



# IP Australia's Information and Advice Policy

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## Introduction

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**Purpose** The purpose of the Information and Advice policy is:

"To provide staff with clear guidelines about the information and advice they can provide to customers to help our customers make informed choices about IP Australia's products and services."

The provision of information and advice must always be guided by the principles set out in the IP Australia [Customer Service Charter](#), Standards and Code of Practice.

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**Audience** The intended audience for the Information and Advice policy is the staff of IP Australia. The policy will affect staff differently depending on their level of skill, knowledge and experience and the level of responsibility of their position.

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**Methods of providing information and advice** IP Australia staff provide information and advice to our customers by the following methods:

- Face to face;
- Over the telephone;
- In writing via e-mail or letter.

This policy is intended to cover the provision of information and advice by any of the above methods.

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**Definitions**  
(from the Macquarie Dictionary)

**"Information** is:

1. knowledge communicated or received concerning some fact or circumstance; news.
2. knowledge on various subjects, however acquired.

**Advice** is:

1. an opinion recommended, or offered, as worthy to be followed: "*I shall act on your advice*".
2. a formal or professional opinion given, especially by a barrister."

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## Overview

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- IP professionals** Throughout this policy, we use the term "[IP professionals](#)" to include:
- Patent attorneys and trade marks attorneys
  - IP lawyers
  - Accountants or consultants who advise on commercialisation of IP
  - IP searching firms
  - IP monitoring service providers
  - Other IP advisers in government and the private sector
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**Our role and the role of Patent and Trade mark Attorneys explained**

As the government agency responsible for examining and granting patent, trade mark and design rights, IP Australia can assist customers to understand the IP environment and the processes, procedures and issues associated with applying for the rights we grant.

Patent attorneys and trade mark attorneys are legally qualified and registered. They help customers obtain or avoid conflict with enforceable IP rights in order to provide customers with the maximum rights available to them. Many patent attorneys and trade mark attorneys are specialists who can assist customers to develop IP strategies.

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**IP Australia's policy on the provision of information and advice**

IP Australia staff provide both information and advice to our customers. The following statements describe our approach as set out in this policy:

- We adopt a positive approach to providing information and advice (as reflected in the Customer Service Code of Practice) to ensure we give customers the best possible customer service.
  - We exercise our duty of care as we provide information and advice to customers.
  - We seek to understand our customers' needs, and to meet these needs, rather than just providing standard answers to their questions.
  - We keep ourselves informed of the latest developments in IP Australia.
  - We advise customers about the range of products and services within our area of responsibility.
  - We advise customers to contact other agencies for products and services outside our area of responsibility.
  - We clearly explain the difference between the services provided by IP Australia and those provided by IP professionals and business advisers.
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## Overview, Continued

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### **Why do we take a positive approach?**

The policy of IP Australia is to provide our customers with a positive outcome from their interactions with us.

Customers may ask us questions that are difficult to answer, or questions that are outside our area of responsibility or authority to answer. Rather than focussing on what we cannot do, or what we cannot tell them, we explain to customers what we can do. We can offer information to the customer, refer them to other agencies, and suggest areas of research. We can assist customers to find the information they need and to understand all the available options. We focus on educating our customers to understand the context of IP rights. We do recommend customers seek the advice of IP professionals, business advisers and other agencies when we believe that is the appropriate course of action in the circumstances.

This approach is designed to enable customers to understand the usefulness of our products and services for their circumstances and so be able to make informed decisions about the products and services that best suit their needs.

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### **Our positive approach in action**

Our positive approach to customer service can be summed up as follows:

- We communicate clearly and listen actively.
  - We are familiar with our organisation's products and services and endeavour to make the customer aware of all the available options.
  - We explain to them the pros and cons of the different options.
  - We ask open questions to ensure we understand the customers' needs.
  - We guide customers by helping them to recognise the questions they need to ask themselves so they can make their own informed decisions.
  - We take a responsible approach and tell the customer when we have reached the limits of our personal knowledge, authority and experience.
  - We help customers find answers by referring them to an internal subject matter expert, external agency or appropriate reference material or by suggesting they contact an IP professional or business adviser as the circumstances dictate.
  - We explain the role of IP professionals in the overall IP system.
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## Overview, Continued

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**Our approach - where the "line" is drawn**

Staff need to be aware of the dividing line between what we can and cannot provide to the customer. The following statements indicate where the "line" needs to be drawn:

- We **don't** offer personal opinions or make decisions for the customers. (eg. We never say "If I were you, I would do XYZ")
- We **don't** give partial or biased information which could limit the customer's options. (There is overlap between the different available IP rights - even if the customer says they want a patent, we ensure they are aware of designs, trade secrets and so on.)
- We **don't** assume we know what the customer's needs are without asking plenty of open questions.
- We **don't** ask misleading questions or make misleading statements.
- We **don't** go beyond the limits of our personal knowledge, authority and experience.
- We **don't** advise on subjects that are beyond our organisation's area of responsibility or authority.
- We **don't** offer legal, financial or business advice to customers.
- We **don't** provide services to customers that would contravene the relevant legislation and our duty of care

See the link ["What we cannot help you with"](#) on our website.

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## Information and Advice - "The Line"

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### **What is "the line"?**

Staff often ask the question "What is the line between the information and advice that we can give to customers and the advice that we can't give to customers?" This section is designed to answer this question in more detail.

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### **We provide information to customers**

Staff at IP Australia provide information to customers on the following subjects:

- Patents - databases; different types of patent products; including types of patent applications and their properties, International searches and international preliminary examinations, and international type searches; the application, searching, examination and registration processes; hearing and oppositions processes
- Trade Marks - databases; guidelines for registrability, Australian and International trade mark registrations; the application, searching, examination and registration processes; hearing and oppositions processes and the classification system
- Designs - databases; application, searching, examination and registration processes; hearing and oppositions processes
- Our search systems
- Our products and services
- Online application procedures, fees and systems
- Where to find information on our website
- Business names search service (BASS)
- Our Customer Service Charter
- How to give feedback to us and make complaints
- How to contact the organisations that administer other IP rights, such as the rights provided by copyright, wine legislation and domain names
- How to contact overseas IP offices
- The role of IP professionals and how to contact them.
- How to contact inventors' associations, Business Enterprise Centres and other agencies dealing with IP legal or commercial issues

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## Information and Advice - "The Line", Continued

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### We do provide certain types of advice to customers

Staff at IP Australia **do** provide advice to customers, including:

- how to use our searching systems and other online facilities
- how to apply for our IP products, including advice on the correct forms and fees
- advising people to carefully consider, as with any business decision, whether or not to apply for IP protection, including weighing up whether the benefits are worth the cost of obtaining and enforcing protection
- recommending people search relevant databases before applying
- recommending people do not disclose their inventions to others before deciding whether they are going to proceed with gaining protection
- recommending people search the trade marks database before registering a business name with State authorities, or a company name with the Australian Securities and Investments Commission
- recommending the services of other agencies (eg. AusIndustry for grants, an Office of Small Business for business planning, Melbourne IT for domain names)
- recommending customers seek professional advice if they:
  - are uncertain whether they should apply for IP rights
  - require advice on the best IP rights for their purposes
  - want advice on strategies for managing their IP portfolio
  - want to apply for a patent and need help drafting the specification
  - want to take action to defend their IP rights

### We don't provide other types of advice to customers

IP Australia does **not** provide:

- legal, financial or business advice or financial assistance
- specific advice on the best IP strategies for business or assessment of the commercial potential of intellectual property
- advice on the merit of applications prior to assessment by an examiner
- a searching service of any databases (ours or those of other organisations) except when provided as a fee for service item (eg. BASS)
- advice on the processes and procedures of overseas IP offices
- advice on other IP rights, such as domain names, trade secrets, copyright, confidentiality agreements, and circuit layout rights.
- an IP enforcement, prosecution or infringement monitoring service
- the service of preparing or helping to prepare patent specifications or any other documents relating to patent specifications other than those in an approved form.

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## Legislation - What Acts underpin the policy?

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**IP Legislation** IP Australia administers the Patents Act 1990, the Trade Marks Act 1995, the Designs Act 2003 and the Plant Breeder's Rights Act 1994. Of these four acts, only the Patents Act contains a section specifically restricting the actions of IP Australia staff in relation to assisting customers.

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**Patents Act 1990, Ch 18, section 185** The Patents Act 1990 contains a section which limits the type of assistance staff can provide to customers. Staff may not prepare, or help to prepare, specifications or any other documents relating to specifications, other than those documents in an approved form. Staff may also not search records for customers other than in their official capacity. Section 185 reads as follows:

**"Patents Act 1990**

**Chapter 18—Miscellaneous offences**

**185 Commissioner etc. not to prepare documents or search records**

The Commissioner, a Deputy Commissioner or an employee must not:

(a) prepare, or help to prepare:

(i) a specification; or

(ii) any other document relating to a specification (other than a document which is in an approved form);

unless the Commissioner, Deputy Commissioner or the employee is the inventor in respect of the specification; or

(b) search the records of the Patent Office otherwise than in his or her official capacity.

Penalty: 10 penalty units."

Other sections of the Patents Act give patent attorneys exclusive rights to do certain actions.

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**What is an "approved form"?**

The Patents Act 1990 provides the following definition in Schedule 1 - Dictionary:

*"approved form* means a form approved by the Commissioner for the purposes of the provision in which the expression appears."

Staff can help prepare documents which are in an approved form. These include application forms. The [approved forms](#) are listed on the Internet.

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## Legislation - What Acts underpin the policy?, Continued

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**What does "in his or her official capacity" mean?**

The phrase "in his or her official capacity" means in the person's role as an employee of IP Australia. The normal duties performed by Customer Service Officers would include showing a customer how to use the databases, but not conducting a search of them for the customer. Examiners would conduct searches as part of their official capacity.

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**What if a staff member breaches the Patents Act?**

A person who went beyond their official capacity, and prepared documents or conducted a search of the Patents databases for a customer, would be in breach of section 185 of the Patents Act, and could be charged under that Act and fined accordingly. They would also be liable for their behaviour under the Public Service Act. Sanctions could range from a fine to dismissal.

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**What does the Trade Marks Act 1995 say?**

The Trade Marks Act 1995 once contained a section very similar to section 185 of the Patents Act. **Section 158** of the Trade Marks Act 1995 was, however, **repealed** by the Trade Marks and Other Legislation Act in August 2001. The explanatory notes said, in part, that section 158:

"...could prevent a Trade Marks Office employee from helping a person fill in their trade mark application or assisting them with a search of the trade marks database. Its repeal will enable the Trade Marks Office to consider new and innovative ways to improve its customer service."

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**Other relevant legislation**

The following legislation also guides what we can say to customers:

- Trade Practices Act 1974
  - Privacy Act 1988
  - Public Service Act 1999 - Summarised in the *APS Code of Conduct and Values*
  - Freedom of Information Act 1982
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## Legislation - What Acts underpin the policy?, Continued

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**Trade Practices Act 1974** Section 52 of the Trade Practices Act 1974 states:

"ss 52.(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

IP Australia received legal advice from legal professionals in relation to the information and advice contained on our website. In the view of the professionals, IP Australia is carrying on a business, so this section of the Trade Practices Act also applies to our activities. The test is whether an ordinary person would be likely to have been misled or deceived by the conduct.

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**Privacy Act 1988**

The Privacy Act 1988 states that organisations must not interfere with the privacy of individuals, and sets out the rules [in the form of Information Privacy Principles (IPPs) and National Privacy Principles (NPPs)] to be observed in disclosing personal information. Staff of IP Australia must not reveal personal information about our customers to the public, including credit card details or details of an invention.

However, customers need to be made aware that their names and contact information will appear in our publicly available databases and in our journals in line with the requirements of the Patents, Trade Marks and Designs Acts.

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**Freedom Of Information Act 1982**

The Freedom of Information (FOI) Act 1982 requires IP Australia to make available to members of the public:

- information about IP Australia, our functions and operations.
- information about rules and practices which are used in making decisions which affect them.

Staff of IP Australia should refer to our website for specific information about the FOI Act, and what information may be released under this Act to the public. We have [FOI](#) information on our website.

Refer all calls about FOI to the Information Access Unit, Business Development & Strategy.

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## Duty of Care - The law and guidelines

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**What is a "duty of care"?**

**Duty of care:** Relationship between two persons in which one person has a responsibility to protect the interests of the other or to avoid injuring the other or their property. If a failure to fulfil a duty of care leads to loss, damage or injury, there may be a basis for an action for damages for negligence.

We have a duty of care to our customers because we have the information the customer needs and the information we give them may materially affect their welfare. Therefore it is important that we give out information which is as correct, complete and appropriate as possible.

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**APS Values and Code of Conduct in practice**

*- Section 2,  
Chapter 5  
Working with  
the Public -  
Providing  
Information or  
Advice -  
APSC 2002*

The Australian Public Service Commission produces Guidelines for Official Conduct for all public servants. These are based on the Public Service Act 1999. Their guidelines on "[Providing Information or Advice](#)" are as follows:

"In doing their work, APS employees are expected to exercise a duty of care, that is, to exercise reasonable care, in giving information or advice. This principle applies equally in the case of written information or advice. When information and advice are sought and provided face to face, over the telephone, electronically or in writing, APS employees should bear in mind the following:

- the APS has a duty to exercise reasonable skill and diligence to ensure that information and advice provided by APS employees, upon which the recipients are likely to rely, are accurate
- there is a need to be sensitive to the use an enquirer may make of information or advice sought and APS employees need to exercise due care in informing and advising enquirers
- the standard of care required will be related to the nature of the enquiry and the possible consequences that may arise from the provision of incorrect information or advice
- when there are doubts about the reliability of the information, or the authority of the APS employee to provide advice, these should be made known to the enquirer
- where information or advice is being given on a matter that has not been finalised, the interim or conditional nature of the information or advice should be made clear
- in some circumstances, it may be possible to indicate that, while all care is taken in providing the information or advice, no responsibility is accepted for any loss incurred as a result
- in some circumstances, it may be relevant to suggest to enquirers that they should seek independent advice from appropriately qualified persons."

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## Duty of Care - The law and guidelines, Continued

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### **The Law of Negligent Misstatement - "Duty of Care"**

Staff of IP Australia have a duty to exercise reasonable care when providing information and advice to customers. The duty of care we owe our customers was reinforced by the decision in a landmark case decided by the High Court in 1981.

In *L Shaddock and Associates v The Council of the City of Parramatta (1980-81)*, the court ruled that "government instrumentalities may be liable in damages for the economic loss suffered by individuals acting on advice negligently given by officials".

It was affirmed in *Shaddock* that this duty of care extends to the provision of information as well as the provision of advice. The courts have also ruled that negligence may arise from omissions as well as positive acts.

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### **High Court Statement in Shaddock case**

In the leading Australian statement of the position on duty of care for providing negligent advice, the High Court said the following:

"Whenever a person gives information or advice to another upon a serious matter in circumstances where the speaker realises, or ought to realise, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to act on that information or advice, the speaker comes under a duty to exercise reasonable care in the provision of the information or advice he chooses to give." [Mason J in *Shaddock* case, 150 CLR 225 at 250.]

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### **Duty of care and our liability**

In certain circumstances, therefore, a Government organisation can incur liability for the giving of negligent advice. Briefly, liability will arise where:

- a duty to exercise reasonable care in giving the advice exists;
  - there has been a breach of that duty (negligence); and
  - the recipient of the advice has suffered reasonably foreseeable and proximate loss as a result of relying on the advice.
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## Duty of Care - The law and guidelines, Continued

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### How could we breach our duty of care?

IP Australia staff could breach our duty of care to customers by negligently providing information or advice that is:

- inappropriate
- inaccurate
- incomplete
- misleading
- deceptive
- biased

It is important therefore that we take reasonable care to provide information or advice that is:

- thoroughly researched and gives all the relevant facts
- accurate and consistent
- clear, unambiguous and relevant to the customer's needs
- honest and impartial

It is also important to recognise the different levels of experience and familiarity our customers have with our processes. You may need to assist first time users of our services more to enable their applications to avoid common pitfalls. Your level of service, including courtesy and helpfulness, and consistency and accuracy of information, should nevertheless be the same for all our customers.

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### It depends why the advice given was incorrect

To decide whether incorrect advice was negligent, the courts will consider the reason why the advice was incorrect.

- Liability will generally not arise if the reason for the advice being incorrect was that the recipient of the advice had provided the staff member with incorrect information, at least where there was no reason to doubt the accuracy of the information.
- Also, no liability will arise if the reason for the advice being incorrect was that the staff member had reached a view of the law which, although erroneous, was reasonable.
- However, where a staff member does not bother to check the relevant law, or where they carelessly misread a clear statement of the law, the staff member will be considered to have been negligent.

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## Our Liability

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### Our legal obligations

Legislation and the courts have therefore defined our legal obligations to our customers in broad terms as follows:

- We are under a duty to exercise reasonable care in providing information and providing advice to our customers (The law of negligent misstatement - Duty of Care).
  - We are under an obligation not to engage in misleading or deceptive conduct, or conduct that is likely to mislead or deceive. (Trade Practices Act 1974, ss52(1)).
  - We may not prepare or help to prepare specifications for patents. We may not prepare or help to prepare documents relating to patent specifications, unless they are in an approved form. (Patents Act 1990, s185(a)).
  - We may not search the records of the Patent Office for customers other than in our official capacity (Patents Act 1990, s185(b)).
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### Can we use disclaimers to avoid our liability?

It may be possible to avoid liability by use of an appropriately worded disclaimer. We have a series of appropriately worded [disclaimers](#) on our website that were written by IP professionals for IP Australia.

However, the courts will not necessarily allow a disclaimer to override a common law duty of care. Much of the information we hold at IP Australia is not accessible from other sources. We therefore owe a duty of care to provide complete and accurate information to those who seek this information from us.

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### Who is liable?

The organisation is responsible (and therefore liable to pay damages) if a customer receives negligent advice from a staff member where the staff member is acting in the normal course of their duties.

If a staff member has acted outside the duties for which they are employed by the organisation, they may be deemed by the court as personally responsible for the action, and they may then be personally liable for any damages awarded.

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## Customers' Rights

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### **What can a customer do if we give negligent or misleading advice?**

Customers of IP Australia who feel they have been given incorrect, misleading, deceptive or incomplete advice can make a complaint:

- to IP Australia,
  - to the Minister,
  - to the Ombudsman or
  - take action in the Courts.
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### **Customer Feedback process**

If a customer complains to you that they received incorrect, misleading, deceptive or incomplete advice or information from IP Australia, you should first attempt to resolve the situation. Record the issue on the online Customer Feedback form or suggest they e-mail their complaint to us at [assist@ipaustalia.gov.au](mailto:assist@ipaustalia.gov.au) or use the [Internet feedback form](#). If it is not resolved, follow the feedback process as outlined on the Intranet in our Customer Feedback guidelines.

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### **The role of the Ombudsman**

The Ombudsman is a watchdog over Commonwealth Departments and prescribed authorities, and may investigate claims from the public of maladministration if the person has first tried all the avenues at their own disposal.

If a person suffered detriment through our maladministration, and they were unable to obtain redress from IP Australia, they could report this to the Ombudsman at <http://www.comb.gov.au>.

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### **Compensation for Detriment caused by Defective Administration (CDDA)**

The Scheme for Compensation for Detriment caused by Defective Administration (CDDA) (details on the Treasury website) is available for appropriate cases where the applicant has suffered detriment caused by defective administration and has no legal avenue of redress against the government agency.

The CDDA Scheme would be available for our customers if we caused them to suffer detriment and they were unable to obtain compensation directly from us.

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