

Submission to the
patent box policy
design discussion
paper

August 2021

Overview

The BCA welcomes the opportunity to provide a submission to the *Patent Box: Discussion Paper on Policy Design*. The BCA supports the introduction of a patent box which will help with the commercialisation of Australia's great ideas and innovations.

A patent box is an important element that will help encourage investment, innovation and commercialisation in Australia. Global R&D investment is highly mobile and operates in an intensely competitive environment as countries seek to attract this investment. Many factors influence companies' decisions on locating R&D investment, some of which, like a skilled workforce, count in Australia's favour. The competitiveness of a country's tax system is nonetheless critical for attracting investment and encouraging - and keeping - the benefits of commercialising innovations in Australia.

As other countries become more attractive investment destinations, the risk is that the marginal R&D investment dollar moves overseas - and the spillover benefits that come with it. This is particularly the case as international company tax rates decline and other countries introduce more competitive and attractive tax regimes. As the rest of the world moves, doing nothing means Australia becomes less competitive. Competition for mobile global capital will become more intense as economies around the world seek to revitalise private sector investment following the peak of the COVID crisis.

The discussion paper outlines the aims of the policy as to:

- encourage companies to base their medical and biotechnology R&D operations, and commercialise innovation, in Australia, and
- retain the ownership of eligible patented inventions in Australia.

The proposed design features and considerations of the patent box should be continuously evaluated against their impact on delivering this policy intent. The design should also reflect commercial realities of patents and their real-world implementation. For example, a medical device could involve dozens of patents - all working together as a system to fulfil its overall function. Identifying the costs and benefits of a single patent may not be practical or reflect business practices in many situations. The Therapeutic Goods Administration has also identified software as becoming "increasingly important in medical devices".¹

A patent box is one of many reforms that could also help Australia manage the several major shifts we face and help reinvigorate economic growth. The arguments for applying a patent box regime to medical and biotechnology apply equally to other sectors where capital is mobile and global competition in innovation is strong. This includes sectors identified under the Government's Modern Manufacturing Strategy as well as its Digital Strategy. Specifically, the regime could be broadened to stimulate investment and innovation in:

- clean energy technology
- mining technology, including in the critical minerals sector
- food and beverage technology, and
- computer software development.

A patent box applied to all patents and sectors could help provide a needed boost to private investment which will be a central part of Australia's economic recovery task. The proposed patent box tax rate is relatively high compared with other regimes around the world. This means the proposed patent box regime should apply to a broad base to ensure it is competitive and effective in delivering on its policy intent.

¹ <https://www.tga.gov.au/regulation-software-based-medical-devices>

Key recommendations

- The BCA supports the introduction of a patent box to encourage more companies to undertake R&D investment and commercialisation in Australia.
- Consideration should be given to the benefits of expanding the patent box to all patents. This will ensure the scheme is competitive, agile to evolving technology and innovations, and could simplify administration of the scheme.
- Several issues for further consideration on some of the more detailed design elements of the patent box are outlined below.

Issues for further consideration

- The scope of eligible patents should not be restricted to Australian patents. The policy should allow for Australian owned patents to qualify. This would help deliver on the overall policy intent, better reflect commercial practices and realities, while not undermining the purpose of the policy.
 - A patent grants exclusive commercial rights for inventions and may be held in other jurisdictions as company patent strategies are impacted by actions of competitors and markets for products. Australia is less than 2 per cent of global GDP.
- The definition of eligible revenue should be practical and reflect the commercial reality that medical devices may involve dozens of patents that work together. Attempting to identify the costs and benefits of a single patent may be conceptually appealing, but it may not be practical in many situations.
 - Tracking revenue or expenses for an individual patent may be challenging where there are multiple patents in a product. R&D spending may deliver benefits to existing patents or lead to new patents, and policy design should be mindful of this reality.
 - For example, a greater focus on the connection with a revenue stream may be more practical and better reflect the nature of modern R&D and commercialisation.
- The discussion paper proposes that the policy is for patents ‘applied for’ after the Budget announcement. This diverges from the approach of patent box regimes around the world, raises several issues, and may not reflect commercial realities for medical products and devices. For simplicity, and to better deliver on the policy intent, it should apply to existing patent income.
 - Where a patent is one of many in a device, it may be difficult and impractical to isolate the costs and benefits of that patent over time.
 - Existing patents may be continuously improved through ongoing R&D, but this may not be reflected in a patent box restricted only to patents ‘applied for’ after the Budget announcement.
 - Restricting the regimes to new patents will limit the benefits of the regime for many years as it takes time to further develop and commercialise innovations.
- The administrative burden around identifying expenses over time should be kept as minimal and practical as possible, noting this will impact the net benefits of the policy.
- The patent box should allow for losses to be carried forward until utilised. Not doing so would undermine the purpose of having allowable deductions that relate to the income earned, reduce the benefits of the regime and may introduce its own complexities compared with allowing for losses to be carried forward.

- Calculations for the substantial activity requirement should ensure a consistent domestic and global R&D base for calculations, consider the implications of foreign exchange movements, and clarify whether the requirement is a 'one off' or should be applied continuously.

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