

Submission to the inquiry of the Productivity Commissions of Australia and New Zealand on strengthening economic relations between Australia and New Zealand

IP Australia
October 2012

IP Australia is pleased to make this submission to the Productivity Commission inquiry into strengthening economic relations between Australia and New Zealand. This submission includes a brief description of IP Australia, our agency's ongoing work on Australia-New Zealand cooperation on patents, the role of intellectual property in economic growth and trade, statistics on patenting activity in the region. In this submission we also address some concerns raised by interested parties on potential economic effects of such cooperation.

IP Australia

IP Australia is the Australian Government agency that administers intellectual property rights and legislation relating to patents, trade marks, designs and plant breeder's rights. IP Australia is a prescribed agency within the Department of Industry, Innovation, Science, Research and Tertiary Education. IP Australia also promotes awareness of intellectual property and provides advice to government on intellectual property policy.

The legal basis for the Australian patent system is Section 51 of the Constitution of Australia, wherein the powers of the Australian Government are defined. It states, in part:

Section 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: ... (xviii) Copyrights, patents of inventions and designs, and trade marks.” (Commonwealth of Australia Constitution Act – Section 51)

The current legislation is the *Patents Act 1990* (Cth) and *Patents Regulations 1991* (Cth).

Australia-New Zealand Cooperation on Patents

In 2009, the Prime Ministers of Australia and New Zealand agreed to accelerate efforts towards trans-Tasman regulatory integration as part of a Single Economic Market agenda. Intellectual property is one of the areas identified in the Prime Ministers' outcomes framework.¹ The four intellectual property outcomes are: a single trans-Tasman regulatory framework for patent attorneys; one trans-Tasman trade mark regime; one application process for patents in both jurisdictions; and a single plant variety right regime.

IP Australia is currently working with our New Zealand counterparts at the Intellectual Property Office of New Zealand (IPONZ) on a single patent attorney

¹ Joint statement by Prime Ministers Rudd and Key (2009).

registration regime and single patent application and examination processes. IP Australia and IPONZ plan to implement the single application process by mid 2013, and the single examination process by mid 2014.

The Role of Intellectual Property in Economic Growth and Trade

The fundamental role of the patent system is to provide an incentive to invest in innovation. An equally important role of the patent system is to increase access to information about new technology. The patent system achieves this by requiring inventors to disclose information about their inventions and how they work in exchange for patent protection. Public disclosure of information about inventions helps subsequent innovators to build on previous innovations and enables the public to perform inventions once patents have expired.

In today's global economy, a strong and well-regulated intellectual property regime can encourage the flow of innovation, technology and knowledge across borders by giving innovators confidence that their technology will be protected from imitation.

For countries that are net importers of technology, such as Australia and New Zealand, a robust intellectual property regime gives Australians and New Zealanders access to new technology and helps businesses that rely on foreign technology to remain competitive. The Australian Bureau of Statistics estimated in its 2010-11 National Accounts that the nation's IP is valued at more than \$182.5 billion.²

Notwithstanding, it is worth noting that an intellectual property regime is but one component of profit incentives for research and development and invention. Secrecy, first-mover product loyalty, and other factors can also support sales and profits (Maskus 2012). Nevertheless, a patent regime has been shown to be an important component of a country's innovation strategy.³

Studies have shown that a nation is more likely to benefit from an intellectual property regime if it is middle-income to high-income, has a strong educational capacity, and labour and capital markets are relatively unrestricted (Maskus 2012; Qian 2007). The economies of Australia and New Zealand both have these characteristics.

Patenting Activity in the Region

The data presented below on patenting activity in Australia and New Zealand suggest that patenting in the region is global in nature, and a relatively high share of applicants seek protection in multiple markets.

The data in Table 1 indicate that over 90% of applicants in Australia and 76% of applicants in New Zealand are non-residents. Similarly, over 90% of patents granted in Australia and New Zealand are granted to non-residents.

² Australian System of National Accounts, 5204.0, Oct 2011.

³ As Schumpeter (1942) noted "a necessary condition for IPRs to promote new products and technologies is that firms and inventors invest in anticipation of making future profits." More recent empirical studies are suggestive that a legal patent regime supports domestic inventive activity, see Chen (2008), Lerner (2002), and Moser (2005), Kanwar and Evenson (2003).

Table 1. Patenting Activity in Australia and New Zealand, by resident and non-resident, 2010

	Australia (2010)	New Zealand (2010)
Patent Applications	24887 (100%)	6636 (100%)
<i>Resident applicant</i>	2409 (9.7%)	1585 (23.9%)
<i>Non-resident applicant</i>	22478 (90.3%)	5051 (76.1%)
Patent Grants	14557 (100%)	4347 (100%)
<i>Resident applicant</i>	1178 (8.1%)	394 (9.1%)
<i>Non-resident applicant</i>	13379 (91.9%)	3953 (90.9%)

Source: World Intellectual Property Indicators, 2011 edition.

Patent Cooperation Treaty (PCT)⁴ filings represent a relatively high share of patent filings in both Australia and New Zealand, as shown in Table 2. In 2010, 76.5% of the patent applications received by IP Australia were from applicants that sought patent protection in multiple jurisdictions through the PCT. Similarly, the same figure was 66.6% for the New Zealand patent office.

Table 2. Patenting Activity in Australia and New Zealand, by PCT and non-PCT route, 2010

	Australia (2010)	New Zealand (2010)
Patent Applications	24887 (100%)	6636 (100%)
<i>PCT filing route</i>	19041 (76.5%)	4420 (66.6%)
<i>Non-PCT filing route</i>	5846 (23.5%)	2216 (33.4%)

Source: World Intellectual Property Indicators, 2011 edition.

Data in table 3 suggest that patenting activity by innovators in Australia and New Zealand is global. Nearly 80% of applications by Australian residents and 50% of applications by New Zealand residents seek patent protection abroad (Table 3).

Table 3. Patenting Activity by Australian and New Zealand residents, 2010

	Australian residents (2010)	New Zealand residents (2010)
<i>Total</i>	10943 (100%)	3087 (100%)
Filed domestic	2409 (22%)	1585 (51.3%)
Filed abroad	8534 (78%)	1502 (48.7%)

Source: World Intellectual Property Indicators, 2011 edition.

Bilateral filings between Australia and New Zealand are modest (table 4) but have increased over time. During the period 1995 to 2010, the number of Australian resident patent applications filed with the New Zealand patent office increased from

⁴ The Patent Cooperation Treaty (entered into force in 1978) is an international agreement designed to strengthen international cooperation between intellectual property offices around the world. We note that there are other ways to seek protection in multiple jurisdictions such as under the Paris Convention for the Protection of Industrial Property of 1883.

186 to 594. Over this same period, New Zealand resident patent applications filed at IP Australia increased from 172 to 259.

Table 4. Bilateral Patenting Activity in Australia and New Zealand, 2010

	Australia (2010)	New Zealand (2010)
Patent Applications	24887 (100%)	6636 (100%)
<i>Australian resident</i>	2409 (9.7%)	594 (9.0%)
<i>New Zealand resident</i>	259 (1.0%)	1585 (23.9%)
Patent Grants	14557 (100%)	4347 (100%)
<i>Australian resident</i>	1178 (9.1%)	436 (10.0%)
<i>New Zealand resident</i>	144 (1.0%)	394 (9.1%)

Source: World Intellectual Property Indicators, 2011 edition.

A single patent application process for Australia and New Zealand

The single application process being developed by IP Australia and IPONZ will enable a customer to apply for a patent in both countries with a single transaction. The primary benefit anticipated by this process will be a more streamlined and efficient system for applicants wishing to file patent applications in both jurisdictions.

The single application process has some important features:

- Participation in the single application process is entirely voluntary for applicants. The applicant retains the right to decide the jurisdictions in which patent protection is sought.
- The applicant is not applying for a "joint patent", but rather seeking to obtain a patent in each jurisdiction.
- The proposed process does not require rigid alignment of patent laws and each country retains flexibility to implement its legislation and policies.

Impact of the single application process

The joint Productivity Commission discussion draft seeks information about the impact of a single patent filing system on the rate of patent filing in both Australia and New Zealand. In particular, it asks (Q4.1) whether a single application process would affect the rate of patent filing in Australia and New Zealand.

The New Zealand Institute of Patent Attorneys (sub. 30) and Baldwins (sub. 45) have suggested that simplifying the application process would increase applications by overseas owners of intellectual property for joint patents. For instance, these submissions suggest that an innovator that previously would have only applied for a patent in Australia now will also file in New Zealand, and that this would be a disadvantage to New Zealand innovators.

As mentioned above, the single application process is intended to make filing in both jurisdictions more efficient. This includes a potential cost savings for applicants

through reduced professional costs.⁵ As such, the single application process may result in an increase in the number of patent filings in either country but any such increase is expected to be moderate for a number of reasons.

Firstly, an innovator will be motivated to file an application in an additional jurisdiction if they have the expectation that the cost of patent protection (a sum of official application filing fees, renewal and maintenance fees, professional fees, and any other legal fees that may come about as a result of exercising and litigating the patent right) is commercially viable. Although the single application process will reduce costs somewhat, there are still substantial costs associated with prosecuting, maintaining and enforcing patent rights.

Secondly, both Australia and New Zealand are members of the Patent Cooperation Treaty (PCT), which already provides applicants with a streamlined approach for filing applications in multiple jurisdictions. The PCT is a popular route for applicants to both Australia and New Zealand. As shown in table 1, foreign (non-resident) filings in Australia and New Zealand already account for more than 90% of patents granted in these countries. As such, the single application process merely presents another option for applicants wishing to file in Australia and New Zealand, and as such it is unlikely that the single application process will markedly change filings in either country.

Even a modest increase in filings could be of concern if patent standards were low, leading to the grant of overly broad patents that may crowd the innovation landscape. Both Australia and New Zealand, however, are currently undertaking substantial reforms to strengthen the thresholds set for grant of a patent. These reforms are expected to prevent the granting of unduly broad patents. The *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* was passed by the Australian Parliament in March 2012, with most of the changes in the Act due to commence in April 2013. These include amendments to raise the levels of inventiveness and disclosure required for grant of a patent. As well as raising Australian patent standards these amendments better align Australian standards with the standards set by the New Zealand's Patents Bill (2008). This Bill was introduced into the New Zealand Parliament in July 2008, but has not yet been passed. Additionally, both countries have sought changes to their patent law to give innovators greater certainty as to where they have freedom to operate, by bolstering patent infringement exemptions.

Moreover, as acknowledged by the explanatory note to the New Zealand Patents Bill (2008) introduced on 9 July 2008:

“The grant of patent rights also provides an incentive for foreign innovators to transfer their innovations to New Zealand. It is the benefits to society of this incentive effect that provide the main justification for the patent system.”

⁵ The savings in professional costs for applicants could be as high as \$2000 to \$5000 per invention (Carr and Power 2011).

Pro-competitive effects from greater cooperation

Another concern raised was that the majority of savings would accrue to non-Australian and non-New Zealand applicants. Given the existing large share of non-resident applicants in each country, it may be reasonable to expect this. On the other hand, the ease of doing business in the region for both domestic and foreign firms is likely to bring other economic efficiencies as well as facilitate trade and foreign direct investment.

The New Zealand Institute of Patent Attorneys also raised the concern that a single application system may induce foreign applicants to use one patent attorney for both Australia and New Zealand filings. While there are several factors that affect an inventor's patent attorney choice, such as size of law firm, professional fees, and technical expertise, a more simplified and efficient patent application system is a net benefit to patent applicants. One effect may be increased competition among patent attorneys, which would likely be a benefit to patent applicants.

We note that under the current Trans-Tasman Mutual Recognition Arrangement, Australia and New Zealand patent attorneys can already register to practice in either country. It is estimated that over half of patent attorneys in each country are registered to practice in both countries.⁶

⁶ In March 2011, there were 860 patent attorneys registered in both Australia and New Zealand, comprising 185 registrations of New Zealand-domiciled attorneys and 675 registrations by Australian-domiciled attorneys. Under the auspices of the Trans-Tasman Mutual Recognition Arrangement, approximately 60% of Australian-domiciled patent attorneys are also registered in New Zealand. Similarly, approximately 55% of New Zealand domiciled patent attorneys are also registered in Australia under this arrangement (Ministry of Economic Development and IP Australia 2011).

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