

AUSTRALIA WRITTEN STATEMENT

Item 5: Exceptions and limitations to patent rights: Exception regarding prior use

Australia thanks the Secretariat for preparing the draft reference document on the exception regarding prior use and welcomes the opportunity to contribute.

Australia believes that the grant of a patent should not deprive a party from continuing to do what they were doing before the patent was granted. Equally, an inventor should not be deprived of patent protection by the secret acts of third parties, of which they can have no knowledge.

Australia's Patents Act provides a balance between the rights of the patentee and third parties. Under [Section 119](#) of the legislation, a prior use infringement exemption is available to a person, if that person immediately before the priority date of a claim was exploiting a product or process in Australia. However, an exemption is not available if, before the priority date, the person had stopped exploiting or had abandoned steps to exploit the product or process.

We wish to note that Australia has a grace period for prior public disclosure of the invention by the patentee or their predecessor in title ([Section 24](#)). The infringement exception is also seen as an important balancing provision such that a person who relies on an unfettered disclosure remains free to exploit an invention despite the grant of a patent. Under [Subsection 119\(3\)](#), the prior use infringement exemption also applies to public disclosures by the patentee or their predecessor in title which would be covered by the grace period provisions.