

Commercialising Business Ideas – Public Consultation Report

Intellectual Property Policy Team, Commercialisation Policy Branch

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Disclaimer

To protect the privacy of individuals, the names and identifying details have been changed. No identification with actual persons (living or deceased), places, buildings, and products is intended or should be inferred. No person or entity associated with this report received payment or anything of value, or entered into any agreement, for the exchange of their experience(s) with intellectual property or the Department of Industry, Innovation and Science.

Executive Summary

The Department of Industry, Innovation and Science's Intellectual Property (IP) Policy Team has conducted a stakeholder consultation process in order to better understand the needs of innovative Australian small and medium enterprises (SMEs) seeking to commercialise their business ideas.

For the basis of this consultation, the department focused the conversation on "intellectual capital", which is defined as: ideas, know-how, branding, data and trade secrets, as well as registered IP Rights (IPRs) such as patents, trade marks, copyright, designs and plant breeders' rights.

The department undertook consultations from 25 May to 14 August 2018. Consultations included a series of in-depth interviews with a range of SMEs, industry bodies and business and IP service providers. To complement these interviews, key stakeholders were invited to submit their thoughts and opinions through the department's consultation portal. Overall, 51 in-depth interviews were conducted face to face or by phone and 12 online submissions were received.

Our consultative process highlighted the full breadth and depth of the issues that are faced by SMEs when identifying, managing and exploiting their intellectual capital.

The key findings are:

1. SMEs view the concept of intellectual capital (especially registered IPRs) as highly technical, complex and daunting;
2. The majority of SMEs consulted do not have the skills or experience to effectively recognise and exploit their intellectual capital;
3. Strategic advice on these matters is not readily available or affordable;
4. SMEs lack the foresight to deal with enforcement and infringement actions when they arise.

Opportunities to address these key findings can be broadly categorised as:

- Improved education and awareness of intellectual capital via a range of delivery modes and channels (1.1 – 1.3);
- Development of new tools or services to improve understanding of and interaction with the broader IP system (2.1, 2.2 and 3.1);
- Streamlined enforcement options (2.3 and 3.2).

The opportunities presented cover a variety of concepts and ideas, which may remedy the issues identified. However, all of these require further exploration and analysis, and ongoing investment in the development of a robust and relevant evidence base is required. We consider this work to be a starting point for the development of a department-wide IP policy framework, which may be leveraged to develop an overarching, cross-portfolio IP policy framework.

Acronyms and Explanations

In this report (unless a contrary intention appears):

Term and Acronym	Explanation
Alternative Dispute Resolution (ADR)	An out-of-court process that allows parties to settle disputes, noting the resolutions are often not legally binding unless later formalised by written agreement.
Branding	Branding is a marketing process of uniquely identifying and differentiating a product or business for customers to recognise the presence in the marketplace. A strong brand is more than just a logo, design or name; it's reflected in everything, from the customer service experience, staff uniforms, business cards and premises to the marketing materials and advertising. ¹
Confidential Information	Confidential information may include information about a business' organisational structure, activities conducted, customer lists, operating procedures, know-how, finances or transactions. For confidential information to be legally protected, it must be secret, treated as being confidential, and clearly advised to external parties that the material is, and should remain, confidential.
Copyright	Copyright protects the original expression of ideas, but not the ideas themselves (an idea might lie in the plot for a story, but it is only the actual text of the novel that can be protected by copyright). Copyright covers drawings, art, literature, music, film, broadcasts, databases and computer code.
Design	A registered design protects the visual appearance of a product, but not the way it works.
Entrepreneurs' Programme (EP)	A Department of Industry, Innovation and Science program. It offers practical support to businesses in the form of independent advice, co-funded grants, funding and connection and collaboration opportunities.
Freedom to Operate	A Freedom to Operate (FTO) analysis involves searching patent literature for issued or pending patents, and obtaining a legal opinion as to whether a product, process or service may be considered to infringe any patent(s) owned by others. ²
Geographical Indication (GI)	A geographical indication identifies a good as originating in a specific territory, region or locality and this place of origin gives rise to a particular quality, reputation or other characteristic. For example, only sparkling wines made in a particular region of France can be called Champagne.
Information and Communications Technology (ICT)	The manufacturing and service industries that capture, transmit and display data and information electronically. ³
Intellectual Capital	Intangible assets that have potential value for a business, including: ideas, know-how, skills, branding, data, information systems and trade secrets, as well as IP rights.
Intellectual Property (IP)	Definitions vary, but the World Intellectual Property Organisation defines IP as creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.

¹ <https://www.business.qld.gov.au/running-business/marketing-sales/marketing-promotion/branding-basics>

² http://www.wipo.int/wipo_magazine/en/2005/05/article_0006.html

³ <https://www.oecd.org/sti/ieconomy/2771153.pdf>

Term and Acronym	Explanation
Intellectual Property rights (IP rights or IPRs)	Some intellectual property can be protected as an intellectual property right. These include patents, trade marks, designs, plant breeders' rights, copyright, circuit layout rights and geographical indications.
IP Australia	The Australian Government agency (within the Department of Industry, Innovation and Science portfolio) that administers patents, trade marks, designs and plant breeders' rights and their relevant legislation.
IP insurance	An IP insurance policy provides protection for one or both of the following: <ul style="list-style-type: none"> • Legal costs of enforcing IP against infringers; • Legal cost of defending claims of infringement made against you.⁴
Landscape search	Patent landscape searches provide a snapshot of the patent situation of a specific technology, either within a given country or region, or globally. ⁵ They can help to identify what technologies are already protected and which companies are active, and can thus inform strategic research planning or technology transfer.
Non-disclosure Agreement (NDA)	A NDA is a legally binding document between parties. It sets out how to share confidential information or ideas. NDAs are also known as confidentiality agreements ⁶ .
Patent	A patent is a right that is granted for any product, method or process that is new, inventive and useful.
Plant Breeders' Rights (PBR)	Plant breeders' rights are exclusive commercial rights for new plant varieties.
Productivity Commission (PC)	The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. ⁷
Research and Development Tax Incentive (R&DTI)	The Department of Industry, Innovation and Science administers a tax offset for some of a company's cost of doing eligible research and development (R&D) activities by reducing a company's income tax liability.
Small and Medium sized Enterprises (SMEs)	The Australian Bureau of Statistics defines SMEs as firms employing 0 to 199 employees.
Startup	Generally associated with an entrepreneurial venture. Exact definitions vary, but are generally based on young business age and/or profit turnover.
Trade Mark	A trade mark identifies the particular goods or services of a trader as distinct from those of other traders. Trade marks can protect, for example, logos, words, colours, a phrase or a sound.
Trade Secrets	A Trade Secret is knowledge that may include any confidential business information which provides an enterprise with a competitive edge.

⁴ <https://www.ipaustralia.gov.au/ip-infringement/more-about-ip-infringement/ip-insurance>

⁵ http://www.wipo.int/patentscope/en/programs/patent_landscapes/

⁶ <https://www.gov.uk/government/publications/non-disclosure-agreements/non-disclosure-agreements>

⁷ <https://www.pc.gov.au/about>

Context

Background

In August 2015, the Australian Government requested that the Productivity Commission (PC) conduct an inquiry into Australia's Intellectual Property arrangements to ensure that the appropriate balance exists between incentives for innovation and investment, and the interests of individuals and businesses in accessing ideas and products⁸. The PC's final report was delivered to the Government in September 2016 and publicly released on 20 December 2016. The Department of Industry, Innovation and Science (the department) coordinated the Government's response to the PC inquiry, working across a range of departments and agencies with responsibilities for the wide range of IP matters included in the report. The Government's response was publicly released on 25 August 2017⁹.

The Government's response to the PC's inquiry has been the catalyst for the department to delve deeper into the relationship between intellectual capital in its broadest sense and the innovation system. This direction aligns closely with the department's support for strong scientific capability, business innovation and commercialisation of new ideas as critical requirements for productivity and economic growth. A key objective for the department is to enhance the science and innovation policy framework to support the creation and sharing of scientific and technological information as an input to commercial activity.

Consultation

In line with the department's intent to better understand the commercialisation challenges facing SMEs, the department commenced a public consultation on both this issue as well as those of enforcement and infringement of IP rights. This breadth enabled the department to gain a wider appreciation of the issues faced by SMEs during the entire intellectual capital life cycle.

⁸ The PC inquiry was established in response to a recommendation of the Competition Policy Review (Harper Review)

⁹

https://www.industry.gov.au/sites/g/files/net3906/f/June%202018/document/pdf/government_response_to_pc_inquiry_into_ip_august_2017.pdf

Focus of the consultation

The consultation was targeted at better understanding the needs of innovative SMEs in relation to commercialising their business ideas.

For the purpose of this consultation, the department focused the conversation on “**intellectual capital**”, which is defined as: ideas, know-how, branding, data, and trade secrets, as well as registered IP rights, such as: patents, trade marks, copyright, designs, and plant breeder’s rights.

The department intentionally avoided the use of the term ‘intellectual property’ due to its association with IPRs. The department was concerned that a focus on the term ‘intellectual property’ could limit the conversations to registerable IPRs.

Key goals of the consultation were to obtain a better understanding of:

- how SMEs currently understand and leverage their intellectual capital;
- whether they experience significant issues in the identification, management, exploitation and enforcement of their intellectual capital;
- whether there is a role for government in assisting SMEs to identify, exploit and enforce their intellectual capital; and
- the role of disruptive business models in commercialising intellectual capital, including those that do not use registerable IPRs.

Intellectual Capital

The PC inquiry noted that, for the most part, Australia’s current IP rights system is robust and world-class, reflecting our economic development and our increasing presence on the global stage. However, we also must acknowledge that the global IP landscape is shifting. The structural changes in the economy as well as new technologies and business models have given a rising importance to intellectual capital.

The generation, development and use of intellectual capital features in all aspects of the innovation life cycle and has been identified as an important source of growth by the OECD.¹⁰ We also know that most Australian businesses do not register IP rights¹¹. Even those businesses that identify as ‘innovation active’ tend to manage their intellectual capital in-house instead of seeking to register their rights¹².

In late 2017 – early 2018, the department’s IP policy team conducted a pilot project to identify the intellectual capital issues that were pertinent to the department’s stakeholders. The project involved consultation with 24 policy and program delivery areas across the department, seeking input based on their experience or on feedback from their stakeholders. These discussions highlighted that the department’s stakeholders recognised the importance and role of intellectual capital, but that there was a general lack of awareness regarding how to identify and protect intellectual capital.

¹⁰ Organization for Economic Cooperation and Development, *Supporting Investment in Knowledge Capital, Growth and Innovation*, 2013, available at <http://www.oecd.org/sti/inno/newsourcesofgrowthknowledge-basedcapital.htm>.

¹¹ In 2017, domestic applicants filed 2503 standard patent applications, 46,352 trade mark applications, 2,854 design right applications and 147 plant breeders’ rights applications.
https://www.ipaustralia.gov.au/sites/g/files/net856/f/ip_report_2018.pdf.

¹² Australian Innovation System Report 2016 showed that around 10% of all Australian innovation-active business applied for a patent, 9% registered a design, 29% registered a trade mark and 31% used trade secrets

Consultation Methodology

Elements of Human Centred Design were adopted where possible for the consultation. This methodology places end-users at the centre of the process so that the development of new solutions suit their needs. The team utilised the department's BizLab methodology and resources to develop a robust selection and engagement process.

One of the key tenets of Human Centred Design is that it requires a deep understanding of the end-users. As such, targeted deep dive conversations with SMEs were identified as essential to understand the needs of our key stakeholder group (innovative SMEs) around the complex issues of intellectual capital. In order to give all stakeholders with an interest in the matter an opportunity to contribute, these conversations were supplemented through an open online consultation portal seeking email responses.

Guiding questions (Attachments A and B) were developed for both consultation processes, based on the themes of identification, management, exploitation and enforcement of intellectual capital. To ensure privacy, participants were advised that:

- all discussions and submissions would be held confidentially and not be made publicly available; and,
- any external reporting of information gathered during the consultation process would be de-identified.

Recognising that individual firm capabilities and interactions with the IP system were likely to be extremely varied, we sought to engage with a wide variety of business types, at various stages of innovation, in various sectors and various locations across metropolitan, regional and rural areas.

The combined consultation commenced on 25 May 2018 and concluded on 10 August 2018. In total, 59 entities engaged in the consultation.

Targeted consultations

Deep dive conversations with innovative SMEs and both business and IP advisory service providers allowed for a deeper understanding of the needs of SMEs around commercialising their IP and some of the issues that they face. Conversations were open and wide ranging, based on guiding questions (Attachment A). Where appropriate, follow-up questions were used to better target the direction of the conversation.

The identification of innovative Australian SMEs to approach for consultation was based on existing networks as well as searches of publicly available information. These included:

- AusIndustry networks (including individual staff in State and Territory offices and Accelerating Commercialisation advisors);
- attendees at the Policy Hack in Brisbane in May 2018;
- SMEs that had voiced opposition to the abolition of the innovation patent;
- technology/innovation award nominees and winners; and,
- incubator and accelerator online presence.

Online consultation

An online consultation portal allowed anyone with an interest in the matter to make a submission. IP Australia, in particular, noted that an online consultation would be an important avenue through which to engage with their key stakeholder base (Patent and Trade Mark Attorneys).

To obtain the most benefit from this approach, guiding questions were provided to target the responses to matters of interest highlighted in the official response to the PC inquiry (Attachment B).

The consultation portal was promoted through a range of channels, including;

- IP Australia posted content on Twitter, Facebook and LinkedIn. Their Twitter post was retweeted via:
 - the department (<https://twitter.com/industrygovau>) - 2,783 followers
 - Jobs and Small Business (<https://twitter.com/JobsGovAU>) - 3,421 followers
 - ATO (https://twitter.com/ato_gov_au) - 56.2K followers
 - ATO Deputy Commissioner Small Business, Deborah Jenkins (<https://twitter.com/ATOSmallbizExec>) - 483 followers
- The Industry Growth Centres weekly CEO and Staff Bulletin included information inviting submissions;
- The IP Stakeholders Forum¹³ was informed of the consultation and invited to make a submission. Members were also invited to inform their clients about the consultation.

Summary statistics

A total of 131 entities were approached to take part in the consultation process. Of those, 51 entities participated in an interview. Four of the interviewees also completed an online submission. A further eight entities completed an online submission but did not wish to engage in an interview.

By the conclusion of the consultation process:

- 39 per cent of total entities approached for a consultation volunteered to participate;
- 31 interviews were conducted face-to-face, 18 were held via teleconference and two were conducted as a roundtable;
- 39 per cent of the interviewees were female founders or CEOs, or were their representatives;
- 23 consultations were conducted with individuals from organisations that had participated in a Government program such as the Entrepreneurs' Programme or Women in STEM.

¹³ IP Stakeholder Forum membership includes IP Australia executive, the department, Knowledge Commercialisation Australia, Universities Australia, AI Group, various patent attorney groups and Law Councils.

Chart 1: Interviews and online submissions filtered by business/organisation types

Chart 1 shows the number of consultations or online submissions by business or organisation type. Those businesses that made an online submission and volunteered for an interview have been counted once as a consultation.

Given that no single accepted definition of 'startup' exists, businesses were asked to categorise as either SME or startup during the interview. The Business Support category includes individuals or organisations that provide advocacy services, consulting, collaboration networks, facilitators and networking opportunities, but does not include Patent Attorneys.

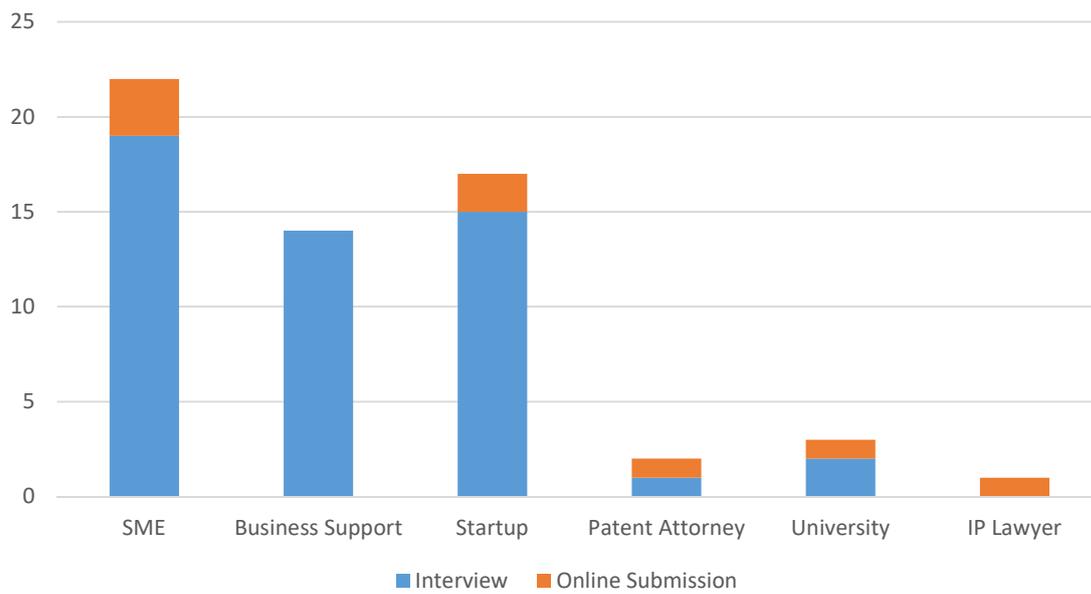
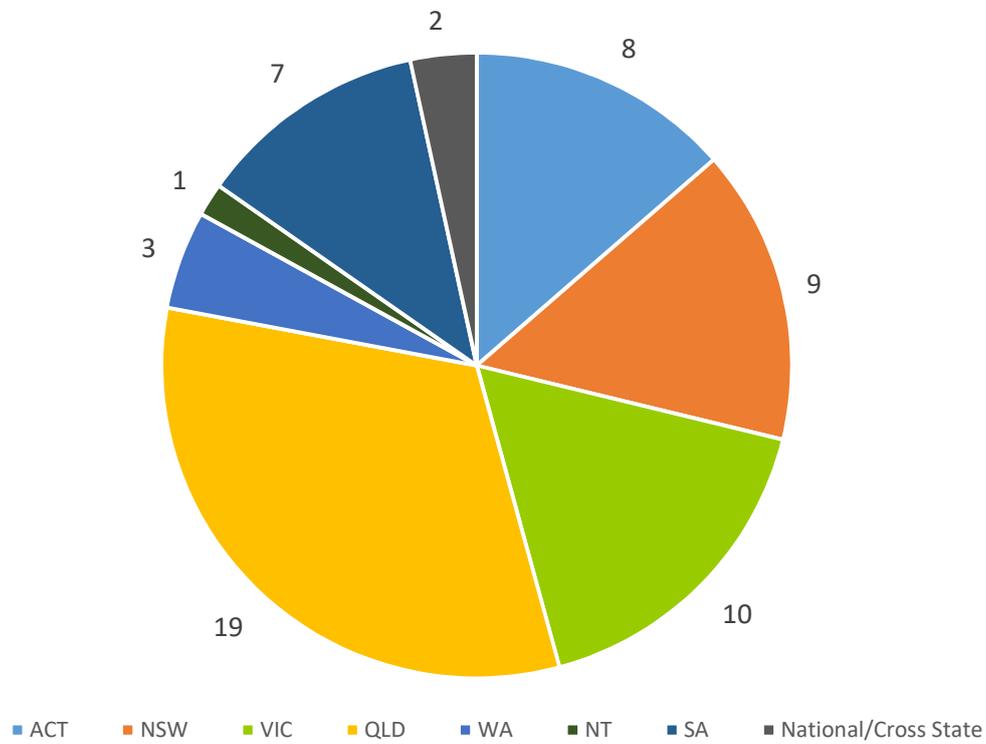


Chart 2: Consultations and online submissions filtered by state/territory

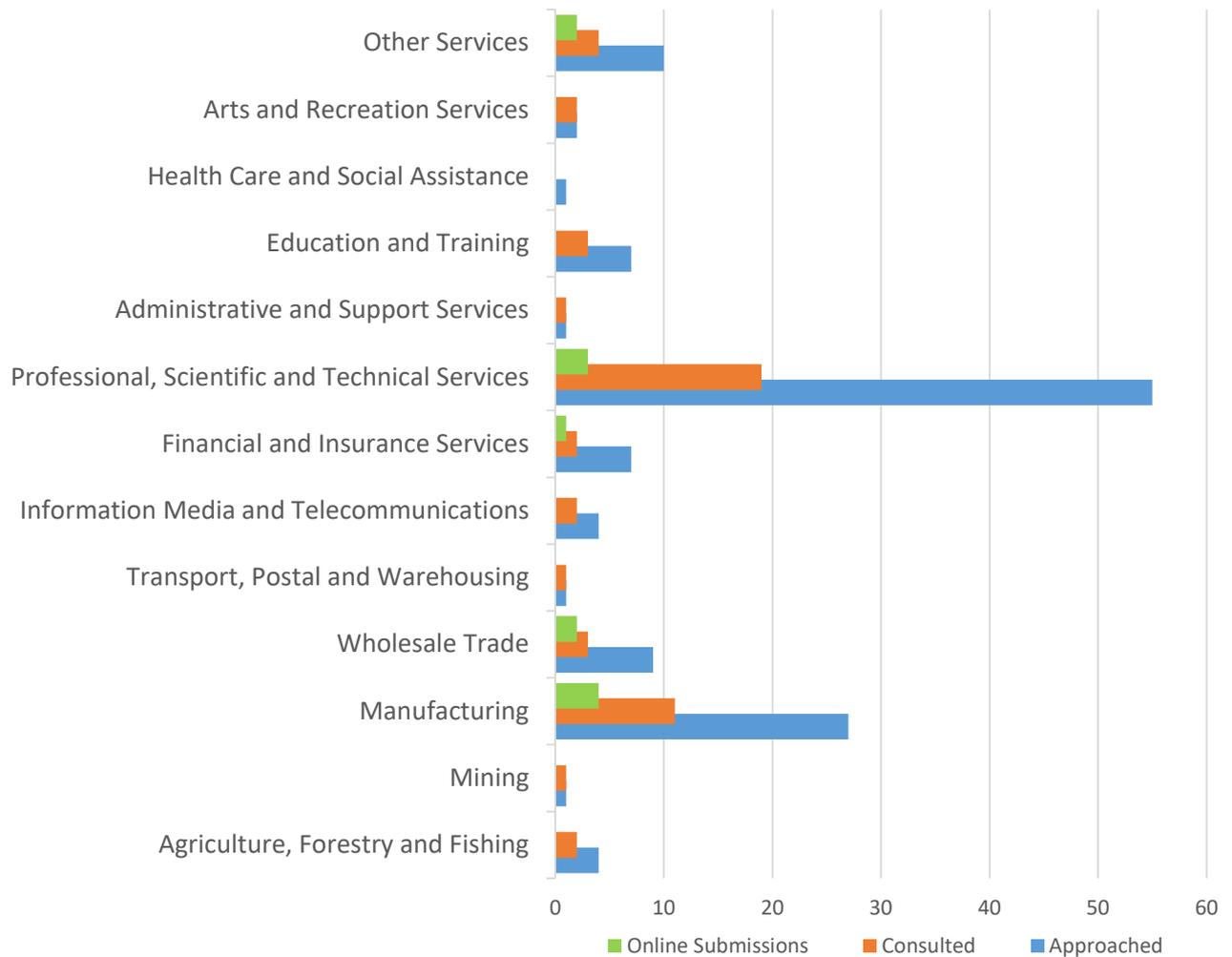
A state and territory breakdown is shown in Chart 2. The total includes the eight online submissions whose authors did not participate in an interview, and two roundtables. One of the roundtable involved a nationally focused entity (Entrepreneurs' Programme Committee) and the other was with a group of co-located startups.



The state or territory classification is based on the headquarters for business operations.

Chart 3: Entities approached and consulted filtered by industry

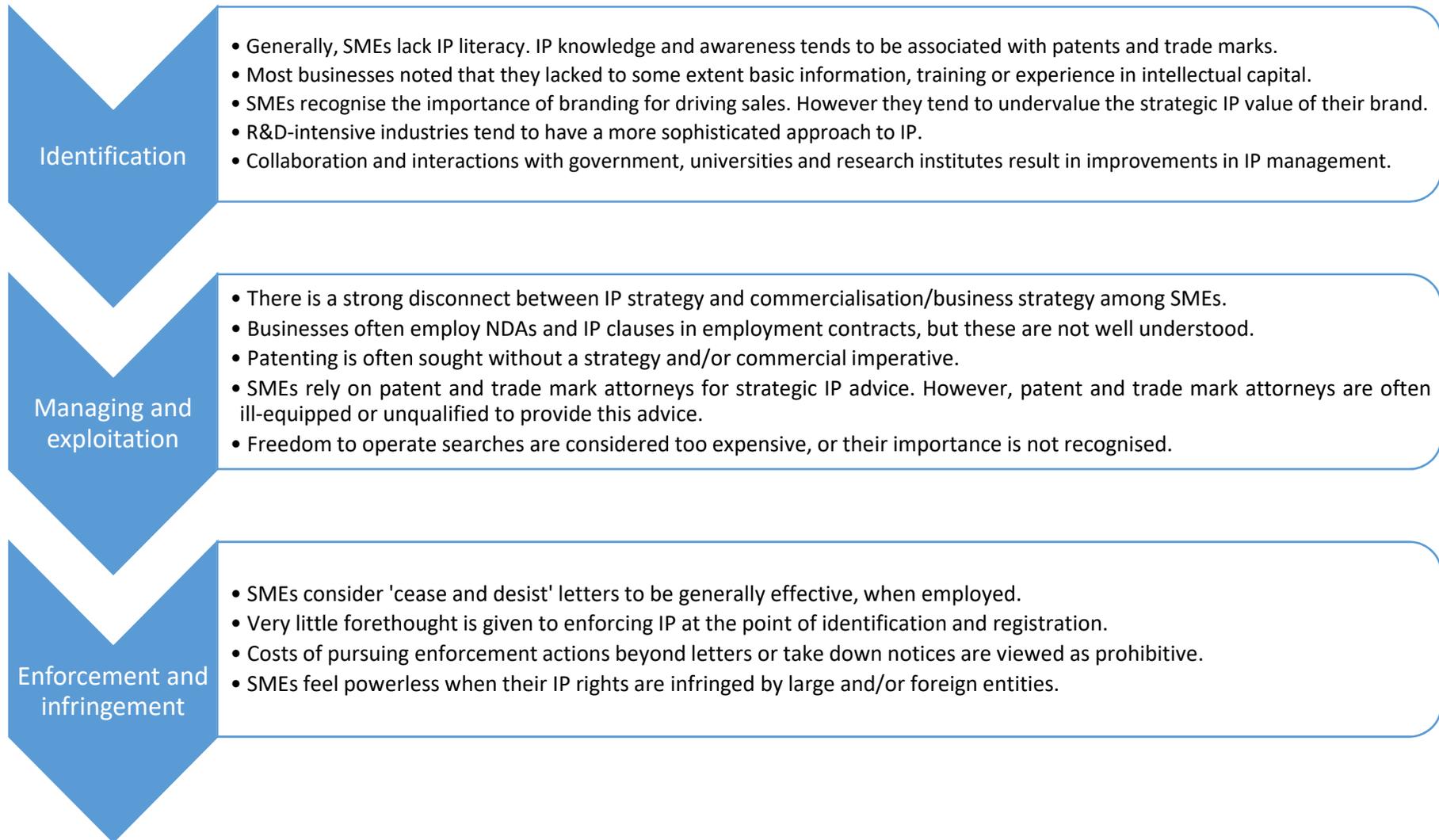
Chart 3 shows a breakdown of total entities approached, entities consulted, and the number of online submissions by industry.



Industry classifications were taken from the Australian Bureau of Statistics definitions¹⁴ and matched against an Australian Business Number where possible.

¹⁴ <http://www.abs.gov.au/ausstats/abs@.nsf/0/AF04F89CEE4E54D6CA25711F00146D76?opendocument>

Summary of Observations from the Consultations



Key findings

The consultations identified a wide range of issues faced by SMEs around the identification, management, exploitation and enforcement of intellectual capital. The following common themes clearly emerged from the consultation process.

1. The concept of intellectual capital (especially formal IP rights) is technical, complex and daunting for most.

A wide variety of IP 'literacy' was identified across all of the SMEs consulted, from businesses that struggle to even recognise intellectual capital to the more sophisticated businesses that have put structures and tools in place to identify and manage a wide range of intellectual capital. Regardless of their level of sophistication, most businesses noted that they lacked to some extent basic information, training or experience in intellectual capital, including what it encompasses, how it should be recorded and how it can be exploited.

This lack of knowledge has resulted in businesses not actively exploiting or ignoring the value associated with their intellectual capital. Much of their exploitation strategy was pinned on common sense and 'hope'. This sometimes led to developing work-arounds, such as limiting their supply chain to trusted domestic providers and limiting their expansion plans.

Case Study – IP Basics

Slaghoope Industries created a new product which brings together two existing technologies. Slaghoope's owner, George, undertook a thorough market analysis, exploring possible competitors and technologies. From this, George determined that a market and technology gap existed.

George employed an individual through Airtasker to write a patent. Unbeknownst to George at the time, the patent process proved to be expensive and time-consuming. Two years on, George's patent remains under examination. George notes that if he had been more educated on the IP system and patent application process, he wouldn't have invested his time and money into developing a patent and may have considered other pathways.

2. The majority of SMEs consulted do not have the skills and/or experience to effectively exploit their intellectual capital.

As noted above, businesses do not fully appreciate the value of their intellectual capital. As a result, they are unable to align its value to their business strategy. In situations where businesses have registered IPRs, many have done this separately from any other commercial decision. Rather than using IPRs as an enabler to meet the overall commercialisation strategy, IPRs, when sought, have tended to be in response to external factors such as expanding into offshore markets, financial or investment opportunities or outsourcing or subcontracting elements of the production process. This approach can fail to realise the full potential of the firm's intellectual capital, and may also lead to the inefficient use of resources.

Many SMEs admitted that they founded or are running their business lacking any real working knowledge of intellectual capital and registrable IPRs in particular. Rather than investing in developing this knowledge and skill, they tend to seek advice or rely on past experiences (positive or negative). This issue is compounded by the lack of strategic advice available in the domestic market (see below for more details and associated recommendation).

Case Study - Brains Trust

Fluppendorf, a technology-focused SME, has created a unique offering for the defence industry. The company's management team has recognised that their intellectual output is their greatest asset. The company has a strong recording process in place and has a good general knowledge of what IPRs are. However, the company's current strategy is to keep everything secret. To this end, they have developed work-arounds to counter for their lack of registered protection.

The company employs a variety of contractors in their supply chain, thereby creating silos of disparate information, with little chance of information leakage. While the company has one main client, it does consider that ongoing financial success will be achieved through global sales and diversification. They acknowledge that this may require expanding their supply chain to include offshore manufacturers. The management team is reluctant to explore these possibilities as they fear that their control over their intellectual output will be put at risk.

3. Strategic IP advice is not readily available

Currently, businesses prefer to seek strategic advice on how best to exploit their intellectual capital from patent attorneys and/or their lawyers. While commercial lawyers may be well-qualified to provide such advice, patent attorneys are generally not appropriately qualified or capable of providing

Case Study – Patent Portfolio Wars

Navier Solutions created three versions of their product, each time improving on the last prototype. The owners of the company did not have prior knowledge of the intellectual property system or experience in commercialising intellectual capital.

Without advice, the company chose not to patent until the inventors were finished developing the prototype. Once the prototype was settled, the company then sought advice from a patent attorney on the patenting process and whether: 1) a patent was obtainable for the prototype; and, 2) a patent would be granted in China.

Not having significant knowledge of the Chinese IP system, the patent attorney advised Navier Solutions not to seek a first tier patent. Further, it was advised that the Chinese second tier 'utility' patent was worthless as it is not examined, even though it is inexpensive to obtain. Based on this advice, the company did not seek to patent in China, despite knowing it would likely be a large export market.

Shortly after releasing the product globally, Navier Solutions faced Chinese copycat companies, one of which had applied for a Chinese utility patent using the company's technology, leading to a dispersion of profit, change in strategic business decisions and international enforcement issues for the company.

the necessary strategic advice. Few of these trusted advisers are able to tie IP strategy to business or commercialisation strategy. There is a misconception, in part due to the title of patent “attorney”, that the profession has the necessary commercialisation or legal experience and skills to provide specific, strategic advice.

In the experience of SMEs interviewed, this has led to decisions being taken that ultimately resulted in poor outcomes for the business. Most businesses are ill-equipped to ask relevant questions and may be encouraged to seek IPRs without a strategic imperative. The cost of filing a patent application is considerable, so if obtaining this protection is not aligned with the business’ strategy, there can be a significant financial impact on the business. Furthermore, the cost associated with pursuing infringement by external parties is not often considered, nor is the need for ongoing freedom to operate searches. This leaves businesses exposed to increased risks and ongoing financial costs.

4. Businesses lack the foresight to deal with enforcement and infringement actions

When a startup founder or small business owner commences on the path of commercialising new intellectual capital, much of their efforts and resources are poured into the new idea or product. If any thought is given to how to strategically protect their intellectual capital, it is focused on the method of protection and the cost of doing so. The thought of how they might need to enforce any protected intellectual capital is so far in the future that it is not considered a priority.

Case Study – Community IP

Pear World, a collaborative workspace for game developers and technology startups, accommodated two friends that collaborate on game development frequently in the same co-working space, but in different offices. Before entering the workspace, occupants are required to enter an agreement acknowledging the nature of the open workplace and that stealing of IP is not acceptable in the community. Further, occupants working in the space, trust that their IP would be respected.

Game Developer 1 (‘Davinia’) and Game Developer 2 (‘Francine’) were friends who had worked together on several games. Davinia, independently of Francine, but with a small team of other collaborators, developed a mobile game application (‘Siege’) and released it. Siege quickly rose in popularity and sales, leading to substantial profits for Davinia and her team. Francine was both happy for Davinia’s success and yet jealous of missing out on the profits.

Seeing the fast success of Davinia, Francine deliberately set out to copy Siege, developing a similar reproduction within a few days and releasing it. The additional competition from Francine led to reduced sales of Siege. However, Davinia was unconcerned with the imitation game as the game’s life-cycle (expected to be 3-6 months) was short and Davinia had already moved onto another project. Davinia did not bother with any copyright enforcement action as she viewed the software development sector as a community that lives by sharing and using open source code and considered seeking enforcement of registered IPRs in the sector to be futile.

Many businesses interviewed assumed that once their IP was registered and/ or they had NDAs in place, their IP and business were secure in their position. Additionally, they were unaware of the enforcement options.

Case Study – Branding Nightmare

Novotonics, a small Australian company, made the strategic decision to use trade marks for their product and proceeded to register the mark in several foreign jurisdictions with the expectation that the company would eventually export its product to those markets.

Xavio, a foreign copycat competitor, was passing off their lower quality product as Novotonics' product and had registered their trade mark in a country which Novotonics had not yet registered in.

Instead of Novotonics enforcing their IP right, they chose to avoid any confrontation or conflict and completely rebranded their product. At significant cost to the business, Novotonics then registered new trade marks in all jurisdictions, including in the foreign markets they intended to enter.

Many businesses admitted that they did not actively monitor possible copycat or counterfeit activity, and did not recognise the need to undertake regular and thorough freedom to operate searches to monitor the technology and commercial landscapes. SMEs believed that their initial searches were sufficient and continual monitoring was neither important nor necessary (as they had registered IP).

Case Study – Whack-A-Mole

Being savvy enough to know there would be potential competitors once their product was publically launched, Asgard Inc. obtained a standard patent in Australia prior to entering the market. On product release, the demand was so incredibly strong that Asgard Inc. became an overnight success.

Due to the rise of the product and media attention Asgard Inc. garnered, foreign opportunists saw the value in developing an inferior quality replica model, which did not contain the same unique mechanics of the original. To further exacerbate the issue, the copycat entity – and later others – priced their meagre clone at half the cost of the original to capitalise on the success of Asgard Inc.'s product. The price point meant legitimate sales were detracted from Asgard Inc.

In order to promote the copied product, the entities started to use Asgard Inc.'s branding, registered business name and trade marked logo, passing themselves off as Asgard Inc. and misleading consumers.

Initially, Asgard Inc. was unaware this was occurring. A decline in sales was noticed jointly with loyal clients bringing the infringement to Asgard Inc.'s awareness.

To protect its business and enforce its IP rights, Asgard Inc. was forced to dedicate staff to continually chase copiers and 'whack' the 'moles' as they popped up. This strategy is proving to be resource draining and ineffectual.

Further it was viewed as costly or detracting from revenue-raising activities. Instead, businesses rely on customers and trade publications for information on these matters. This reflected the advice provided by trusted advisers to these businesses.

Australian SMEs have experienced the infringement/enforcement coin from both sides, either having their innovations brazenly duplicated or stolen by copycats or competitors, or having their small business being chastised by a larger corporate company for infringement of their registered IP. The immense amount of capital, time, human resourcing and effort required to deal with these situations leaves SMEs feeling helpless and disheartened at the prospect that their business and livelihood is threatened by potential litigation, lost revenue and business rebranding or restructuring costs.

Case Study – David vs Goliath

Neith had been casually playing Australian football before the Women's Australian Football League (AFLW) was established. Prior to joining competitive AFLW, Neith sustained an impact injury to her chest area and from that, thought that better torso protection was required in women's sportswear. This led to the creation of the 'Torso Shield' and a line of designer active wear for women that was more protective than the traditional men's uniforms and fabrics.

Creating a new small business based on designing tailored active wear for women and also operating the manufacturing process, Neith was initially met with resistance from the male dominated AFL community. Proceeding with passion, Neith received media attention and had her product advertised on a reality TV show, which highlighted the ingenuity in the gender specific designs.

Shortly after, Neith was faced with competition from the typically men's focused clothing manufacturers, who would change the colouring to match the AFLW colours but use the same men's shape and design for the sportswear and without including a protective element to the clothing.

Neith then found it extremely difficult to create a distribution channel for her products, or convince some that the product is the unique original with 'Torso Shield' technology. While doing well initially, Neith struggles with accessing enforcement actions and obtaining advice on what she could do to protect her product and business from conglomerates who mislead consumers in their trade without repercussions. Yet, Neith continues to fight against the larger companies that have taken market share from an SME who is able to provide a distinct offering.

Opportunities to address key findings

The opportunities identified below represent a number of possible actions to address the key findings discussed above. These opportunities would all require further development, consultation and analysis before they could be implemented. Further consideration needs to be given to existing resources, implementation costs and delivery mechanisms, as well as an approach to evaluation. IP Australia will be an important partner in this development work, building upon their significant expertise, resources and market reach.

A broader list of stakeholder suggestions and ideas collected through these consultations can be found at Attachment E.

1. Departmental intervention - Short-term

1.1. Provision of basic and intermediate education courses and services

In order to raise awareness of intellectual capital and its value to businesses, new or improved educational material could be developed. These educational resources should target all aspects of intellectual capital, including registerable rights and non-registerable IP, basic recording and management, registering processes and highlighting common issues faced in dealing with intellectual capital. It is envisaged that these materials be delivered in a workshop or seminar model, with supporting material being available online. This material would be available and delivered through all available networks (such as state and territory office networks, IP Australia's stakeholder networks, incubators, accountant bodies etc.). While these materials will seek to demystify issues pertaining directly to intellectual property, it will primarily seek to **shift the focus to intellectual output as being an asset for businesses, and one to be managed and exploited accordingly**. It is noted that some existing educational material already exists (e.g. the IP Collaboration Toolkit). This proposal seeks to build on these existing resources.

Complementing this is the need for intermediate-level education for those with basic knowledge. This could be directed through trusted advisors to small businesses, and also businesses with a more sophisticated knowledge of the IP system. This level of education will encompass more practical elements and focus on how to exploit and manage intellectual capital. This will include exploring issues pertaining to costs and infringement/enforcement, as well as leveraging existing resources and services to maximise benefits to businesses. The channels for delivery would be through chambers of commerce, industry groups and other aggregator groups. As with the above, these would be delivered as small group presentations focused on transferring valuable and relevant knowledge to the audience.

Educational courses could also be delivered with private providers; for example, through institutions which provide professional development sessions for certain sectors, as is done in the legal industry.

The businesses consulted recognised the value of education delivered by an independent party, free from the presumption that intellectual capital should be protected by IPRs. Importantly, the focus should be on the provision of high-level advice which ties intellectual capital to the business' asset base and the organisation's strategic objectives.

1.2. Increase education and awareness of intellectual capital at the program level.

Evidence suggests that simple record keeping practices create collateral benefits and value to the greater business community. A quick and easy way to increase awareness of intellectual capital and

how it should be managed, is to amend current departmental program guidelines, reporting and auditing requirements to facilitate this.

This is partially achieved within the R&D Tax Incentive program, where customers are required to provide records of their R&D activity as part of their compliance. A further requirement could be to also submit an IP register. This could be expanded into other programs administered by the department by including 'nudges' in report templates to promote better record keeping and management of intellectual capital.

While this is targeted at firm-level activity, the provision of supporting online resources and tools may lead to increased general awareness of intellectual capital. Program guidelines may also be amended to include these considerations and promote awareness at a relatively low resource cost.

1.3. Building an evidence base

Where relevant, questions relating to intellectual output identification and management should be included in existing program reporting requirements and surveys.

From the evidence gathered from a sample of 51 consultations, we base this proposal on the clear indication that Australian SMEs do not have a succinct way of identifying, recording and maintaining the full extent of their intellectual capital. These views are supported by the lack of participation of SMEs in the IP system, as evidenced by the statistics available from IP Australia¹⁵. However, given the relatively small scale of these consultations it is recognised that the findings may not be fully representative of broader economy-wide issues.

For policy makers, this significant evidence gap may result in an increased risk of poorly targeted policy and program initiatives. Policy makers require ongoing investment in a robust evidence base to support the development of relevant, adaptable and accessible policies and programs. Short-term initiatives could include the addition of questions relating to: intellectual capital identification and management; current departmental economic surveys; and the collection of relevant data from existing customers.

2. Departmental intervention - Long-term goals

2.1. IP Advisor network

The Entrepreneurs' Programme (EP) adviser network have worked with nearly 12,000 business since 1 July 2014¹⁶. The program provides practical support in the form of grants, access to networks and advice to aid businesses to innovate and grow. The Accelerating Commercialisation stream of this program aims to help businesses overcome the challenges of commercialisation. An IP advisor sitting within this network and providing strategic advisory services would align well with the objectives of the Accelerating Commercialisation stream and also address the issues raised during the IP consultation.

The lack of independent, strategic advice identified above could also be partially remedied by upskilling the existing advisors to improve the delivery of independent and strategic advice relating to intellectual capital. The focus of such advice, as with the educational resources mentioned above, will be to create a link between intellectual capital, the business' assets and the business' strategy.

¹⁵ There are a number of data sources available from the IP Australia web site, including IP Australia, Data and Research available at <https://www.ipaustralia.gov.au/about-us/data-and-research> and the 2018 IP report at https://www.ipaustralia.gov.au/sites/g/files/net856/f/ip_report_2018.pdf

¹⁶ To 31 July 2018

<https://dochub/div/ausindustry/programmesprojectstaskforces/ep/admin/EP%20Output%20Report.pdf>

However, such a network would have limited reach due to it being part of a rather targeted stream within the broader EP suite. A more generic, economy-wide solution is proposed below. A larger, all-encompassing network is currently being developed in Canada. It would be worthwhile to keep a watching brief on these developments.

2.2. IP Education and Training Centre

During the consultation process, there was a strong push for independent, strategic advice to be funded through a government program. There are a number of ways this need can be addressed. This report considers both a targeted approach, as discussed above, and an economy-wide solution, as follows.

An economy-wide solution targeting businesses, advisors/aggregators and the patent attorney profession is proposed to provide an enhanced, holistic and complete solution to the issues raised above. An IP Education and Training Centre, perhaps modelled on the Singaporean IP Academy model¹⁷, would deliver the seminars and workshops alluded to in the above education opportunity 1.1, in addition to covering additional topics, including more practical issues such as:

- understanding the importance and the need for IP registers and how to effectively use these;
- how to develop, use and enforce NDAs;
- navigating foreign IP systems;
- how to develop and enforce employment agreements covering confidentiality and IP;
- how to effectively license IP.

An advisory service would supplement the material and courses proposed in opportunity 1.1. This would assist SMEs in understanding the role of intellectual capital in their business or commercialisation strategy prior to seeking advice from patent attorneys and other professionals. Advisory services would also aid businesses in identifying available options for enforcement, such as alternative dispute resolution (ADR), providing detailed resources such as template letters and guidance when seeking professional legal expertise, and improving the accessibility of freedom to operate searches.

The secondary premise is the delivery of an education/training service aimed at raising the standard of intellectual capital awareness and knowledge in aggregators, trusted advisors and related parties. This would act as an enabling service broadening the centre's reach to a wider audience, with the goal of empowering advisers and professionals to provide commercialisation and intellectual capital strategy services to Australian businesses.

An additional stream to the Centre could focus on creating a commercially-savvy patent attorney profession. This could include the development and delivery of an accredited education program aimed at broadening the skill base of patent attorneys, which would be in addition to what's required for attorney accreditation. This portion of the Centre may be outsourced to external providers and/or monitored by a chosen professional body or, in the first instance, a government-owned entity.

2.3. Streamlined enforcement options

The high costs attributed to IPR registration and enforcement require new approaches. For example it may be possible to reduce costs through targeted assistance to resolve IP disputes or by leveraging

¹⁷ www.ipacademy.com.sg. The IP Academy Singapore offers a range of programmes, high-level conferences and roundtables to broaden knowledge and capabilities in IP protection, management and value creation.

existing mechanisms and sharing administrative data between agencies to streamline processing times.

The targeted activities could include IP registration and enforcement. This would enable businesses to protect their technology in a timely fashion, prior to entering the market and securing their position in the technology landscape to enable them to realise the business' commercialisation strategy.

Given the time constraint under which businesses work, such any options considered would need to be administered and delivered in a timely fashion, ensuring that applicants are not disadvantaged by having to wait for an outcome.

3. APS-wide intervention

3.1. Holistic IP database

A holistic IP database would expand on IP Australia's existing IP Nova visual search engine which includes patents, designs, trade marks and plant breeders' rights. An expanded database could include searches of scientific publications, matching text on the internet or digitised publications, business names, domain names and broader market research. The resulting product would be a comprehensive freedom to operate search at what would be intended as a low resource cost to businesses.

Such a system would equip businesses with a higher level of information, increasing their confidence to seek IPRs, secure their position in the market and enhance their position in any infringement proceedings.

There is a level of risk attributed to this, as any search outcomes would be limited to publically available information and registered IPRs at a certain point in time. Such intelligence is beneficial, but should not be entirely relied upon, and that risk would need to be managed by the resource provider. It should also be recognised that interpreting and acting on the results of search outcomes may still require additional support and advice.

This tool could be delivered with supporting material covering all issues pertaining to intellectual capital. This would be a free and accessible to all and may reduce the generation of low quality patents and trade marks, better inform business owners on their competitors and aid businesses facing enforcement or infringement proceedings, all raised as issues of concern by the PC.

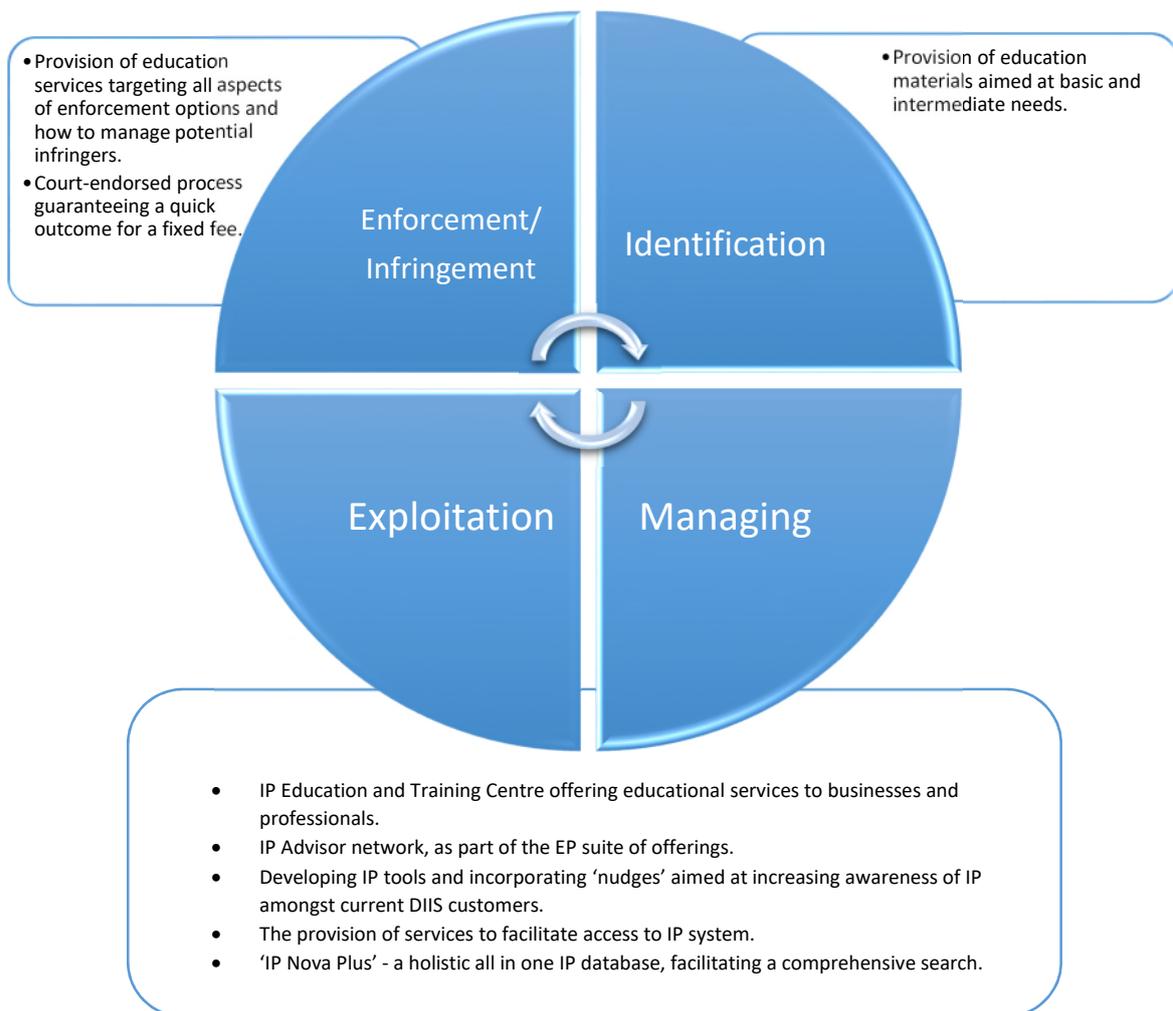
This database would need to be promoted as an essential business tool, as opposed to an IPR management tool.

3.2. IP Ombudsman or IP arbitration service

Given that we found that businesses give little forethought to possible enforcement and infringement actions, we seek to remedy this proactively through the provision of education and other services identified above. However, should businesses find themselves facing compliance issues, we recommend the development of a process which allows small businesses to access an arbitration procedure with mandatory short time frames and at a fixed fee.

Such a process would limit risk and address the key constraints raised by SMEs, namely time and costs. This would go to addressing some of the concerns raised by the PC in its report which noted that the need for a specialised court, similar to the UK IP Enterprise Court which offers time-limited trials and has caps on costs and damages. While this service would not offer the same court-level process, it would facilitate SME access to a resolution process. Issues relating to the nature of proceedings admissible under such a service, the non-legally binding nature of outcomes and the 'judicial' officials to be employed for this service require further exploration.

Summary of Recommendations



Conclusions and Next Steps

The consultation process has allowed the department to obtain a deeper understanding of a range of issues facing SMEs seeking to identify, exploit and protect their intellectual capital.

From the findings, some strong common themes were identified and the department has proposed a number of opportunities to address these findings. These opportunities can be broadly categorised as:

- Improved education and awareness of intellectual capital through a range of delivery modes and channels;
- Development of new tools or services to improve understanding of and interaction with the broader IP system;
- Targeted financial support at key points in the IP lifecycle.

Following on from this consultation process, the department intends to use this discussion paper to:

- form the basis of proposals to develop new policy ideas to address the challenges identified by stakeholders;
- provide interested stakeholders with an opportunity to further refine and validate the challenges and opportunities identified in this paper;
- inform further investigation of some of the relevant IP related initiatives in international jurisdictions¹⁸;
- assess and prioritise the opportunities to address the challenges identified in the paper.

This department intends to use the input and feedback received, in collaboration with internal stakeholders (e.g. IP Australia and Department of Communication and the Arts) external stakeholders (e.g. innovative SMEs and IP related service providers) to develop new policies and programs and to refine existing policies and programs to:

- demystify intellectual capital;
- help SMEs develop the skills and capabilities to effectively commercialise intellectual capital;
- improve the availability and access to strategic advice on intellectual capital issues; and
- simplify IP enforcement and infringement
- improve Australia's IP system in conjunction with other existing research, provides a strong basis on which to develop policy and delivery options that better integrate all forms of intellectual capital as a key part of the commercialisation journey for Australian SMEs.

¹⁸ On 7 November 2012 the UK Government's Intellectual Property Office published its conclusions to the discussion paper 'From ideas to growth: Helping SMEs get value from their intellectual property', expanding on plans and outlining how it will support SMEs, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316117/ip4b-sme-conclusions.pdf>

Attachment A – Interview Questions

Theme 1: Identification

What does “IP” mean to you?

- Does your business generate new ideas, *processes, data, branding*?
- How do you ID the IP?
- How do you ID its value?
- What challenges do you face in doing so?

Do you take active steps to protect intellectual assets (record keeping, NDAs, IP rights, restricting access etc.)?

- How do you make the decision on how to protect them?

Theme 2: Exploitation

Does your business have a business plan or commercialisation strategy?

- Is IP part of that plan/strategy?
- What importance is given to IP?

How do you make the decision on how to exploit your IP?

- What information/skills do you need to make that decision?
- Are you confident in making those decisions?

Where do you seek information/advice to help you make these decision?

- Have you used formal IP rights (standard patents, innovation patents, trade marks, designs, plant breeder’s rights, copyright, circuit layout rights)?
- Why did you choose this method, or why did you choose not to use registered IP rights?

Where did you seek information/advice to help make this decision?

- What are your thoughts on the costs associated with obtaining these rights?

Do you have feedback on the relative strengths/weaknesses of any of the approaches you’ve taken to exploit IP?

Theme 3: Management

Does your business currently manage its IP?

- How does your business manage its IP?
- How much time does your business spend on managing IP?

What are your thoughts about the process or administration required to manage IP?

What are your thoughts on the costs associated with managing IP?

Theme 4: Enforcement/Infringement

Have you ever been accused of infringing on someone else's IP?

- Did you consider freedom to operate before you commenced development/commercialisation of your idea?
- Where did you seek information or assistance?

Have you experienced someone else infringing your IP?

- How did you find out about the possible infringement?
- What actions did you take?
- Where they effective?
- Where did you seek information or assistance?

Attachment B – Online Submission Guide

How do you commercialise your business ideas?

We invite you to use the following questions to guide your submission:

What does “intellectual capital” mean to you? What role does it play in your business strategy?

We have defined Intellectual capital as being ideas, know-how, branding, data, trade secrets and copyrights as well as registered IP rights such as patents, trade marks, designs and plant breeder’s rights.

How does your business exploit its intellectual capital? Can you tell us about any successes or failures? Have you ever filed for any IP rights?

Do you seek advice on how to manage and exploit your intellectual capital? If so, who do you seek advice from? If not, why not?

Have you experienced any issues relating to the protection or enforcement of your intellectual capital, particularly registered IP rights?

This includes issues relating to the protection of your own capital, as part of your business strategy. This also includes how your business may be impeded by existing protection owned by others.

What are the biggest challenges faced now in managing and exploiting your intellectual capital? Where do you expect to see challenges in the future?

Please tell us a bit about your business

- ABN
- Business size (employees)
- Business age
- ANZSIC (to four digits)
- What type of innovative activity is the business undertaking? (eg R&D, process innovation, organisational innovation)
 - Is the innovation new to business, new to industry, new to Australia or new to world?
- Do you view your business as a startup, scaleup, deeptech, fintech, etc?
- Are you responding as a professional organisation providing service or advice to SMEs?

The consultation process will also involve some in depth interviews with individual businesses. We won’t be able to consult with every one, however if you’re interested in taking part, please indicate this in your response.

Due to the potential for submissions to include commercially sensitive information, responses will not be published.

Please email your submission to IP.consultation@industry.gov.au

Attachment C - Summary of Consultation

Our consultative process highlighted the breadth and depth of the issues that are faced by SMEs when identifying, managing and exploiting their intellectual output. The following findings synthesise the core issues and views identified through this consultation process.

In line with previous research, it was found that SMEs often choose not to seek registered rights for their intellectual capital. Trade marks were commonly used either independently or as part of a larger branding strategy. Trade secrets (or keeping information confidential) seemed the most often employed means of protecting in-house knowledge.

The methods of identifying, managing, recording and protecting intellectual capital vary widely. There appears to be a lack of awareness on how to best do this, and also how to utilise this internal knowledge strategically for the benefit of the business.

The triggers for Australian businesses seeking formal IPRs include:

- Internationalisation – expanding markets offshore. However, international operations are also often associated with added challenges regarding protecting IPRs, as well as countering infringement;
- Outsourcing or subcontracting elements of the production process;
- Collaboration in general – the more parties involved, the more likely they are to seek formal IP protection;
- Legal triggers, including acquisition or merger offers; or, consulting a patent attorney; and,
- Financial or investment opportunities, where investors are attracted to SMEs with registered IP, and particularly, patents.

The reasons for not seeking formal protection include:

- the cost in applying, maintaining and defending registerable IPRs;
- time and resources required to write and develop documentation or defend a claim;
- uncertainty regarding the value of potential enforceability outcomes.

Sometimes, these difficulties can act as barriers for collaboration and expansion plans.

Further insights are captured below.

What does intellectual capital mean to your business?

This question sought to gain a broader, more comprehensive understanding of the role that intellectual capital plays in the business, defining what it includes, recognition and identification of intellectual capital as it's created or used, and recording of intellectual output. The key observations include:

- Registrable IPRs are the most recognised form of intellectual capital – all businesses consulted were aware of the existence of patents and trade marks. Branding and trade secrets were the other most commonly mentioned forms of intellectual capital;

- Certain industry sectors (medical technology, biotechnology and certain niche areas of Information and Communications Technology (ICT)) outperform others in their ability and willingness to formally identify, record and manage intellectual capital. This was particularly obvious in entities developing products or innovations with a high technology readiness level and those with an R&D focus;
- The identification and recording of intellectual output is strongest in engineering and ICT, where document management systems and project management methodologies often support the entire operation of the business. These are also strongly linked to industry norms and standards;
- Collaboration with government departments, and the processes involved with applying for government programs, such as The Entrepreneurs' Programme and the R&D Tax Incentive, lead SMEs to improve their record keeping and identification of IP;
- Certain sectors of the ICT industry (specifically those in programming, software and app development) value intellectual capital differently to the conventional understanding, in that if the ICT industry utilises IP, it tends to favour copyright, trade secrets, and licensing. However, the preferred approach is communal, relying on code sharing and open source;
- For smaller and internet-driven businesses, branding is important. Owners are directly aware when their brand generates revenue for the business as a direct conversion from exposure to sale. For example, if their product – or a competitor's similar product – is used as part of media advertising or print marketing campaign. However, they may fail to connect the brand to goodwill (an intangible, sellable business asset), or potential registerable IPRs. So while the monetary value associated with the brand may be recognised, its strategic value to the business is seldom acknowledged or understood;
- Trade marks are very useful and highly valued by smaller businesses. However, there is little sophistication associated with the process beyond registration and this can often lead to disputes around infringement;
- The designs system is not well understood. As a result, Australian design rights are undervalued and underutilised. It appears that SMEs are more likely to seek design protection in foreign jurisdictions, such as the USA, based on the guidance provided by advisors in these markets and differences in associated costs and duration of protection;
- Universities that commercialise and university spin outs often employ a sophisticated IP recording process, stemming from traditional laboratory protocols and processes.

How do you manage and exploit your intellectual capital?

This line of questioning sought to understand the link between intellectual capital and the strategic objectives of the company. Topics covered included the skillset within the business, the decision making process, the trusted advisors used and personal experiences in dealing with the IP system. Key observations include:

- Most businesses did not have a specific strategy that identifies the best way to exploit their intellectual capital. Those that did mostly failed to integrate their IP strategy as part of their overall business or commercialisation strategy. This is often related to the lack of

recognition/identification of intellectual capital, and its potential value to the business. For example, decisions on how to protect intellectual capital (e.g. through a patent or a trade secret) are made independently of the business's strategy to enter or expand its market. This can result in poor outcomes such as being locked into a rigid patent lifecycle timeframe that does not match with the projected business milestones, or missing out completely on the chance to patent an invention because a marketing strategy has publicly disclosed the invention;

- With regard to the management of IP, the vast majority of SMEs lacked the ability to set up a specialised IP management team and were lacking in professional IP management staff;
- Patenting is often commenced without a strategy or a commercial value imperative. The intention is often to validate the technology and/or to utilise a patent or patent pending as leverage when seeking external investment;
- The ICT industry (specifically those in programming and software development) notably choose to forgo IP protection in favour of being first to market and the need for 'the [ICT] community' to be agile, transparent and have the freedom to share without concern of infringement. However, there are many drivers pushing such a decision, including: capitalising on novelty; lack of awareness of IP created; inability to protect or register IP; speed of technology development; a notion of creative commons licences being essential; and, competition (while friendly), reducing profits.
- While many businesses rely to some extent on trade secrets, very few had the necessary understanding of how to effectively manage trade secrets or what remedies may be available if there was a breach. NDAs and IP clauses in employment contracts are generally adopted. However, the perception is that these seem to be a token effort to deter nefarious behaviour;
- There is a lack of independent, strategic advice which encapsulates all intellectual capital matters, including how it fits into the organisation's broader commercial objectives;
- Patent and trade mark attorneys are being approached to provide advice on commercial strategies to exploit intellectual capital, but are often ill-equipped or unqualified to provide this advice.

What barriers do you face in exploiting or managing your IP?

We sought to identify the key barriers or difficulties that SMEs face in managing and exploiting their intellectual capital. This was an opportunity to further expand on some of the issues raised under the previous topics and to understand the real impacts of these issues on the business. Key observations include:

- Businesses whose key output is new content or materials (typically digital) find it difficult to fully exploit and manage their intellectual capital. A common theme from this creative sector was that their intellectual capital lies in their ideas, but ideas themselves cannot be protected. Copyright and trade marks provide some protection but cannot prevent the underlying unique idea being copied. This creates uncertainty and increases risk for the business;
- Trade secrets, NDAs and IP clauses in employment contracts are seen as vital to those who use them. However, there is lack of understanding regarding use and enforcement of these. For example, employers often cited NDAs as being an administrative step to the collaborative process, rather than an effective tool to deter unauthorised disclosure;

- There is often tension between disclosing intellectual capital and engaging with external third parties for collaboration or investment purposes. While NDAs may be in place, there is a general reticence to engage with third parties in the absence of registered rights in place;
- IP insurance was used by some of the SMEs consulted. However, this was used predominantly by those trading internationally and/or in markets where litigation was common, noting that the domestic market for IP insurance offerings is limited. Few could quantify its value, scope of protection or financial risk mitigation;
- The large majority of SMEs consulted did not have an IP management system in place. There were exceptions for businesses who were managed by staff with engineering and ICT qualifications. These often employed industry best practice protocols and software in their processes;
- While businesses tend to know their market, there is a general lack of awareness around the importance of establishing that their ideas will not infringe on a third party's IP through a freedom to operate search, or around how to conduct an effective, affordable search;
- In instances where there has been alleged infringement, no attempts have been made to enforce them. This is due to lack of resources, affordability of enforcement, ignorance of available options, complacency to seek information, intimidation of or from a third party, and the perceived potential risk of litigation;
- While businesses are cognisant of cyber security issues, they are unsure of how to protect their IP held in the cloud or on computer servers. Participants were particularly concerned about Chinese interference with their IT systems.

Have you experienced infringement and/or enforcement of IP?

This question explored the understanding SMEs have regarding the varying levels of enforcement, from: identifying potential infringements against its IP, monitoring for infringement, the steps taken in enforcing IPRs, to the effectiveness and affordability of enforcement. It also explored what actions had been considered or employed when accused of infringement by another. There are fewer observations in this section as few participants had any direct experience in actively enforcing their IP or had been accused of infringing on someone else's IP. The key observations include:

- Protection and proof of ownership of intellectual capital becomes critical at certain points of the business life cycle. For example, when establishing a supply chain offshore, seeking investment or expanding to international markets. At these times, businesses are often unprepared to deal with IP related issues. Attempts to remedy or address these issues are often lacking and lead to increased exposure to infringement and enforcement proceedings. The lack of strategic intent noted above compounds these issues;
- Almost all of the businesses interviewed admitted that when they are deciding how to protect their intellectual capital, little or no forethought is given to whether or how they might enforce their protection mechanisms. This was variously described as being due to poor advice from advisors, not realising what potential measures for enforcement are, or simply the realisation that they would unlikely to be able to afford to pursue an infringer;
- Many SMEs did not actively monitor the market for potential infringement of their IP;

- A few participants had sent a cease and desist letter when they became aware of a potential infringer. These resulted in a successful outcome for some. However, if these did not work, further action through the court system or by using alternative dispute resolution services were not pursued;
- Several businesses chose to make internal changes (to trade marks or to their product) rather than pursue a potential infringer;
- There was a general perception that the costs of pursuing enforcement action are prohibitive. This perception, in most cases, was not based on any particular knowledge or experience;
- Trade marks were generally deemed easier to enforce;
- Several interviewees noted that unregistered intellectual capital is easily stolen. It is difficult to prove and regain ownership;
- Some of the SMEs consulted felt that they were powerless to act when infringed by a foreign entity. This was particularly evident for those operating online businesses and those who did not link their commercialisation (including globalisation) plans with their IP strategy. Examples were raised where a business changed its own strategy in order to avoid pursuing legal action;
- There was a mixed response from businesses about whether they had conducted their due diligence or a freedom to operate search to ensure that their intellectual capital did not infringe on the registered rights of others. Often there was the expectation – rather than confirmation – that their trusted advisor or patent attorney had sufficiently completed this on their behalf.

Key findings about the innovation patent

During the consultation period the following observations were made regarding the use of the Innovation Patent system:

- Most interviewees had no or limited knowledge of the system;
- Those that had an awareness generally deemed the innovation patent to be
 - of little or no value, or
 - useful to the extent that it could be used as a means of creating patent thickets in order to block out competitors;
- The few that supported the continuation of the innovation patent saw them as a useful component of their broader IP portfolio.

The consultations found that the businesses advocating the benefits of the innovation patent tended to use their filing strategically: to deter competitors by threatening enforcement; for attracting investors; or for short term protection of incremental improvements to already existing products. Some acknowledged that the innovation patent provided no real legal protection, but its major benefit was that most competitors were unaware of this.

Attachment D – Stakeholder suggestions and other recommendations

A list of suggestions and recommendations which were raised by those consulted is presented below. Some have been incorporated into the main body recommendations above, or could be included in proposed educational material, while others require further consideration.

- As innovations and disruptive technologies emerge rapidly, the Government should conduct a regular review of IP legislation and the IP system approximately every two years so Australia's ecosystem can reflect industry developments.
- The IP Australia website should be streamlined as it can be difficult to navigate and find the relevant information. Alternative to this, if an IP education or an independent strategic IP advisory centre is funded, that entity should provide unbiased advice on intellectual capital and commercialisation.
 - A specific suggestion was to improve IP Australia's search function for designs and patents
- IP Australia should consider:
 - using technology and artificial intelligence for efficiencies in patent examinations
 - speeding up application and examination/review process for registerable IP rights
 - reducing the complexity of trade marks
 - in particular, the two stage filing process can be confusing and lead to mistakes.
- Streamline the due diligence process and searches to deliver a 'holistic' IP landscape search service (that covers a business's intellectual capital in all its forms and searches IP rights as well as markets, domain names, online retailers, etc.):
 - All-in-One IP Database
 - Database
 - all forms of IP (including unregistrable IP, where possible) consolidated
 - Due diligence search
 - Includes index of registered IP
 - Freedom to Operate
 - Landscape Searching
 - Preliminary validation of IP (originating from patents)
 - Registration/Application Portal
 - User Tracker
 - Able to submit applications for registration
 - Upload proposed IP to be registered (e.g.: picture file of logo) to be contested against index of registered IP
 - Infringement Check
 - Using algorithms and AI, advises if proposed IP infringes or not and whether to proceed
 - Workflow process
 - This process should reduce need for enforcement
 - If necessary, include pro-forma template cease and desist letters

- Reforms to the Patent Attorney profession to improve clarity around what services are being offered.
 - As the title of 'Patent Attorney' misleads consumers (to think people in the profession are qualified to advise on IP more broadly and provide all strategic options), a change of the title to 'Patent Agent' would not only alter the misconception, but would also reflect international practice.
 - The patent attorney code of conduct, standards of practice and duty of care to clients should be improved through regulation of the profession.
- Establish a mentoring network that balances hope and reality
 - There is an ongoing need to connect experts and start ups
- Government support (in addition to R&D Tax Incentive) which provides the ability for businesses to 'fail' in the Australian innovation ecosystem
- In any educational material (pre-existing and new) there needs to be simple explanations of the terminology used in licences (e.g. exclusive, transferrable)
 - Provide options for ideal licensing terms and changes for acceptable options.
- It would be valuable to have a clear and simple roadmap of the patent process including timelines, decision points and potential costs.
- For easier access to university and research institutions' IP, Technology Transfer Offices should have a standard agreement.
- For the creative sector, pseudo-licences that have a notice and approval process to use IP more freely, but still recognise rights and allow for royalties.
- More assistance is needed to deal with digital/online enforcement issues:
 - A single portal to request take down of (online) infringing imports
 - Assistance with Border Control required
 - An information guide would be useful
 - E.g. trade mark infringement can be partially curbed when a Notice of Objection is filed with the Department of Immigration and Border Force
 - Digital trade is unregulated – need assistance
- Streamline courts and approvals
- Need guidance/advice for commencing proceedings against Chinese infringement
- Government Program: IP Enforcers
 - Compliance checks and regular, complete IP audits of businesses
- Creation of a group to fund IP enforcement might resolve some of the issues around costs