

IP Australia submission

Productivity Commission Study on Bilateral & Regional Trade Agreements

Free Trade Agreement (FTA) Objectives

IP Australia supports the objectives of FTAs to:

- remove trade barriers;
- increase economic integration between countries; and
- foster strategic trade linkages.

This organisation has been actively engaged in the development of the Australian Government's commitment to pursue comprehensive FTAs that include Intellectual Property (IP) as a mechanism to address "behind the border barriers to trade" and as an enabling condition for domestic innovation within the multilateral trade environment.

IP Australia has agency responsibility for advising Government on industrial property policy within the whole of Government framework. IP Australia provides direct technical input in the FTA process to promote positive outcomes for its IP stakeholders and to support a suitable environment for innovation.

This involvement is consistent with IP Australia's 2009-2014 Strategic Statement to support and encourage innovation, investment and international competitiveness.

FTA IP Chapter Objectives

In supporting the Government, IP Australia seeks FTA IP chapters that support IP policies to:

- improve market access and certainty in IP rights for Australian exporters;
- reduce transaction costs by encouraging efforts to accede to international standards and best practice through international harmonization; and
- increase legal certainty and improve enforcement.

IP provisions in Australia's FTA chapters seek to support continued development of innovative products and to promote technology transfer into Australia. They seek to encourage further development of an IP environment whereby our trading partners provide similar systems of protection to Australia. Thus Australian exporters are better positioned to adequately protect the IP attached to their exports.

Australia has not taken the strong "template" approach to FTA development that is followed by some countries. IP Australia does not seek FTA provisions that:

- are mere reproductions of provisions from previous FTAs that are of no particular interest to Australia and would simply advance the interests of other countries;
- inappropriately reduce flexibility to amend or change Australia's legislation or practices;
- require legislative change; or
- add unnecessary complexity to negotiations.

How do FTA industrial property provisions translate to benefits for Australian rights holders?

Impacts on trade and investment and economic affects

While Australia has concluded a number of FTAs, it is difficult to access empirical evidence as to the impact of IP chapters as opposed to the impact of other international or domestic measures. However, in general terms, there are benefits for trade and investment through improvements for IP rights holders and their advisors along the following lines:

- **Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPS) compliance** and “TRIPS Plus” provisions - Where FTA partners enhance their legislation to provide, for example, for applicants’ choice as to how they file their IP applications, in paper form or electronically, there are benefits to IP users. Where FTA partners enhance their IP legislation or practices so that Australian rights holders potentially can register all their patents, trade marks, designs and plant breeders’ rights in partner countries, not just some of those rights, then they will have greater confidence about trading with those countries.
- **Transaction costs** - Accession to agreements consistent with World Intellectual Property Organization (WIPO) treaties to which Australia is a party, and other international agreements, such as the International Convention for the Protection of New Varieties of Plants (UPOV) treaty, improves accessibility for Australia’s IP rights holders to other IP systems and potentially reduces transaction costs for Australian business seeking to protect their IP in FTA partner countries.

Two of Australia’s FTA partners, Singapore and the United States, acceded to the *Singapore Treaty on the Law of Trademarks in 2009*. This treaty harmonises administrative trademark registration procedures. As a result Australia’s IP rights holders have greater certainty about the administrative requirements when seeking to protect their trade marks in Singapore and the United States. This provides administrative efficiencies in applying for, and maintaining, trade mark registrations.

Concluding FTAs may have other benefits. For example, FTA negotiations with Australia, as well as a commitment under its FTA with the US, provided further impetus for Chile to accede to the Patent Cooperation Treaty (PCT) in 2009.

Another FTA partner, Thailand, also acceded to the PCT in 2009. While the numbers of Australia patent applications is low in these countries, accession by Chile and Thailand results in Australian patent applicants now having a more cost efficient and streamlined option for protecting their inventions in those countries.

That said, it is unclear how much accession to a treaty is due to engagement in the FTA process with Australia, as opposed to other FTA negotiations, international trends or domestic influences.

- **Harmonisation of IP laws** may be promoted through decisions of FTA partners to accede to international treaties or to streamline their laws and practices with international trends. As indicated above, there has been progress by some partner countries in acceding to international registration treaties and treaties aimed at administrative harmonisation.

IP reviews can also be drivers for domestic IP reform and may bring closer international alignment. We note, not only Australia but also, our FTA partners like China and Malaysia are engaged in IP reviews.

Closer alignment in intellectual property laws and practices provides Australian exporters with a more familiar and certain legal environment when seeking to protect their IP overseas, promoting trade and economic development. Therefore this is an area of particular interest to Australia in FTA negotiations.

- **Increasing transparency** of IP systems similarly benefits Australian traders and rights holders by promoting better access to IP systems. Improving the availability of material about our FTA partners' IP systems (laws and procedures), especially through the Internet, assists IP users to be better informed about the relevant IP systems thus enabling them to make more strategic decisions about protecting their rights.

FTAs provide an opportunity to focus on and commit to providing information about IP laws and practices and IP rights, especially on the Internet. Access to appropriate information increases the probability of securing IP rights through a better understanding of the requirements for each jurisdiction.

As with harmonisation of IP laws, increasing transparency of IP systems to promote trade and economic growth is a multi-pronged exercise. There have also been continuing efforts in WIPO and amongst APEC partners to increase public education and awareness of IP and to promote the Internet as the prime mechanism to assist with information flow. So again the FTA process provides reinforcement to programs in a number of fora.

- Encouraging **participation in international forums** builds on the foci mentioned above to further develop IP systems supporting the principles of international best practice. While FTA partners may be engaging already in international forums, such FTA provisions do focus each partner's attention on continuing to improve and streamline IP systems consistent with international trends for the benefit of IP users and demonstrate a commitment to stakeholders.
- **Technology transfer** - A particular issue for many countries is the ability to attract the latest technology to its shores. One reason for this is its strong IP system. IP rights holders have confidence in Australia's ability to respect, protect and enforce IP rights. In some jurisdictions, lack of confidence in the IP systems leads to the transfer of outdated technology or previous generation

technology. Therefore increasing the strength of IP systems through FTAs can have beneficial effects for the flow of investment and technology between partners.

Foreign policy and strategic considerations

Australia seeks FTAs with key trading partners. IP provisions in FTAs support better access to and certainty of IP rights in those jurisdictions.

Parallel with the Government's identification of key countries of interest, IP Australia similarly identifies countries of strategic priority with respect to IP. IP Australia works with these countries in a cooperative way to target areas aimed at increasing efficiencies for its domestic and overseas users of the IP system. There is not always a complete match between those countries of interest to the Government in the FTA process and those of interest to IP Australia. Any IP initiatives are also subject to the resource limitations of the parties. Funding from other agencies, such as AusAID, may need to be sought to support Government priorities.

Best practice principles for bilateral and regional agreements

IP Australia supports studies aimed at developing best practice principles for the conclusion of bilateral and regional agreements. Initiatives that may lead to a decrease in costs in terms of human resources and travel, as well as the time taken to complete agreements, are supported. As indicated above, in some instances, offensive interests are being met outside the FTA process where FTA partners are undertaking the IP reforms. In some cases, because of the time taken to complete the FTA process, other IP issues may emerge because of particular directions taken by Governments. For example, Governments may seek to change aspects of the balance between IP rights and public benefit. It may be difficult in the latter stages of a long running FTA negotiation to introduce new provisions to cover off emerging issues.

Conclusion: The inclusion of IP chapters in FTA negotiations promotes understanding of the intersection of IP with trade issues. It encourages FTA partners to focus on systemic IP issues of concern to its IP rights holders seeking to export to the FTA partner. The negotiations also serve to encourage FTA partners to seek to improve aspects of their domestic IP framework and to work together to improve the international IP framework to assist traders to have easier and more effective access to IP protection.

While supportive of the positive outcomes that may eventuate from any FTA negotiation, IP Australia considers the FTA negotiations are just one of the avenues to achieve international reforms. It is a costly exercise for our organisation. Without empirical evidence, it is hard to accurately quantify the benefits for the investment made to support the FTA process as opposed to other international activities IP Australia undertakes to support the IP system.

To assist the Productivity Commission, answers have been provided to some of the questions it posed in the Productivity Commissions Issues Paper.

Answers to questions posed by Productivity Commission

How have behind-the-border measures restricted trade and investment?

IP is considered to be a behind-the-border issue where legal systems, relating to IP, are considered to be deficient. IP rights holders may be reluctant to trade with those countries, invest in those countries or to transfer their latest technologies to them. Even when strong IP systems are in place, there may be areas of uncertainty about the enforcement of comparative rights.

As well FTA partners may engage in practices or have subtle differences in their IP system that result in additional costs and time. These may be features of an IP system that prevent IP rights holders from protecting particular aspects of their IP in partner countries. For example, Australia is one of the most liberal jurisdictions in what can be protected as a trade mark or as subject matter for patents. Therefore Australian IP rights holders may not always be able to get equivalent protection for their IP value-added products overseas.

By engaging in the FTA process, such concerns can be raised with FTA partners. As indicated above, it is considered that improvements in the IP system to address behind-the-border barriers to trade will often result from a multi-pronged approach. Internal pressures, pressure from governments such as the US and EU and international developments and cooperation all contribute to improvements.

To what extent have agreements resulted in liberalisation of non-tariff import barriers and behind-the-border measures?

Australia has a strong IP system, dating back over a hundred years. IP Australia has a long history of active engagement in technical cooperation projects in the region and international IP reform. Such engagement, which has gone on outside the Government's FTA activities, already targets improvements in "behind-the-border" issues.

Complementary to those activities, FTA engagement increases the focus on individual IP systems, more clearly identifying systemic issues of concern to traders and the potential for behind-the-border measures to assist traders. Progress in the FTA context may be limited as there is a natural reluctance by FTA participants to be pushed to undertake reforms that may be of no current interest to them or that inhibits their ability to initiate changes to respond to future challenges.

It may be difficult to quantify results of IP behind-the-border measures. However, one result is a clear statement to interested parties as to the state of each FTA partner's IP system, both in a technical sense and in aspirations. For example, there are usually provisions promoting transparency of the IP systems and requirements. In addition there may be an indication of the scope of IP matters that can be protected as well as commitments to continue to improve the system. Such provisions are designed to benefit the public and IP rights holders which can, in turn, address behind-the-border issues.

Have the trade agreements' provisions dealing with IP been liberalising or have they increased barriers to competition in certain markets?

Australia seeks to promote access of its IP rights holders to IP registration systems and enforcement mechanisms. It also seeks to streamline administrative procedures and reduce costs for rights holders. The provisions that Australia seeks are included to increase liberalisation.

There are concerns that some recent FTAs, to which Australia is not a party, have the potential to result in additional barriers for our traders. This is because other Parties are seeking to pursue issues, that are not being resolved in multilateral fora, through their FTA agenda. FTAs can be a quicker and easier mechanism to push trade-related IP agendas with results that may impact on the interests of countries not party to them.

How do trade agreements' provisions dealing with IP interact with Australia's commitments and obligations under the WTO TRIPS Agreement and other multilateral agreements on IP?

In undertaking FTA negotiations, Australia is very conscious of its international obligations and the need for any provisions to be consistent with those obligations.

IP Australia has found that specificity and complexity of obligations can result in an additional layer of complexity in negotiating later FTAs and may also have implications for domestic legislation. IP Australia is keen to maintain an ability to quickly address emerging issues such as those relating to public health while meeting FTA and other treaty obligations.

How have the broader provisions contained in trade agreements affected trade and investment?

It is very difficult to quantify how the provisions in the IP chapters have affected trade and investment. Some credit may be due to FTA negotiations, increasing awareness of IP and use of electronic facilities, requiring greater visibility of IP laws and procedures and ultimately leading to increased global trade.

Are there examples where agreements have largely codified what is already in place, rather than achieved liberalisation?

To a large extent IP chapters do codify what is already in place in partner countries, for example reaffirming obligations under the TRIPS Agreement, re-stating IP registration practices and outlining current enforcement regimes. However there may be liberalising elements such as agreeing to join certain international treaties, as well as commitments for IP rights to be delivered efficiently and cost effectively.

Since FTA partners, as well as Australia, are very reluctant to undertake legislative change on IP matters or undertake change which reduces their flexibility to address future issues of national interest, commitments within IP chapters to a large extent reflect each Party's current system or short-term aspirations. Their ability to commit to certain IP provisions will also often depend on what other FTA partners they have and what they have committed to in those FTAs. For example, those partners who

already have FTAs with the United States or the EU are likely to have different limitations to commit to some provisions.

Is there evidence that trade agreements have prevented the development of new barriers to Australia's exports and investment in overseas markets?

There is evidence that some FTAs undertaken between other countries have the potential to create uncertainty for Australian IP rights holders in foreign jurisdictions. In framing FTA provisions, Australia seeks to respond not only to issues within each partner's IP system but also to what is happening internationally. Therefore, some provisions in Australia's IP chapter to support its IP rights holders do reflect Australia's international concerns, for example in relation to geographical indications.

As indicated elsewhere, the ambitions of some countries in the multilateral fora are also being pursued through FTA negotiations. Provisions included in their FTAs have the potential to disadvantage or increase barriers for Australia's traders in third party countries. Therefore, FTAs may provide an avenue to address these issues and to provide increased certainty in Australian IP stakeholders' rights.

More generally, how has the nature and pace of trade and investment reform been influenced by the formation of trade agreements? Is there evidence that the formation of trade agreements has contributed to greater reform than could otherwise have been achieved?

Only the AUSFTA has resulted in IP Australia undertaking legislative change or changes in practice. In some instances, FTA provisions have cemented interests already identified by Parties eg accession to treaties, increasing transparency, harmonisation of IP laws and procedures with international standards and cooperation activities. In some instances, IP Australia has undertaken technical support with partner countries, either independently of or in conjunction with FTA implementation.

Are there examples of where Australian trade and businesses have been hampered by the introduction and operation of trade agreements that do not involve Australia as a party?

It has become apparent that the "spaghetti bowl" effect of FTAs is likely to have consequences for IP related aspects of trade where Australian negotiations with a trading partner come after their negotiations with, for example, the EU. As mentioned barriers may increase for our traders because of FTAs concluded by other parties with countries where Australia has market interests, or there may be potential for future market share. For example, there are concerns that some trade mark owners may no longer be able to use their trade marks in certain jurisdictions because of FTA provisions.

To what extent has the Australian Government assisted local businesses to take advantage of trade agreements? For example, has Austrade assistance been steered towards countries that are partners to trade agreements?

Under the previous Australian government, IP Australia did receive government funding to support its full participation in negotiating free trade agreements with

China and Japan and to undertake advocacy programs. These advocacy programs focussed on better informing Australian business about the IP systems in both countries. They were developed to enable Australian business to formulate appropriate strategies for protection of their IP.

The funding enabled IP Australia to increase its engagement with Chinese and Japanese IP officials and develop fact sheets and a website to assist Australian IP owners and their advisers, trading in or with China or Japan, to more effectively protect their IP and business interests. Austrade did partner with IP Australia in two seminar series across mainland Australia to support the China advocacy program.

IP Australia also provides basic IP information on its website to assist exporters in key overseas countries, supports seminars and contributes articles to various publications in its efforts to increase awareness about protecting Australian IP overseas. These public education and awareness efforts are funded by IP Australia.

How effective have trade agreements been in contribution to efforts to boost integration in the region? What are the potential benefits and costs of greater integration?

IP Australia has a long history of technical cooperation with IP offices in the region and partnerships with key IP offices to address issues of interest. It has overarching international policy objectives to influence the international IP system in Australia's national interests and to improve access for Australians to IP regimes in other jurisdictions. It seeks to enhance the quality of the international IP system and to increase certainty in the rights granted in Australia and in other countries. It also seeks to foster technology and knowledge transfer.

While IP Australia continues to support the Department of Foreign Affairs and Trade (DFAT) in the negotiation of FTA agreements to support integration, it is engaged on a bilateral or plurilateral basis on a number of fronts to increase integration in the region. It is thus difficult to fully determine the separate effects of the FTAs. For instance IP Australia supports Australia's development cooperation obligations under the TRIPS Agreement, its WIPO-Australia Workplan for Cooperation and various Action Plans with IP offices. These activities focus on developing and emerging economies which are key markets for Australian exporters, or identified as potential future markets.

The agency pursues work-sharing and mutual recognition initiatives with key IP Offices to improve efficiency of services and operations, as well as maximising opportunities for IP harmonisation in key markets. To progress this, it works closely with countries such as New Zealand, Korea, Canada, the US and the UK. It also has Action Plans or regular high level official talks with countries such as India, Thailand, Viet Nam, Singapore and China.

The development of such relationships has positive flow-on effects for FTA negotiations. This is because it establishes the potential for good rapport between the FTA IP negotiators and because it increases understanding of the counterpart's IP system. However, again it remains unclear how much any integration in the region is

due to FTAs negotiations, work undertaken between IP offices, or international or domestic initiatives.

Alternative mechanisms for achieving the Government’s objectives – what are the relative advantages and disadvantages of these, or any other, alternative approaches in addressing trade and investment barriers?

Participation in FTA negotiations comes at considerable cost to this organisation, an organisation which is cost recovery on a “fee for service” basis. Under most conditions it does not cross subsidise its activities. Thus engaging staff to provide technical input into, and attend negotiations, has cost implications and requires financial rebalancing.

IP Australia has its own international engagement strategy, to influence the international IP system (as much as a medium size office can) and improve access for Australians to IP regimes in other jurisdictions. It seeks to enhance the quality of, and to increase certainty in, the rights granted in Australia and in other countries. FTA negotiations go some way to support these strategic goals.

IP Australia considers that well targeted projects, commitments through Memorandums of Understanding and Heads of IP Office meetings with our key trading partners, as well as advocacy programs to promote awareness of IP strategies for exporters, all contribute to improvements in the IP system thus reducing trade barriers. These activities, while less resource intensive than FTA negotiations, are effective in relationship building with our trading partners.

Do the costs of negotiating broad agreements vary significantly from those of negotiating narrower agreements.

Some of our FTA partners are keen to include substantive IP provisions and there is good engagement on text. Progress is made quickly and negotiations are completed in minimal timeframes. Other partners appear not so convinced on the merits of more than high level cooperative text. The level of costs for this organisation depends on the number of rounds of negotiations undertaken to conclude agreement on the IP provisions. There can be considerable investment of time from personnel in terms of briefing and developing text as well as costs associated with travelling. The time taken and costs involved need therefore to be weighed against the outcomes achieved in final text.

IP Australia’s cooperative activities, including concluding arrangements with other IP offices, can be undertaken through electronic means and *ad hoc* visits to fit in with other priorities. Therefore costs associated with such activities is minimised compared to those associated with FTAs.

Are agreements taking too long to negotiate and, if so, how can the process be streamlined or expedited?

Some agreements have been negotiated for lengthy periods. This results in considerable financial and human resource costs to this organization. If negotiations

drag on then questions may arise in the organisation about whether support should continue to be provided and the commitment of parties to achieving substantial outcomes.

Often when FTAs do take a long time to negotiate there are changes in personnel in negotiating teams and this also results in additional costs as they need to get up to speed on the environment, objectives and what has preceded them.

Are the resources (including in terms of the quantum and quality/skills) currently committed by government departments and agencies to the negotiation, implementation, maintenance and review tasks adequate?

IP Australia, while committed to support the government in the FTA process, is continually stretched financially in the process. There is a continuing need to balance the organisation's priorities with those of the Government's FTA program. Ongoing staffing is required to undertake work on FTA matters. FTA participation in the current environment must be balanced against IP Australia's other core business activities.

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