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**Submission to the Productivity
Commission's inquiry into
Australia's intellectual property
system**

Intellectual Property Arrangements
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

**The China-Australian Chamber of Commerce in Beijing
(AustCham Beijing) Submission to the Australian Government’s
public enquiry into Australia’s intellectual property system
*November 2015***

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1. Summary

A long-predicted trend has now become a reality; China is a world leader in innovation in terms of invention-patent applications. Since 2010, the number of patent applications have remained constant in countries such as Japan and America. Meanwhile, the Chinese figure has more than doubled, surpassing all other countries.

Despite innovation in China flourishing over the past five years, intellectual property rights (IPR) laws are largely ill-enforced. IPR violations and counterfeiting remain a major problem and concern for Australian exporters, Australian businesses currently operating in China and technology transfer companies alike.

Australia is nearing the final stages of entering into the China-Australia Free Trade Agreement with the non-mining and resource sectors set to lead growth in bilateral trade and investment. Particularly within the industries of food and beverage, agriculture and healthcare, Australian small to medium sized businesses will have greater opportunities for business in China, however Australian IPR risks will be exposed without an increased level of in country support.

AustCham members have provided a comprehensive overview of IPR issues and recommendations for the Australian Government to strengthen support to Australian businesses navigating intellectual property issues in China. Strong sentiment shows that to be competitive through innovation and technology, key Australian growth sectors require an increased level of in-country market entry support in China for IPR.

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2. Issues

2.1 Counterfeit Issues

Australia's intellectual property laws are well established and overwhelmingly adhered to. In China, the confusing intellectual property landscape acts as a barrier to market entry.

Due to the sheer volume of goods passing through Australian customs every day, an understandable trade-off is reached between processing efficiency and detecting counterfeit goods. It is increasingly difficult for border security and customs to identify counterfeit goods outside of specifically singling out an importer with a bad history. There are IPR issues related to the importation of counterfeited goods, this hurts Australian industries engaged in import-export trading routes with China.

2.2.1 Manufacturing

After consultation with members there were two main channels through which the IPR of Australian companies are violated.

- 'Third shift' counterfeits - Factories in China which produce luxury consumer goods usually have two shifts per day. However, after the second shift, workers often return to the factory and begin a 'third shift' where they produce additional goods but often with offcuts, or at a lower standard. These additional goods, sometimes called 'factory seconds' are rejected production from shifts 1 and 2 and are then sold as counterfeits.
- Research and Copy – A product is taken and then disassembled, or reversely engineered, to be copied and remade as cheaply as possible with inferior materials.

2.2.2 Transliteration

- Within the agricultural industry, Australian companies with China experience often find it most useful to engage the local police and private investigators to ascertain whether a particular market within China is viable for entry. Moreover, we have been told that sometimes the only option left for a firm is to ultimately walk away from a potential market on the advice of local private investigation.
- Within the wine, beer and spirits industries, there is a dedicated black market for used bottles.
 - Recently, over 2 million empty beer bottles with their original (internationally-known) label intact, were refilled by a Chinese beer producer, who then attempted to ship these bottles to Australia under their business name – not that of the label on the bottles.
 - These grievances have caused smaller Australian wine producers to decide against exporting to China due to lack of support for, and fear of the impact that

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IP related risks could have on their businesses. Alternatively, empty bottles are smashed so that the bottles cannot be refilled.

2.2 Trademark Issues

Trademark registration and ownership in China is still relatively ambiguous, and in practice the trademark registration process can be anti-competitive.

The current 'first-to-come first-to-file' system of trademark registration is open to abuse and manipulation. The first company or person to register a trademark owns the rights to that trademark in China. Unlike Australia and other western countries, misleading and deceptive conduct surrounding intellectual property is rarely recognised in China. It is not uncommon for professional trademark pirates to bring an action towards a legitimate company attempting to enter the Chinese market. Consequently, risks surrounding brand protection is also a major concern. Currently there is no workable solution, and trademark piracy is a growing industry in China.

The only substantial trademark protection is available to brands which are deemed to have 'Well Known Mark' status. This status is given to brands by the Chinese government by seemingly ambiguous criteria. For instance there are many smaller Chinese brands that have been awarded 'Well Known Mark' status, but many well-known international couture houses are unable to secure this protection. Furthermore, the brand needs to be protected in specifically nominated industries

2.2.1 Patent Infringement

- A prominent Australian Medical Device company operating in China held a 65% global market in 2010.
 - In 2013 market share was roughly the same although two new producers from Shanghai and Guangzhou had entered the industry. The producer in Shanghai was then interviewed on a national television station, for a program on innovation in China. He openly admitted on the program to stripping the product down, then reversely engineering and rebuilding it with locally-sourced materials and selling it as his own.
- Another member-based example came from an SME producing a water purification device small enough to fit into a 40 foot container. (This member asked not to be named in this report but is willing to discuss with Australian Officials which can be facilitated by AustCham)

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- The producer had decided not to patent the key technological components of his device because he felt a patent would leave them too accessible and vulnerable to counterfeiters forging his invention. In China, filing a patent makes your designs or other IP publicly known. Other businesses are able to access this information and use it illegally, the patent is often not enforced.
- This is a clear example of the lack of faith and apprehension shown by Australian entrepreneurs and innovators when seeking to engage in the Chinese market.

2.2.2 Transliteration

- Even if a firm or person owns the English trademark, the transliteration, or Chinese language representation of their product name, may be trademarked by a completely disassociated person or entity in China.
 - This has spurred on a whole sub-industry of agents trademarking Chinese transliterations of certain brand names in anticipation of a pay out from the genuine companies at a later date.
 - This has already occurred to Apple's iPad and resulted in Apple settling out of court.

2.3 E-commerce

The thriving E-commerce industry in China is a trading and selling platform taken advantage of by Australian SMEs and global corporations alike. Despite the benefits of engaging with China's E-commerce scene can provide; the complexity of the online environment can prove to be both risk laden and daunting.

- Domain name squatters
 - Agents making a commission on early trademark pirating of brand and other related names in the hope of being bought out at a later date.
 - This is also prevalent among other Chinese social media platforms such as WeChat as Weibo.
- Website and Domain Ownership issues.
 - Chinese websites that are built under the guise that they are a genuine representation of another brand or institution, only to draw people in to

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a connector or middle-man service. This is particularly prevalent among Universities.

- Chinese search engines will always go for a website with more traffic, people are taking advantage of this by purchasing key words to draw consumers to the aforementioned illegitimate websites.
- There are problems with the registration of transliterated Chinese brand associated with Western and European brands.
 - Transliteration can cause more of an issue within E-Commerce than traditional brick and mortar operations due to the fact that pirated Chinese language trademarks can be used in search engines and drive traffic away from legitimate websites.
 - For example, Apple had no direct Chinese brand name for its iPad and ended up having to significantly pay out persons who had already trademarked a commonly accepted Chinese title for the iPad.
- Chinese companies are creating complete sub brands to ride off the reputations of well established brands, a problem is also seen when Australian benchmarks in beef and other products are leveraged to sell non-genuine food products.
 - There is significant reputation damage being suffered through fake websites for brands being ranked higher than the real website on Baidu.

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3. Recommendations

Tangible contact point

1. Australian trade facilitation support for IP is of a lower standard than other large trading nations. A designated IP contact group within the Australian Embassy in Beijing should be implemented.
2. A funded market entry support staff with IPR experience at AustCham supported by collaboration with IPR counsellor at the Australian Embassy.

Education and Awareness

3. A dedicated website about IP protection for Australian businesses in China and those looking to enter the market funded by the Australian Government and developed by AustCham, IP Australia and Standards Australia. It would include:
 - a. IP best practice checklists
 - b. Updates on decided cases
 - c. Contact details for Embassy and Chamber staff
 - d. Areas for subscribing to joint IP updates from the via social media or email
 - e. Links to relevant Chinese government department websites and contacts
 - f. Details of upcoming joint events and roundtables in Australia and China
 - g. Contact list for people with long-term China IP experience and are able to help with registration/litigation/advisory, including contact details for AustCham members with IPR experience on the ground in China.
4. China IP training seminars, online and in-person run by AustCham in conjunction with the Australian Embassy and relevant government departments.
5. Regular formal and informal meetings between IPR contact Group at Australian Embassy and the IP courts, CTO and SIPO to build productive working relationships.

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