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Intellectual Property Research Institute of Australia

Occasional Paper No. 2/05

ISSN 1449-8782

April 2005

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Intellectual Property Law and Policy-Making in Australia: A Review and a Proposal for Action¹

Andrew F. Christie² and Emma Caine³

This short paper reviews the history of intellectual property law and policy-making in Australia from federation until the present. The review shows a dramatic increase in the volume of IP legislation and in the reviews of that legislation, indicating a future trend of exponential growth. The paper suggests that such growth is neither desirable nor inevitable, and that a future action-plan involving simplification of IP legislation and unification of IP administration is needed.

A Brief History of IP Law and Policy-Making

Our analysis of the history of IP law and policy-making in Australia focuses exclusively on the traditional IP regimes of copyright, designs, patents and trade marks law - it does not include *sui generis* regimes, such as plant breeder's rights or protection for circuit layouts. Our review is undertaken at a macro-level, and is concerned with quantitative, not qualitative, issues. Because IP policy is implemented primarily through law, because IP law is embodied primarily in statutes, and because statutes generally are introduced and amended following a review process, our analysis of the history of IP law and policy-making in Australia is primarily an analysis of the volume of IP legislation over time, and the volume of policy reviews undertaken in relation to that IP legislation over time.

¹ This paper is based on a presentation by Andrew Christie delivered at the Conference in Honour of Jim Lahore on his retirement from the University of Melbourne, held on 27 January 2005 at the University of Melbourne. Professor Lahore's distinguished contribution to IP law and policy-making includes his participation through the following positions: Chair of the Industrial Property Advisory Committee, 1989-1992; Chair of the Designs Office committee reviewing intellectual property protection for industrial designs, 1989-1992; Commissioner of the Australian Law Reform Commission, for its review of designs law, 1992-95; Chair of the Copyright Law Review Committee, for its reviews of copyright and contract, and Crown copyright; and membership of the Law Council of Australia's IP committee and its various working groups.

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One measure of the volume of IP law is the number of subsections in IP legislation. For each of the traditional IP regimes, we have counted the number of subsections in the original Commonwealth Act,⁴ in each subsequent new Act,⁵ and in the most recent consolidated reprint of the Act.⁶ We did not count the multiple reprints of Acts as amended.

The volume of reviews of IP law is measured by the number of government inquiries into the law undertaken over time. For the purposes of our analysis, only those inquiries that were commissioned by government and demonstrated a substantive consideration of a relevant IP regime were counted.

The number of subsections in a given piece of legislation indicates not just its size, but also its complexity. This is because, we assume, the larger the legislation, the more complex is the law it implements. The significant increase in the size and complexity of IP law can be seen in Figure 1, which shows the total number of subsections in the four pieces of traditional IP legislation in 1906 and in 2005. The volume of IP law increased six-fold over the century: from 553 subsections in 1906 to 3 317 subsections in 2005.

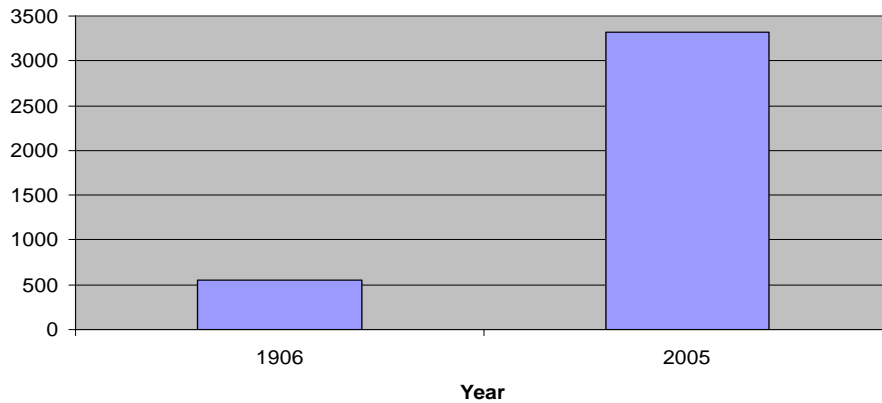
⁴ The original Commonwealth Acts are: *Copyright Act 1905* (Cth), *Designs Act 1906* (Cth), *Patents Act 1903* (Cth), *Trade Marks Act 1905* (Cth). Various colonial Acts provided for these regimes prior to the introduction of the Commonwealth Acts, eg the *Copyright Acts 1869 and 1890* (Vic) and the *Patents, Designs and Trade Marks Act 1884* (Qld). For more information on the history of the different pieces of IP legislation, see generally Staniforth Ricketson, *The Law of Intellectual Property* (1984).

⁵ By ‘subsequent new Act’, we mean a replacement enactment (ie. not merely an amending enactment). An example, from patents law, is the *Patents Act 1952* (Cth), which replaced the originating Commonwealth enactment, the *Patents Act 1903* (Cth).

⁶ The most recent enactments are: *Copyright Act 1968* (Cth), *Designs Act 2003* (Cth), *Patents Act 1990* (Cth), *Trade Marks Act 1995* (Cth). In each case, we have used the most recent consolidated reprint, as at 15 February 2005.

Figure 1. Volume of Intellectual Property Law

Copyright, designs patents, trade marks legislation: 1906 and 2005

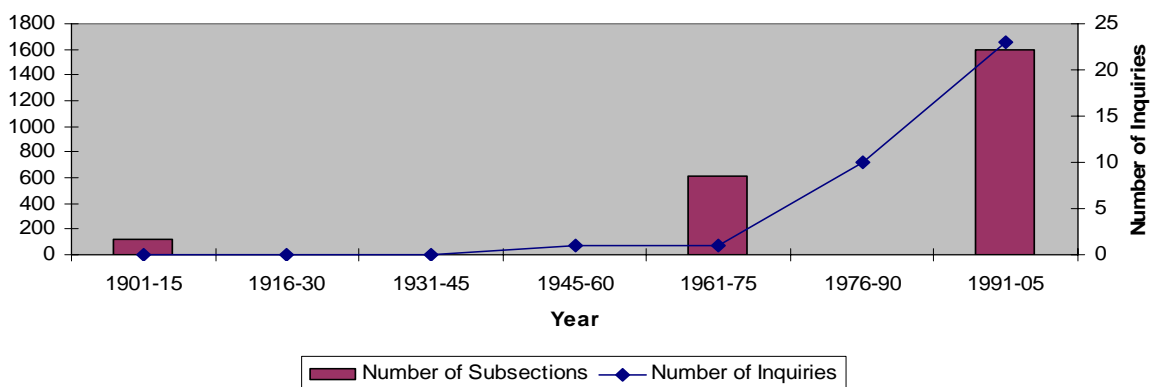


Copyright

The substantial increase in copyright law, and in the reviews of copyright law, can be seen in Figure 2, which shows the number of subsections in the Copyright Act and the number of copyright inquiries from federation to now. The Act starts as a 120-subsection lightweight in 1905, expanding twelve-fold to weigh-in at 1 597 subsections in 2005. The first copyright law inquiry occurs in 1958: the Spicer Committee review⁷. The Franki Committee review on reprographic reproduction is next in 1974.⁸ The number of inquiries soars from the 1980s on.

Figure 2. Copyright Law and Policy-Making

Volume of legislation and inquiries: 1901-2005



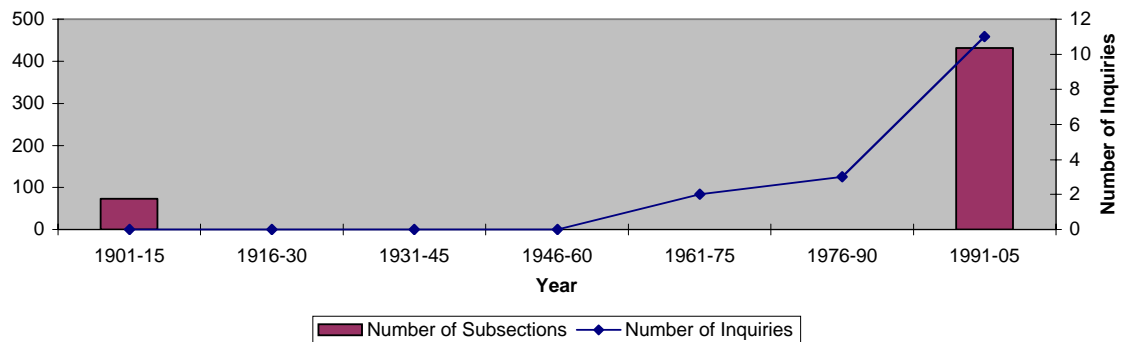
⁷ The committee reported in 1959: *Report of the Committee appointed by the Attorney-General of the Commonwealth to consider what alterations are desirable to the Copyright Law of the Commonwealth* (22 December 1959) Government Printer, Canberra, 1965.

⁸ *Copyright Law Committee on Reprographic Reproduction: Report*, AGPS, Canberra 1976.

Designs

Figure 3 illustrates a significant increase in designs law, and in the reviews thereof, though on a smaller scale than occurred in relation to copyright. The 1906 Act is a compact 73 subsections, increasing six-fold to 432 subsections by 2003, a figure which has not since increased. All was quiet on the designs front until 1970 when the Franki Committee conducted its inquiries, producing two reports: one specifically relating to designs, and one relating to utility models with substantive content concerning designs.⁹ Thereafter the number of inquiries continues rose significantly.

Figure 3. Designs Law and Policy-Making
Volume of legislation and inquiries: 1901-2005



Patents

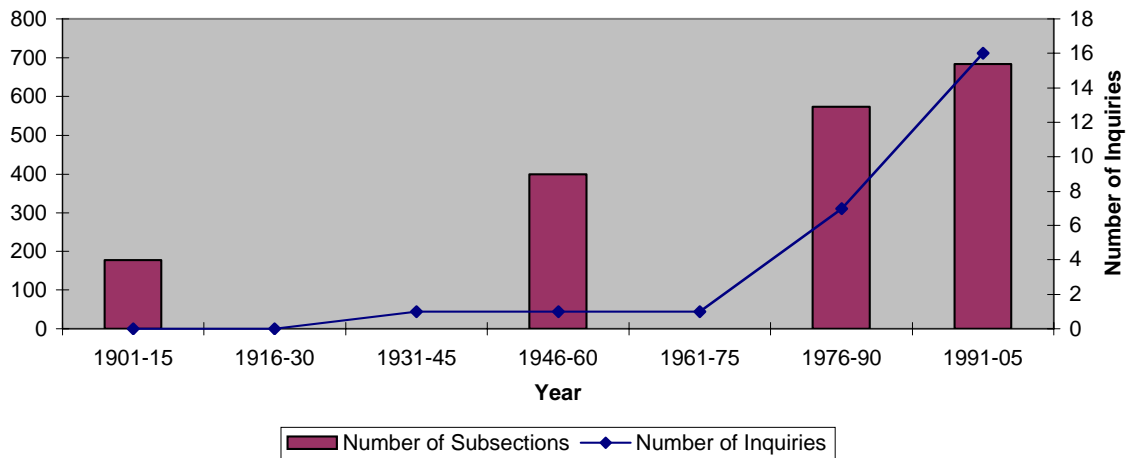
The increase in patents law and in patents law review is marked, though less dramatic than that of copyright law. Figure 4 shows a steady, and substantial, increase in the number of subsections and inquiries. The Act debuts in 1903 at 177 subsections, making it already significantly larger than the Copyright and Designs Acts of the time, and on an approximate par with the Trade Marks Act (see below). By 2005, it has quadrupled in size to 683 subsections. The first patents inquiry is also the first IP inquiry: the Knowles Committee commenced its review in 1935.¹⁰ This review was followed by the Dean Committee inquiry in 1950,¹¹ and the Franki Committee inquiry into utility models in 1970.¹² The number of inquiries surges from the late 1970s on.

⁹ Designs Law Review Committee, *Report on the Law relating to Designs (First Term of Reference)* Parl Paper No1 (1973) and *Report relating to Utility Models (Second Term of Reference)*, Parl Paper No 121 (1973). The reports were counted as two inquiries.

¹⁰ The reports of the Knowles Committee are contained in the subsequent Dean Committee report: *Report of the Committee appointed by the Attorney-General of the Commonwealth to consider what Alterations are Desirable in the Patent Law of the Commonwealth*, 1952.

¹¹ *Ibid.*

Figure 4. Patents Law and Policy-Making
Volume of legislation and inquiries: 1901-2005



Trade Marks

Figure 5 illustrates an increase in trade marks law, and in the reviews of trade marks law, which is unique for two reasons: the size of the increase in the number of subsections, and the pattern of the increase in the number of inquiries. Of all four regimes, the increase in the number of subsections is the smallest, though the Act expands by more than three-fold: from 183 subsections in 1906 to 605 subsections in 2005. The first trade marks inquiry occurs early (the Knowles Committee in 1938),¹³ the next in 1954.¹⁴ The number of inquiries falls to zero, and twenty-four years passes before the next inquiry commences.¹⁵ From then, the number of inquiries continues to increase dramatically.

¹² Above n 6.

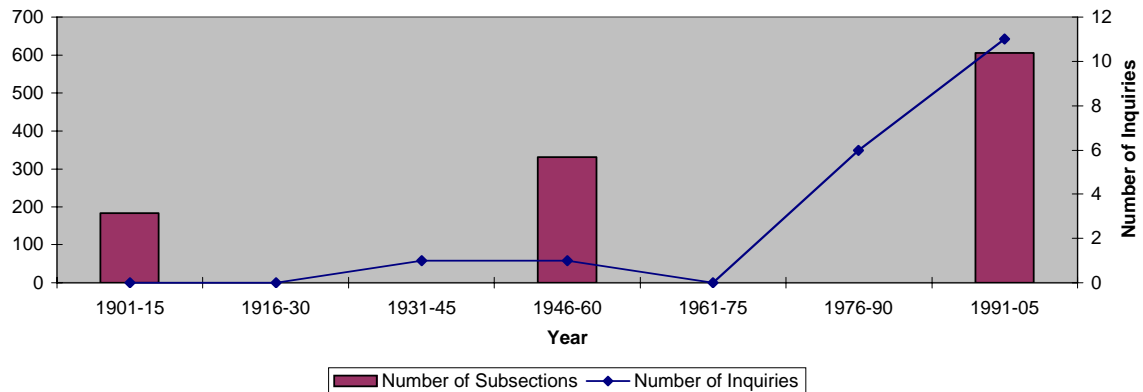
¹³ The report of the Knowles Committee is contained in the subsequent *Dean Committee report: Report of the Committee appointed to consider what Alterations are desirable to the Trade Marks Law of the Commonwealth*, 1954.

¹⁴ *Ibid.*

¹⁵ Industrial Property Advisory Committee, *Report: The Trade Marks Act and Importation of Goods bearing a Registered Trade Mark*, AGPS: Canberra, 1981. The inquiry commenced in 1979.

Figure 5. Trade Marks Law and Policy-Making

Volume of legislation and inquiries: 1901-2005



Observations on the History of IP Law and Policy-Making

It is possible to make various observations about the data on the size of IP legislation and the number of IP inquiries, both simple and complex.

The simple, and indeed self-evident, observations are:

- the volume of IP legislation is greater now than it was at federation;
- more reviews of IP law are occurring now than previously; and
- there is a causal relationship between inquiries and legislation.

The causal relationship between inquiries and legislation is that inquiries cause new legislation. This is indicated by the timing of the introduction of new legislation, which occurs after major review, though often several years later.¹⁶ The existence of this causal relationship can also be presumed, given that it is in the nature of reviews to make recommendations for law reform, which are usually to a greater or lesser extent implemented in the legislation.

The complex, and more profound, observations are:

- the volume of IP legislation has increased at an exponential rate;
- the number of reviews of IP legislation has increased at an exponential rate, and that rate is greater than the rate of increase in the size of legislation; and
- the causal relationship between inquiries and legislation is a feed-back loop.

The causal relationship between inquiries and legislation is not a simple unidirectional one, but rather a circular one: a review of a piece of legislation

¹⁶ For instance, the recommendations of the Spicer Committee in relation to copyright, received by the Government in 1959, were only implemented eight years later, with the enactment of the *Copyright Act 1968* (Cth).

will lead to the enactment of a larger piece of legislation, which will in turn lead to a number of reviews of that legislation, leading to even larger pieces of legislation, and so on. Thus, a feed-back loop is produced: information about the result of an action (the enactment of legislation) is sent back into the system (the IP law and policy-making system) as input data, accelerating the action in the same direction (enactment of more legislation), resulting in exponential growth.¹⁷ This cycle of proliferation might also be likened to the spread of a virus.

Our observations might appear, at a first glance, to be unremarkable. Why is it interesting to observe an exponential expansion of IP policy-making over the last century? Such an expansion may well appear natural and inevitable to IP professionals. However, such individuals are ‘embedded’ in the system, so to speak. Ask the opinion of any extra-terrestrial being (or, failing that, of a reasonable layperson on the Manly ferry) and the response would arguably be quite different. Such a creature might expect that a review of legislation would ‘fix it up’, nip problems in the bud and prune excess foliage, resulting in a sleek, streamlined IP machine (to switch metaphors). This machine – compact, new and improved – would naturally require fewer tune-ups (reviews of the legislation) in the future. However, just the opposite is in fact true – a result which we suggest is not inevitable.

Nor is such a result desirable. Our estimates suggest that, unless there is a change in the way IP law and policy is made, IP legislation will double in size every 20 years, and the number of reviews of IP legislation will double every ten years.

Figure 6 represents a projection based on our current data for the number of subsections in the copyright, designs, patents and trade marks legislation over the last century. We project 5 000 subsections of IP law by 2020. This projection does not take account of other areas of IP law, such as plant breeder’s rights and protection of integrated circuit layouts, or of emerging *sui generis* areas of protection such as traditional knowledge, folklore, geographical indications and *droit de suite*. If these areas were taken into account, we presume the figures would be even higher.

¹⁷ J de Rosnay (2000): “Feedback”, in F. Heylighen, C.Joslyn and V.Turchin (editors): *Principia Cybernetica Web* (Principia Cybernetica, Brussels): <http://pespmc1.vun.be/FEEDBACK.html>. One factor contributing to this process is the stipulation of future review periods for new legislation, such as the 3-year review period stipulated in the Digital Agenda reforms: Phillips Fox, *Digital Agenda Review Report and Recommendations* (January 2004), 12, available at <http://www.ag.gov.au/www/securitylawHome.nsf/AllDocs/RWPDBBAA360633B83A3CA256E7F0017FC71?OpenDocument>.

Figure 6. Projected Volume of IP Law

Copyright, designs, patents and trade marks: 1901-2020 (est.)

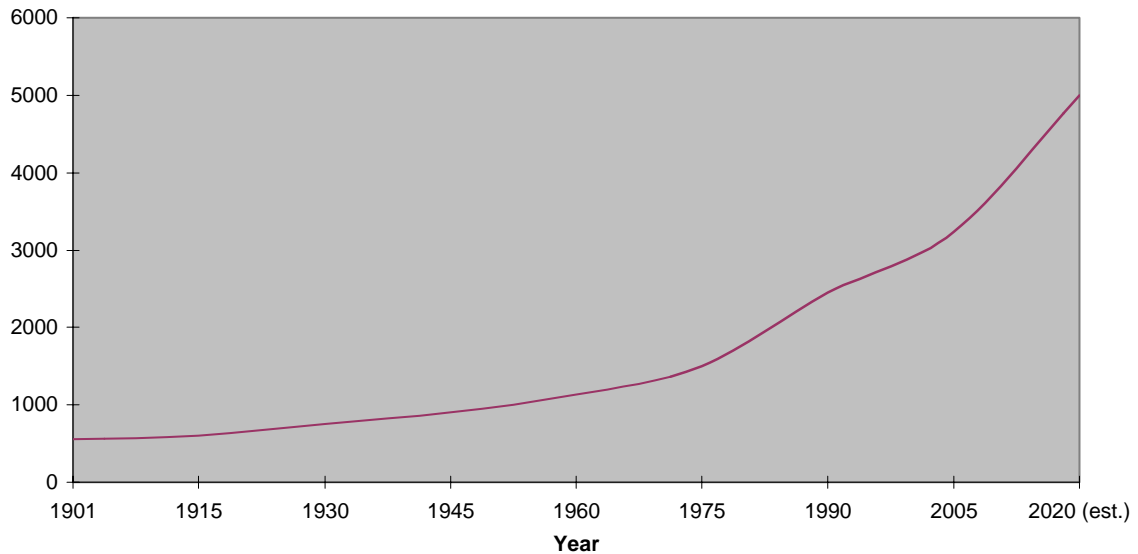
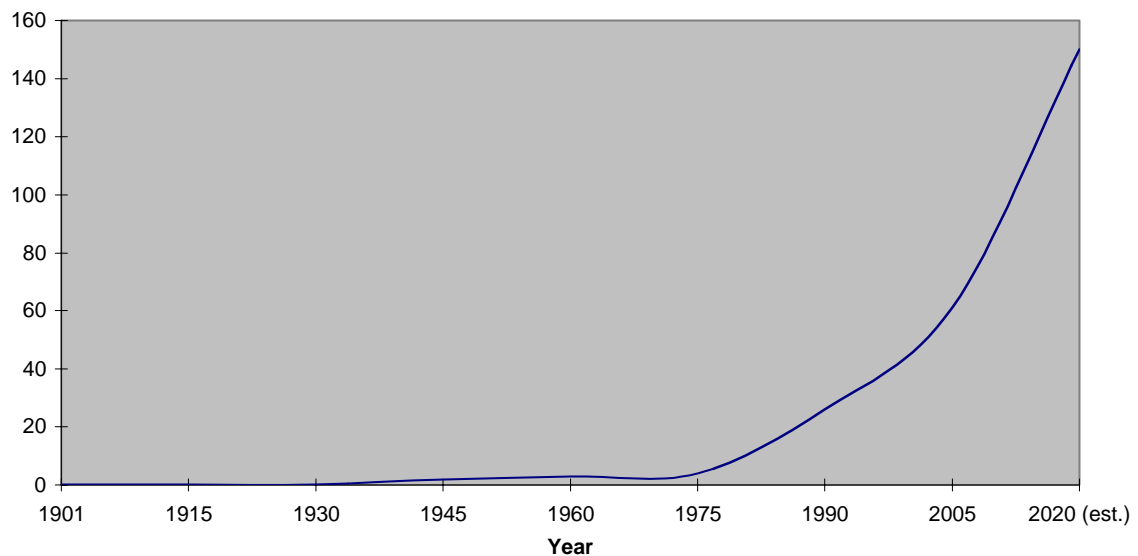


Figure 7 shows our projection for the number of IP inquiries: a staggering 150 inquiries over the next 15 years, which corresponds to ten inquiries per year on average. If this proliferation of IP policy-making is a virus, then the prognosis for IP is not good.

Figure 7. Projected Number of IP Law Reviews

Copyright, designs, patents, trade marks: 1901-2020 (est.)



The Future for IP Law and Policy-Making

How should we respond to this problem? We suggest the following: simplify IP legislation, and unify IP administration.

Simplification of legislation should be actively pursued in relation to all IP regimes. The Copyright Law Review Committee undertook extensive deliberation on this issue in the late 1990s, producing two lengthy and detailed reports which provide proposals for the simplification of both copyright subject-matters and exclusive rights, and exceptions.¹⁸ As yet, these proposals have not been adopted, nor have any steps been taken in the direction of simplification of copyright law, or of other IP regimes. Yet simplification has been embraced in corporations law, and is often championed in tax law. In light of this, it is difficult to see why simplification should not be pursued in relation to IP law.

In 1992 and again in 2000,¹⁹ Sam Ricketson recommended unifying the administration of IP law as follows:

- institute single departmental portfolio responsibility for IP law, and ensure the responsible Minister is in Cabinet;
- disband the present plethora of *ad hoc* and standing committees on IP law reform, and replace them with a single permanent Intellectual Property Law Reform Commission; and
- establish a ‘peak’ body of all IP stakeholders.

We support these recommendations, and note in particular that it should be no great feat to take the final step from having two departments with responsibility for IP to one responsible department. In recent times four departments have shared responsibility for IP policy: the Department of Agriculture, Fisheries and Forestry administered the plant breeder’s rights (PBR) legislation; the Attorney-General’s Department administered the copyright and the circuit layouts legislation; the Department of Communication, Technology and the Arts had joint responsibility for copyright with the Attorney-General’s Department; and the Department of Industry, Tourism and Resources administered the designs, patents and trade marks legislation, through the agency IP Australia. Now the

¹⁸ Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 1 Exceptions to the Exclusive Rights of Copyright Owners* (1998); *Simplification of the Copyright Act 1968, Part 2, Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999). For elaboration on the proposals to simplify the protected subject matters and exclusive rights of copyright, see Andrew Christie, ‘Simplifying Australian Copyright Law - the Why and the How’, (2000) 11 *Australian Intellectual Property Journal* 40-62.

¹⁹ Sam Ricketson, ‘The Future of Australian Intellectual Property Law Reform and Administration’ (1992) 3 *Australian Intellectual Property Law Journal* 3, 27-9; and Sam Ricketson, ‘Intellectual Property Administration and Policy in Australia – An Examination of the Australian Situation, Past and Present, and Recommendations for Future Change’ (Paper presented at the National Innovation Summit, Melbourne, 9-11 February 2000).

Attorney-General's Department has sole responsibility for copyright,²⁰ and the Department of Industry, Tourism and Resources has responsibility for PBR,²¹ along with designs, patents and trade marks.

This streamlining of responsibility from four departments to two departments provides a precedent for the next step: from two departments to one department. It is submitted that the Department of Industry, Tourism and Resources, through IP Australia, should assume full responsibility for the administration of all IP laws.

Conclusions

In summary, the macro-level data shows that the history of IP law and policy-making in Australia is one of increasing volume and complexity. IP law and policy-making appears to be caught in a feed-back loop, resulting in exponential growth. This path is not sustainable. It is neither desirable nor possible to undertake 150 substantive reviews of IP law between now and 2020. The prospect of IP legislation expanding to contain in excess of 5 000 subsections is equally unappealing. Thus we need to actively choose another approach to IP law and policy-making: 'IP reform' should itself be reformed.

This paper has suggested that such reform could best be achieved by simplification of the law, on the one hand, and unification of the administration of the law, on the other hand. If we actively pursue such an agenda, while we might not instantly declare IP cured, the prognosis would at least be hopeful.

²⁰ Commonwealth of Australia, *Administrative Arrangements Order* (16 Dec 2004), available at <http://www.dpmpc.gov.au/parliamentary/docs/aa0.pdf>.

²¹ See IP Australia website:

http://www.ipaustralia.gov.au/resources/news_new_archived_2004.shtml#60.

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