



His Excellency The Hon George Brandis QC
High Commissioner for Australia
Australian High Commission
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13 January 2021

Dear High Commissioner Brandis

I am writing as President of the IP Federation about the intellectual property aspects of a potential free trade agreement between the UK and Australia.

The IP Federation represents the views of UK industry in intellectual property rights (IPR) policy and practice matters within the UK, Europe and internationally. We believe that a cost effective, high quality IPR framework is a critical component in industry's present and future successes in the global economy. Our membership of 44 influential IP-intensive companies has wide experience of how IP works in practice to support the growth of technology-driven industry and generate economic benefit.

The IP Federation fully supports the UK Government's aim of securing the best possible trade agreement with Australia. In addition to reaping the benefits that a new trade deal can bring, it is important also to avoid the risks of agreeing provisions which are inconsistent with other established international treaties, such as the European Patent Convention (EPC). The very existence of a question over the UK's membership of this vital treaty would lead to many years of uncertainty and weakening of the IP system. This would have very negative consequences for innovative Australian businesses operating not just in the UK but across Europe.

I have pleasure in enclosing a short briefing paper on this subject - *Getting a great UK/Australia trade deal*. It sets out some of the key issues, and crucially explains the benefits to Australian enterprises of the UK's continued membership of the EPC. I hope this paper will be interesting and informative for you and your colleagues in the Australian government.

I would of course be very happy to discuss, or supply further information on, the issues raised in the briefing paper, or indeed any other intellectual property matters, if that would be helpful.

Yours sincerely

A handwritten signature in black ink that reads 'S A Roberts'.

Scott Roberts
President

enc.



IP Federation members 2021

The IP Federation represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. Its membership comprises the innovative and influential companies listed below. The CBI, although not a member, is represented on the Federation Council, and the Council is supported by a number of leading law firms which attend its meetings as observers. It is listed on the joint Transparency Register of the European Parliament and the Commission with identity No. 83549331760-12.

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AstraZeneca plc
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Unilever plc
Vectura Limited
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IP Federation¹ briefing paper: Getting a great UK/Australia trade deal

1 UK/Australia trade deal – putting it into context

- 1.1 Having left the EU, the UK is free to strike an exciting new trade deal with Australia which benefits both countries. The discussions will inevitably cover Intellectual Property (IP) provisions, which are almost universal in trade agreements. Setting agreed standards for IP rights directly reduces trade barriers and boosts competitiveness and prosperity.
- 1.2 With the world on the cusp of a 4th Industrial Revolution promising emerging technologies such as Internet of Things, autonomous vehicles, quantum computing, AI and genomics, it is critical to get the IP aspects of the UK/Australia trade deal right. The profound global challenges posed by the Covid-19 pandemic make successful outcomes from trade negotiations even more important.
- 1.3 The UK is one of the most innovative and creative nations in the world, and the contribution of IP to the economy is massive. Firms in the UK market sector [invested](#) £134bn (A\$240, 6.8% of GDP) in knowledge assets in 2016, about half of which were protected by IP rights. The UK is one of the top 10 countries as a base for global R&D performing companies with UK R&D valued at £25 billion (A\$45 billion) in 2018. Australia is the world's fourteenth largest economy and has exhibited strength and resilience, growing for 28 consecutive years to 2019, a record among developed economies for uninterrupted expansion. The digital technologies sector contributes around A\$122 billion (6.6 per cent of GDP) to the Australian economy each year, with the Australian government expecting this figure to grow by 40 per cent by 2023. The UK is attractive to Australian companies owing, in part, to the availability of high-quality IP professionals, through them access to the European patent system, a commercial and rigorous legal enforcement system, pro-innovator tax incentive schemes (including patent box), and a common language.
- 1.4 The value generated by industries based on knowledge and services is growing, along with the proportion of market value that is attributable to intangible assets, such as research and development (R&D) and branding. The Australian government recognises this fundamental change in how economic value is derived in its [IP Australia and the Future of Intellectual Property](#) report. This includes recognition of the importance of international harmonisation efforts and work-sharing between national IP offices. Optimising the IP ecosystem in trade agreements is therefore vital and a common goal for the UK and Australia if their businesses are to continue to attract investment, generate and exploit new ideas, and compete successfully. The IP Federation is confident that

a win-win outcome can be achieved from UK trade negotiations with Australia, delivering substantial benefits for both states and their businesses, without relinquishing critical aspects of the UK's existing and highly rated IP framework, including its existing treaty obligations.

2 Trade deal discussions between the UK and Australia

- 2.1 Many aspects of IP law are aligned by over-arching international treaties to which the UK and Australia both belong. These impose minimum standards on their members, allowing them to implement additional measures in their own national laws. It is important that a new trade agreement does not militate against the real benefits already enjoyed from continued membership of an over-arching treaty. In particular, it is important that the value, to Australian as well as UK businesses, of the UK's continued membership of the non-EU European Patent Convention (EPC), dating from 1973, is not underestimated.
- 2.2 Australia is a signatory of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and has adapted its domestic patent law accordingly. The CPTPP includes provisions on *grace period* such that patent validity is not affected by making information available publicly in certain circumstances. The CPTPP also includes provisions on patent term adjustment for granting authority delay, though these provisions are currently suspended by agreement of all CPTPP states. The grace period and patent term adjustment provisions in the CPTPP are not present in UK patent law or in the EPC.
- 2.3 Australia is also a signatory to the Regional Comprehensive Economic Partnership (RCEP) of November 2020, whose members comprise 15 countries from the Association of Southeast Asian Nations and its free trade agreement partners. On the subject of the grace period, the RCEP states that "the Parties recognise the benefits of patent grace periods to disregard certain public disclosures of inventions when determining if an invention is novel in order to support innovation". Both the EPC and UK patent law fully meet that provision, which could therefore be adopted in a UK/Australia trade agreement without calling into question the UK's participation in the EPC.
- 2.4 The UK will expect to continue to be a member of the EPC and it is in the interests of innovators in potential trading partners, including Australia, that it should be. While not an EU instrument, the EPC is a multi-lateral treaty of 38 states which establishes a legal system for the grant of patents from a single application processed by a central European Patent Office (EPO). The UK Government has published its strategic approach to a free-trade agreement with Australia. This states an explicit intention to secure patents, trade marks and designs provisions that are consistent with the UK's existing international obligations, including the European Patent Convention, to which the UK is party.
- 2.5 The IP Federation believes that the grace period and patent term adjustment for granting authority delay are best addressed not in

bilateral trade agreements but in multilateral treaties and initiatives for harmonising IP. For example, one such initiative includes the Substantive Patent Law Harmonisation discussions (within the Industry Trilateral reporting into the B+ group of nations) in which the UK is an active participant. An agreement on IP between two states has no effect beyond those states. Businesses, whether based in Australia, UK, or elsewhere, must devise their strategies taking a global view, with account of the position in all states in which they operate, be that for R&D, production, or sales. Well-established multilateral initiatives for IP harmonisation, such as that referred to above, are already addressing issues such as grace period and offer the most effective solutions from the perspective of business.

- 2.6 There is a risk that agreeing, as part of a trade deal, provisions which are inconsistent with other established international treaties, such as the EPC, could call the UK's membership of them into doubt. The very existence of a question over the UK's membership of a vital treaty like the EPC would lead to many years of uncertainty and weakening of the IP system. This would have very negative consequences for innovative Australian businesses operating not just in the UK but across Europe.

3 Why Australian business should press for the UK's continued membership of the EPC: the benefits for Australian enterprises

- 3.1 The IP Federation believes it is in Australian business's own interests to highlight to the Australian government the dangers of seeking provisions within a trade agreement that could jeopardise, or merely create uncertainty about, the UK's membership of the EPC.

- 3.2 The UK leaving the EPC would incur a number of quantifiable and unquantifiable losses to business and undermine the UK's attractiveness as a centre for their innovation:

(a) **An immediate increase in business costs** for firms seeking to protect inventions in both the UK and remaining EPC countries. Of all patent applications filed by Australian applicants in Europe, 88% are filed at the European Patent Office. For Australian owned businesses to maintain the current level of IP protection they need in the UK, in addition to remaining EPC countries, would incur new and unnecessary costs.

(b) **An erosion of the UK's influence in establishing global IP policy.** The UK has a valuable role in advocating, influencing and establishing harmonised global IP policy, not least because it acts as a bridge between a common law system of proprietary rights and the civil law jurisdictions on which basis treaties such as the EPC were conceived. The UK has a disproportionately high level of engagement in policy-setting, consultation and influence on the development of European and international patent policy. Any compromise to the UK's patent and legal expertise will necessarily lead to an erosion of the UK's influence in European and global IP policy. This

would in turn have a negative impact on Australia: the UK and Australia have many similar goals in the IP field, and history has shown that they are more productively delivered when the two states' efforts are aligned. The outcome from a new UK/Australia trade deal should be to enhance the combined influence of the two states, not diminish it.

- (c) **Significant impact on the representation for Australian companies in Europe.** UK IP professionals provide services to Australian and other foreign companies across the globe to file and prosecute a high proportion of all patent applications at the EPO. If the UK were not a member of the EPC then UK patent professionals could no longer represent Australian applicants at the EPO. Australian applicants would need to transition their representative relationships to professionals in other EPC states. These new representatives would not benefit from the world-class legal and enforcement framework of the UK, would not have the common law background which Australia and the UK share, and the benefit of a common first-language would be lost.

4 How can the IP Federation help?

- 4.1 Through its membership of nearly 50 leading UK-based IP-intensive companies, the IP Federation is uniquely placed to offer informed ideas and comment on the IP aspects of UK trade agreements. As such, we would be happy to elaborate further on the points presented here, or indeed on any others which may bear on getting the best UK/Australia trade agreement.

IP Federation
17 December 2020

¹ The IP Federation aims to improve the IP framework to meet the needs of innovative industry by representing, nationally and internationally, the views of UK-based businesses. Its membership of influential IP-intensive companies has wide experience of how IP works in practice to support the growth of technology-driven industry and generate economic benefit. As a cross-sectoral industry organisation covering all technologies, the IP Federation is able to offer a viewpoint which is authoritative and balanced. Details of the IP Federation membership are given at the end of this paper.



IP Federation members 2020

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