

Report 90

Treaties tabled on 12 March 2008

Singapore Treaty on the Law of Trademarks, Regulations and a Supplementary Resolution by the Diplomatic Conference (Singapore, 27 March 2006)

Patent Law Treaty (Geneva, 1 June 2000)

Agreement between the Government of Australia and the Government of the Kingdom of Tonga relating to Air Services, done at Neiafu, Tonga on 23 August 2003

Withdrawal of Australia's exemption for the use of mirex under Article 4 of the Stockholm Convention on Persistent Organic Pollutants, done at Stockholm on 22 May 2001

Constitutional amendments to the Convention Establishing the World Intellectual Property Organization and other WIPO administered treaties adopted by the WIPO General Assemblies in September 1999 and October 2003

© Commonwealth of Australia 2008

ISBN 978-0-642-79055-2 (printed version)

ISBN 978-0-642-79056-9 (HTML version)



Contents

Membership of the Committee	vi
Resolution of appointment.....	viii
List of abbreviations	ix
List of recommendations	x
1 Introduction	1
Purpose of the Report	1
Briefing documents	2
Conduct of the Committee's Review	2
2 Patent Law Treaty.....	5
Introduction	5
Reasons for Australia to take treaty action	5
Provisions of the PLT	7
Future treaty action.....	9
Implementation and Costs	10
Entry into force and withdrawal.....	10
Consultation	11
Conclusion and Recommendation	11
3 Singapore Treaty on the Law of Trademarks	13
Introduction	13
Background.....	13

The Singapore Treaty	14
Implementation and costs	15
Entry into Force.....	16
Consultation	16
Conclusion and recommendation	17
4 Constitutional amendments to the Convention Establishing the World Intellectual Property Organization (WIPO).....	19
Introduction	19
The Amendments	19
Consultation and entry into force.....	20
Implementation and costs	21
Recommendation	21
5 Tonga Air Services Agreement.....	23
Introduction	23
Background	23
The Agreement	24
Costs and implementation	26
Consultation	26
Conclusion and recommendation	26
6 Australia's withdrawal of the exemption for the use of mirex under the Stockholm Convention	29
Introduction	29
Background	29
Reasons for Australia to take the treaty action.....	31
Obligations	31
Implementation and costs	32
Consultation	32
Australia's National Implementation Plan (NIP).....	32
Elimination of mirex from Australia	33
Entry into force and withdrawal.....	34
Conclusion and Recommendation	34

Appendix A- Submissions.....37

Appendix B - Witnesses39

Monday, 17 September 2007 – Canberra 39



Membership of the Committee

42nd Parliament

Chair Mr Kelvin Thomson MP

Deputy Chair Senator the Hon Sandy Macdonald

Members	Hon Kevin Andrews MP	Senator Andrew Bartlett
	Mr John Forrest MP	Senator Simon Birmingham
	Ms Jill Hall MP	Senator David Bushby
	Ms Belinda Neal MP	Senator Gavin Marshall
	Ms Melissa Parke MP	Senator Glenn Sterle
	Mr Luke Simpkins MP	Senator Dana Wortley
	Mr Chris Trevor MP	
	Ms Maria Vamvakinou MP	

Committee Secretariat

Secretary James Rees

Inquiry Secretary Sonya Fladun

Julia Searle

Administrative Officers Heidi Luschtinetz

Dorota Cooley

41st Parliament

Chair	Dr Andrew Southcott MP	
Deputy Chair	Mr Kim Wilkie MP	
Members	Hon Dick Adams MP	Senator Andrew Bartlett
	Mr Michael Johnson MP	Senator Simon Birmingham
	Mr Michael Keenan MP	Senator Carol Brown
	Mr Andrew Laming MP	Senator The Hon Ian Macdonald
	Mrs Margaret May MP	Senator Julian McGauran
	Mr Bernie Ripoll MP	Senator Glenn Sterle
	Hon Bruce Scott MP	Senator Dana Wortley

Committee Secretariat

Secretary	James Rees
Inquiry Secretary	Serica Mackay
Research Officers	Sonya Fladun
	Clare James
Administrative Officers	Heidi Luschtinetz
	Dorota Cooley



Resolution of appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and

such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of abbreviations

APVMA Australian Pesticides and Veterinary Medicines Authority

DAFF Department of Agriculture, Fisheries and Forestry

DOTARS Department of Transport and Regional Services

NIA National Interest Analysis

NIP National Implementation Plan

PCT Patent Cooperation Treaty

PLT Patent Law Treaty

POPs Persistent Organic Pollutants

WIPO World Intellectual Property Organization



List of recommendations

2 Patent Law Treaty

Recommendation 1

The Committee supports the *Patent Law Treaty* and recommends that binding treaty action be taken.

3 Singapore Treaty on the Law of Trademarks

Recommendation 2

The Committee supports the *Singapore Treaty on the Law of Trademarks* and recommends that binding treaty action be taken.

4 Constitutional amendments to the Convention Establishing the World Intellectual Property Organization (WIPO)

Recommendation 3

The Committee supports the *Constitutional amendments to the Convention establishing the World Intellectual Property Organization* and recommends that binding treaty action be taken.

5 Tonga Air Services Agreement

Recommendation 4

The Committee supports the *Tonga Air Services Agreement* and recommends that binding treaty action be taken.

6 Australia's withdrawal of the exemption for the use of mirex under the Stockholm Convention

Recommendation 5

The Committee supports the *Withdrawal of Australia's exemption for the use of mirex under Article 4 of the Stockholm Convention on Persistent Organic Pollutants* and recommends that binding treaty action be taken.

Introduction

Purpose of the Report

- 1.1 This report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of five treaty actions tabled in the 41st Parliament on 15 August 2007¹ and 11 September 2007². The inquiries into these treaty actions lapsed on the dissolution of the 41st Parliament on 17 October 2007. The treaty actions were subsequently tabled in the 42nd Parliament on 12 March 2008.³

15 August 2007

- *Singapore Treaty on the Law of Trademarks, Regulations and a Supplementary Resolution by the Diplomatic Conderence (Singapore, 27 March 2006)*
- *Patent Law Treaty (Geneva, 1 June 2000)*

11 September 2007

- *Agreement between the Government of Australia and the Government of the Kingdom of Tonga relating to Air Services, done at Neiafu, Tonga on 23 August 2003*

1 Australia, House of Representatives 2004-05-06-07, *Votes and Proceedings*, No. 188, p. 2073; Australia, Senate 2004-07, *Journal*, No. 158, p. 4204.

2 Australia, House of Representatives 2004-05-06-07, *Votes and Proceedings*, No. 190, p. 2093; Australia, Senate 2004-07, *Journal*, No. 161, p. 4315.

3 Australia, House of Representatives 2008, *Votes and Proceedings*, No. 10, p. 153, Australia, Senate 2008, *Journal*, No. 5, pp. 197-198.

- *Withdrawal of Australia's exemption for the use of mirex under Article 4 of the Stockholm Convention on Persistent Organic Pollutants, done at Stockholm on 22 May 2001*
- *Constitutional amendments to the Convention Establishing the World Intellectual Property Organization and other WIPO administered treaties adopted by the WIPO General Assemblies in September 1999 and October 2003*

Briefing documents

- 1.2 The Report refers frequently to the National Interest Analysis (NIA) prepared for each proposed treaty action. This document is prepared by the Government agency (or agencies) responsible for the administration of Australia's responsibilities under each treaty. Copies of each NIA may be obtained from the Committee Secretariat or accessed through the Committee's website at:

www.aph.gov.au/house/committee/jsct/12march2008/tor.htm

- 1.3 Copies of each treaty action and NIA may also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade. The Australian Treaties Library is accessible through the Committee's website or directly at:

www.austlii.edu.au/au/other/dfat/

Conduct of the Committee's Review

- 1.4 The reviews contained in this report were advertised in the national press and on the Committee's website.⁴ Invitations to lodge submissions were also sent to all State Premiers, Chief Ministers, Presiding Members of Parliament and to individuals who have expressed an interest in being kept informed of proposed treaty actions. Submissions received and their authors are listed at Appendix A.

4 The Committee's review of a number of proposed treaty actions was advertised in *The Australian* on 2 April 2008. Members of the public were advised as to how to obtain relevant information both in the advertisement and via the Committee's web site, and invited to submit their views to the Committee.

- 1.5 The Committee also received evidence at a public hearing on 17 September 2007 in Canberra. A list of witnesses who appeared before the Committee at the public hearings is at Appendix B. Transcripts of evidence from public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website at:
www.aph.gov.au/house/committee/jsct/11september2007/hearings.htm
- 1.6 The Committee in the 42nd Parliament resolved that the evidence from the previous Parliament be used as a basis for this Report.

Patent Law Treaty

Introduction

- 2.1 The proposed treaty action is that Australia accede to the Patent Law Treaty (PLT).¹ The Treaty was done at Geneva on 1 June 2000 and came into force generally on 28 April 2005.
- 2.2 The PLT seeks to harmonise, on a worldwide basis, formal patent procedures relating to national and regional applications for obtaining and maintaining a patent. The aim is to make filing and processing procedures for patent applications more user-friendly.
- 2.3 Australia has been a member of the *Patent Cooperation Treaty*² (PCT) since 31 March 1980. Under the PCT, inventors seeking patent protection must meet certain formal requirements in order to avoid rejection and a loss of rights. These formal requirements vary from one country to another.

Reasons for Australia to take treaty action

- 2.4 The PLT offers inventors and national and regional patent offices a number of advantages, including:

1 Full title: Patent Law Treaty, done at Geneva on 1 June 2000.

2 [1980] ATS 6.

- Use of standardised forms and simplified procedures for obtaining and maintaining a patent that reduce the risk of error;
- Cost reductions for patent protection;
- Enhanced legal certainty for applicants filing in their home country and abroad;
- Established safeguards against loss of rights on procedural grounds; and
- Procedures which are more user-friendly and widely accessible.

2.5 By acceding to the treaty, Australia would provide a positive example to its trading partners, enhancing our reputation as a leading member of the intellectual property community in the region. Australia would be able to encourage non-members to simplify and harmonise their domestic patent systems to be consistent with the PLT.

Australian patent holders seeking to protect and commercialise their inventions in foreign markets will benefit from greater harmonisation, flexibility and scrutiny.³

2.6 The Committee raised concern about the fact that several significant Asian trading partners of Australia, including China, India, Japan and South Korea, had not yet signed the PLT. In addition to the positive example Australia's accession would provide to its trading partners the Committee was informed that IP Australia actively encourages other countries to join.

There are always expectations that other economies and other jurisdictions would join to the Patent Law Treaty. It is harmonising the administrative processes for patent applications and we certainly encourage those economies to continue to pursue and to accede to these. ... We encourage and will continue to encourage other economies to join.⁴

We are certainly encouraging [countries of] the Asian region to join as much as any other country. We are doing a lot of work in Asia.⁵

3 Mrs Fatima Beattie, *Transcript of Evidence*, 17 September 2007, p. 1.

4 Mrs Fatima Beattie, *Transcript of Evidence*, 17 September 2007, p. 4.

5 Mrs Joanne Rush, *Transcript of Evidence*, 17 September 2007, p. 4.

Provisions of the PLT

- 2.7 The PLT does not oblige the protection of patents, nor does it set out any substantive aspects of patent protection (Article 2(2)). Rather, the PLT provisions relate to the procedural aspects of a Contracting Party's system for applying for and maintaining patent rights.
- 2.8 With the significant exception of the filing date requirements, the PLT provides maximum sets of requirements, which the patent office of a Contracting Party may apply (Article 6). A party is free to impose less than the listed requirements, though it may require no more.
- 2.9 The most important provisions of the PLT are as follows:
- Requirements for filing dates are standardised in order for applicants to minimise the loss of the filing date, which is of utmost importance in the entire procedure. Under the PLT, a filing date must be given to an application if the applicant complies with three formal requirements:
 1. the papers submitted include an express or implied indication that the documents being filed are intended to be a patent application;
 2. there is information allowing the identity of the applicant to be established or allowing the applicant to be contracted; and
 3. there is text which on the face of it appears to be a description of an invention.

No additional elements can be required for a filing date to be accorded. These requirements are not maximum requirements, but constitute absolute requirements, so that a Contracting Party would not be allowed to accord a filing date unless all those requirements are complied with (Article 5).

- No Contracting Party may impose requirements as to the form or content of an application different from or additional to those of the PCT (Article 6(1)).
- Patent offices are prohibited from routinely requiring evidence of matters asserted in a patent application unless there is reason to doubt the veracity of a matter or the accuracy of a translation (Articles 6(6) and 8(4)(c)).

- A patent office must notify the applicant when an application does not comply with the requirements and provide an opportunity for rectification (Article 6(7)).
- Any person is entitled to pay maintenance fees. Patent offices may not require the applicant to appoint a local agent or legal representative for certain procedures, including payment of fees and filing an application for the purposes of obtaining a filing date (Article 7).
- The implementation of electronic filing is facilitated, while ensuring the co-existence of both paper and electronic communications. Contracting Parties can generally choose how they receive communications, whether they accept electronic or paper correspondence or both. However, Parties must accept paper communications for the purposes of complying with a time limit or establishing a filing date (Article 8).
- Non-compliance with the formal requirements in Articles 6(1), (2), (4) and (5) and 8(1) to (4) with respect to an application may not be a ground for invalidity or revocation of a granted patent unless the failure in compliance was “the result of a fraudulent intention”. So a patent office will not be able to revoke a patent once it is granted merely due to the applicant’s failure to meet any formal requirement that was not noticed by the patent office during the application process (Article 10).
- Contracting Parties must provide for the possibility of reinstatement of rights in a patent or application which the applicant or owner has lost by failure to meet a time limit if:
 - ⇒ a request for reinstatement of rights is properly made; and
 - ⇒ the patent office in question determines that the failure to comply with the time limit “occurred in spite of due care required by the circumstances having been taken” or was unintentional (Article 12).
- Regulations annexed to the PLT provide extra details about implementation and administrative requirements. The Regulations also provide for the establishment of Model International Forms which must be accepted by all Contracting Parties. The Regulations are binding on all Parties. However, in the case of conflict between the Regulations and the provisions of the PLT, the latter prevails (Article 14).

- All Contracting Parties must comply with the provisions of the *Paris Convention for the Protection of Industrial Property*⁶ that relate to patents⁷ (Article 15).
- The Contracting Parties will have an Assembly, to be made up of one delegate from each Party (Article 17).

Future treaty action

2.10 Subject to one exception, the PLT may only be revised by a conference of the Contracting Parties. The Assembly will decide which Parties will be involved (Article 19(1)). Any such amendments would be subject to Australia's normal treaty making process.

Accession to the Patent Law Treaty will also enable Australia to influence further enhancement of the treaty through participation in the assembly.⁸

2.11 Provisions dealing with the tasks of the Assembly (Article 17(2)) and the frequency of the Assembly's meetings (Article 17(6)) may be revised by either:

- a conference of the Contracting Parties, or
- the Assembly itself (Article 19(2)).

2.12 In the latter case, the amendment must be adopted by a three-fourths majority of the Assembly and will enter into force for all Contracting Parties one month after notification of the adoption (Article 19(3)).

2.13 The Regulations may be amended by a three-fourths majority of the Assembly (Article 14(2)). Amendments to the Regulations will come into effect immediately and become binding on Australia once adopted by the Assembly.

2.14 Finally, due to the PLT operating closely with the PCT, the Assembly may decide, by a three-fourths majority, whether any relevant amendments made to the PCT will apply to Contracting Parties for the purposes of the PLT (Article 16(1)).

6 [1972] ATS 12.

7 As Australia is already a party to this convention, Australia already complies with its provisions.

8 Mrs Fatima Beattie, *Transcript of Evidence*, 17 September 2007, p. 3.

Implementation and Costs

- 2.15 Australia already provides a patent system that is substantially PLT compliant. No Commonwealth, State or Territory action is required to implement the treaty.⁹ Legislation and IP Australia's current practices are already compliant with the Treaty.¹⁰
- 2.16 As a result, there will be no costs for either the Australian Commonwealth or State Governments in acceding to the PLT. Nor will the treaty action increase costs for industry. In fact, the treaty may potentially reduce costs for Australians wanting to protect their patents in other countries.¹¹
- 2.17 Some enhancement of IP Australia's computer system is necessary to comply with the PLT but this is currently being addressed and will be completed shortly.¹² Costs related to computer enhancements and of attendance by IP Australia officials at any working group meetings will be met within IP Australia's existing budget.¹³

Entry into force and withdrawal

- 2.18 It is proposed that Australia accede to the PLT as soon as practicable, and if this were to occur, the treaty would enter into force for Australia 3 months after Australia deposits its instrument of ratification (Article 21(2)).
- 2.19 Under Article 24, any Contracting Party can denounce the Treaty by notification to the Director-General of the World Intellectual Property Organization (WIPO). The denunciation takes effect one year from the date on which the Director General has received the notification.¹⁴

9 National Interest Analysis (NIA), para. 26.

10 NIA, para. 25.

11 NIA, paras 28 and 30.

12 NIA, para. 27 and see *Transcript of Evidence*, 17 September 2007, pp. 5 & 6.

13 NIA, para. 29.

14 NIA, para. 37.

Consultation

- 2.20 In addition to regular consultation with industry and professional organisations regarding international patent law activity, IP Australia placed on its website a Public Consultation Notice in May 2007 regarding Australia's consideration of the Patent Law Treaty. In the same month, IP Australia notified approximately 1200 people¹⁵ via email of the potential treaty action. These consultations were also listed on the www.business.gov.au website.
- 2.21 Public Information Seminars were held around Australia in June 2007. Attendees at these seminars were in favour of Australia joining the PLT.

Conclusion and Recommendation

- 2.22 The Committee supports the objective of the PLT to harmonise and simplify requirements for patent administration procedures and the advantages achieving that provides to patent applicants. The Committee is also supportive of IP Australia's efforts to encourage wider membership of the PLT amongst Australia's major trading partners and other countries.

Recommendation 1

The Committee supports the *Patent Law Treaty* and recommends that binding treaty action be taken.

¹⁵ Including intellectual property professionals, academics, intellectual property owners and potential applicants, as well as staff of State and Federal government departments and agencies.

Singapore Treaty on the Law of Trademarks

Introduction

- 3.1 The Singapore Treaty on the Law of Trademarks (the Singapore Treaty)¹ is designed to establish consistent procedures for registering trademarks. It was adopted in Singapore on 27 March 2006 and signed by Australia a year later on 26 March 2007.

Background

- 3.2 The Singapore Treaty revises and updates the Trademark Law Treaty, which was finalised in 1994 and signed by Australia in 1998.² The Singapore Treaty does not completely supersede the Trademark Law Treaty and the Trademark Law Treaty remains open for adoption by countries wishing to do so.³ However, the Singapore Treaty will apply exclusively between States that are party to both instruments.⁴ The Committee was informed that there are key differences between the two treaties.

1 Full title: *Singapore Treaty on the Law of Trademarks, adopted at Singapore on 27 March 2006* [2007] ATNIF 18

2 National Interest Analysis (NIA), para. 2.

3 NIA, para. 11.

4 NIA, para. 11.

Whilst marks consisting of visible signs, including colour, are covered by Trademark Law Treaty, non-visible signs such as sounds and scents are not. The Trademark Law Treaty also does not provide for the technology changes that have occurred in the last 10 years. The treaty has been revised and a new treaty, the Singapore Treaty on the Law of Trademarks, was adopted...⁵

The Singapore Treaty

- 3.3 The Singapore Treaty sets the maximum requirements that the trade marks office of a Contracting Party can insist on in a trade mark application.⁶

So if an office has word marks, like every office has, you can only request a certain number of copies with the application. If an office or a country has scent marks – for example, the UK has a registration for rose-scented tyres – it stops someone asking for an enormous amount of supporting evidence at the filing stage.⁷

- 3.4 The Singapore Treaty applies to all marks consisting of signs that can be registered in a given country and therefore potentially applies to non-visible and other non-traditional marks, such as holograms, three-dimensional marks, colour, or taste and feel marks.⁸ IP Australia provided the Committee with examples of non-traditional marks.

We do not have any smell registrations in Australia, although there have been quite a number applied for. There have been three successful cases before the office, but they were probably only used as test cases, and they did not pay the registration fee. One of them, for instance, was the smell of beer on darts. Another was the smell of fresh-cut grass on tennis balls. Again, these are things which are designed to indicate that you could go into a shop and say, 'I want the tennis balls that smell like fresh-cut grass,' or, 'I want the darts that smell like beer.' But, as I said, none of them have

5 Mrs Fatima Beattie, *Transcript of Evidence*, 17 September 2007, p. 8.

6 Article 3 of the Singapore Treaty; NIA, para. 20.

7 Mrs Joanne Rush, *Transcript of Evidence*, 17 September 2007, pp 10-11.

8 Article 2(1) of the Singapore Treaty; NIA, para. 20.

yet been registered. The bulk of non-traditional signs registered in Australia are shape trademarks.⁹

3.5 However the Singapore Treaty does not oblige parties to protect these kinds of signs.¹⁰

3.6 The Singapore Treaty also provides for:

- relief measures in case of failure to comply with time limits;
- correction of errors in some circumstances, e-filing of all application forms and communications;
- recording, amendment and cancellation of licence interests;
- procedures relating to trade marks that are non-visible or non-traditional signs;
- regulations to be annexed to the Singapore Treaty which set out matters expressly delegated by the Treaty text, administrative matters and details useful for implementation; and
- the establishment of an Assembly of the Contracting Parties which is able to modify the regulations.

3.7 The Committee was informed that the benefits of the Singapore Treaty and the Trademark Law Treaty are that:

They lower costs for applicants; they give greater certainty for applicants; they ensure, again, as with the comment on the Patent Law Treaty, that applicants and owners do not lose rights because of relatively trivial formality issues; and, in relation to trademark licences, the Singapore law treaty guarantees that failure to record a licence does not invalidate the trademark.¹¹

Implementation and costs

3.8 Australia already provides a trademark system that complies with the Singapore treaty. In particular, Australian trade mark law allows for marks consisting of a wide range of signs including scents, sounds,

9 Mr Michael Arblaster, *Transcript of Evidence*, 17 September 2007, p. 10.

10 NIA, para. 20. The NIA states that this point was affirmed in a resolution adopted by the Diplomatic Conference that adopted the Singapore Treaty.

11 Mr Michael Arblaster, *Transcript of Evidence*, 17 September 2007, p. 11.

colours, holograms, three-dimensional shapes and movement marks. No action is required to implement the Singapore Treaty.¹²

- 3.9 The NIA states that ratification of the Singapore Treaty would not result in any costs to the Commonwealth or the State and Territory governments.¹³

Entry into Force

- 3.10 The Singapore Treaty will enter into force three months after ten States or intergovernmental organisations ratify or accede to it.¹⁴ It will enter into force for Australia either on the date on which it comes into force generally or three months after Australia deposits its instrument of ratification, whichever is later.¹⁵

Consultation

- 3.11 The NIA states that IP Australia consults regularly with industry and professional organisations.¹⁶ In relation to the Singapore Treaty, IP Australia placed a Public Consultation Notice on its website which provided a general overview of the treaty, the dates of free information sessions to be held in each mainland capital city and called for comments.¹⁷ Also, 1200 people were notified by email of the potential treaty action and were directed to the website. The NIA states that any feedback IP Australia received was supportive of the Singapore Treaty.¹⁸
- 3.12 The Committee commends IP Australia on its thorough consultation in relation to the Singapore Treaty.¹⁹

12 NIA, para. 28.

13 NIA, para. 29.

14 Article 28(2); NIA, para. 2.

15 NIA, para. 3.

16 NIA, 'Consultation', para. 1.

17 NIA, 'Consultation', para. 1.

18 NIA, 'Consultation', para. 5.

19 The same consultation process was observed for the Patent Law Treaty, in Chapter 2.

Conclusion and recommendation

- 3.13 The Committee supports measures which simplify the procedures for trademark applications.

Recommendation 2

The Committee supports the *Singapore Treaty on the Law of Trademarks* and recommends that binding treaty action be taken.

Constitutional amendments to the Convention Establishing the World Intellectual Property Organization (WIPO)

Introduction

- 4.1 The *Constitutional amendments to the Convention establishing the World Intellectual Property Organization (WIPO)*¹ consist of two sets of minor changes adopted in 1999 and 2003 aimed at simplifying the WIPO system. There are no substantive changes to Australia's obligations under any of the WIPO administered treaties.

The Amendments

- 4.2 The 1999 Amendment limits the tenure of the Director General of WIPO to a maximum of two fixed terms of six years each.²
- 4.3 The 2003 Amendments relate to three matters:
- The abolition of the WIPO Conference. The activities and work of the WIPO Conference are largely overlapped by the activities and

1 Full title: *Constitutional amendments to the Convention establishing the World Intellectual Property Organization and other WIPO administered treaties adopted by the WIPO General Assemblies in September 1999 and October 2003* [2007] ATNIF 20 and [2007] ATNIF 21.

2 National Interest Analysis (NIA), para. 20.

work of the WIPO General Assembly. The WIPO General Assembly will take over the functions of the WIPO Conference³;

- The formalisation of the unitary contribution system and changes in contribution classes. The unitary contribution system, which involves the classes of financial contribution by member states, has been changed to be more equitable and in line with the economic capacity of Member Countries⁴; and
- The establishment of annual ordinary sessions of the WIPO General Assembly and the Assemblies of the Unions administered by WIPO. The General Assembly will now meet every year, rather than every two years.⁵

4.4 The NIA states that Australia strongly supports constitutional reforms that simplify the international intellectual property system and has previously indicated its support for these amendments.

Consultation and entry into force

4.5 Consultation on this treaty was undertaken in conjunction with the consultation process for the Singapore Treaty (see paragraph 3.11 of Chapter 3 of this Report). The NIA states that any feedback IP Australia received was supportive of the amendments.⁶

4.6 Both the 1999 and 2003 amendments will enter into force once three-fourths of WIPO member states (at the time the amendments were adopted) have ratified. Once in force, the amendments will bind all States that are party to the instrument including those states that have not formally accepted it.⁷

3 NIA, para. 10.

4 NIA, para. 12.

5 NIA, para. 16.

6 NIA, 'Consultation', para. 6.

7 NIA, para. 22.

Implementation and costs

- 4.7 No action is required to implement the amendments.⁸ However, the Committee was informed that Australia is party to the following treaties that are to be amended to formally implement the recommendations adopted by the assemblies: the Convention Establishing the World Intellectual Property Organisation; the Paris Convention for the Protection of Industrial Property; the Berne Convention for the Protection of Literary and Artistic Works; the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration Marks; the Patent Cooperation Treaty; the Strasbourg Agreement Concerning the International Patent Classification; and the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure.⁹
- 4.8 Acceptance of the amendments is not expected to result in additional costs to the Commonwealth or the State or Territory governments.¹⁰

Recommendation

Recommendation 3

The Committee supports the *Constitutional amendments to the Convention establishing the World Intellectual Property Organization* and recommends that binding treaty action be taken.

8 NIA, para. 26.

9 Mrs Fatima Beattie, *Transcript of Evidence*, 17 September 2007, p. 15.

10 NIA, para. 27.

Tonga Air Services Agreement

Introduction

- 5.1 The Tonga Air Services Agreement¹ (the Agreement) will allow direct air services to operate between Australia and Tonga and is based on Australia's standard air services agreement. Pacific Blue, a subsidiary of Australia's Virgin Blue Airlines, currently provides a service between Australia and Tonga. The Agreement will provide a binding legal framework to support the operation of these services.

Background

- 5.2 A memorandum of understanding, signed by Tonga and Australia in 2002 preceded the Agreement. In accordance with established Australian practice, the provisions of the Agreement are applied pending the completion of domestic requirements which will bring the Agreement into force.² The Committee was informed by

1 Full title: *Agreement between the Government of Australia and the Government of the Kingdom of Tonga relating to Air Services, done at Neiafu, Tonga on 23 August 2003* [2003] ATNIF 16.

2 National Interest Analysis (NIA), para. 4.

representatives from the then Department of Transport and Regional Services (DOTARS)³ that:

The air services arrangements between Australia and Tonga take place in line with the arrangements that we are putting before you today. The aeronautical authorities of the respective countries observed these arrangements. They have interim administrative effect, pending the completion of the formal treaty processes.⁴

- 5.3 DOTARS also informed the Committee that there are a number of outstanding air services agreements which had been signed by Australia but had not been brought into force.

Between 35 and 40 are awaiting the completion of treaty processes. Some of those are quite dated. We have endeavoured to prioritise the ones that are to be brought forward. We are currently focusing on between eight and 10 that are priority treaties. For the moment, we have deferred the remainder for a variety of reasons. Some are outdated and include model clauses that are no longer accepted international practice. We will be seeking to renegotiate those treaties, update them and bring them forward at that time.⁵

The Agreement

- 5.4 The key provisions of the Agreement include:

- Australia and Tonga must allow the designated airlines of the other country to operate scheduled air services on specified routes between the two countries.⁶ To facilitate this, the Agreement includes reciprocal provisions on a range of aviation related matters, such as safety, customs, regulation, and the commercial aspects of airline operation, including the ability to establish offices in the territory of the other party and to sell fares to the public;

3 The name of the Department changed to the Department of Infrastructure, Transport, Regional Development and Local Government following the Administrative Arrangements Order dated 25 January 2008.

4 Mr Stephen Borthwick, *Transcript of Evidence*, 17 September 2007, p. 19.

5 Mr Stephen Borthwick, *Transcript of Evidence*, 17 September 2007, p. 19.

6 Article 2 of the Agreement; NIA, para. 10.

- Australia and Tonga may designate as many airlines as it wishes to operate the agreed services. Either party may revoke or limit authorisation of an airline's operations if the airlines fails to meet agreed conditions⁷;
- Designated airlines have the right to overfly the territory of the other party and to make stops in its territory for non-traffic purposes⁸;
- The designated airlines of the other Party must comply with the domestic laws, regulations and rules of the other Party relating to matters such as entry, clearance, aviation security, immigration, passports, customs, quarantine and postal services⁹; and
- Australia and Tonga are required to recognise certificates of airworthiness, competency and licences issued by each other.¹⁰

5.5 The Agreement adopts a liberal approach to code sharing, giving the airlines the flexibility to serve the market through selling seats on other airlines, as well as through its own aircraft operations.¹¹

5.6 The NIA states that the aviation market between Australia and Tonga is small and unlikely to grow substantially in the near future.¹²

The Australian airline Pacific Blue, part of the Virgin Blue group, operates two weekly flights using Boeing 737 aircraft between Sydney and Tonga, utilising 360 seats each way each week. The capacity entitlement of 600 seats each way each week is therefore well in advance of the actual operations currently underway.

Following the bankruptcy of Royal Tongan Airlines in 2004, there were no Tongan airlines operating services to Australia. In the year ending June 2007, a total of almost 27,000 passengers travelled between Australia and Tonga.¹³

7 Article 2 of the Agreement; NIA, para. 11.

8 Article 3 of the Agreement; NIA, para. 12.

9 Article 4 of the Agreement; NIA, para. 13.

10 Article 5 of the Agreement; NIA, para 14.

11 NIA, para. 7.

12 NIA, para. 7.

13 Mr Stephen Borthwick, *Transcript of Evidence*, 17 September 2007, p. 18.

Costs and implementation

- 5.7 The Agreement will be implemented through the *Air Navigation Act 1920* (Cth) and the *Civil Aviation Act 1988* (Cth). The *International Air Services Commission Act 1992* (Cth) provides for the allocation of capacity to Australian airlines. No amendments to these Acts are required for the implementation of the Agreement.¹⁴ Similarly, the Agreement is not expected to result in any additional costs for Commonwealth or State and Territory governments.¹⁵

Consultation

- 5.8 Consultation was undertaken prior to negotiation with Tonga in 2002, when the draft text of the air services agreement was settled. Stakeholders, including the State and Territory governments, were advised by letter and/or email of the proposal to negotiate a new air services agreement between Australia and Tonga and invited to comment.¹⁶
- 5.9 The only response received was from Qantas, in support of the formalisation of air services arrangements through the negotiation of an air services agreement.¹⁷

Conclusion and recommendation

- 5.10 The Committee supports the formalisation of air services arrangements through treaty status agreements. It is therefore concerned by the number of air services agreements that have not completed the domestic treaty process. The Committee expects the Department of Infrastructure, Transport, Regional Development and Local Government to table any air services agreement which have not
-

14 NIA, para. 25.

15 NIA, para. 26.

16 NIA, 'Consultation', para. 2. Other stakeholders include: the Commonwealth Department of Industry, Tourism and Resources, the Commonwealth Department of Foreign Affairs and Trade, the Australian Tourist Commission, the South Australian Tourist Commission, Sydney Airport Corporation, Tourism Queensland, Melbourne Airport, Australian Capital Territory Government, Northern Territory Airports, Qantas, Tourism New South Wales, Adelaide Airport, Tourism Tasmania and Perth Airport.

17 NIA, 'Consultation', para. 3.

been brought into force promptly and to ensure that any future air services agreements are tabled in Parliament within a reasonable period of signing.

Recommendation 4

The Committee supports the *Tonga Air Services Agreement* and recommends that binding treaty action be taken.

Australia's withdrawal of the exemption for the use of mirex under the Stockholm Convention

Introduction

- 6.1 The proposed treaty action is the withdrawal of Australia's current exemption for the use of mirex under Article 4 of the Stockholm Convention on Persistent Organic Pollutants (the Convention). The Convention was done at Stockholm on 22 May 2001 and ratified by Australia on 20 May 2004.

Background

- 6.2 The Convention requires Parties to eliminate the use of Persistent Organic Pollutants (POPs), which are toxic and persistent chemicals. Mirex is one of the 12 POPs currently listed for action under the Convention. Mirex is listed under Annex A as a POP to be eliminated.¹

Mirex, like any chemical listed under the Stockholm convention, meets the criteria for a persistent organic pollutant, which means that it is toxic, that it bioaccumulates and that it travels long distances in the environment ...

1 National Interest Analysis (NIA), para. 1.

It has been well designed as a pesticide chemical. Unfortunately, it does more than it should in that it goes further than its target audience and will create further damage within the environment and to human health.²

- 6.3 When ratifying the Convention, Parties may register a specific exemption to allow continued production and/or use of POPs listed under Annex A. While an exemption is valid, the Party must restrict production and/or use rather than eliminate use.³
- 6.4 When ratifying the Convention, Australia registered an exemption for the continued use of mirex. Australia and China were the only countries to lodge an exemption for mirex. The Committee was informed that mirex came into use in Australia sometime in the early 1980s prior to the creation of the National Registration Scheme in 1993 administered by the Australian Pesticides and Veterinary Medicines Authority (APVMA).⁴
- 6.5 Mirex is the active ingredient in two pesticide products:
- Mirex Termite Bait, previously used by licensed pest controllers and tree crop growers in the northern tropical area to control termites⁵; and
 - Mirant, to control the giant termite in horticultural crops.⁶
- 6.6 Registration of both products has been ceased by the APVMA due to research by the NT Government that found alternative chemical products to replace mirex. This elimination of mirex from use in Australia allows Australia to now withdraw its exemption for mirex under the Convention.⁷
- 6.7 Australia's exemption is currently due to expire on 17 May 2009, five years from the date of entry into force of the Convention for Australia. However, the proposed treaty action is that Australia submit its notification of withdrawal to the Stockholm Secretariat as soon as practicable.⁸

2 Mr Lee Eeles, *Transcript of Evidence*, 17 September 2007, p. 24.

3 NIA, para. 2.

4 Department of the Environment, Water, Heritage and the Arts, *Submission No. 2*.

5 Ms Mary Harwood, *Transcript of Evidence*, 17 September 2007, p. 24.

6 NIA, paras 6 & 8.

7 NIA, para. 8.

8 NIA, para 5.

Reasons for Australia to take the treaty action

- 6.8 By withdrawing its registered exemption to mirex, Australia will demonstrate its commitment to:
- protecting human health and the environment from the adverse effects of POPs; and
 - supporting effective approaches to eliminating the production and use of POPs.⁹
- 6.9 According to the then Department of the Environment and Water Resources¹⁰:
- ...the withdrawal of Australia's exemption from the register of specific exemptions would enhance our capacity to influence international efforts to address chemical issues and to demonstrate Australia's commitment to implementing effective approaches to eliminating the production and use of persistent organic pollutant chemicals listed under the convention.¹¹

Obligations

- 6.10 Following the proposed withdrawal of Australia's registered exemption for mirex, Australia will be obliged to:
- prohibit the production, use and import of mirex (Article 3);
 - prohibit the export of mirex, except for the purpose of environmentally sound disposal (Article 3(2)(a));
 - destroy any stockpiles of mirex in an environmentally sound manner (Article 6).
- 6.11 In February 2007, a stockpile of approximately 165kg of Mirant remained in the NT. The NT Government collected these stocks, which were transported by road from the Northern Territory to Brisbane to be destroyed at the BCD Technologies plant in

9 NIA, para. 7.

10 The name of the Department changed to the Department of the Environment, Water, Heritage and the Arts following the Administrative Arrangements Order dated 25 January 2008.

11 Ms Mary Harwood, *Transcript of Evidence*, 17 September 2007, p. 24.

Queensland, in accordance with Article 6 of the Convention.¹² BCD Technologies will destroy the stockpile utilising plasma arc technology in accordance with relevant Queensland licensing arrangements.¹³

Implementation and costs

- 6.12 The Department of the Environment, Water, Heritage and the Arts will continue to ensure Australia meets its obligations under the Convention in cooperation with other Australian Government and State and Territory agencies.¹⁴
- 6.13 The Department of Agriculture, Fisheries and Forestry (DAFF) administers the *Agricultural and Veterinary Chemicals Code Act 1994* (Agvet Codes). No amendments to the Agvet Codes are necessary.¹⁵
- 6.14 The APVMA issues permits that allow a person to possess, supply or use a chemical product, which would otherwise be an offence under the Agvet Code. The APVMA will not issue any future permits of products containing the chemical mirex.¹⁶
- 6.15 There are no foreseeable costs for either the Australian Commonwealth or State/Territory Governments in taking the proposed treaty action.¹⁷

Consultation

Australia's National Implementation Plan (NIP)

- 6.16 Under Article 7 of the Convention, each Party is required to develop a National Implementation Plan (NIP) setting out how it will address its obligations under the Convention.¹⁸

12 NIA, para. 17.

13 Department of the Environment, Water, Heritage and the Arts, *Submission No. 2*.

14 NIA, para. 18.

15 NIA, para. 18.

16 NIA, para. 18.

17 NIA, para. 19.

18 NIA, 'Consultation', para. 1.

6.17 The then Department of Environment and Water Resources led the development of the NIP in consultation with other Australian Government agencies.¹⁹ State and Territory governments and non-government organisations were consulted through the establishment of the Stockholm Reference Group in December 2004.

We have a close consultative process. Australia is a party to the convention. When we participate in meetings of either the chemicals review committee or the conference of parties, our delegation always includes representatives from concerned agencies such as DAFF. And, while we are essentially the lead agency for engagement in the convention, the processes for working on the listing of chemicals and so on involve state government agencies, the Department of Agriculture, Fisheries and Forestry, the Department of Health and Ageing and others, as well as industry and NGOs.²⁰

6.18 A draft NIP was released in October 2005 for public comment. Several submissions were received, raising concerns of a minor nature which were taken into account in preparing the final NIP. The final NIP outlines the actions that Australia:

- has undertaken to date in reducing the presence of POPs; and
- will undertake in the future to meet its obligations under the Convention.²¹

Elimination of mirex from Australia

6.19 Both the Australian Government and the NT Government undertook extensive consultation with government agencies, industry groups and registrants²² in the lead up to the voluntary cancellation and non-renewal of the registrations for mirex, as set out in Section 2.2 of the NIP.²³

19 Including the Department of Agriculture, Fisheries and Forestry, the Department of Health and Ageing, the Department of Foreign Affairs and Trade, and the Department of Industry, Tourism and Resources.

20 Ms Mary Harwood, *Transcript of Evidence*, 17 September 2007, p. 26.

21 NIA, 'Consultation', para. 3.

22 Including the Northern Territory Horticulture Association, the Northern Territory Mango Association, growers, chemical companies, the APVMA, and other non-government organisations through the Stockholm Reference Group.

23 NIA, 'Consultation', para. 7.

- 6.20 As stated in the NIP, the implementation of the proposed actions for the elimination of mirex was a two phase process. In the first phase support was received from the Northern Territory horticulture industry, growers and chemical companies for research into an alternative chemical product, and APVMA issued permits for its use to control the giant termite. The second phase involved the APVMA, Mirant Pty Ltd and the Agriculture Protection Board of WA in the cancellation and non-renewal of registration of mirex in Australia.²⁴

Entry into force and withdrawal

- 6.21 Under Article 4 of the Convention, when there are no longer any Parties registered for a particular type of specific exemption, no new registrations may be made with respect to it.
- 6.22 Under Article 28 of the Convention, a Party may withdraw from the Convention any time after three years from the date the Convention enters into force for that Party. Withdrawal takes effect after one year from the date notification of withdrawal is received by the depositary.

Conclusion and Recommendation

- 6.23 The Committee supports measures which protect human health and the environment by reducing or eliminating the use of persistent organic pollutants wherever possible.

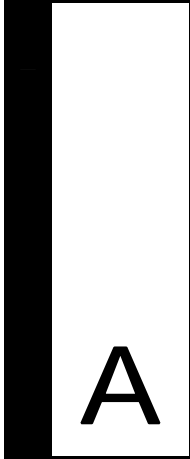
Recommendation 5

The Committee supports the *Withdrawal of Australia's exemption for the use of mirex under Article 4 of the Stockholm Convention on Persistent Organic Pollutants* and recommends that binding treaty action be taken.

²⁴ NIA, 'Consultation', para. 8.

Kelvin Thomson MP

Committee Chair



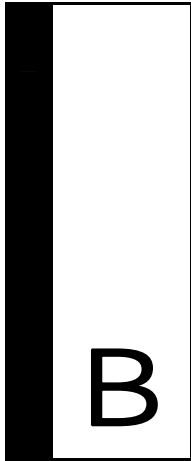
Appendix A- Submissions

Singapore Treaty on the Law of Trademarks Patent Law Treaty

- 1 Australian Patriot Movement
- 1.1 Australian Patriot Movement

Tonga Air Services Agreement Australia's withdrawal of the exemption for the use of mirex under the Stockholm Convention Constitutional Amendments to the Convention Establishing the World Intellectual Property Organisation (WIPO)

- 1 Australian Patriot Movement
- 1.1 Australian Patriot Movement
- 1.2 Australian Patriot Movement
- 2 Department of the Environment, Water, Heritage and the Arts



Appendix B - Witnesses

Monday, 17 September 2007 – Canberra

Attorney-General's Department

Mr Christopher Creswell, Copyright Law Consultant

Mr Matt Hall, Principal Legal Officer, Office of International Law

Department of Foreign Affairs and Trade

Mr Tony Huber, Director, Pacific Bilateral Section

Mr David Mason, Executive Director, Treaties Secretariat, Legal Branch

Department of the Environment and Water Resources

Ms Mary Harwood, First Assistant Secretary, Environment Quality Division

Mr Lee Eeles, Director, Chemical Policy Section, Environment Protection Branch

Department of Transport and Regional Services

Mr Stephen Borthwick, General Manager, Aviation Markets

Mr Samuel Lucas, Assistant Section Head, Bilateral Aviation, Aviation Markets Branch

Mr Iain Lumsden, Section Head, Bilateral Aviation, Aviation Markets Branch

IP Australia

Mr Michael Arblaster, Assistant General Manager, Trade Marks and Designs

Mrs Fatima Beattie, Deputy Director General

Mrs Joanne Rush, Assistant Director, International Policy

Mr Philip Spann, Assistant General Manager, Patents and Plant Breeders Rights