

Submission to Australian and New Zealand Productivity Commissions | Strengthening the Single Economic Market

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Introduction

1. I am a retired patent attorney and intellectual property lawyer. I worked for a firm of New Zealand IP lawyers and patent attorneys for 32 years before my retirement in 2006. Since then I have been an editor of a patent attorney newsletter and an IP journal, and an occasional guest blogger. I have styled myself as an IP Mentor.
2. During my working life I became involved in patent law reform in various capacities including making written and oral submissions from patent policy development through to select committee consideration of bills. I have been active at every step of the development of the Patents Bill now before the New Zealand parliament. I have been following the development of trans-Tasman IP relationship since the CER treaty was first signed.
3. It is with this background that I make this submission. I stress that the views I set out here are mine alone and are not intended to represent the views of any group with which I am now or was formerly associated.
4. This submission is intended to address Q.31¹ posed in the Issues Paper. One possibility raised in asking the question is that trans-Tasman knowledge creation and flows could be enhanced through introducing a single regulatory framework for patents and trade marks. I leave it to others to comment on the trade marks aspects.

A Brief History of Harmonisation of Australian and New Zealand IP Laws

5. Ever since the 1988 Memorandum of Understanding² the possible harmonisation of intellectual property laws across the Tasman has been much like the weather – everybody talks about it but nobody does anything much about it. In that time Australia has implemented a new Patents Act 1990, a new Plant Breeders' Rights Act 1994, a new Trade Marks Act 1995 and a new Designs Act 2003. New Zealand has enacted a new Trade Marks Act 2002 and has a Patents Bill currently pending. A

¹ "How could Australia and New Zealand enhance the creation and transfer of knowledge between the two countries to mutual benefit?"

² *Issues Paper*, Box 1, page 4.

consistent characteristic of each of these new laws is that harmonisation has never been mentioned as a key consideration in any of the policy development papers.

6. The only exception to the general lack of action on harmonisation was the change brought about by the trans-Tasman Mutual Recognition Act, which in 1998 brought into being a single IP services market. Whereas previously a New Zealand qualified patent attorney had to pass qualifying examinations in Australia, after the change, being registered in New Zealand entitled a New Zealand attorney to be registered in Australia. The reverse applied for Australian registered attorneys as well. This allowed New Zealand attorneys to act for their New Zealand clients in Australia and to compete with Australian attorneys over who would represent clients from third countries. Again the reverse was true for Australian attorneys. There was even a short-lived trans-Tasman patent attorney partnership. To this extent there has existed for the last 14 years an SEM for patent attorney and other IP services.
7. It was only with the 2009 Joint Statement of Intent³ under the SEM that policy makers began to further scratch the surface of intellectual property harmonisation. The three initiatives that are now being acted upon are joint registration of patent attorneys, a single patent examination process and a single patent filing portfolio. The possible single trade mark regime is still on the back burner.
8. Australia amended its Patents Act this year⁴ to increase the rigour of examination. Although the changes did bring some of the Australian eligibility requirements into line with the New Zealand Patents Bill, the changes were made as a result of considerations raised in policy reviews in Australia - and no mention was made of bringing Australian law more into line with New Zealand law.

Patent Law Policy

9. The patent law reform process in New Zealand began in 1983 with the appointment of IPAC⁵ in recognition that the Patents Act 1953 was by then 30 years old and the 1949 British Patents Act (from which it had been cloned) had been replaced by a new one modeled on the European Patent Convention. In 1992 the Ministry of Commerce produced a proposed recommendations paper for a new patent law. It cherry picked a number of international precedents, including the 1990 Australian legislation. Before a new bill incorporating the proposals was drafted,

³ *Issues Paper*, Box 1, page 5.

⁴ [The Intellectual Property Laws Amendment \(Raising the Bar\) Act 2012](#)

⁵ The Industrial Property Advisory Committee.

New Zealand had agreed to join the TRIPS Agreement.⁶ In 1994 New Zealand passed legislation updating all of its IP laws to the TRIPS standards.

10. The 1994 amendments were strongly opposed by Maori claimants who had lodged a claim⁷ with the Waitangi Tribunal alleging that both joining the TRIPS agreement and the New Zealand law changes were breaches of the 1840 Treaty of Waitangi. At that point further drafting of a patents bill was put on hold.
11. By 2000 it had become apparent that the Wai 262 claim was not going to be resolved soon.⁸ So a new patent policy development process began that resulted in the 2008 Patents Bill that has been through a select committee review and has been awaiting a second reading since March 2010. A main driver behind the Patents Bill policy development⁹ has been the observation that 90% of New Zealand patents are granted to foreigners and therefore the benefits of those patents might flow overseas. This theme has been repeated in the policy development and cabinet papers.
12. In the initial briefing paper¹⁰ provided to the select committee considering the Patents Bill the officials advised:

“20. In developing patent legislation for New Zealand, the aim must be to maximise the benefits of the patent system to New Zealand. In light of the preceding discussion, there would seem to be no value to New Zealand in having a patent system that provides wide patent rights. This would probably have little effect on innovation in New Zealand or anywhere else, but would, because of the high proportion of overseas patents, potentially impose significant costs on New Zealand for little compensating benefit.

21. The best policy for New Zealand, given what is known about the workings of the patent system, would be to have the strictest criteria for granting a patent that are consistent with our international obligations, and apply these criteria as rigorously as possible.”

13. In the context of SEM, the officials made no distinction between the benefits of New Zealand patents flowing overseas to Australian patent

⁶ Trade Related Aspects of Intellectual Property, a chapter of the treaty establishing the World Trade Organisation. TRIPS sets minimum standards for IP laws that member countries must meet.

⁷ The Wai 262 claim. The final report of that claim can be accessed at: <http://www.waitangi-tribunal.govt.nz/news/media/wai262.asp>

⁸ In the end the report was released in July 2011 and the Government has not yet made a formal response.

⁹ <http://www.med.govt.nz/business/intellectual-property/patents/review-of-patents-act>

¹⁰ Available at: http://www.parliament.nz/en-NZ/PB/SC/Documents/Advice/d/3/4/49SCCO_ADV_00DBHOH_BILL8651_1_A21721-Initial-briefing.htm

owners; and benefits flowing overseas to patent owners from any other country. A single economic market was not a consideration.

14. After a single market for patent attorney services was created in 1998 Australian patent attorneys began to register themselves on the New Zealand register. By 2011 they made up about 60% of attorneys registered in New Zealand.¹¹ While the authors of New Zealand patent policy were determined to slow the flow of the benefits of patents registered in New Zealand from flowing to their Australian owners – the authors were not concerned that the possible benefits from Australian patent attorneys being registered in New Zealand might also flow out of the country.

Evidence Based Policy

15. It is apparent from the above discussion that (at least on the eastern side of the Tasman) evidence has had little, if any, influence on the development of patent policy in general, and movement toward a trans-Tasman patent market in particular. So it was not surprising to read the observation that “there has been no comprehensive assessment of the extent to which businesses have made practical use of the concessions granted under the CER agenda and whether it has enhanced overall community welfare in Australia or New Zealand.”¹²
16. The economic effects of patents, both positive and negative, will be debated as long as there are more than two economists studying them at any given time. WIPO¹³ published a comprehensive report¹⁴ on the state of play late in 2011. The main themes of the debate on the economic effects of patents are fairly clear:
- Patents aid the diffusion of innovation into economies by granting time limited exclusive rights to investors in commercialization of inventions - v - patents owned by existing market players stifle innovators by creating entry barriers to new innovators.
 - Patents assists new medicines and medical technologies in being available because the exclusive rights they create give patent owners the incentive needed to underwrite the large costs to obtain regulatory approval - v - patents prevent patients from getting affordable treatment because of the monopoly prices patent owners are able to charge.

¹¹ *Fact sheet: Trans-Tasman patent attorney regulation:*

<http://www.med.govt.nz/business/intellectual-property/proposal-for-trans-tasman-regulation-of-patent-attorneys>

¹² *Issues Paper*, page 8.

¹³ The World Intellectual Property Organisation

¹⁴ *The Changing Face of Innovation:* http://www.wipo.int/econ_stat/en/economics/wipr/

17. The WIPO report cites many references, some of which are empirical studies. But there are no in depth empirical studies in either Australia or New Zealand – giving economists on either side of the debate free rein to put forward beautiful hypotheses without fear of them being spoiled by ugly facts.
18. Both IP Australia and IPONZ have digital databases that go back to before the 1998 date of the opening of a single market for IP services. With modern data mining algorithms it should be possible to gather evidence about users of both systems, and what changes, if any, followed the 1998 creation of a single IP services market. A broader study could explore the relationship between patents and investment in innovation and patents and the availability of innovations in health care. While the boffins can do the data mining, the tricky bit is asking the right questions.
19. If I were designing such a study the questions I would want answered are:
- How many New Zealand patent applications for third country patent owners were filed by New Zealand attorneys each year prior to 1998 and how has this changed since then?
 - Was there a corresponding decrease in the number of third country applications filed in Australia by Australian attorneys?
 - Was there a net benefit or loss for attorneys in each country?
 - What percentage of third country owned applications for the same invention were filed in both countries, both before and after 1998?
20. The answer to these questions – and subsidiary questions that might occur to someone doing the study – would be a start to answering Q.31.
21. It would take similar data mining exercises to try to determine who would be the winner and who would be the loser - an objective of this study - if there were an SEM for patents. One starting study that might be explored is to establish a base line set of data of medicines available in each country and whether or not they have patent protection there. Another might be to do the same thing comparing foreign direct investment and patents. (The tricky bit of that sort of study is determining what part, if any, of FDI is at least partly dependent upon patents.) A raw patent count is not a very precise indicator. A count of patents that have been renewed over time is a better one, but still not a precise indicator.

Conclusion

22. There is no apparent connection between the policies behind the current

SEM initiatives in the area of patents and overall patent policy. Neither appears to have much evidence basis. It is recommended that evidence along the lines I have suggested above should be developed and form the basis for determining if a single patents regime would enhance knowledge creation and knowledge flows. This would be a first step in the direction of the Commissions' stated intention to apply a net benefits' framework to consider how the gains and losses of an SEM are to be distributed.¹⁵

23. Such a study could even suggest that there is a lot more to the enhancement of knowledge creation and flow through the use of patents than the structure of a patent granting regime. Singapore has set itself the goal of becoming the innovation hub of Asia.¹⁶ One of the mechanisms for doing this is the ramping up of its IP Academy to lift the game of all the participants in the IP space. A 2010 study¹⁷ commissioned by the Ministry of Economic Development found that while there was a general awareness of the term "intellectual property" among New Zealanders that was not matched by a good working knowledge of how the system worked and could be used to enhance their businesses.

¹⁵ *issues Paper*, page 1.

¹⁶ <http://www.ipos.gov.sg/topNav/news/pre/IPA+becomes+part+of+IPOS+to+build+world-class+IP+capabilities+and+infrastructure.htm>

¹⁷ <http://www.med.govt.nz/business/intellectual-property/review-of-new-zealand2019s-intellectual-property-system>