

TPP IMPACT: IP AUSTRALIA

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Legal Briefings

The potential treatment of [intellectual property](#) in the [Trans-Pacific Partnership \(TPP\)](#), fuelled by leaks of complex and incomplete drafts of the TPP text, generated a substantial level of speculation about the [impact on Australia's IP laws](#), both in the media and academia. However, the final text of the TPP reveals that the impact on Australia's IP laws will be substantially less than many had been predicting.

Statements from the Australian Government that the "TPP Intellectual Property Chapter is consistent with Australia's existing intellectual property regime" appear largely correct. However, there do appear to be some areas of Australia's existing intellectual property laws that may not fully conform with the TPP. These may eventually lead to (relatively minor) legislative reform.

This article addresses the impact of the TPP on key areas of Australia's intellectual property laws and identifies whether or not changes may be required as a result of its intellectual property provisions.

KEY IP OBLIGATIONS CONSISTENT WITH AUSTRALIA'S CURRENT IP LAWS

- **Copyright term:** The Australian Department of Foreign Affairs and Trade (**DFAT**) has commented that Australia will not be required to alter its current laws in respect of copyright duration, saying the TPP "will not require an increase in the term of copyright protection in Australia"
- **Patents:** The TPP requires signatory states to confirm that patents are available for either "new uses of a known product, new methods of using a known product, or new processes of using a known product". Secondary use patents are already permitted

under Australia law and no change is likely to be required. This may restrict any potential future policy changes. It may also require a change to the laws of a number of other signatory states

- **Data exclusivity:** The TPP provides for a general data exclusivity period of 5 years from the date marketing approval of a pharmaceutical product is received. This reflects the existing law in Australia.
- For biological [pharmaceutical products](#), the TPP requires either a period of 8 years data exclusivity, or 5 years provided the signatory state also provides effective market protection through "other measures". DFAT has issued a statement confirming that the phrase encompasses "existing measures in the case of Australia ... [such as] regulatory settings, patents, and the time it takes for follow-on medicines to become established in the market." The statement goes on to also confirm that "Australia will follow the 5 year option, which reflects our current system and requires no changes."
- **Internet Service Provider (ISP) liability:** DFAT has also confirmed that Australia will not be required to alter its current laws in respect of liability for ISPs as the "TPP standard is consistent with Australia's existing ISP liability regime."

IP LAWS THAT MAY BE IMPACTED BY THE TPP

The Commonwealth Government's position is that the "TPP Intellectual Property Chapter is consistent with Australia's existing intellectual property regime".

However, it is possible another signatory Party could question Australia's implementation of a trade agreement, for which there is a precedent. The United States has previously questioned whether Australian law sufficiently complies with article 17.10.4 of the Australian-United States Free Trade Agreement (**AUSFTA**) to prevent the marketing of a pharmaceutical product (or product for an approved use), which relies on the prior marketing approval of a previously approved product. Notably, the TPP contains provisions that reflect article 17.10.4 of AUSFTA.

Unclear areas which may eventually lead to legislative reform include:

- **Patent term extensions on the basis of delay:** The TPP specifies that "if there are unreasonable delays in a Party's issuance of patents, that Party shall provide the means to, and at the request of the patent owner shall, adjust the term of the patent to compensate for such delays." AUSFTA already imposes an equivalent obligation on Australia, but despite this, Australia does not currently provide compensation for unreasonable delays in the issuance of a patent. This is because Australia took the view that it was not required to give effect to this provision until such a time as 'there is evidence of unreasonable delay in the grant of patents' in Australia. Accordingly, it

remains to be seen whether Australia will take a similar approach in relation to the equivalent provisions in the TPP.

- **Expanded offences for counterfeit or pirated goods:** The TPP requires signatory states to implement criminal procedures and penalties for the wilful importation and domestic use, in the course of trade and on a commercial scale, of a label or packaging to which a mark (which is identical to, or cannot be distinguished from, a registered mark) has been applied without authorisation. While Australia's trade mark legislation already criminalises various acts involving the application of counterfeit marks on goods, it remains unclear in Australian law whether our existing criminal offences cover labels or packing, as distinct from "goods" alone. Consequently, Australia may need to amend its trade marks legislation to specifically put this situation beyond doubt.

Thus, while there appear to be a small number of areas where Australia's existing IP laws may not fully conform with the TPP Intellectual Property Chapter, the impact of the TPP to Australia's IP laws is likely to be relatively small.

For more information or if you have any questions please contact the sector experts listed below.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



KRISTIN STAMMER
PARTNER, SYDNEY

+61 2 9225 5572
Kristin.Stammer@hsf.com



SUE GILCHRIST
HEAD OF
INTELLECTUAL
PROPERTY,
AUSTRALIA, SYDNEY
+61 2 9225 5221
Sue.Gilchrist@hsf.com



SHAUN MCVICAR
PARTNER,
MELBOURNE
+61 3 9288 1587
Shaun.McVicar@hsf.com



REBEKAH GAY
PARTNER AND JOINT
GLOBAL HEAD OF
INTELLECTUAL
PROPERTY, SYDNEY
+61 2 9225 5242
Rebekah.Gay@hsf.com

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