemption.

#### Recommendation 16.1

The Australian, and State and Territory governments should implement an open access policy for publicly funded research. The policy should provide free and open access arrangements for all publications funded by governments, directly or through university funding, within 12 months of publication. The policy should minimise exemptions.

The Australian Government should seek to establish the same policy for international agencies to which it is a contributory funder, but which still charge for their publications, such as the Organisation for Economic Cooperation and Development.

The Government **supports** this recommendation.

The recommendation is consistent with current Australian Government policy and emerging international best practice in Europe, the United Kingdom, the United States as well as international organisations such as the Organisation for Economic Co-operation and Development (OECD). Promoting open access to science and research publications and collaborative use of research outputs by researchers and industry is an important element of the Government's National Innovation and Science Agenda (NISA).

The Australian Research Council (ARC) and National Health and Medical Research Council (NHMRC) already require publications arising from government funded grants to be made available in a publicly accessible repository within twelve months of publication. Further implementation arrangements are being developed in consultation with universities and publicly funded research agencies (PFRAs). As part of these arrangements, the Government plans to require all PFRAs to put in place transparent policies that are consistent with this approach, with the flexibility to allow exemptions in specific circumstances, tailored to the needs of individual agencies.

The Australian Government also calls on state and territory governments to implement transparent open access policies that are consistent with this policy for publications arising out of the research they fund.

### Recommendation 17.1

The Australian Government should promote a coherent and integrated approach to IP policy by:

- establishing and maintaining greater IP policy expertise in the Department of Industry, Innovation and Science
- ensuring the allocation of functions to IP Australia has regard to conflicts arising from IP Australia's role as IP rights administrator and involvement in policy development and advice
- establishing a standing (interdepartmental) IP Policy Group and formal working arrangements to ensure agencies work together within the policy framework outlined in this report. The Group would comprise those departments with responsibility for industrial and creative IP rights, the Treasury, and others as needed, including IP Australia.

The Government **supports** this recommendation.

The Department of Industry, Innovation and Science (DIIS) established a dedicated IP Policy Unit in April 2016. This unit works closely with IP Australia and the Communications and the Arts portfolio in developing policy and providing advice to the government. The unit is also strengthening relationships with other relevant portfolios including the Treasury.

The Government agrees with the Commission's view that rights administrators, such as IP Australia, have an important contribution to make to policy development. The Government will continue to ensure that the allocation of functions to IP Australia has regard to any potential conflicts.

IP Australia generally takes the lead on technical policy issues. DIIS takes the lead on broader policy issues that deal with other aspects of innovation policy or relate to the role of IP in Australia's innovation system. DIIS and IP Australia have measures in place to manage potential conflicts, including the creation of the position of Deputy Director General (Policy and Corporate) at IP Australia; convening regular IP Policy meetings of senior officials of both organisations aimed at actively investigating options regarding their respective responsibilities in the IP policy landscape; and as noted above, building DIIS capacity in IP policy.

A standing interdepartmental IP Policy Group (IPPG) has been established as recommended, to support an integrated and coherent approach to developing the Government's policy agenda for IP issues, with regard to the Commission's policy framework (recommendation 2.1). It currently comprises senior officials from nine departments and agencies and is chaired by the responsible Deputy Secretary of DIIS.

### Recommendation 17.2

The Australian Government should charge the interdepartmental IP Policy Group (recommendation 17.1) and the Department of Foreign Affairs and Trade with the task of developing guidance for IP provisions in international treaties. This guidance should incorporate the following principles:

- avoiding the inclusion of IP provisions in bilateral and regional trade agreements and leaving negotiations on IP standards to multilateral fora
- protecting flexibility to achieve policy goals, such as by reserving the right to draft exceptions and limitations
- explicitly considering the long term consequences for the public interest and the domestic IP system in cases where IP demands of other countries are accepted in exchange for obtaining other benefits
- identifying no go areas that are likely to be seldom or never in Australia's interests, such as retrospective extensions of IP rights
- conducting negotiations, as far as their nature makes it possible, in an open and transparent manner and ensuring that rights holders and industry groups do not enjoy preferential treatment over other stakeholders.

The Government **notes** this recommendation.

The Government has accepted the Commission's recommendation to establish an IP Policy Group to promote policy coordination. However, the Government does not consider that tasking the IP Policy Group and DFAT to develop guiding principles will provide additional benefit.

The IP Policy Group will work to support the robust arrangements the Government has in place for negotiating IP provisions in international treaties. The Government considers improved coordination of Australia's IP policy priorities and interests will, in itself, deliver the benefits the Commission seeks in this recommendation.

Engaging with stakeholders and understanding their perspectives and priorities is an integral and valued part of Australia's treaty negotiation process. The Government welcomes public interest in IP negotiations and will continue to work with all stakeholders to deliver outcomes that benefit Australia.

Various means are used to provide transparency and facilitate stakeholder engagement. These include encouraging stakeholders to provide submissions outlining their interests and concerns, convening stakeholder meetings and providing updates and briefing on the progress of negotiations. Before any action is taken that would bind Australia under international law, draft agreements are tabled in Parliament and made publicly available for scrutiny and discussion. In addition to general scrutiny, the Joint Standing Committee on Treaties (JSCOT) considers draft treaties and makes recommendations on whether to proceed with binding action. JSCOT is a public process that includes consideration of submissions from interested parties. JSCOT and general public consideration of draft treaties is enhanced by the release of a National Interest Analysis explaining the outcomes of a treaty and its impact on Australia's interests.

The Government comprehensively considers Australia's domestic interests in the treaty making process. The negotiation of international IP provisions is informed by domestic policy and best practice approaches. Specialists within the Government agencies responsible for development of IP policy participate actively in formulating and negotiating IP positions in trade agreements and take the lead on broader multilateral IP negotiations. Stakeholder consultations also inform approaches, as do feasibility studies and other assessments. Government agencies, as part of obtaining mandates

for treaty outcomes, also complete a Regulatory Impact Statement that assesses the costs and benefits of proposed actions.

While a number of the Commission's proposed principles already inform Government arrangements, the Government firmly rejects the proposed principle that IP provisions be excluded from Free Trade Agreements (FTAs). Decisions about whether it is in Australia's best interest to pursue IP provisions within an international negotiation are made on a case-by-case basis. Preventing Australia from negotiating IP provisions in FTAs would impede efforts to advance the interests of Australian exporters in balanced and effective IP protection in overseas markets. It would also preclude Australia from participating in important FTA negotiations such as the Trans-Pacific Partnership and Regional Comprehensive Economic Partnership. With this in mind, the Commission's proposal would prevent Australia from accessing significant economic and welfare benefits of new trade liberalisation occurring through FTAs.

#### Recommendation 18.1

The Australian Government should:

- pursue international collaborative efforts to streamline IP administrative and licensing processes separately from efforts to align standards of IP protection. In so doing, it should consider a range of cooperative mechanisms, such as mutual recognition
- use multilateral forums when seeking to align standards of protection.

The Government **supports in part** this recommendation.

The Government agrees with the Commission on the importance of international collaboration on IP. However, the Government does not support the Commission's proposal to separate collaboration on IP administration from collaboration on IP protection, and to limit the forums in which the latter could be pursued.

The Government considers that attempts to force a separation between international collaboration on IP protection and international collaboration on IP administration would not deliver better outcomes for Australia. For example, leading multilateral treaties within both the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) contain both IP administration and IP protection provisions, as do bilateral and plurilateral trade agreements.

Australia's international collaboration on IP is broad-ranging and multifaceted. Key areas of activity include:

- multilateral cooperation under the auspices of WIPO and the WTO;
- bilateral, plurilateral and multilateral international agreements;
- bilateral and plurilateral initiatives involving Australia's domestic IP agencies and their overseas counterparts; and
- capacity building activities to strengthen IP systems in developing country partners.

#### Recommendation 18.2

The Australian Government should play a more active role in international forums on intellectual property policy — areas to pursue include:

- calling for a review of the TRIPS Agreement (under Article 71.1) by the WTO
- exploring opportunities to further raise the threshold for inventive step for patents
- pursuing the steps needed to explicitly allow the manufacture for export of pharmaceuticals in their patent extension period
- working towards a system of eventual publication of clinical trial data for pharmaceuticals in exchange for statutory data protection
- identifying and progressing reforms that would strike a better balance in respect of copyright scope and term.

The Government **notes** this recommendation.

The Government supports active engagement by Australia in international forums on IP policy, and will continue to do so on the basis of achieving balanced and effective outcomes in Australia's interest. The Government notes the Recommendation that Australia should be even more active.

The Government agrees with the Commission on the importance of Australia taking an active role in international IP forums. Australia is already an active player, and the recommendation takes insufficient account of these efforts.

The leading international forum on IP policy is the World Intellectual Property Organization (WIPO). Australia is actively advancing its interests within WIPO. For example:

- an Australian official currently Chairs an ambitious normative project in WIPO, the Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore (charged with pursuing multilateral IP outcomes that will promote effective protection of traditional knowledge, traditional cultural expressions and genetic resources);
- Australia pioneered, with Canada and the UK, the WIPO Centralized Access to Search and Examination system (a powerful tool to help IP agencies around the world increase their efficiency through work sharing initiatives);
- Australia is one of a modest number of countries operating a Funds-in-Trust arrangement with WIPO to partner on wide-ranging capacity building projects in our region and to invest in partnerships to improve access to medicines (a total of \$5 million committed since 2012);
- Director General of IP Australia, Ms Patricia Kelly, currently Chairs Group B+, an influential grouping established to promote and facilitate progress on key issues under consideration at WIPO. Group B+ includes Canada, Japan, the United States, South Korea, European Union member states and the European Commission; and
- In 2016, Australia was one of the initial twenty countries to ratify and bring into force the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. Australia was involved in the first cross-border transfer of accessible books under the Treaty when books in audio format were provided by the Canadian National Institute for the Blind to Vision Australia on 30 September 2016.

Australia is also an active player in IP-related meetings at the World Trade Organization. For example:

- in 2015, the Government passed legislation to implement the Protocol to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), enabling Australian medicine producers to manufacture and export patented pharmaceuticals to countries experiencing health crises, under a compulsory license from the Federal Court. The Government, since Protocol negotiations concluded in 2005, has actively encouraged WTO Members to join the agreement to ensure its entry into force. That goal was achieved on 23 January 2017;
- Australia actively promotes an IP and innovation agenda in TRIPS meetings, working with other Members to share experiences and promote best practice; and
- Australia actively engages with least developing countries on measures to promote technology transfer, including through workshops and whole-of-government reporting on actions in this area.

The Government's international engagement is already focussed on achieving balanced and effective outcomes in Australia's interest and it will continue to consider new initiatives as appropriate.

#### Recommendation 19.1

The Australian Government should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services.

The Government **supports in principle** this recommendation.

The Government recognises the limitations of the safe harbour scheme being restricted to only carriage service providers. The Government is undertaking additional consultation on the safe harbour scheme before considering whether to introduce amendments to the Parliament. This additional consultation will ensure our safe harbour scheme will encourage growth in Australia's digital economy and ensure a thriving and vibrant creative sector, whilst respecting the interests of copyright holders.

#### Recommendation 19.2

The Australian Government should introduce a specialist IP list in the Federal Circuit Court, encompassing features similar to those of the United Kingdom Intellectual Property Enterprise Court, including limiting trials to two days, caps on costs and damages, and a small claims procedure.

The jurisdiction of the Federal Circuit Court should be expanded so it can hear all IP matters. This would complement current reforms by the Federal Court for management of IP cases within the National Court Framework, which are likely to benefit parties involved in high value IP disputes.

The Federal Circuit Court should be adequately resourced to ensure that any increase in its workload arising from these reforms does not result in longer resolution times.

The Australian Government should assess the costs and benefits of these reforms five years after implementation, also taking into account the progress of the Federal Court's proposed reforms to IP case management.

The Government **notes** this recommendation.

The ability to enforce IP rights in a timely and cost-effective manner is an important aspect of the IP system. IP rights provide an incentive to innovate and create. An IP rights system that meets the principles of effectiveness, efficiency, adaptability and accountability must include ways to ensure that benefits accrue to the creators of IP, that disputes are resolved efficiently and that frameworks for enforcement of IP have the flexibility to meet the demonstrated needs of users.

The Productivity Commission notes that Australia's IP enforcement arrangements compare well internationally. However, it found that there is room for improvement in facilitating access to IP enforcement options for innovative and creative SMEs who are particularly affected by the time and cost of entering into legal proceedings.

The Government supports strategies to improve access to the full spectrum of enforcement options, from low cost resolution through negotiation or mediation through to litigation when it becomes necessary.

The Government notes that the Federal Circuit Court (FCC) has commenced a pilot in its Melbourne Registry to streamline its management of IP matters and to increase the visibility of the FCC as an alternative to the Federal Court of Australia (FCA). A Practice Direction sets out the arrangements for

the management of the IP pilot, which can be established by the FCC using its existing powers to resolve matters in a flexible manner that is proportionate to the issue in dispute. In planning this IP Pilot, the FCC has closely considered the practices and procedures adopted by the UK Intellectual Property Enterprise Court. It has also built on its own experience in establishing dedicated lists in other areas of the law.

Given that patent matters can be particularly complex, the Government considers that it is essential to ensure that patent matters are dealt with in the appropriate forum by judges with the requisite expertise. The Government notes that recent initiatives of the FCA address several of the issues identified by the Productivity Commission. The FCA has implemented an IP National Practice Area and issued a new Practice Note for IP matters. These initiatives aim to increase the efficiency of the conduct of litigation in the Court and reduce the cost of that litigation. Such active case management initiatives are acknowledged as an effective way to streamline the court process, reducing trial duration and costs.

More broadly, the Government will continue to explore strategies to enable SMEs to understand that alternative methods of dispute resolution are available outside of the courts. IP Australia has recently launched its IP Mediation Referral Service, and is investigating how to improve accessibility to IP insurance. The Government will also review existing information it provides about IP infringement and enforcement. This review will seek to ensure that information provided meets the needs of Australian innovative and creative businesses and enables them to take the most appropriate course of action to resolve IP disputes.