Managerialist influences on granting patents in Australia

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This article examines important influences other than the Patents Act 1990 (Cth) on the Commissioner of Patents decision-making to grant or refuse to grant patents. The influences considered are the recent public administration reforms on budget, financial management, people management and reporting arrangements. The analysis shows that there is considerable potential to influence the Commissioner’s decision-making. Most importantly, the article identifies a range of policy and guidance materials that contribute to the environment (a matrix of legalities) in which decisions are made. Unfortunately, key instruments are not presently publicly disclosed, challenging the rhetoric of accountability and transparency in the recent public administration reforms, and leaving open questions about managerialist influences on granting patents in Australia.

1. INTRODUCTION

IP Australia is a governmental entity with a regulatory function promoting innovation, investment and international competitiveness (or trade), in part, through allocating time-limited “exclusive rights” under the Patents Act 1990 (Cth).1 Within IP Australia the “decision”2 to grant or refuse to grant3 these “exclusive rights” is made by a statutory office holder, the Commissioner of Patents.4 The Commissioner’s decisions have immediate consequences for invention, investment and competition affecting the invention incentives of both initial inventors (the extent to which revenues must be shared with independent improvers) and follow-on inventors (the choice between seeking ambitious or niche improvements).5 If the thresholds are too low there may be patent proliferation (various described as thickets, minefields, royalty stacks, anti-commons effects and flooding), restricting “freedom of operate”, requiring unnecessary licensing negotiations, and creating, maintaining or extending unwarranted market power.6 If the thresholds are too high then there will be suboptimal

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2 These “exclusive rights” are “during the term of the patent, to exploit the invention and to authorise another person to exploit the invention” where the term “exploit” means “in relation to an invention, includes: (a) where the invention is a product – make, hire, sell or otherwise dispose of the product, offer to make, sell, hire or otherwise dispose of it, use or import it, or keep it for the purpose of doing any of those things; or (b) where the invention is a method or process – use the method or process or do any act mentioned in paragraph (a) in respect of a product resulting from such use”: Patents Act 1990 (Cth), s 13 and Sch 1 (“exploit”).

3 In the nature of an administrative determination: see Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 335-338 (Mason J), 369 (Deane J). Notably, this conception of a “decision” contemplates the place of other considerations that “guides but does not control the making of decisions”: Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634 at 640-641 (Brennan J). See also Tang v Minister for Immigration and Ethnic Affairs (1986) 67 ALR 177 at 178 (Evatt J), 183 (Davies J) and 189-190 (Pincus J).


6 See, eg, Federal Trade Commission, n 5, pp 4-4-4-6.
levels of invention and investment in invention leading to a long term decline in competition. The purpose of this article is to consider how the Commissioner’s decisions, the article assumes the Commissioner makes decisions within an environment of policy and guidance materials (a matrix of legalities) and tests the thesis that there are important influences other than the Patents Act 1990 (Cth) on the Commissioner’s decisions. While others have focussed on the “quality” of patents, or the decision-making processes, and so on, this article focuses solely on governance arrangements that potentially influence the Commissioner’s decision making. The analysis is confined to the formal reporting periods from the 2006 Budget to the 2006-2007 Annual Report that covers the period of the 2006 Budget allocation.

The article is structured as follows: Part 2 provides an overview of the institutions and personalities involved in the governance of IP Australia and the Commissioner addressing the budget, financial management, people management and reporting arrangements; Part 3 sets out practical examples of financial management and people management arrangements affecting the Commissioner; and Part 4 sets out a conclusion suggesting that any future assessment of the efficiency and effectiveness of the patent scheme needs to consider the consequences of the recent public administration reforms on the budget, financial management, people management and reporting arrangements. Most importantly, however, the article identifies a range of policy and guidance materials that contribute to the environment in which decisions are made and that are not presently publicly disclosed, challenging the rhetoric of accountability and transparency in these recent public administration reforms.

2. THE INSTITUTIONS AND PERSONALITIES

The Commonwealth Constitution provides: “[t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to … patents of inventions”. According to this power the Parliament has enacted the Patents Act 1990 (Cth) providing for the granting of patents and the administration of the patent scheme created under

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7 See, eg, IPCRC, n 5, pp 136-138. See also Federal Trade Commission, n 5, pp 2-1-2-7; Treasury, n 5, pp 11-12.
8 Patents Act 1990 (Cth), s 209.
9 In the context of regulation this means “efficient” in terms of “maximising the benefits to the community, taking account of the costs”, and “effective” in “addressing an identified problem”: Office of Best Practice Regulation, Best Practice Regulation Handbook (Productivity Commission, 2007) p 1. See also Productivity Commission, Regulation and Its Review 2002-2003, Annual Report Series (Productivity Commission, 2003) p 1. More broadly, and in the context of resources, “efficiency relates to the productivity of the resources used to conduct an activity in order to achieve the maximum value for the resources used” and “effectiveness relates to how well outcomes meet objectives”: Department of Finance and Administration, Commonwealth Procurement Guidelines, Financial Management Guidance No 1 (Department of Finance and Administration, 2005) pp 13-14.
10 The Australian Government has acknowledged that key determinants of regulatory outcomes include how regulations are interpreted, applied and enforced by regulators: see, eg, Australian Government Taskforce on Reducing Regulatory Burdens on Business, Rethinking Regulation (2006) p 158.
15 Constitution, s 51(xviii).
that Act. Administering the patent scheme relies on the executive power under the Constitution. The executive power itself almost certainly includes the authority for the institutions and body of persons of government to administer the laws authorised by the Constitution and carry on the business of government.

The Constitution vests executive power in the “Governor-General” as the Queen’s representative. A “Federal Executive Council” (or “Governor-General in Council”) is established to “advise” the “Governor General”. In the practice of responsible government, however, the authority to “advise” is a power vested in the “Federal Executive Council” to exercise the executive powers under the Constitution according to the expressed values of the community that have been resolved through parliamentary politics. The “Federal Executive Council” must include every “Minister of State” and may include others. The “Ministers of State” (including those designated as Parliamentary Secretaries) are appointed by the Governor-General on the advice of the Prime Minister. The Governor-General, again on the advice of the Prime Minister, establishes Departments of State and formally allocates executive responsibility among Ministers and Parliamentary Secretaries through the Administrative Arrangements Order. Ministers and Parliamentary Secretaries swear a declaration before the Governor-General to administer the Department of State in the portfolio area to which they have been appointed.

According to the Administrative Arrangements Order the legislation administered by the Minister for Industry, Tourism and Resources administering the Department of Industry, Tourism and Resources includes the Patents Act 1990 (Cth), and matters dealt with by the Department of Industry, Tourism and Resources include “patents” and matters arising under the Patents Act 1990 (Cth). The other portfolio Ministers assisting the Minister for Industry, Tourism and Resources are the Minister for Small Business and Tourism and the Parliamentary Secretary to the Minister for Industry, Tourism and Resources.


Notably, the scope and extent of the Executive power remains uncertain and open to interpretations, although administering the Patents Act 1990 (Cth) is unlikely to be contentious: see Victoria v Commonwealth (1975) 134 CLR 338 at 396-397 (Mason J).

Although the Crown may exercise certain constitutional powers when present in Australia: see Royal Powers Act 1953 (Cth), s 2.

Noting, of course, that the “Governor-General in Council” acts with the advice of the “Federal Executive Council” being the exercise of those powers and functions that do not include the prerogative powers of the Crown and only those powers exercisable by the Crown in right of the Commonwealth. See Constitution, s 62; Acts Interpretation Act 1901 (Cth), s 16A.

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According to practice those appointed remain executive councillors for life (adopting the title “Honourable”), although only those executive councillors who are members of the current ministry are summoned to advise the Governor-General: see Federal Executive Council Secretariat, Federal Executive Council Handbook (Federal Executive Council Secretariat, 2009) p 3; Prime Minister, A Guide on Key Elements of Ministerial Responsibility (Department of the Prime Minister and Cabinet, 1998) 8.

See Ministers of State Act 1952 (Cth), s 4.

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See also Key Elements of Ministerial Responsibility, n 24, p 1.

Federal Executive Council Secretariat, n 24, p 3.

Resources. In respect of intellectual property policy the Minister is provided with “independent advice” by the Advisory Council on Intellectual Property.

In short, the powers to administer the laws and institutions of the Crown (the legal personality of the State) under the Constitution are exercised by Ministers as heads of departments directing the work of public servants (collectively termed the “Australian Government”). The Ministers, and through the Minister the public servants, remain responsible to the Parliament and must comply with the Parliament’s directions set out in the laws and other instruments made by the Parliament. In dealing with “patents” under the Patents Act 1990 (Cth), however, there are a number of other competing sources of authority within the Executive, albeit under the umbrella of ministerial responsibility. These include both competing institutions and competing personalities. The recent evolution of these institutions and their personalities identifies these competing sources of authority.

In 1992 the Australian Industrial Property Organisation was created out of the Australian Patent, Trade Marks and Designs Offices. The statutory offices of the Commissioner of Patents, Registrar of Trademarks and Registrar of Designs were placed with a “Division Head” in the Department of Industry, Technology and Regional Development, together with the overall administration responsibility of the Australian Industrial Property Organisation. This arrangement was changed by the Industry, Technology and Regional Development Legislation Amendment Act 1994 (Cth) that amended the Patents Act 1990 (Cth) to removed the administration of the Australian Industrial Property Organisation from the Commissioner of Patents, Registrar of Trademarks and Registrar of Designs. This allow for the appointment of the separate Commissioner of Patents, Registrar of Trademarks and Registrar of Designs to administer each of the Patents Act 1990 (Cth), the Trade Marks Act 1955 (Cth) and the Designs Act 1906 (Cth) respectively, and leaving an overseeing “Director General” “to concentrate on the overall financial and general management of the Australian Industrial Property Organisation”. In 1994 the Australian Industrial Property Organisation was a Division of the Department of Industry, Science and Technology organised into Patents and Designs, Trademarks and Support Services sub-programs. On 25 February 1998 Australian Industrial Property Organisation was given a new “corporate image” with the new name, “IP Australia”, to “reflect a changing business

31 The Advisory Council on Intellectual Property is an “advisory body” within the Industry, Tourism and Resources Portfolio appointed by the Minister for Industry, Tourism and Resources and funded through IP Australia and its allocations: see Department of Finance and Administration, List of Australian Government Bodies, Financial Management Reference Material No 1 (Department of Finance and Administration, 2004) p 310.
33 Patents Act 1990 (Cth), s 207 providing: “(1) There is to be a Commissioner of Patents” and “(2) The Commissioner has, under the Minister, the administration of the Patent Office”.
34 Trade Marks Act 1955 (Cth), s 10(1).
35 Designs Act 1906 (Cth), s 8(1).
37 Industry, Technology and Regional Development Legislation Amendment Act 1994 (Cth), s 3 and Sch.
38 Notably the Trade Marks Act 1955 (Cth) and the Designs Act 1906 (Cth) have been replaced with the Trade Marks Act 1995 (Cth) and the Designs Act 2003 (Cth) respectively.
39 Parliamentary Debates (Senate), n 13, 16 December 1993, pp 4762-3 (Nick Sherry, Parliamentary Secretary to the Minister for Primary Industries and Energy); Parliamentary Debates (Representatives), n 13, 2 March 1994, pp 1594-6 (Eamon Lindsay, Parliamentary Secretary to the Minister for Industry, Technology and Regional Development). See also Department of Industry, Science and Technology, Annual Report 1993-1994 (Department of Industry, Science and Technology, 1994) p 103.
environment and a new direction for the organisation”. In recent times IP Australia exists as a semi-autonomous entity in the Industry, Tourism and Resources portfolio associated with the Department of Industry, Tourism and Resources.

Within the institution of the Department of Industry, Tourism and Resources and IP Australia a number of personalities have powers: the Secretary of the Department of Industry, Tourism and Resources has responsibility under the Workplace Relations Act 1996 (Cth) and the Public Service Act 1999 (Cth) as an “Agency Head”, and the Director General has responsibility under the Financial Management and Accountability Act 1998 (Cth) as a “Chief Executive”.

The following sections address the roles of the Ministers and these different personalities through the budget, financial management, people management and reporting arrangements to show the scope of these overlapping authorities.

A. Budget arrangements

A key measure of accountability required by the Constitution is that any appropriation of the “Treasury of the Commonwealth” must be for the expenditure purposes of the Commonwealth. The historic basis for requiring a separate Consolidated Revenue Fund (CRF) and an appropriation law was carried into the Constitution at Federation was the imperial and colonial imperative that Parliament should exert some control over the expenditure of the Executive. There is no doubt that an appropriation law must disclose its purpose and that this purpose must also be a “purpose of the Commonwealth”. There remains some doubt about what constitutes a valid Commonwealth purpose and how broadly a Commonwealth purpose may be claimed. Unfortunately, the High Court’s decisions do not comprehensively settle the matter. The reasoning in Brown v West and Combet v Commonwealth suggests that these purposes may be very, very broadly stated and that the

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43 See Public Service Act 1999 (Cth), s 9.
44 See Financial Management and Accountability Act 1997 (Cth), s 5; Financial Management and Accountability Regulations 1997 (Cth), r 5 and Sch 1 (item 128A).
45 Constitution, ss 81, 83.
46 See, eg, Northern Suburbs General Cemetery Reserve Trust v Commonwealth (1993) 176 CLR 555 at 599 (McHugh J); Combet v Commonwealth (2005) 224 CLR 494 at 522-523 (Gleeson CJ), 535-537 (McHugh J), 577 (Gummow, Hayne, Callinan and Heydon JJ) and 594-598 (Kirby J). Notably, the expenditure (as a debit or payment) of an appropriation requires a “drawing right” issued by the “Finance Minister”: Financial Management and Accountability Act 1997 (Cth), ss 26, 27.
47 See, eg, Attorney-General for Victoria v Commonwealth (1945) 71 CLR 237 at 271 (Dixon J); Victoria v Commonwealth (1975) 134 CLR 338 at 353 (Barwick CJ) and 392 (Mason J). The requirement for a “law” may not, however, be so certain, as the commonly cited authority of Viscount Haldane in Auckland Harbour Board v King [1924] AC 318, 326 stated “no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself”, the term “authorisation” arguably including something less than a “law”.
48 See, eg, Victoria v Commonwealth (1975) 134 CLR 338 at 392 (Mason J); Attorney-General for Victoria v Commonwealth (1945) 71 CLR 237 at 253 (Latham CJ); Commonwealth v Colonial Ammunition Co Ltd (1924) 34 CLR 198 at 224 (Isaacs and Rich JJ); New South Wales v Commonwealth (1908) 7 CLR 179 at 200 (Isaacs J).
49 See, eg, Victoria v Commonwealth (1975) 134 CLR 338 (Barwick CJ, McTiernan, Gibbs, Stephen, Mason and Jacobs JJ).
52 (2005) 224 CLR 494 at 529-530 (Gleeson CJ), 553-554 (McHugh J), 577 (Gummow, Hayne, Callinan and Heydon JJ) and 612-613 and 614-615 (Kirby J).
High Court will be reluctant to intervene. Put another way, the current practice of very broadly stated purposes in appropriation laws are unlikely to restrict the expenditures incurred in administering the Patents Act 1990 (Cth). However, for IP Australia the budgeting arrangements are somewhat complicated by there being both an annual appropriation (though, for example, the Appropriation Act (No 1) 2006-2007 2006 (Cth) and Appropriation Act (No 5) 2006-2007 2007 (Cth)) and a standing appropriation (though, for example, a “Special Account”).

Annual appropriations are made according to an “outcomes and outputs framework”. The outcomes and outputs framework was introduced in the Federal Budget 1999 and coincided with the adoption of the accrual budgeting framework in the Financial Management Legislation Amendment Act 1999 (Cth). The purpose of the framework was to impose “a means of structuring corporate governance and management arrangements and reporting on planned and actual performance” taking into account that “agencies and their ministers have considerable scope for adopting specific structures and arrangements that suit their circumstances”. In other words, to improve public sector corporate governance through devolved responsibility and at the same time enhanced public accountability. At its heart was the imperative to establish performance benchmarks based on performance indicators of efficiency of agency operations and cost effectiveness of the outputs delivered.

...performance indicators are developed to allow scrutiny of effectiveness (ie the impact of the outputs and administered items on outcomes) and efficiency (especially in terms of the application of administered items and the price, quality and quantity of outputs) and to enable the system to be further developed to improve performance and accountability for results.

The outcomes and outputs framework specifically addresses what the government wants to achieve ("outcomes"), how that is to be done ("outputs" and "administered items"), and how those administering the outcomes can know if it has been successful ("performance reporting"). “Outputs” and “administered items” are identified separately to reflect their different accountability requirements; “administered items” are those resources administered by the agency on behalf of the...
As part of the annual appropriation arrangements for 2006-2007, IP Australia recorded the following resources, in summary:

IP Australia operates on a full cost recovery basis and utilises the receipts from charges for intellectual property services to fund its operations … The only funds received directly via the Appropriation Bills in 2006-07 relate to notional interest paid against the IP Australia Special Account ($1.787m), last financial year’s measure in relation to the China Free Trade Agreement ($0.268m) and a small administered amount in relation to Plant Breeder’s Rights ($0.074m). The balance of IP Australia’s expenditure is appropriated via the use of a Special Account established under the Financial Management and Accountability Act 1997.

The main annual appropriations for 2006-2007, the Appropriation Act (No 1) 2006-2007 (Cth), recorded for IP Australia amounts up to a total $2,129,000, comprising Departmental Outputs of $2,055,000 and Administered Expenses of $74,000 for “Outcome 1 – Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade”. The “Portfolio Budget Statements” were declared to detail activities (the outputs) relevant to the appropriated outcomes. The relevant details for 2006-2007 are set out in Table 1. The contributions to achieving Outcome 1 were stated to be:

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62 Finance Outcomes & Outputs Framework Guidance, n 56, p 16. “Those items that an [agency] does not control but over which it has management responsibility on behalf of the Government and which are subject to prescriptive rules or conditions established by legislation, or Australian Government Policy, in order to achieve Australian Government outcomes”.

63 Finance Outcomes & Outputs Framework Guidance, n 56, p 16. “Those items which the [agency] controls that are used in the operational activities of the [agency]”.

64 Notably, the Portfolio Budget Statements and Portfolio Additional Estimates Statements are Budget Related Papers and are declared by the Appropriation Bills to be “relevant documents” for the interpretation of the Bills: Appropriation Act (No 1) 2006-2007 (Cth), s 4 and Appropriation Act (No 5) 2006-2007 (Cth), s 4.


68 Appropriation Act (No 1) 2006-2007 (Cth), ss 7 (departmental items), 8 (administered items), 15 (appropriation) and Sch 1.

69 Appropriation Act (No 1) 2006-2007 (Cth), s 4(2).
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A robust intellectual property (IP) system stimulates investment and trade by providing incentives for individuals and industry to invent and create. IP Australia contributes to the achievement of its outcome through three main areas – IP Rights administration, education and advice. Through the administration and regulation of Patent, Trade Mark, Design and Plant Breeder’s Rights, IP Australia ensures a sound intellectual property protection regime, providing investors with confidence that products and brands will not be threatened with unauthorised use. IP Australia’s regulatory role also includes an accreditation and registration system for IP professionals to ensure a level of quality advice is available.

To ensure business and individuals are aware of the importance of IP rights and fully understand the best type of right for their need, IP Australia undertakes an education and awareness role. Engagement in the international intellectual property system is also crucial to ensure improved access for Australia to the global market.

As IP becomes of increasing interest to business investing in research and supporting innovation, and to Government in negotiating international trade agreements, IP Australia’s role in supporting quality research and providing policy advice is growing. This specialist advice enables Australia to keep on the forefront of IP issues and be influential in international activities.70

The Appropriation Act (No 5) 2006-2007 2007 (Cth) and the Portfolio Additional Estimates Statements varied the appropriated amounts but made no change to the principal objectives and functions of IP Australia for Outcome 1.71 A detailed summary of the prospective performance measures in the outcomes and outputs framework are set out in Tables 1 and 2.

The other appropriations for IP Australia are standing appropriations through Special Accounts. Special Accounts under the Financial Management and Accountability Act 1997 (Cth) are established either by the Minister responsible for the Financial Management and Accountability Act 1997 (Cth) (the “Finance Minister”)72 by written determination73 or as a provision in legislation.74 In both instances they are a ledger75 of the CRF.76 The essential features of Special Accounts are that they: are a method by which money may be drawn from the “Treasury of the Commonwealth”77 for the expenditure purposes of the Commonwealth; articulate the requirements of an appropriation from the CRF; set out an authorisation to expend; and, identify the Commonwealth purposes for which that money may be expended.78

IP Australia administers a number of Special Accounts established by written determination.79 Importantly, however, the full cost recovery by IP Australia from “customers” of its intellectual

71 See Department of Finance and Administration, Portfolio Additional Estimates Statements 2006-2007: Industry, Tourism and Resources Portfolio (Department of Finance and Administration, 2007) p 43. The revised appropriation for Output 1 was $2 506 000 and for Output 2 was $391 000 to reflect notional interest for Special Accounts of $842 000.
72 Financial Management and Accountability Act 1997 (Cth), s 5. The “Finance Minister” is currently the Minister for Finance and Administration.
73 Financial Management and Accountability Act 1997 (Cth), s 20. Noting that such determinations are disallowable instruments that must satisfy special procedural requirements before the Parliament before they take effect (s 22.
75 They are an “account … used to record moneys received for a designated purpose and expenditure of those moneys”: Explanatory Memorandum, Financial Management Legislation Amendment Bill 1999 (Cth) 3.
76 See Constitution, s 81. Note also Constitution, ss 66, 82.
77 This is “any fund or sum of money standing to the credit of the Crown in right of the Commonwealth”: Northern Suburbs General Cemetery Reserve Trust v Commonwealth (1993) 176 CLR 555 at 573 (Mason CJ, Deane, Toohey and Gaudron JJ). In other words, the moneys actually held by the Commonwealth.
79 These are: “IP Australia Special Account (Departmental) … for expenditure in connection with the provision of services in relation to intellectual property”; “Other Trust Monies – World Intellectual Property Organisation … for the receipt of moneys temporarily held in trust for the World Intellectual Property Organisation under the Patent Cooperation Treaty and Madrid
property services that are used to fund its operations are conducted through a Special Account.\(^{80}\) As a consequence, the Special Account acts as a standing appropriation of the amount credited to the account that is supplemented with any annually appropriated “notional interest” and various other amounts for identified purposes (as set out above).\(^{81}\) However, the costs recovered from “customers” of intellectual property services\(^{82}\) also include a component of the costs of IP Australia’s activity and another component related to other policy considerations.\(^{83}\) These include rising annual renewal fees after the fifth year so that less innovative patents extract lower economic rents (discouraging unwanted patents),\(^{84}\) a waiver of fees for public goods (such as lower costs for small to medium sized enterprises),\(^{85}\) and so on.

For the IP Australia Special Account used to credit receipts from charges for intellectual property services to fund its operations the appropriation is set out in the Financial Management and Accountability Act 1997 (Cth): “[t]he CRF is hereby appropriated for expenditure for the purposes of a Special Account … up to the balance for the time being of the Special Account the expenditure purpose of the Commonwealth”.\(^{86}\) The Commonwealth purpose is set out in the determination establishing the Special Account: “[f]or expenditure related to the development and administration of intellectual and industrial property systems, including the provision of property rights in inventions … and matters incidental thereto” and “[f]or expenditure comprising payments of moneys to the [CRF], as agreed from time to time by the Minister for Finance and the relevant Minister, in addition to payments expressly required to be paid to that fund under legislation”.\(^{87}\) The appropriated amount credit to the Special Account available to expend is recorded in 2006-2007 (“receipts”) as $120,224,000 and associated with the “Outcome 1” in the terms “Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade.”\(^{88}\) Importantly, the Portfolio Budget Statements records the Special Account balance as “receipts” and distinct from the amount of the annual appropriation by the Appropriation Act (No 1) protocol and IP legislation”: “Other Trust Monies – Security of Costs … for the receipt of moneys held as a security in respect of the costs of the opposition proceedings under … s 219 of the Patents Act 1990 [(Cth)]: ‘services for Other Governments and Non-Agency Bodies Account … [for] monies advanced to Australia by Comcare for the purpose of distributing compensation payments made in accordance with the Safety, Rehabilitation and Compensation Act 1998 [(Cth)]’; and, ‘services for Other Governments and Non-Agency Bodies Account – Australia Salary Packaging … for payment of Salary Packaging expenses on behalf of current IP Australia employees in accordance with the IP Australia Certified Agreement’: DITR Annual Report 2006-2007, n 14, pp 369-371. See also DITR Portfolio Budget Statements 2006-2007, n 67, p 86 (listing only three of these Special Accounts).


\(^{81}\) See, eg, DITR Portfolio Budget Statements 2006-2007, n 67, p 83. See also DITR Portfolio Budget Statements 2007-2008, n 67, p 89.

\(^{82}\) This was a policy that already featured in patent practice at the time the Patents Act 1990 (Cth) was implemented: see, eg, Department of Industry, Technology and Commerce, Annual Report 1989-1990 (Department of Industry, Technology and Commerce, 1990) p 98.

\(^{83}\) For example, this includes agreed charges applying under international agreements, such as applications filed under the Patent Cooperation Treaty [1980] ATS 6 in an agreement with the World Intellectual Property Organisation.

\(^{84}\) Patents Regulations 1991 (Cth), Sch 7(pt 2). See also IPCRC, n 5, pp 144, 156, 157; IP Australia, Government Response to Intellectual Property and Competition Review Recommendations (IP Australia, 2001) p 7.

\(^{85}\) See, eg, IP Australia, Corporate Guidelines for Refunds and Waivers (IP Australia, 2007) p 13.

\(^{86}\) Financial Management and Accountability Act 1997 (Cth), s 20(4).

\(^{87}\) Initial Determination to Establish Components of the Reserved Money Fund (1997), sch. Notably the Financial Management Legislation Amendment Act 1999 (Cth), s 5 merged the Loan Fund and the “components” of the Reserve Money Fund and the Commercial Activities Fund into the single CRF with the “new” Special Accounts preserving the rights and obligations of the “components” of the Reserve Money Fund and Commercial Activities Fund: Department of Finance and Administration, Reserved Money Fund (RMF) and Commercial Activities Fund (CAF) – Transition to “Special Accounts”, Finance Circular 1999/03 (Department of Finance and Administration, 1999); Finance Guidelines for Special Accounts, n 78.

As a consequence of the outcomes and outputs framework in annual appropriations, and the form of Special Account standing appropriation, there has been a move away from before-the-event parliamentary scrutiny of expenditure contemplated by the Constitution at Federation to an after-the-event accountability and transparency as part of the broader financial management, reporting and audit arrangements. This has diminished the significance of the budgeting arrangements on imposing limits on future spending through limiting purposes and shifted the focus to the later reporting requirements in meeting the broadly stated appropriation purposes. A broader effect of adopting the outcomes and outputs framework (budget arrangements) has also been in most agencies to align the agency’s organisational structure with its financial management, people management and reporting arrangements.

Alignment of an agency’s organisational structure with outcomes, outputs and administered items best defines management accountabilities and responsibilities and enables agencies to directly translate internal reporting to external reporting.

So, the Minister for Industry, Tourism and Resources is the personality formally responsible and accountable to Parliament for the expenditures of the Australian Government in respect of IP Australia. However, the interest of the Parliament in the conduct and operations of IP Australia have been superficial and have not reported a detailed after-the-event assessment according to the outcomes and outputs framework. As a consequence the budget arrangements (and the scrutiny by the
Parliament) appear to have a very limited direct effect on the Commissioner’s decision-making, albeit there is potential for considerable intervention by the Minister (and Parliament) through controlling specific expenditures.

B. Financial management arrangements

The Financial Management and Accountability Act 1997 (Cth) imposes part of the Australian Government’s financial management and reporting arrangements. The underlying objective of this arrangement was to devolve financial management consistent with the entity’s departure from ministerial control and its legal and financial separation from the Commonwealth, while still being able to assess and compare the financial performance of individual entities through obligatory and uniform reporting and audit requirements. The Financial Management and Accountability Act 1997 (Cth) imposes a “regulatory/accounting/accountability framework for dealing with and managing the money and property of the Commonwealth”, specifying the “responsibilities and powers necessary for the efficient, effective and ethical use of the resources lawfully available to the Commonwealth to carry out its program”, and providing “for appropriate mechanisms to ensure that the stewardship and management performance of those who are responsible for those resources can be made visible and, thereby, allow them to be held accountable”. Following amendment in 1999, the Financial Management and Accountability Act 1997 (Cth) imposes accrual budgeting placing a focus on the outcomes and outputs from budget allocations. This was to be achieved by requiring an “Agency” (including a “prescribed Agency”) to manage their resources efficiently, accountable to the Parliament (including persons allocated to that Department) (see s 5). These are a Department of State (including persons allocated to that Department) (see Financial Management and Accountability Regulations 1997 (Cth), r 4(1)(a)-(d), (f)), a Department of the Parliament (including persons allocated to that Department) (see r 4(1)(e)), and a “prescribed Agency” (see s 5: “a body, organisation or group of persons prescribed by the regulations for the purpose of this definition”; for the purposes of this definition 5 prescribed the “body, organisation or group” set out in Sch 1, and “other persons who perform financial tasks in relation to a function of a person referred to in an item in sch 1”). It is notable that some of the “prescribed Agencies” in Sch 1 are subject to the Commonwealth Authorities and Companies Act 1997 (Cth) and the Parliamentary Service (Consequential and Transitional) Determination 2000 (Cth) and the Parliamentary Service (Consequential and Transitional) Determination 2000 (Cth) and the Parliamentary Service (Consequential and Transitional) Determination 2000 (Cth) and the Parliamentary Service (Consequential and Transitional) Determination 2000 (Cth) and the Parliamentary Service (Consequential and Transitional) Determination 2000 (Cth) and the Parliamentary Service (Consequential and Transitional) Determination 2000 (Cth) for their handling of “public money”.


98 Notably, other key elements of this formal framework include the Commonwealth Authorities and Companies Act 1997 (Cth), the Charter of Budget Honesty Act 1998 (Cth), the Auditor-General Act 1997 (Cth), the Joint Committee of Public Accounts and Audit under the Public Accounts and Audit Committee Act 1953 (Cth) and the referral of annual reports to the Senate and House of Representatives Standing Committees under Senate Standing Order 25(21) and House of Representatives Standing Order 324(b) respectively.


101 Parliamentary Debates (Representatives), n 13, 12 December 1996, p 8344-5 (John Fahey, Minister for Finance).

102 See Financial Management Legislation Amendment Act 1999 (Cth). See also Parliamentary Debates (Representatives), n 13, 10 February 1999, p 2283 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration). Other amendments were included in the Public Employment (Consequential and Transitional) Amendment Act 1999 (Cth), Financial Management and Accountability Amendment Act 2000 (Cth), Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (Cth) and the Parliamentary Service (Consequential and Transitional) Determination 2000/1 (Cth).

103 Financial Management and Accountability Act 1997 (Cth), s 5. These are a Department of State (including persons allocated to that Department) (see Financial Management and Accountability Regulations 1997 (Cth), r 4(1)(a)-(d), (f)), a Department of the Parliament (including persons allocated to that Department) (see r 4(1)(e)), and a “prescribed Agency” (see s 5: “a body, organisation or group of persons prescribed by the regulations for the purpose of this definition”; for the purposes of this definition 5 prescribed the “body, organisation or group” set out in Sch 1, and “other persons who perform financial tasks in relation to a function of a person referred to in an item in sch 1”). It is notable that some of the “prescribed Agencies” in Sch 1 are subject to the Commonwealth Authorities and Companies Act 1997 (Cth) for their handling of “public money”.

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effectively and ethically, and setting out mandatory accounting requirements to satisfy the role of the “Finance Minister” (the Minister for Finance and Administration) in preparing an account of the Commonwealth (including the Australian Government) for the Parliament. Central to the objective of this reform was to give chief executives the powers to make and then be accountable for decisions about expenditure, and the use of money and the other resources of the Commonwealth under their control.

Under the Financial Management and Accountability Act 1997 (Cth) “IP Australia” is a “prescribed Agency” comprised of “the person occupying, or performing the duties of, the position within the Department of Industry, Tourism and Resources known as the Director General of IP Australia” and “persons engaged under the Public Service Act 1999 [(Cth)] to assist the Director General”. The “Chief Executive” for the purposes of the Financial Management and Accountability Act 1997 (Cth) is the “Director General”. As the “Chief Executive”, the Director General has definite management responsibilities over the control and management of public money and public property, including:

- To “manage the affairs of the Agency in a way that promotes [efficient, effective and ethical use] of the Commonwealth resources for which the Chief Executive is responsible”;
- To complying with the “Finance Minister’s Orders” and other requirements so that “the Chief Executive must manage so as to promote proper use of those resources to the greatest extent practicable while complying with those requirements”;
- To “implement a fraud control plan for the Agency”;

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105 Financial Management and Accountability Act 1997 (Cth), s 5. For a prescribed Agency, “the person identified by the regulations as the Chief Executive of the Agency”, and for any other Agency, “the person who is the Secretary of the Agency for the purposes of the Public Act 1999 (Cth) or the Parliamentary Service Act 1999 (Cth)”. Noting that the Public Service Act 1999 (Cth), s 7 provides that the “Secretary” means “the Secretary of a Department”; the term “Department” is defined to mean “a Department of State, excluding any part that is itself an Executive Agency or Statutory Agency”; the term “Agency Head” is defined to mean “the Secretary of a Department”; “the Head of an Executive Agency” or “the Head of a Statutory Agency” and the Parliamentary Service Act 1999 (Cth), s 7 provides that the “Secretary” means “the Secretary of a Department and includes the Clerk of the Senate and the Clerk of the House of Representatives” and that “Secretary of a Department” means “(a) if the Department is the Department of the Senate – the Clerk of the Senate; or (b) if the Department is the Department of the House of Representatives – the Clerk of that House; or (c) if the Department is another Department – the Secretary of that Department”.

106 Financial Management and Accountability Act 1997 (Cth), s 44. This is assisted through issuing Chief Executive Instructions (s 52), implementing a Fraud Control Plan (s 45) and requiring an Agency Audit Committee (s 46).

107 Financial Management and Accountability Act 1997 (Cth), ss 54-57. The standards are proscribed by the Finance Minister’s Orders (s 63).

108 See Parliamentary Debates (Representatives), n 13, 12 December 1996, p 8345 (John Fahey, Minister for Finance).


110 The term “ethics” is probably “the moral boundaries or values within which officials work”, so that “[e]thical behaviour encompasses the concepts of honesty, integrity, probity, diligence, fairness, trust, respect and consistency”: Commonwealth Procurement Guidelines, n 9, p 16. Unfortunately the Director General of IP Australia has never articulated his conception of efficient, effective or ethical use.

111 Financial Management and Accountability Act 1997 (Cth), s 44(1), (3).

112 See Financial Management and Accountability Act 1997 (Cth), s 63.

113 Financial Management and Accountability Act 1997 (Cth), s 44(2).

• To “establish and maintain an audit committee for the Agency, with the functions and responsibilities required by the Finance Minister’s Orders”; \(^{115}\)
• To “ensure that accounts and records of the Agency are kept as required by the Finance Minister’s Orders”; \(^{116}\)
• To “give instructions to officials in their Agencies on any matter on which regulations may be made under this Act” (the “Chief Executive’s Instructions”). \(^{117}\) The regulations provide: “to give instructions … to officials in that Agency on any matter necessary or convenient for carrying out or giving effect to the Act or these Regulations, and, in particular” the “handling, spending and accounting for public money”, “making commitments to spend public money”, “recovering amounts owing to the Commonwealth”, “using, or disposing of, public property”, and “acquiring property that is to be public property” for “ensuring or promoting” the “proper use and management of public money, public property and other resources of the Commonwealth” and “proper accountability for the use and management of public money, public property and other resources of the Commonwealth”; \(^{118}\) and
• To give to the Finance Minister any required “financial statements” and “information” about the financial affairs of the Agency. \(^{119}\)

The effect of each of these measures in the financial management arrangements is that the Director General can have a considerable influence on the Commissioner’s decision-making. So, for example, by limiting the expenditure and other resources available to the Commissioner the Director General may influence the ability of the Commissioner to complete her statutory duties, and perhaps also the quality of the Commissioner’s decisions.

C. People management arrangements

The Workplace Relations Act 1996 (Cth) \(^{120}\) and the Public Service Act 1999 (Cth) \(^{121}\) both introduced reforms directed specifically at placing responsibility for employment arrangements at the workplace between employees and their immediate employers. In the words of the then Minister for Industrial Relations, the Workplace Relations Act 1996 (Cth) was intended to:

deliver the framework for structural reform of the labour market demanded by the imperatives of world competition and warranted by the legitimate expectation of Australians to enjoy improved living standards through higher employment and better paid jobs over time. \(^{122}\)

The Workplace Relations Act 1996 (Cth) established a process for agreement-making and details specific protection against unlawful termination, discrimination, and so on. The Workplace Relations Act 1996 (Cth) also imposes the same industrial relations and employment arrangements for public


\(^{116}\) Financial Management and Accountability Act 1997 (Cth), s 48(1); Financial Management and Accountability Orders 2005 (Cth), O 2.3.

\(^{117}\) Financial Management and Accountability Act 1997 (Cth), s 52(1).

\(^{118}\) Financial Management and Accountability Regulations 1997 (Cth), r 6(1).

\(^{119}\) Financial Management and Accountability Act 1997 (Cth), ss 50(1), (2).

\(^{120}\) See Parliamentary Debates (Representatives), n 13, 23 May 1996, pp 1295-1305 (Peter Reith, Minister for Industrial Relations). Notably, the final Bill was subjected to considerable amendment: see Parliamentary Debates (Representatives), n 13, 21 November 1996, pp 7179-7217.

\(^{121}\) See Parliamentary Debates (Representatives), n 13, 30 March 1999, pp 4683-5 (David Kemp, Minister Assisting the Prime Minister for the Public Service). Notable an earlier Bill had been considered by the Joint Committee of Public Accounts that had recommended that the Bill be simplified, modernised and presented in a more accessible form: see Joint Committee of Public Accounts, Advisory Report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997 (Senate Printing, 1997).

\(^{122}\) Parliamentary Debates (Representatives), n 13, 23 May 1996, p 1296 (Peter Reith, Minister for Industrial Relations). In addressing the Public Service Act 1999 (Cth) the former Minister said the statute would “promote higher performance in the APS by devolving management responsibility to individual agencies and, at the same time, ensure that public interest objectives are maintained through enhanced accountability”: Parliamentary Debates (Representatives), n 13, 26 June 1997, p 6461 (Peter Reith, Minister for Industrial Relations).
servants as those applying to other workers. The effect was to devolve employment decision about setting remuneration and employment terms and conditions to the individual agencies through Australian Workplace Agreements (AWAs) and Certified Agreements.123

The Public Service Act 1999 (Cth) essentially provides the basic framework for the structure, responsibilities and management of the Australian Public Service (APS).124 The major advances brought about by the Public Service Act 1999 (Cth)125 were a declaration of “APS Values” (reflecting public expectations of the relationship between the public service and the government, the Parliament and the Australian community),126 a “Code of Conduct” (reflecting the public expectation that public servants will exercise appropriate conduct),127 and the devolution to “Agency Heads” of all the rights, duties and powers of an employer in respect of their APS employees,128 subject to the Workplace Relations Act 1996 (Cth).129 Under the Public Service Act 1999 (Cth) there is a statutory office of Public Service Commissioner with various function addressing APS employment,130 including promoting the APS Values and the Code of Conduct.135 The Public Service Commissioner must also issue directions about APS Values,133 the Code of Conduct,134 and various other matters.135 Further, the Prime Minister may issue general directions to Agency Heads about the management and leadership of APS employees.136 The people management approach to devolution under the Workplace Relations Act 1996 (Cth) and the Public Service Act 1999 (Cth) was also balanced with “enhanced accountability for Agency performance”137 that included an annual reporting obligation.138

IP Australia is a separately identifiable entity as a “prescribed Agency” under the Financial Management and Accountability Act 1997 (Cth) with its employees engaged under the Public Service Act 1999 (Cth).139 For the purposes of the Public Service Act 1999 (Cth), however, the employer is the “Agency Head”, being the Secretary of the Department of Industry, Tourism and Resources.140

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123 Although this was not without some limits. See, eg, Australian Public Service Commission, Policy Parameters for Agreement Making in the APS (APSC, 2006).
124 The APS consisting of Agency Heads and APS employees: Public Service Act 1999 (Cth), s 9.
126 Public Service Act 1999 (Cth), s 10. See also Public Service Commissioner’s Directions 1999 (Cth), d 2.1-4.7.
127 Public Service Act 1999 (Cth), s 13. See also Public Service Commissioner’s Directions 1999 (Cth), d 5.1-5.6.
128 See Public Service Act 1999 (Cth), ss 20, 22, 24(1). See also APSC Australian Experience, n 100, pp 33-37.
129 Public Service Act 1999 (Cth), s 8(1).
130 Public Service Act 1999 (Cth), s 40(1).
131 See Public Service Act 1999 (Cth), s 41(1).
133 Public Service Act 1999 (Cth), s 11. See also Public Service Commissioner’s Directions 1999 (Cth), d 2.1-4.7.
134 Public Service Act 1999 (Cth), s 15(4). See also Public Service Commissioner’s Directions 1999 (Cth), d 5.1-5.6.
135 Public Service Act 1999 (Cth), s 36 (senior executive employment). See also Public Service Commissioner’s Directions 1999 (Cth), dd 6.1-6.8 (senior executive employment).
136 Public Service Act 1999 (Cth), s 21(1). See Prime Minister’s Public Service Directions 1999 (Cth).
137 APSC Australian Experience, n 100, p 55.
138 Public Service Act 1999 (Cth), s 63(1), (2). See also Department of the Prime Minister and Cabinet, Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies (PMC, 2006).
139 See Financial Management and Accountability Act 1997 (Cth), s 5; Financial Management and Accountability Regulations 1997 (Cth), r 5 and Sch 1 (item 128A).
140 Public Service Act 1999 (Cth), s 7 (“Agency Head”).
Agency Head is bound by the Code of Conduct and must uphold and promote the APS Values. The Secretary is also responsible for managing the Department, advising the Agency Minister in matters relating to the Department, and assisting the Agency Minister to fulfil any parliamentary accountability obligations. The Secretary’s reporting obligations include the provision of an annual report according to guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.

The Secretary (as the Agency Head) is appointed by the Prime Minister for up to 5 years after consultation with the person who is, or is expected to be, the portfolio Minister. These conditions are not publicly disclosed, although they do include performance benchmarks and a bonus payments scheme. The Agency Head must also comply with the Public Service Commissioner’s Directions under the Public Service Act 1999 (Cth), and may be investigated by the Public Service Commissioner for alleged breaches of the Code of Conduct.

The Director General and Commissioner are employed according to an AWA under the Workplace Relations Act 1996 (Cth). The terms and conditions of the AWA are not publicly disclosed, although they include performance benchmarks and a bonus payments scheme. The Director General and Commissioner must comply with the Public Service Commissioner’s Directions under the Public Service Act 1999 (Cth), and may be investigated by the Agency Head for alleged breaches of the Code of Conduct according to the Directions issues by the Public Service Commissioner.

The other persons assisting the Director General in IP Australia are employed by the Secretary under the Public Service Act 1999 (Cth) and subject to either an AWA or an enterprise agreement (a Certified Agreement) under the Workplace Relations Act 1996 (Cth). The terms and conditions of the Certified Agreement are disclosed and include performance benchmarks and a bonus payments scheme.

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141 Public Service Act 1999 (Cth), s 14(1). This also includes statutory office holder such as the Commissioner of Patents (Patents Act 1990 (Cth), s 207) (s 14(2)).
142 Public Service Act 1999 (Cth), s 12.
143 Public Service Act 1999 (Cth), s 57.
144 Public Service Act 1999 (Cth), s 63(1).
145 Public Service Act 1999 (Cth), 63(2). See Prime Minister and Cabinet Requirements for Annual Reports, n 138.
146 Public Service Act 1999 (Cth), s 58(1), (4).
147 Public Service Act 1999 (Cth), s 61(1).
148 See also Commonwealth, Determination under Section 61: Consolidation of Secretaries’ Remuneration and Other Conditions, Gazette No 40, 11 October 2001 (Commonwealth, 2001).
149 Public Service Act 1999 (Cth), s 42(2).
150 Public Service Act 1999 (Cth), s 41(1)(f).
151 Public Service Act 1999 (Cth), s 20(1). See also Public Service Regulations 1999 (Cth), r 3.2, 3.3.
154 Public Service Act 1999 (Cth), s 42(2).
155 Public Service Act 1999 (Cth), s 15(1), (3). See also Public Service Regulations 1999 (Cth), r 2.3.
157 See IP Australia, IP Australia Certified Agreement 2005-2008 (IP Australia, 2005). Notably, a recent performance audit (Auditor-General Act 1997 (Cth), s 18) that included IP Australia reported: “[t]he audit identified that each of the three audited agencies” had adopted a “cascading of plans” approach to linking agency plans to (individual performance agreements) in their planning and performance management frameworks. However, there was not a consistent or systematic approach to
The terms and conditions of the AWAs are not publicly disclosed but they also include performance benchmarks and a bonus payments scheme.\textsuperscript{159} Under these people management arrangements the Secretary has considerable scope to influence the decision-making of the Commissioner. The primary influence will be the terms and conditions of employment set out in the Commissioner’s AWA and her delegates’ AWAs or Certified Agreement. Unfortunately the AWAs are not publicly available so the actual influential effects of these agreements and the role of the Secretary are uncertain. However, there are Australian Government policy positions addressing employee performance,\textsuperscript{160} and within IP Australia, there are performance benchmarks with bonus payments available for desirable performance achievements,\textsuperscript{161} showing that the Secretary has articulated his conception, at least in part, of performance. The Certified Agreement perhaps provides some further indications.\textsuperscript{162} The Certified Agreement promotes “continuous improvement in performance … by recognising effective performance”.\textsuperscript{163} The performance is then articulated in *IP Australia’s Work Level Standards and Work Skills Framework,*\textsuperscript{164} the *IP Australia Performance Management Policy,*\textsuperscript{165} and *IP Australia’s Performance Management Process Manual and Guidelines.*\textsuperscript{166} Unfortunately, none of these documents are publicly available. Presumably, the desirable performance will also be consistent with the Australian Government’s policy positions that clearly advocates that Agency “vision”, “mission”, “aims”, “values”, “behaviours”, “major directions/priorities” and “management structures” should be directed to achieving the “outcomes”, “outputs” and “performance indicators”.\textsuperscript{167} In short, there is considerable potential for the Secretary (and perhaps others) to influence the Commissioner’s decision making through the people management arrangements.

### D. Reporting arrangements

Each of the financial management and people management arrangements impose reporting obligations.\textsuperscript{168} The outcomes and outputs framework requires agencies to provide relevant incorporating [Portfolio Budget Statements] performance indicators, as appropriate, into agency plans or [individual performance agreements] and linking these plans with “outcomes and agency outputs”: ANAO Application of the Outcomes and Outputs Framework, n 54, p 54. The Auditor-General recommended and IP Australia accepted the recommendation: “that to enhance the integration of the framework into agency operations, details of outcomes and outputs and Portfolio Budget Statement indicators be incorporated into … individual performance agreements, to the extent appropriate” (p 55). It seems likely that the recommendation will be implemented in the Certified Agreement nominally commencing on 28 January 2008.


\textsuperscript{160} See, eg, Management Advisory Committee, *Performance Management in the APS: A Strategic Framework* (APSC, 2001) p 5 provides: “the factors that will assist organisations in designing, implementing and reviewing their performance management systems. The success factors for performance management systems are summarised as: alignment – within a values-based framework that takes account of the organisational culture and business objectives; credibility – applying across the organisation, and seen as fair, transparent and rigorous; and, integration – integrating organisational objectives with the performance of teams and individuals”. See also Prime Minister, *More Time for Business* (DITR, 1997) p 54.

\textsuperscript{161} See DITR Annual Report 2006-2007, n 14, p 143.

\textsuperscript{162} See DITR Annual Report 2006-2007, n 14, p 149.

\textsuperscript{163} IP Australia Certified Agreement 2005-2008, n 157, p 33.

\textsuperscript{164} IP Australia Certified Agreement 2005-2008, n 157, p 33.

\textsuperscript{165} IP Australia Certified Agreement 2005-2008, n 157, p 34. See also IP Australia, *Guidelines on the Examiner of Patents Efficiency Advancement Scheme* (IP Australia, 2006).

\textsuperscript{166} IP Australia Certified Agreement 2005-2008, n 157, p 35.


\textsuperscript{168} See *Financial Management and Accountability Act* 1997 (Cth), ss 54-57 (financial management); *Public Service Act* 1999 (Cth), s 63(1) (people management).
performance information about the effectiveness of achieving outcomes and the efficient delivery or management of outputs and administered items in the Public Service Act 1999 (Cth) Annual Report. The Annual Report itself is a report from a Public Service Act 1999 (Cth) “Agency Head” to the portfolio Minister for tabling in the Parliament about that Agency’s performance. The Financial Management and Accountability Act 1997 (Cth) compliments these requirements by obliging the “Chief Executive” to prepare annual financial statements (according to the Finance Minister’s Orders), and the associated Auditor-General’s report, to be included in that Annual Report. In effect, the Annual Report is the “key reference document” that links the financial management and people management arrangements within an outcomes and outputs framework set out in the Portfolio Budget Statements (and Portfolio Additional Estimates Statements) accompanying Budget appropriations. IP Australia’s obligations for an Annual Report are those imposed on the Secretary of the Department of Industry, Tourism and Resources as the Agency Head of the Department of Industry, Tourism and Resources, and incorporate IP Australia’s audited financial statements provided by the Director General. Tables 1 and 2 detail in summary form the outcome and output (performance) measures, and the quality, quantity and price projections and actual deliverables, derived from the Portfolio Budget Statements (and Portfolio Additional Estimates Statements) and Annual Report for the reporting period 2006-2007.

The Annual Report is tabled in Parliament and referred to a Senate Standing Committee and a House of Representative Standing Committee. In the case of the Department of Industry, Tourism and Resources the Annual Report is referred to the Senate Standing Committee on Economics and the House of Representative Standing Committee on Industry and Resources. These committees have the mandate to rigorously assess the Annual Report, although in practice, their assessments are fairly superficial and have not commented on IP Australia in recent reports. Other opportunities for parliamentary scrutiny of the Australian Government’s operations, activities and expenditure proposals occurs through the Joint Committee of Public Accounts and Audit under the Public Accounts and 

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169 See Prime Minister and Cabinet Requirements for Annual Reports, n 138, p 1.
170 Notably, these reporting requirements also apply to prescribed Agencies under the Financial Management and Accountability Act 1997 (Cth), s 5: Prime Minister and Cabinet Requirements for Annual Reports, n 138, p 1.
173 Financial Management and Accountability Act 1997 (Cth), s 57(7). This has been interpreted to mean the Annual Report required by the Public Service Act 1999 (Cth), s 63(1): Prime Minister and Cabinet Requirements for Annual Reports, n 138, p 13; ANAO Portfolio Budget Statements Performance Information, n 65, p 5.
174 ANAO Annual Performance Reporting, n 58, p 21. See also Senate Standing Order 25(21); ANAO and Finance Guide on Annual Performance Reporting, n 65.
175 See ANAO Portfolio Budget Statements Performance Information, n 65, p 5. See also Prime Minister and Cabinet Requirements for Annual Reports, n 138, pp 3-4.
176 Public Service Act 1999 (Cth), ss 7 (“Agency Head”), 63 (annual reporting).
177 Financial Management and Accountability Act 1997 (Cth), s 57(7).
178 Public Service Act 1999 (Cth), s 63(1).
180 House of Representatives Standing Order 215(c). See also Harris I (ed), House of Representatives Practice (5th ed, Senate Printing, 2005) p 624.
181 See Senate Standing Order 25(21); House of Representatives Standing Order 215(c).
182 See, eg, Senate Standing Committee on Economics, Annual Reports, No 1 of 2007 (Senate Printing, 2007) pp 6-7 (addressing the DIIT Annual Report 2005-2006, n 30); Senate Standing Committee on Economics, Annual Reports, No 1 of 2006 (Senate Printing, 2006) p 5 (addressing the DIIT Annual Report 2004-2005, n 42). Notable the House of Representative Standing Committee on Industry and Resources has not assessed any recent Annual Reports.
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Audit Committee Act 1951 (Cth) and the twice yearly Senate Estimate Committee hearings. However, the formal scrutiny of IP Australia by the Parliament has been very limited.

There are a range of other mandatory reporting obligations imposed by the Financial Management and Accountability Act 1997 (Cth) and the Charter of Budget Honesty Act 1998 (Cth), and a plethora of discretionary reports depending on the particular agency and its business. For example, IP Australia provides a range of reports (and other publications) directed to its particular stakeholders, such as a patent practice manual, information materials, notices and so on. IP Australia is also required to identify and make available some internal management documents.

3. Practical examples of affects

So far the article has detailed the separate budget, financial management, people management and reporting arrangements, and the potential for institutions and personalities to influence the Commissioner’s decision making. The remaining parts now address practical examples of how those arrangements might affect the Commissioner’s decision-making. Unfortunately, the Commissioner’s AWA is not publicly available so the actual influential effects of that agreement and the role of the Secretary are uncertain, albeit potentially significant.

A. Regulatory or service delivery?

A fundamental governance issue is determining whether IP Australia’s function is to impose a regulatory arrangement for a broader public interest, or delivering a service to patent applicants. Is the IP Australia “customer” (or stakeholder) a broader public benefiting from innovation, investment and international competitiveness, or is the “customer” (or stakeholder) only those making patent applications with the attendant services for granting the patent? The Commissioner’s decision making is likely to be affected by this choice.

The Portfolio Budget Statement articulates an Outcome 1 effectiveness measure that “Australians benefit from effective use of intellectual property” (see Table 1). The listed sub-outcomes include that “Australians benefit from IP initiatives”, with the effectiveness measures, indicators and targets

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183 See Evans, n 179, pp 307-312, 364-369. See also Department of the Senate, Consideration of Estimates by the Senate Committees, Senate Brief No 5 (Senate Printing, 2006).

184 See, eg, Commonwealth, Committee Hansard, Senate Economics Legislation Committee, 29 May 2006, pp E86-E96 (new performance measures, employing patent examiners, cost recovery, work for other patent offices and examination periods), E20-E30 (springboard provisions, applicants keeping IP Australia informed about patent searches and inventive web links).

185 These include, eg, a monthly financial statement in a form consistent with the Budget estimates that includes information about the fiscal balance, the underlying cash balance and the net operating result for the general government sector, and annually consolidated financial statements for the Commonwealth: Financial Management and Accountability Act 1997 (Cth), s 54 (monthly financial statement), 55 (consolidated financial statements). See, eg, Department of Finance and Administration, Consolidated Financial Statements for the Australian Government for the Financial Year Ended 30 June 2006 (Department of Finance and Administration, 2007).

186 These include, eg, a budget economic and fiscal outlook report with each budget and a final budget outcome report within 3 months of the end of each financial year: Charter of Budget Honesty Act 1998 (Cth), ss 10 (budget economic and fiscal outlook report with each budget), 14(1) (mid-year economic and fiscal outlook report based on financial statistics by the end of January in each year, or within 6 months after the last budget, whichever is later), 18 (final budget outcome report within 3 months of the end of each financial year). See, eg, Treasury, Final Budget Outcome 2006-2007 (Treasury, 2007); Treasury, Mid-Year Economic and Fiscal Outlook 2006-2007 (Treasury, 2006).


188 See, eg, IP Australia, Australian Patents for Biological Inventions (IP Australia, 2005); IP Australia, Patents for Computer Related Inventions (IP Australia, 2005); and so on.


being “[a]nalysis of benefit through periodic research and programs studies and independent reviews”, and “[i]ncreased application by Australian industry for international IP Rights”.\(^{193}\) However, this sub-outcome is not restated in the output groups of proposed performance measures and actual performance measured (see Table 2). In short, there is no assessment of the sub-outcome that “Australians benefit from IP initiatives” in the Annual Report. However, the listed sub-outcomes “[c]ustomer and stakeholder satisfaction”,\(^{194}\) with the effectiveness measures, indicators and targets being “[c]ustomer satisfaction with products and services measured through surveys and feedback”,\(^{195}\) is re-stated in the outputs groups as “[c]ompliance with IP Australia customer service charter and quality standards” (emphasis added).\(^{196}\) IP Australia’s Customer Service Charter\(^{197}\) reflects an Australian Government requirement for an Agency engaged in “service delivery”.\(^{198}\) The charter is “the driver for cultural change within the Agency … [and] … can encompass client-focus, changed business practices, outcomes rather than process, better and more responsive communications, and improved relationships with clients”.\(^{199}\) IP Australia’s Customer Service Charter is promulgated by the Director General in meeting his obligations to manage the resources under his control efficiently, effectively and ethically.\(^{200}\)

The Portfolio Budget Statement and Annual Report also place a considerable focus on “customers”. For example, the Portfolio Budget Statement articulates various “quality”, “quantity” and “price” measures in addressing sub-outputs (see Table 2). In particular the “quality” relating to “patents” for “output 1” that contributed to the Outcome 1 is “[c]ompliance with IP Australia customer service charter and quality standards” (emphasis added).\(^{201}\) The Annual Report records “greater than 96% compliance across all national and international work against published Product Quality Standards for patents”,\(^{202}\) “[m]ore than 98% of applications proceeded to grant unopposed”, “[f]ifty-two hearing decisions were issued and of these 83% were issued within the required time”, and so on.\(^{203}\) The Customer Service Charter identifies it’s “customers” as “[n]ational and international businesses and research companies”, “[i]nventors, small to medium enterprises, students, people with good ideas” and “[a]ttorneys and other IP professionals, including professional searchers”.\(^{204}\) There is no mention or even oblique suggestion in the output measures that the Commissioner or IP Australia is administering the statutory scheme for a broader public. Further, the Director General has advised Parliament that the key indicator of performance is “to meet our customer service charter standards” (emphasis added)\(^{205}\) and the “customer” in mind refers to the “customer satisfaction benchmarking...
survey” directed to “the quality, efficiency and timeliness of our services”. This appears consistent with the Minister for Industry, Science and Resources intention that IP Australia should seek to be a leading provider of IP rights in the world, and the Australian Government policy that promotes the interests of the “client” – “it infers a level of empowerment to those undertaking a transaction with the … Agency”. Put simply, the focus of the Commissioner within IP Australia appears to be directed to “customer” satisfaction (or service delivery) according to the management directives from the Director General as opposed to addressing a broader public interest. The remaining question is how this focus on the “customer” might influence the Commissioner’s decisions.

Perhaps surprisingly, there is no clear statement from the Australian Government about what it believes the patent scheme is intended to achieve. The available stated policy objectives for patents are couched in generalized terms such as “strengthen our intellectual property (IP) management processes and increase access to global research and technologies”, and to variously stimulate invention (and innovation), increase the public availability of information about new technology, encourage entrepreneurs, promote investment and address free-riding on investment in intellectual effort. While these are undoubtedly desirable, they do not provide a basis for detailed policy choices about the objectives of a policy, and in the context of the outcomes and outputs favouring “customers” and “stakeholders”, the default position might be expected to favour those using the scheme rather than the broad and nebulous “Australian public”.

The consequences of the distinction between regulatory or service delivery for IP Australia might best be illustrated by contrast with another competition focus regulatory agency, the Australian Competition and Consumer Commission (ACCC) administering the Trade Practices Act 1974 (Cth). The ACCC is a statutory body corporate consisting of a Chairperson and others appointed by the Governor-General on approval of the Minister (Treasurer). The ACCC is also a prescribed Agency under the Financial Management and Accountability Act 1998 (Cth) with the Chairperson as the “Chief Executive”, comprising, in part, persons engaged under the Public Service Act 1999 (Cth) to assist the ACCC. However, the ACCC is also a “Statutory Agency” with the Chairperson being the Agency Head for the purposes of the Public Service Act 1999 (Cth). Put simply, the Chairperson in responsible for both financial and people management arrangements. The interesting contrast between IP Australia and the ACCC, however, is in the latter’s focus on regulatory compliance, recalling that both agencies administer statutory arrangements intended to promote competition. In particular, the ACCC administers authorisations, notifications and clearances of authorisations, notifications and clearances of

211 IPCRC, n 5, pp 136-138.
212 See Trade Practices Act 1974 (Cth), s 6A.
214 Financial Management and Accountability Act 1997 (Cth), s 5; Financial Management and Accountability Regulations 1997 (Cth), r 5 and Sch 1 (item 108). Notably, the Australian Competition and Consumer Commission is not a “business operation”: see Financial Management and Accountability Orders 2005 (Cth), O 6.2.
215 Trade Practices Act 1974 (Cth), s 27(1); Financial Management and Accountability Regulations 1997 (Cth), r 5 and Sch 1 (item 108).
216 Trade Practices Act 1974 (Cth), s 27(2).
217 Trade Practices Act 1974 (Cth), s 27(2); Public Service Act 1999 (Cth), s 7.
potentially anti-competitive practices.\textsuperscript{218} The ACCC’s 2006 Budget outcome is “to enhance the social and economic welfare of the Australian community by fostering competitive, efficient, fair and informed Australian markets”.\textsuperscript{219} In addressing this outcome, the ACCC focuses on a broader “public interest”. For example, the ACCC Service Charter provides:

At the ACCC we produce results in the public interest by:

- being accessible, transparent, independent and fair in our dealings with the community including consumers, business and governments.
- performing our role in a timely, effective, efficient and consistent manner.\textsuperscript{220}

In contrast to IP Australia’s Customer Service Charter,\textsuperscript{221} the ACCC’s Service Charter does not use the language of “customer” (or “stakeholder”), albeit that it does address “service” and “service performance”.\textsuperscript{222} The significance of this issue is not in the semantics of “customer” and “stakeholder”, but rather in an attitude to regulation and whose interests are being served. In the case of the Commissioner’s decisions, this is particularly important as the patent applicants (or their representatives)\textsuperscript{223} negotiate with the Commissioner about the objections to patentability in preparing the report for examination.\textsuperscript{224} While the Commissioner’s exercising statutory decision-making powers might be characterised as an objective enterprise, it is possible that that exercise might be in sympathy with other considerations and that the primary consideration might be “customer satisfaction” as opposed to protecting a broader public interest. In these circumstances the influences of the financial management promulgated by the Director General favouring “customer service” over the “public interest” could be significant. Further, the performance arrangement in the Commissioner’s AWA promulgated by the Secretary could also favour “customer service” over the “public interest”, although without access to the AWA this is presently highly speculative, albeit very likely given the intention of integrating the outcome and output framework with individual performance.\textsuperscript{225}

**B. Efficiency and effectiveness**

The budget arrangements in the form of the outcomes and outputs framework, together with the financial management and people management frameworks, are directed to establishing and measuring performance related to the efficiency of an Agency’s operations and the effectiveness of the Agency’s contribution to the identified outputs and administered items.\textsuperscript{226} The “efficiency” is measured by assessing the “quality”, “quantity” and “price” of an Agency’s goods or services.\textsuperscript{227} Meanwhile “effectiveness” is measured by assessing the contribution to the identified outputs and administered items.\textsuperscript{228} Central to these measures are the reporting standards before the event in the Portfolio Budget Statements and after the event in the Annual Report. The content of performance measures in the Portfolio Budget Statements and Portfolio Additional Estimates Statements is assessed in the performance reporting framework and its component measures are assessed in the annual financial statements and annual performance statements.

\textsuperscript{218} See Trade Practices Act 1974 (Cth), ss 88 (authorisations), 93 (notifications), 95AC (clearances).

\textsuperscript{219} Department of Finance and Administration, Portfolio Budget Statements 2006-2007: Treasury, Budget Related Paper No 1.17 (Department of Finance and Administration, 2006) p 83.

\textsuperscript{220} Australian Competition and Consumer Commission, Service Charter (ACCC, 2005) p 2.

\textsuperscript{221} IP Australia Customer Service Charter, n 197, pp 1-6.

\textsuperscript{222} See ACCC Service Charter, n 220, pp 1-4.

\textsuperscript{223} See Patents Act 1990 (Cth), s 200.

\textsuperscript{224} Patents Act 1990 (Cth), ss 49, 104. See also Patent Regulations 1991 (Cth), rr 3.19(2), 10.5(1)(b).

\textsuperscript{225} See, eg, Management Advisory Committee Performance Management, n 160, p 5.

\textsuperscript{226} See Department of Finance and Administration, Performance Reporting Under Outcomes and Outputs (Department of Finance and Administration, 2003); Department of Finance and Administration, Performance Management Principles (Department of Finance and Administration, 2003). See also ANAO Application of the Outcomes and Outputs Framework, n 54; ANAO Annual Performance Reporting, n 58.

\textsuperscript{227} See Finance Performance Reporting Under Outcomes and Outputs, n 226, pp 1-2.

\textsuperscript{228} See Finance Performance Reporting Under Outcomes and Outputs, n 226, pp 1-2.
Estimates Statements) are determined by the Agency (and the “prescribed Agency”), 229 albeit with
 guidance from the Department of Finance and Administration. 230 The content is intended to addresses
 issues such as balance and clarity (“a concise basket of performance indicators which can be
 understood, are well-defined, and are cost-effective to collect, store and manage”), targets (“where
current output performance can be compared qualitatively or quantitatively against specific
 benchmarks, targets or activity levels”), balance (“a balance between addressing progress against
 milestones or intermediate outcomes and ultimate long-term impacts”), stability and improvement
 (“performance information should be regularly assessed for appropriateness”), and so on. 231 The
 overall purpose of these arrangements was “to provide a basis for deciding and managing what
 agencies should produce, assessing how well it was produced, how it contributed to the Government’s
 outcomes, and at what cost”. 232 The consequence was intended to be “information of sufficient quality
 that can be relied on by both Agency management and stakeholders in making judgements about the
 Agency’s performance”. 233 According to these arrangements, the Director General, with the assistance
 of the Department of Finance and Administration, formulates the performance measures that the
 Commissioner then seeks to achieve.

The Auditor-General’s performance audit 234 of IP Australia’s application of the outcomes and
 outputs framework for the 2005-2006 year recommended, and IP Australia agreed:

that agencies review and where necessary improve: their performance indicators to ensure that they
 have a range of appropriate indicators that incorporate better practice characteristics that provide
 stakeholders with useful and reliable performance information. 235

Unfortunately, the Auditor-General’s performance audit did not provide specific and identifiable
details about IP Australia’s outcomes and output framework arrangements. In general terms, however,
the Auditor-General found:

that annual reports generally reported on activities and initiatives undertaken and not on the
effectiveness with which outputs contributed to the achievement of outcomes. In addition, there was
limited information presented on the overall state of outcomes … Agency annual reports generally had
indicators of quality, quantity and price for each output. The [Australian National Audit Office] found
that while performance was reported against the majority of [Portfolio Budget Statements] indicators,
agencies generally did not include any discussion or analysis of the efficiency with which their outputs
were delivered or the extent to which expected performance was achieved … The [Australian National
Audit Office] found that the audited agencies did not generally report on the effectiveness of
administered items in achieving outcomes. Agencies often provided details of activities undertaken or
funding provided without demonstrating how these activities achieved programme objectives and,
ultimately, outcomes. 236

Similarly, the Auditor-General’s performance audit did not provide specific and identifiable details
about IP Australia’s Annual Report performance reporting requirements. In general terms, however,
the Auditor-General concluded:

229 Based on their interpretation and application of the Department of Finance and Administration guidance materials. See, eg,
230 See Finance Performance Reporting Under Outcomes and Outputs, n 226; Finance Performance Management Principles,
 n 226. Notably, some of the guidance is mandatory: see ANAO Application of the Outcomes and Outputs Framework, n 54, p 85.
231 Finance Performance Reporting Under Outcomes and Outputs, n 226, pp 1-2. See also ANAO and Finance Guide on Annual
 Performance Reporting, n 65; Finance Performance Management Principles, n 226; ANAO Portfolio Budget Statements
 Performance Information, n 65.
233 ANAO Application of the Outcomes and Outputs Framework, n 54, p 57.
234 Auditor-General Act 1997 (Cth), s 18.
236 ANAO Application of the Outcomes and Outputs Framework, n 54, p 80.
agencies needed to improve performance reporting in relation to reporting on: the overall state of outcomes; the effectiveness of agency and administered items in contributing to the achievement of outcomes; the efficiency of outputs; and agency achievements rather than activities. 237

With IP Australia’s focus on “customers” and “stakeholders”, there is the potential that its performance measures might be eliciting inappropriate outcomes and outputs. In particular there is the concern that:

poorly designed indicators can result in unintended consequences if the behaviours they encourage are not carefully considered and there is a risk that managers may feel obliged to generate output that is tailored to an artificial or inappropriate target. 238

Table 2 details the prospective performance (Portfolio Budget Statements) and actual performance (Annual Report) of IP Australia, and appears to favour quantitative (“quantity” and “price”) over qualitative (“quality”) measures. This is reinforced by IP Australia seeking service delivery process certification according to international standards (ISO 9001:2000) and various awards for public sector service delivery. 239

With the Director General setting the performance standards for the Commissioner within the outcomes and outputs framework, the Director General is directly influencing the Commissioner’s performance and directing it towards those performance measures. The analysis in this article shows that these measures are directed and that there is a “customer” focus. Whether this influences the Commissioner’s decisions is not certain. Again, the performance arrangement in the Commissioner’s AWA promulgated by the Secretary could also favour these performance measures. This seems very likely given the intention of integrating the outcome and output framework with individual performance 239 and an AWA that includes performance benchmarks and a bonus payments scheme. 240

The significance of this analysis is to suggest that the Commissioner’s decision-making might be directed towards performance measures (perhaps “quantity” over “quality”), set out by both the Director General in the financial management arrangements and the Secretary in the people management arrangements, which influence her exercising her statutory decision-making powers.

C. Cost recovery

Central to IP Australia’s ongoing financial viability and cost effective operations is the “achievement of cost recovery on an accrual basis over time”. 242 These fees and charges are significant for patents, projected to be $71,485,000 in 2006-2007, 243 and represent the fees paid by customers for applications, registration, examination, renewals and hearings work. 244 This cost recovery objective is governed by the Australian Government Cost Recovery Guidelines that requires a Cost Recovery Impact Statements (CRIS) for “significant cost recovery arrangements” being “total cost recovery receipts equal [to] $5 million or more per annum”. 245 IP Australia’s justification for charging fees is:

Cost recovery is appropriate for the administration of IP rights by IP Australia. Customers are provided with an “exclusive capturable commercial benefit” and cost recovery is not inconsistent with the

237 ANAO Application of the Outcomes and Outputs Framework, n 54, p 83.
238 ANAO Application of the Outcomes and Outputs Framework, n 54, p 59. See also Department of Finance and Administration, Outcomes and Outputs Guidance (Department of Finance and Administration, 2003).
240 See eg, Management Advisory Committee Performance Management, n 160, p 5.
243 DITR Portfolio Budget Statements 2006-2007, n 67, pp 96-98. Notably, patents comprised the largest contribution to IP Australia revenues, followed by trademarks ($42 018 000), designs ($1 890 000), plant breeder’s rights ($1 254 000) and Professional Standards Board ($435 000).
244 DITR Portfolio Budget Statements 2006-2007, n 67, p 96.
objectives of the IP legislation, in particular the promotion of innovation in Australia. Costs related to the administration of IP rights can be recovered, over the period of IP protection, through the fees paid by customers.

IP Australia has developed a four-year cost recovery budget [2006-2010] with revenues and costs allocated against each of the five main customer groups. In complying with cost recovery policy IP Australia is attempting to achieve the following three budget objectives:

1. the removal of any subsidies between the customer groups (over the four-year budget period);
2. budget surpluses at the agency level in each separate financial year; and
3. a small over-recovery at the agency level (over the four-year budget period) to enable sustainable future operations as a cost recovery agency.  

The cost recovery policy is promulgated by the Director General in compliance with the Patents Regulations 1991 (Cth). Cost recovery from “customers” has the potential to create a conflict between recovering increasing financial resources to cover administration costs and favouring granting more and more low quality patents. This is particularly likely as the fees and charges are determined as a fixed amount for a particular service as opposed to a cost related to processing time, and the Special Account standing appropriation for administering the Patents Act 1990 (Cth) functions within IP Australia is linked directly to those fees and charges. These resources are under the direct management and control of the Director General. In these circumstances the Commissioner’s decision making, and particularly the resources allocated to those decisions, are intimately tied to the costs recovered and most likely influenced by the likely amounts recoverable and their management by the Director General. The following examples illustrate some of the Director General’s likely influences:

(a) The Director General can limit the available public money to pay for the number of patent examiners exercising the Commissioner’s delegated powers directly affecting the quality and timeliness of the Commissioner’s decisions about patent grants.

(b) Director General has articulated the Strategic Statement 2007-2012 that commits IP Australia and its employees to, among other things, “[s]trengthen stakeholder relationships and better inform decision-making in order to remain a competitive provider of high quality products and services”. This requires that the results of the Commissioner’s decision-making be sympathetic with this strategic objective, and in particular, that it be “competitive”. Presumably, “competitive” means granting more patents as the focus of reporting (the quality, quantity and price) is directed to meeting the needs of “customers”, the number of applications made and examined and the costs involved (see Table 2).

In short, the Commissioner must exercise her powers within the auspices of constrains imposed on the recovered “public money” managed by the Director General. This means that the Director General’s financial management responsibilities could have manifest effects on the Commissioner’s decision-making.

247 See IP Australia, Care and Custody of Public Money, Chief Executive Instruction No 8 (IP Australia, 2003). Related policies include refunds and waivers: see IP Australia Refunds and Waivers, n 85.
248 Patents Regulations 1991 (Cth), r 22.2 and Sch 7 (pts 2 and 3).
249 See Patents Regulations 1991 (Cth), r 22.2 and Sch 7 (pts 2 and 3).
251 Financial Management and Accountability Act 1997 (Cth), s 44(1).
252 This continues to be a concern, as more rigorous screening of patent applications entails significant costs irrespective of whether they are passed on to “customers”: see, eg, IPCRC, n 5, pp 164-167. See also Jensen P and Webster E, “Achieving the Optimal Power of Patent Rights” (2004) 37 Australian Economic Review 419.
D. Performance reporting

The Financial Management and Accountability Act 1997 (Cth) also provides a more formal avenue for management influences. The Director General is empowered to give instructions (the “Chief Executive’s Instructions”){255} to those public servants comprising IP Australia “on any matter necessary or convenient for carrying out or giving effect to the Act or … Regulations”{256} including to the Commissioner. The content of these instructions can address “any matter that promotes the efficient, effective and ethical use of the Commonwealth resources for which the Chief Executive is responsible” (emphasis added).{257} While these instructions must be consistent with the Financial Management and Accountability Act 1997 (Cth),{258} they may address various aspects of the Commissioner’s decision-making under a rubric of managing Commonwealth resources efficiently, effectively and ethically. The extent of these Chief Executive’s Instructions, that may be written, oral, or in some other form, are not comprehensively documented. Those of a legislative nature need to comply with the Legislative Instruments Act 2003 (Cth) and be registered.{259} and all instructions “should be publicly available on the agency’s public internet site for access by officials (including allocated officials) and contractors”.{260}

For IP Australia a number of Chief Executive’s Instructions are publicly available, and some of these could affect the Commissioner’s decision-making, such as, complying with Portfolio Budget Statements performance targets setting the number of patent applications to be considered,{261} managing risk according to a strategy for which the Director General is responsible,{262} and so on. However, a number of others are not so clearly identified and they have the potential to significantly influence the Commissioner’s decision making. So, for example, the Director General might proscribe quality standards for the Commissioner as this might be characterised as going to the efficient and effective allocation of available Commonwealth resources.{263} The Director General has issued a “Quality Policy” that applies to the assessment of patent applications by the Commissioner,{264} providing in part:

We strive to deliver quality products and services that are valued by our customers and which contribute to the realisation of our vision of becoming an “Office of Choice”. Certification of our Quality Management System for key business processes to the ISO 9001 standard is a means by which we will achieve and maintain the necessary alignment of our people, products, services, business systems and processes.{265}

The question then arises, whether the central place of performance in the financial management and people management arrangements is actually delivering better quality through the more efficient and effective allocation of resources? In the case of patents, the “quality” of the Commissioner’s decisions is critical:

{255} Financial Management and Accountability Act 1997 (Cth), s 52.
{256} Financial Management and Accountability Regulations 1997 (Cth), r 6(1).
{257} Finance Chief Executive’s Instructions Circular, n 200, p 1.
{258} Financial Management and Accountability Regulations 1997 (Cth) r 6(2).
{259} See Legislative Instruments Act 2003 (Cth) ss 5, 20. See also Finance Chief Executive’s Instructions Circular, n 200, pp 4-5.
{260} Finance Chief Executive’s Instructions Circular, n 200, p 5. Notably, special provision may be necessary for sensitive information such as matters of commercial confidentiality or national security (p 5).
{261} IP Australia, Financial Framework, Forecasting and Reporting, Chief Executive Instruction No 1 (IP Australia, 2003) p 1.
{262} See IP Australia, Managing Risk and Accountability, Chief Executive Instruction No 11 (IP Australia, 2003) p 1.
{264} Although it is not clear whether this “Quality Policy” is formally classed as a “Chief Executive Instruction” by the Director General (or IP Australia), there does not appear to be another relevant head of power available for management directions that are promulgated by the Director General.
The Committee notes that the effective quality of the granted patent and the costs and benefits of the patent system depend on the threshold tests as actually applied to the application during examination. In addition to the height of the thresholds being defined through the legal requirements … the height of the threshold for a granted patent depends on two administrative factors: (a) the stringency of the test; and (b) the quality of examination.266

There seems little doubt that by some measures performance of both individuals and organisations in the public sector has improved.267 However, whether this applies to IP Australia is uncertain. IP Australia was subjected to a performance audit by the Auditor-General of “the effectiveness of IP Australia’s management of productivity and client service”.266 The conclusions from this performance audit included:

IP Australia can also strengthen its performance information framework in two important areas. Currently there are no measures of the effectiveness with which IP Australia’s outcomes meet its objectives, although this issue is being considered in the Outcomes and Outputs Framework. Furthermore, there are limited measures of quality of the product, an area which clients have identified as of key importance to them. A quality assurance framework which focuses more on client perceptions of quality, and which makes greater use of information already available, would improve quality management of processes and outputs.269

IP Australia agreed with this critique,270 and subsequently introduced changes to its outcomes and outputs framework most recently reflected in the 2006-2007 Portfolio Budget Statement.271 The outcomes and outputs chosen by the Director General, with the assistance of the Department of Finance and Administration,272 determine the performance measures that the Commissioner then seeks to achieve. Interestingly, the predominant focus of this performance audit was on improving “customer/client services” where the customer/client was the patent applicant (and their representatives), and in terms of improved cost and timeliness of services for that customer/client.273 Perhaps unsurprisingly, the Director General’s responding performance measures appear to be directed to those measures, and presumably the Commissioner’s response will also be directed to those measures.

4. CONCLUSIONS

In recent times the Australian Government’s public administration reforms have been directed towards the twin goals of (a) “building a performance culture”, and (b) “making the public sector more responsive to government”.274 The significant reforms included changes to the arrangements for the budget (following the Financial Management Legislation Amendment Act 1999 (Cth)), financial management (under the Financial Management and Accountability Act 1998 (Cth), the Auditor-General Act 1998 (Cth) and the Charter of Budget Honesty Act 1998 (Cth)) and people (public

266 IPCRC, n 5, p 166.
268 ANAO IP Australia Productivity and Client Service, n 207, p 11. See also Auditor-General Act 1997 (Cth), s 18.
270 See ANAO IP Australia Productivity and Client Service, n 207, p 41.
servants) management (under the Workplace Relations Act 1996 (Cth) and the Public Service Act 1999 (Cth)). Put simply, the key change brought about by these reforms has been a change in governmental accountability and transparency from how the resources of the Australian Government were expended to revealing why the Australian Government wants to expend those resources (outcomes and outputs) and how those ends have been achieved (performance).

The Commissioner’s decision-making according to the Patents Act 1990 (Cth) is an in situ example of the consequences of these public administration reforms. In particular, addressing the question of how these reforms might influence the Commissioner’s decision-making under the Patents Act 1990 (Cth)? This analysis has not established that such influence has actually been effected. Rather, the article identified budget arrangements that broadly state the appropriation purposes with a focus on after-the-event reporting; a financial management arrangement with potential for the Director General to influence the Commissioner’s decision-making through directing the use of public money, public property and other Commonwealth resources; a people management arrangement with potential for the Secretary to influence the Commissioner’s decision-making through the terms and conditions of employment; and finally, reporting arrangements with potential to influence the Commissioner’s decision through setting inappropriate outcomes and outputs.

Perhaps the most important outcome of this analysis is to show that recent public administration reforms have introduced new influences on the exercise of statutory powers under the Patents Act 1990 (Cth) and that those influences need to be considered in properly assessing the efficiency and effectiveness of the patent scheme.275 Critically, the documentary sources of those influences need to be clearly identified, such as the Director General’s influences through the Financial Management and Accountability Act 1998 (Cth) and the Secretary through the Public Service Act 1999 (Cth), and the content of the influential arrangements made publicly available to ensure accountability and transparency. These publicly available documents might include all the Chief Executive’s instructions, the terms and conditions of employment (including the performance targets, bonus payments thresholds, policy preferences, and so on), and all the policy and guidance materials that contribute to the environment (the matrix of legalities) in which decisions are made. Without access to these documents the rhetoric of accountability and transparency in the recent public administration reforms remains undelivered and the Commissioner’s decision making haunted by the prospect that the Secretary and Director General might be eliciting inappropriate outcomes and outputs. While this article has not been able to deliver actual evidence of influence beyond the Patents Act 1990 (Cth), these seems little doubt that such an influence exists, and that it should be addressed in properly assessing the quality of the Commissioner’s decisions.

275 Notably, that “[o]nce a Party has reviewed legislation that restricts competition under the principles … the Party will systematically review the legislation at least once every ten years”: Competition Principles Agreement, cl 5(6). The Intellectual Property and Competition Review Committee conducted such an inquiry reporting in 2000, so the next review might be expected before 2010: see IPCRC, n 5, pp 20-21.
<table>
<thead>
<tr>
<th>Outcome</th>
<th>Outcome particulars</th>
<th>Sub-outcomes</th>
<th>Effectiveness through measures, indicators and targets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outcome 1: Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade</td>
<td>IP Australia seeks to achieve this outcome by administering the Patents … acts, promoting the benefits of intellectual property and participating in the development of international IP systems</td>
<td>Australians benefit from IP initiatives&lt;br&gt;Customer and stakeholder satisfaction&lt;br&gt;Recognised as best practice in administration and delivery of high quality IP system&lt;br&gt;Ongoing financial viability and cost effective</td>
<td>*Analysis of benefit through periodic research and programs studies and independent reviews&lt;br&gt;*Increased application by Australian industry for international IP Rights&lt;br&gt;*Customer satisfaction with products and services measured through surveys and feedback&lt;br&gt;*Ministerial and stakeholder feedback&lt;br&gt;*Compliance with quality management framework&lt;br&gt;*Results of periodic benchmarking studies&lt;br&gt;*Feedback from overseas offices involved in bilateral agreements with IP Australia&lt;br&gt;*IP Australia prices aligned to Outcome and in operations compliance with cost recovery policy and international competitiveness&lt;br&gt;*Products and service charges remain internationally competitive</td>
</tr>
</tbody>
</table>

## TABLE 2 Actual performance measures for Outcome 1

<table>
<thead>
<tr>
<th>Output groups</th>
<th>Output particulars</th>
<th>Sub outputs</th>
<th>Quality</th>
<th>Quantity</th>
<th>Price</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Outcome 1:</strong> Intellectual property rights Administration and professional registration</td>
<td></td>
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<tr>
<td><strong>Outcome 2:</strong> Awareness, Education and International Engagement</td>
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</table>

### Output particulars
- **Output 1:** Intellectual property rights Administration and professional registration
- **Output 2:** Awareness, Education and International Engagement

### Sub outputs
- Quality
- Quantity
- Price

### Quality
- Compliance with IP Australia customer service charter and quality standards
- Stakeholder satisfaction with secretariat support
- *Compliance with IP Australia customer service charter and quality standards
- *Stakeholder satisfaction with secretariat support

### Quantity
- Patent applications for registrations
- Patent examinations
- *26,331 Patent applications
- *17,900 Patent examinations

### Price
- *Cost: $65.898m
- *Cost: $0.451m

### Output particulars
- Intellectual property rights Administration and professional registration encompasses the administration of Patent, Trade Mark, Design and Plant Breeder’s IP rights under Australian legislation. This output also includes the operation of the Professional Standards Board for Patent and Trade Marks Attorneys and the Patent Attorneys Disciplinary Tribunal.

### Output particulars
- Awareness, Education and International Engagement represents IP Australia’s role in raising awareness and educating customers about intellectual property, and engaging with key international stakeholders and IP bodies.

### Output particulars
- Australian business demonstrates increased awareness of intellectual property
- Business sectors consider information useful, accessible and easy to understand
- *3,354 people attended presentations
- *1,383 website visitors, 94.4% found information useful

### Output particulars
- Key outcomes achieved through participation at key international and regional fora
- *Delivered symposiums, and so on
- *Signed MOU and so on

### Output particulars
- Number of information kits distributed from IP Australia’s website
- Number of subscribers to online subscriber lists
- *14,670 kits distributed
- *86,102 brochures downloaded

### Output particulars
- Number of International activities and agreements
- Number of externally funded aid projects delivered against key target segments
- *110 international activities
- *5 major projects
<table>
<thead>
<tr>
<th>Output groups</th>
<th>Output particulars</th>
<th>Sub-outputs</th>
<th>Customer/stakeholder</th>
<th>Prospective performance</th>
<th>Actual performance</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Price</td>
<td></td>
<td></td>
<td>*Cost: $2.208m</td>
<td>*Cost: $2.010m</td>
</tr>
<tr>
<td></td>
<td>Internal Engagement</td>
<td></td>
<td></td>
<td>*Cost: $1.036m</td>
<td>*Cost: $2.001m</td>
</tr>
<tr>
<td>Output 3:</td>
<td>Advice to Government</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>Advice to Government relates to IP Australia’s role in providing advice on intellectual property matters, and supporting research into the current and future use of IP Rights</td>
<td></td>
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</tr>
<tr>
<td></td>
<td>Quality</td>
<td></td>
<td></td>
<td>*Satisfaction of stakeholders with quality and timeliness of advice on policy and legislation, ministerial correspondence, speeches &amp; briefings, submissions to reviews and Government responses</td>
<td>&quot;All stakeholders reported high levels of satisfaction …&quot;</td>
</tr>
<tr>
<td></td>
<td>IP Research</td>
<td>*Increased understanding of IP issues impacting on Australian industry.</td>
<td></td>
<td></td>
<td>&quot;Increasing use of IP Australia-supported research …&quot;</td>
</tr>
<tr>
<td></td>
<td>Support for Advisory Boards</td>
<td>*Council &amp; Board satisfaction with quality of secretariat and research support provided</td>
<td></td>
<td></td>
<td>&quot;… all have reported high levels of satisfaction …&quot;</td>
</tr>
<tr>
<td></td>
<td>Quality</td>
<td>*Number of draft bills, regulation changes, amendments ministerial responses &amp; briefs prepared</td>
<td></td>
<td>1 Bill</td>
<td>2 Regulations</td>
</tr>
<tr>
<td></td>
<td>IP Research</td>
<td>*Number of IP research initiatives</td>
<td></td>
<td>17 initiatives, 15 reports/papers</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Support for Advisory Boards</td>
<td>*Number of ACIP reviews undertaken</td>
<td></td>
<td>*Progressed current reviews</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>*Number of meetings, briefings and seminars held</td>
<td></td>
<td>15 meetings</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Price</td>
<td>*Cost: $1.521m</td>
<td></td>
<td></td>
<td>*Cost: $2.272m</td>
</tr>
<tr>
<td></td>
<td>IP Research</td>
<td>*Cost: $0.524m</td>
<td></td>
<td></td>
<td>*Cost: $0.276m</td>
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<tr>
<td></td>
<td>Support for Advisory Boards</td>
<td>*Cost: $1.320m</td>
<td></td>
<td></td>
<td>*Cost: $1.110m</td>
</tr>
</tbody>
</table>