Aristocrat Technologies Australia Pty Ltd (Aristocrat) appreciates the opportunity to comment on the proposed draft legislation, Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill and Regulations 2017. This submission is limited to comments on the draft legislation relating to the abolition of the innovation patent system in Australia.

Notwithstanding that the Government has already supported the Productivity Commission’s recommendation to abolish the innovation patent system, Aristocrat would like to make some brief submissions regarding this decision before it comments on the proposed draft legislation. These submissions are set out at section 3 below.

1 Introduction and background to Aristocrat Group

Aristocrat is an ASX-listed company and a leading global designer, developer and distributor of gaming solutions. Founded in 1953 the company is licensed by over 240 regulators, employs 800 staff in Australia as part of a 3,000 strong global team and its products are available in over 90 countries around the world. Aristocrat offers a diverse range of products and services including Class II and Class III electronic gaming machines (EGMs), casino management systems and digital gaming which utilises game intellectual property (IP) for non-gambling social games. Aristocrat is proudly headquartered in Australia, with a market capitalisation of approximately $15 billion.

2 Aristocrat's engagement with the IP system in Australia

A key reason for the success of Aristocrat is its continual quest for innovation and its very significant investment in developing IP. Reliance on a robust IP regime in Australia has been critical. The company has a particular focus on patents, although trademarks, copyright and registered designs are also important as these prevent the use of company branding and
trade dress without permission. A prime example of this successful utilisation of IP rights is the "Hyperlink" family of patents (AU Patent 81994/98), which is the most frequently cited patent in Australia in terms of citations in other patents. This Australian invention utilises a unique technology linking together EGMs to allow for a more equitable prize structure to ensure fairness to players of the linked EGMs. Hyperlink has been a key product differentiator for Aristocrat and subsequent improvements have all been developed domestically.

Aristocrat is consistently one of the highest ranked Australian companies for patents granted and in 2012 was ranked 4th among companies to be granted the most patents in Australia.¹

Aristocrat has been involved in a significant number of patent disputes and legal proceedings. These include a substantial number of patent oppositions and other hearings before IP Australia and over 15 Federal Court patent litigation cases. Importantly, Aristocrat has been engaged in these matters not only as a patentee but also as an alleged infringing party and/or a party seeking to challenge or revoke patents. Therefore, Aristocrat submits it is uniquely placed as an Australian stakeholder to understand and address both sides of the equation in terms of the balance that the patent system needs to maintain between innovators and users of technology.

2.1 IP as a driver of Research & Development (R&D) and employment


In those submissions, Aristocrat made comments on IP as a driver of Research and Development (R&D) and employment (at section 1.2). Aristocrat relies on that section of its response in this submission, but in summary, Aristocrat invests over $130m annually in R&D and is consistently ranked as one of the top 5 R&D spenders in Australia. The majority of Aristocrat’s IP rights are owned by the Australian entity, which allows Aristocrat to repatriate overseas earnings back to Australia.

2.2 The importance of a robust IP system to Australia’s economy and wellbeing

In its response to Public Consultation Papers 1 and 2 dated 17 November 2017, Aristocrat made submissions on the importance of a robust IP system to Australia's economy and wellbeing (at section 2). Aristocrat relies on that section of its response in this submission. In summary, Aristocrat employs around 800 people in Australia and over two-thirds of Aristocrat’s Australian workforce are highly-skilled university graduates, mostly from STEM disciplines. These opportunities are only possible due to Aristocrat's increasing investment into R&D, a key part of Aristocrat’s IP strategy that is developed under the assumption of there being a robust IP regime.

2.3 Patents

Aristocrat made submissions to the Productivity Commission on 18 December 2015 regarding the proposed abolition of the innovation patent system. In those submissions, Aristocrat commented on the use and importance of patents, particularly innovation patents, in the gaming industry (at section 2.2). Aristocrat relies on that section of its submissions in this submission. In summary, Aristocrat operates in a “capped market” where there is a limit on the total number of gaming machines available in a given market, and where regulations differ from jurisdiction to jurisdiction. Innovations by gaming machine suppliers generally occur incrementally, building upon the successes of previous products. While such innovations may seem slight, these can be the difference between a product that is commercially successful or not. A second-tier patent system is often ideal for capturing such incremental innovations.

3 The proposed abolition of the innovation patent system

Aristocrat made submissions to the Productivity Commission and the Australian Government regarding the proposed abolition of the innovation patent system on 18 December 2015 and 14 February 2017, respectively.

Aristocrat continues to maintain the view that the innovation patent system should remain in some form and that alternatives should be considered before abolishing the innovation patent system in its entirety. There is no benefit to be gained from simply abolishing one system without replacing it for a better alternative. This will only limit and restrict the rights of business owners, and will discourage incremental innovation in particular.

If the system is ultimately abolished, Aristocrat suggests that the effect of the abolition is considered within a few years after the commencement of the new legislation, in order to assess the effect of the new changes, and consider whether any further improvements or changes should be made.
3.1 History and earlier submissions

From 1979 to 2001 the petty patent system was the second-tier patent system that operated in Australia. Petty patents were limited to three claims and only provided up to six years protection. The same inventive threshold applied as with standard patents and the patents were required to be examined.

The former Advisory Council on Intellectual Property (ACIP) reviewed the petty patent system in 1995. This review revealed a ‘gap’ in the system which failed to protect lower level or incremental inventions that had commercial potential. The ACIP recommended that the petty patent system be abolished and in its place a new second-tier patent system be adopted, being the innovation patent system. The ACIP considered the key objectives of the system “should be to provide a protection system for minor or incremental innovations which:

- fills the gap between designs and standard patents;
- is quick to obtain;
- is cheap to obtain and enforce;
- is reasonably simple;
- helps small/medium business enterprises;
- has a measure of certainty; and
- lasts for a sufficient time to encourage investment in the developing and marketing of the innovation.”

The Government accepted the recommendations of the ACIP and introduced the innovation patent system into the legislation.

The ACIP reviewed the system again and provided a report in May 2014, which did not make a recommendation supporting the retention or abolition of the innovation patent system. IP Australia then issued a further report in early 2015, based on the release of the Intellectual Property Government Open Data, called the Economic Impact of Innovation Patents: IP Australia Economic Research Paper 05. Following the release of this report, ACIP issued a

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Corrigendum to its earlier report, recommending that the government “consider abolishing the system”.6

Whilst it is acknowledged that the IP Australia Economic Research Paper 05 did present some interesting and useful data for policy makers, some of the observations of the paper should cast some doubt over whether the system should be abolished. These observations are set out in Aristocrat’s submissions to the Productivity Commission of 18 December 2015.

IP Australia sought feedback from stakeholders on the ACIP recommendation that the government should consider abolishing the system, and any alternative suggestions to encourage innovation amongst SMEs. Interestingly, the majority of those submissions were in favour of retaining an innovation patent system in some form. Various alternative suggestions were also proposed in the submissions.

The Productivity Commission subsequently commenced its inquiry into intellectual property arrangements in Australia. As mentioned above, Aristocrat provided submissions dated 18 December 2015. The Productivity Commission released its final report on 20 December 2016, which made the recommendation that the Australian Government should abolish the innovation patent system. Aristocrat made further submissions on 14 February 2017 maintaining the view that the innovation patent system should remain in some form. Nevertheless, the Government subsequently accepted the recommendation to abolish the innovation patent system.

Aristocrat is concerned by the proposed abolition of the innovation patent system. The system was introduced to fill a gap in the system that failed to encourage and protect incremental innovation. Today, in 2017, that gap remains and abolishing the innovation patent system without a suitable replacement can only be detrimental in addressing the issues identified by the ACIP in 1995. Furthermore, there is strong evidence that the innovation patent system is being used by Australian businesses. As at 2015, there were approximately 6,500 innovation patents in Australia, more than half of which were held by Australians.7

After only 15 years, it is now being proposed that this system be abolished in its entirety. Whilst Aristocrat accepts that the system is not necessarily perfect, innovation patents are the only secure way to protect the commercial value in innovations. The abolition of innovation patents will simply re-introduce an already identified gap in the system, taking us further

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backwards. The better way forward would be to look at ways to improve the current innovation patent system, rather than eliminate it altogether with no alternative. This is supported by the majority of interested parties in Australia who filed submissions on the issue – those submissions appear to have been ignored.

In the Government’s response to the Productivity Commission’s report, the Government indicates that it has introduced a number of measures to support small to medium enterprises (SMEs), including the IP Toolkit for Collaboration, Source IP and the Patent Analytics Hub. Whilst these are all helpful and educational resources for SMEs, they are not adequate replacements for the protection afforded by innovation patents.

3.2 Effect of abolishing innovation patents

In its submissions to the Productivity Commission dated 18 December 2015, Aristocrat commented on the effect of abolishing innovation patents from Aristocrat’s perspective (in section 2.2.1). Aristocrat relies on that section of its submissions in this submission. In summary, Aristocrat believes that there has been insufficient empirical data collected over the relatively short lifetime of the innovation patent system to justify the wholesale abolition the innovation patent system. Importantly, one strong advantage of an innovation patent over a standard patent is that the innovation patent is significantly more certain in terms of the more subjective matters such as inventive step. Aristocrat’s experience is that this certainty has a direct correlation to efficiencies in developing enforcement strategies.

4 Exposure draft legislation – Innovation Patents

Based on the exposure drafts of the new legislation, innovation patents will only be granted if the date of the patent and priority date for each claim is before the commencement date of the new legislation. Innovation patents filed after that date will not be granted, although divisional applications can still be granted and standard patents can be converted to innovation patents after the commencement date provided the date of the patent is earlier than the commencement date. The commencement date will be one year and one day from the date the new legislation receives Royal Assent. The aim of this commencement provision has been to avoid affecting any existing rights.

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Aristocrat agrees that steps should be taken to avoid affecting any existing rights of applicants. Aside from Aristocrat’s objection to the introduction of the legislation in general, Aristocrat notes the following issues with the proposed draft legislation:

(a) Applicants who file a priority application (e.g. an Australian provisional application) after the date of Royal Assent will only have the time remaining until the commencement date of the new legislation within which to file an innovation patent claiming priority from the priority application. They should be allowed the usual twelve-month period if they have filed the priority application prior to the commencement date.

(b) Businesses, including those based overseas, may have already formulated and invested in strategies based on the protection of their invention under the innovation patent system. The changes could materially affect their potential for protection in circumstances where the invention might not be eligible for protection as a standard patent. Accordingly, any changes should be delayed for as long a period as possible, in order to allow sufficient time for alternate strategies to be developed.

The above matters should be considered before finalising any proposed legislation.

Aristocrat’s primary position is that the proposed legislation should only commence once an alternative system is developed and implemented to replace the innovation patent system before it is abolished. One suggestion is to “promote” the existing design registration system to a quasi-second-tier patent system. As noted above, one of the objectives identified by ACIP was to “… provide a protection system for minor or incremental innovations which: fills the gap between designs and standard patents…”. Accordingly, the design system itself could be strengthened to partially fill this gap. Whatever the case, any alternative system needs to meet the objectives identified previously and, in particular, fill the gap that the innovation patent system was intended to address. Those issues will not disappear once the innovation patent system is abolished. It will still be necessary to have some sort of second-tier patent system in place.

Aristocrat suggests that if the proposed legislation remains as drafted, then the commencement date of the legislation be deferred to 3 years from the date of Royal Assent, rather than 1 year. It is likely that many businesses currently investing in developing new technologies might have made those investments and spent time and money based on their understanding that they could rely on the innovation patent system to protect their innovations. A 3 year phase out period would ensure that those businesses can still implement any strategies they have already invested in that might include protection through the innovation patent system. This is particularly important in circumstances where the
innovation might not be eligible for a standard patent. Businesses will have sufficient time to ensure they consider and develop new and alternative strategies for any future innovations with the new legislation in mind before time and money is spent on future innovations.

5 Conclusion

Aristocrat appreciates the opportunity to comment on the proposed draft legislation. Aristocrat remains of the view that that the innovation patent system should remain in some form, or that alternative systems should be considered before abolishing the current system.

With respect to the proposed draft legislation, Aristocrat suggests that the commencement date of the legislation be no less than 3 years from the date of Royal Assent, rather than 1 year. This will allow businesses time to implement these significant changes into their business and investment strategies in relation to new technologies. Furthermore, Aristocrat believes that an alternative system should be implemented before the innovation patent system is abolished that will aim to deal with the issues the innovation patent system was meant to resolve.

If the innovation patent system is ultimately abolished, Aristocrat suggests that the effect of the abolition is considered within a few years after the commencement of the new legislation, in order to assess the effect of the new changes, and consider whether any further improvements or changes should be made.