



SUBMISSION

Submission to the Productivity  
Commission inquiry into Intellectual  
Property Arrangements

DECEMBER 2015

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economic, social  
and environmental  
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The Business Council of Australia (BCA) is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

## About this submission

This is the Business Council of Australia's submission to the Productivity Commission's issues paper released as part of their inquiry into Intellectual Property Arrangements.

The Business Council is engaging in this process because intellectual property fundamentally underpins the competitive position of Australia as a modern, knowledge based economy, and is also critical to each of the individual members of the Business Council.

## Key recommendations

- The Productivity Commission should prioritise continuity and consistency in Australia's intellectual property arrangements, in order to maintain a business environment conducive to investment in innovation.
- Any changes to IP arrangements should therefore meet a high standard, including that a problem with the current framework is clearly identifiable and that the benefits of change clearly exceed the costs. In particular this standard should apply to:
  - 'Fair use' exceptions for copyright, which should be informed by the completion of the cost-benefit analysis already underway.
  - Repeal of sub-section 51(3) of the Competition and Consumer Act, as recommended by the Harper review.
- The Business Council supports the recommendation from the Harper review of National Competition Policy that: "trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded"
- The inquiry should prioritise reforms that can streamline governance structures or processes to reduce unnecessary costs associated with protecting intellectual property, in particular where issues are minor or a decision can be made easily.
- Consistent with the intent of the agreement under the Australia-United States Free Trade Agreement the Business Council supports the expansion of the definition applied to the safe harbour regime from carriage providers to content providers under the Copyright Act.

## **1. Context for the inquiry – Intellectual property plays a critical role in a knowledge based economy**

Knowledge has long been recognised as a key driver of both productivity and economic growth in developed nations, such as Australia and other OECD countries. A country's knowledge infrastructure is a core component of its innovation capability.

Productivity will need to be the key driver of economic growth and living standards going forward in Australia. Future productivity growth must be driven by innovation. This will require an effective innovation system which provides the incentives for individuals and organisations to innovate. Intellectual property rights and regulation is one of many elements that play an important role in influencing the incentives that individuals and organisations face.

The business environment that organisations face is changing rapidly. Economic and demographic changes around the globe, combined with rapidly advancing technology, are driving profound changes in the economies of all countries. Technology is becoming more pervasive, developing at an accelerating pace and is penetrating into every aspect of business. Global value chains are being reconfigured and are increasingly dispersed. The implication of this is that Australia's intellectual property settings need to support Australian businesses to compete in this dynamic and competitive environment.

## **2. The inquiry should build on findings from other reviews**

The issues paper notes that there have been a number of recent reviews which are relevant to this inquiry, including:

- the Innovation Patent System (2015)
- Pharmaceutical Patents Review (2013)
- the Review of the Designs Systems (2015)
- Copyright and the Digital Economy (2013).

The Business Council would summarise the overarching recommendations of the four reviews are as follows:

- the scope of innovation patents should be limited by raising the threshold for granting patents and limiting the scope of innovations that can be covered by an innovation patent
- the approach to patent standards have enabled patents to be granted that are not sufficiently inventive (although the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* attempted to address this in 2012)
- the designs system is working well, although it could be more efficient with some technical amendments.
- copyright legislation requires amendment to be suitable, fit-for-purpose and to encourage innovation in a digitised economy.

While endeavouring to take an overarching perspective of the Australian intellectual property system, the Business Council recommends that the Productivity Commission should build upon the findings of these reviews.

### **3. BCA principles for innovation policy and intellectual property**

#### **Creating an effective innovation system**

The creation and use of intellectual property occurs within the context of a broader innovation system. People will innovate when they have the capabilities to innovate and operate in an environment which provides them with an incentive to innovate. Australia's innovation system needs to facilitate this.

The Business Council has previously articulated its priorities for building a more effective Australian innovation system in our submission to the Senate inquiry into Australia's Innovation System. One of the priorities identified in this piece of work was creating an environment and culture that incentivises innovation and enables risk taking. Intellectual property arrangements are at the very heart of this.

#### **Striking a balance between generating and disseminating knowledge**

At its core, the Business Council is of the view that the purpose of intellectual property arrangements and rights is to encourage additional investment in, and the creation, development and marketing of innovative products and services.

Intellectual property arrangements achieve this through the creation of a property right. This is particularly important for innovation such as medical research which is both long term and costly. In the absence of property rights which allow the investors in research and development to recoup their costs and profit from their investment it can be argued that there would be less incentive to undertake the investment.

However, intellectual property arrangements also need to strike an appropriate balance between generating new knowledge and allowing for the dissemination of existing knowledge.

#### **The frameworks underpinning intellectual property should adhere to good regulatory practice**

Intellectual property rights are created and protected through regulatory mechanisms. As such, they should adhere to good regulatory practice. The Business Council has previously articulated its views on how to create a more efficient regulatory system in Australia in *Improving Australia's Regulatory System*.

A high performing regulatory system should follow five key principles:

1. The problem to be solved by regulation is well understood.
2. New regulation is subject to cost–benefit analysis.
3. Regulation achieves its objectives at least cost.
4. Regulators perform efficiently.
5. Regulation is constantly reviewed.

The Business Council has also outlined a framework in relation to performance and accountability for regulators to ensure that regulation is administered in the most efficient manner possible to facilitate economic progress. These standards are:

1. Regulators are subject to regular and meaningful performance assessment and reporting.
2. The government's expectations of a regulator are transparent, and are clearly within the scope of the regulator's powers.
3. Regulators follow a risk-based approach to enforcement and compliance activities.
4. Regulatory decisions are timely.
5. Regulators are continuously streamlining their processes.
6. There is a clear separation of roles between policymakers and regulators.
7. Regulators adopt a client-focused approach to regulated parties.
8. Regulatory decisions are fair and contestable.

In developing its recommendations, the Productivity Commission should endeavour to adhere to these principles.

#### **4. Approach of the inquiry**

The origin of this inquiry into intellectual property arrangements can be traced back to the Harper Competition Policy Review. The review stated that:

“The Panel is concerned that Australia has no overarching IP policy framework or objectives guiding changes to IP protection or approaches to IP rights in the context of negotiations for international trade agreements”

As such the Business Council supports the first principles approach taken by the Productivity Commission in the issues paper.

The Business Council supports the stated objective ‘to maximise wellbeing of Australians’ of the Productivity Commission in relation to the inquiry. This is consistent with the Business Council's broader economic agenda and in particular with our *Action Plan for Enduring Prosperity (2013)* which sets out an overarching vision of securing enduring prosperity for all Australians. The role of intellectual property in driving the creation of new knowledge, in creating new products and services and in adding value is critical to improving the well-being of Australians.

The Business Council strongly supports the principles that the Productivity Commission has outlined in the issues paper to guide its deliberations. These principles relate to effectiveness, efficiency, adaptability and accountability. They are consistent with the Business Council's guidelines for best practice regulation and are also critical in the context of the changing economic environment that individuals and businesses operate in.

Continuity and consistency in the business environment is essential. It makes it easier for individuals and organisations to have a clear understanding of the rules and regulations

that they must adhere to. A stable business environment is necessary for businesses to invest in innovation. To ensure continuity and consistency, the Business Council recommends that the Productivity Commission should only recommend changes to the system where a problem is clearly identifiable.

## **5. Key matters for the Inquiry**

The members of the Business Council have raised a number of issues relevant to this inquiry in consultations undertaken with them. These are outlined below:

### **Overall, Australia's intellectual property system is operating well**

Feedback from Business Council members was consistent in that the overarching intellectual property system in Australia is operating well and disturbing it materially could have unintended consequences.

Members views included that:

- It is inevitable that the Copyright system is always having to catch up because of rapidly changing technology.
- The Trademarks system is fit for purpose
- Our patent system, and handling by the Australian Courts, is very even handed, and not overly pro or against patent holders
- Members noted that in generally we have an evenly balanced system, with solid reserves of settled case law which provide certainty.

Based on this, BCA members did not feel that there was a need for a comprehensive overhaul of the system. There are a number of opportunities for refining the system and improving its operation. However, given that the current system is functioning well, and is well understood, the Business Council suggests that the threshold for proposing (and accepting) changes to the system should be set high.

### **Lack of transparency and consultation associated with international agreements**

Australia's intellectual property settings are increasingly determined by international trade agreements. These agreements generally tend towards greater international alignment. There is considerable value in aligning regulatory processes and timeframes across markets given the increasingly global nature of the economy. However, this needs to be balanced by what is in the best interests of Australia.

Examples of this include Australia's recent signing of the Trans-Pacific Partnership. Intellectual property was hotly contested between parties, raising domestic community opposition. While the Australian government was successful in negotiating an outcome that allowed it not to change its domestic settings for biologic data exclusivity, these commitments now bind Australia's domestic system and make our IP regime less adaptive to change.

Where trade negotiations are conducted with the objective of trade liberalisation, the Australian government should ensure changes that go against the spirit of liberalisation are canvassed clearly with the community.

Some members have expressed concern that there was a lack of transparency around the process for developing Australia's position. Others argued that consultations with government did not result in a change in the government's negotiation position.

To improve transparency of trade negotiations, the Business Council recommends the government design a model free trade agreement, which then provides a useful benchmark to measure other negotiated trade agreements against. Other countries like the United State effectively have this in instruments like the Trade Promotion Authority, where negotiators are provided with authority to complete a deal, as long as they remain within the boundaries of the mandate. The model free trade agreement should receive extensive stakeholder consultation.

The Business Council also supports the recommendation from the Harper review of National Competition Policy that:

“Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded”

The government response to the National Competition Policy review stated that the government did not support an independent cost benefit analysis being undertaken and published before negotiations are concluded. The pursuit of participation in any trade agreement is premised upon expanding the net benefits to Australia and its citizens. In the absence of undertaking a cost benefit analysis, government should consider other alternative means of increasing the transparency associated with trade negotiations.

### **Consideration of implementing 'fair use' exceptions for copyright need to be carefully considered**

There are different views within the Business Council in relation to implementing 'fair use' exceptions for copyright. The main arguments in favour of implementing fair use provisions are that it allows for flexibility in responding to changing conditions, which is critical in the quickly changing environment that consumers and businesses operate in, and that it would better balance the system. Arguments against 'fair use' are primarily based around the change being seen as unnecessary and that it would create uncertainty and expense.

The Business Council understands that a cost-benefit analysis of implementing fair use provisions is currently underway, led by the Department of Communications and the Arts. This is the right approach to identifying the economic impacts of this proposal before proceeding with change. The Business Council recommends that the Productivity Commission should await the findings of the cost-benefit analysis before making recommendations on fair use.

### **Unnecessary costs in the intellectual property system should be addressed**

Members of the Business Council noted that protecting intellectual property rights can be a costly and expensive process, particularly in relation to applications of patents and litigation. Costs are incurred in terms of initiating legal processes and initiating and/or defending intellectual property through the court system which often requires the engagement of expensive technical experts and lawyers. In considering this issue, the Productivity Commission should seek to balance the need for low cost litigation with the need to avoid vexatious cases, such as patent trolls.

As part of the inquiry, the Productivity Commission should consider changes that could assist in reducing the time and cost associated with protecting intellectual property. This should include consideration of potential changes to governance structures, processes and agreed timeframes.

These issues are particularly relevant to low level issues associated with intellectual property. Where the issue is minor, or a decision can be made easily, governance structures should be able to deal with these issues in a manner which does not pose an excessive burden on participants. This is consistent with the principle of proportionality.

### **Assessing the scope of safe harbour provisions**

The safe harbour regime established in the Copyright Act is more narrow than allowed under the US Free Trade Agreement. Currently, providers of content services do not have the safe harbour regime available to them. It would be within the spirit of the US FTA and the existing range of copyright exceptions to expand the definition to include these service providers in the safe harbour regime. The Business Council supports the expansion of the definition.

### **Comment on the removal of the intellectual property licensing exemption from the Competition and Consumer Act**

The Competition Policy Review recommended the repeal of subsection 51(3) of the Competition and Consumer Act which provides an exemption for intellectual property licensing.

The proponents of repeal argue that intellectual property rights can be used anti-competitively and should be fully subjected to the Competition and Consumer Act. However, intellectual property rights are also different to other rights in that their protection provides an important incentive to innovate. In the event that it is made more difficult to obtain a patent, it may result in less inventors filing for patents, and subsequently lead to less innovation. Changes to the law that reduce the incentive to innovate should be avoided, and all potential costs to the economy need to be tested.

In this context, the Productivity Commission may wish to consider whether there are ways of improving the effective operation of licensing, rather than simply removing the exemption. Furthermore, the benefits of repealing the subsection have not been clearly set out. Consistent with our position on a number of other complex issues in this review, any recommendation to repeal subsection 51(3) should be dependent on the outcome of a cost-benefit analysis.

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