

17 April 2023

Committee Secretary
Standing Committee on Economics
PO Box 6021
Parliament House
Canberra ACT 2600

By email: economics.reps@aph.gov.au

Dear Sir/Madam

Inquiry into promoting economic dynamism, competition and business formation

1. The Intellectual Property Committee of the Business Law Section of the Law Council of Australia (**IPC**) welcomes the opportunity to make a submission to the House of Representatives Standing Committee on Economics' Inquiry into promoting economic dynamism, competition and business formation.
2. The IPC is concerned with intellectual property law and policy in Australia. Its members have significant cumulative experience in conducting negotiations, transactions and disputes relating to intellectual property, including in the context of the most commercially important innovations made or used in Australia.
3. The purpose of this submission is:
 - to highlight the important role of intellectual property rights in contributing to Australia's economic dynamism; and
 - to suggest topics for consideration for potential policy reform and/or new initiatives to support commercialisation of IP to contribute to advancing Australia's economic dynamism.

Background: definition and purpose of intellectual property

4. The World Intellectual Property Organisation (**WIPO**) describes intellectual property as "creations of the [human] mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce".
5. Intellectual property can take a number of legal forms including patents, designs, copyright, trade marks, plant breeders' rights and circuit layout rights. So-called "trade secrets" are covered by confidentiality law but are also encompassed in the definition for present purposes.

6. A number of recent reviews have considered the role of intellectual property in Australia's innovation system. For example, the Competition Policy Review, Final Report, March 2015 (Harper Report) summarised the rationale for IP rights as follows (page 100):

The underlying rationale for IP rights is to promote new ideas and creations. Competitive markets can fail to support an efficient level of innovation because creations and ideas, once known, can be copied at little cost.

Knowledge has 'public good' characteristics. It is difficult to exclude others from using new ideas, and use by one person has little or no effect on the extent to which it is available to others. These public good characteristics of knowledge typically lead to under-investment in research and development—the returns to creators will be insufficient to provide incentives for efficient investment in IP material.

7. Similarly, the Productivity Commission referred to the roles that IP plays in Australia's innovation system:¹

IP arrangements form part of the broader innovation system. The role they play differs depending on the right afforded. Patents and copyright seek to promote product innovation and the creation of new works. Design rights seek to encourage improvements in the look and feel of consumer products. Trade marks differ again, providing consumer information and protecting brand reputation.

Recent competition law reform

8. In 2019, following the Harper Review and the Productivity Commission Inquiry Report, the *Competition and Consumer Act 2010 (CCA)* was amended to repeal a long-standing exemption that applied to certain IP transactions. Following the repeal, under Australian law, as with Australia's comparable trading partner countries, commercial transactions involving intellectual property rights are subject to competition law in the same manner as transactions involving other property and assets.
9. Although the Harper Review recommended repeal of the IP exemption,² it made these two recommendations in conjunction with other key recommendations:
- that IP licences should remain exempt from the *per se* cartel conduct prohibitions of the CCA insofar as they impose restrictions on goods or services produced through application of the licensed IP;³ and
 - that section 47 of the CCA should be repealed and that vertical restrictions and associated refusals to supply should instead be addressed by sections 45 and 46 of the CCA.⁴

¹ Productivity Commission Inquiry Report into Intellectual Property Arrangements (Productivity Commission Report No. 78, 23 September 2016) page 3.

² Competition Policy Review Panel, Final Report, March 2015, Recommendation 7.

³ Competition Policy Review Panel, Final Report, March 2015, Recommendation 27.

⁴ Competition Policy Review Panel, Final Report, March 2015, Recommendation 33.

10. Neither of those two recommendations has been implemented. The repeal of the IP exemption combined with the failure to implement the two related recommendations has created uncertainty and unintended consequences for IP owners and licensees.
11. The Harper Review also recommended the introduction of a block exemption power,⁵ which the ACCC noted⁶ in its submission to the inquiry could be used to specify 'safe harbour' licensing practices for IP owners. The block exemption power recommendation was subsequently implemented in the form of a class exemption process, but this process has not yet been used to specify 'safe harbour' licensing practices for IP owners.

Role and importance of intellectual property rights in contributing to economic dynamism

12. As noted earlier, intellectual property rights have an important role to play in encouraging investment in innovation and can also play a pro-competitive role in facilitating the uptake and diffusion of technology through assignment and licensing.
13. Following the competition law reform referred to above, the Australian Competition and Consumer Commission published guidelines on aspects of the relationship between IP and competition law in Australia.⁷ In the ACCC's guidelines, under the heading "General Principles":
 - In paragraph 2.2, the ACCC stated "Intellectual property rights and competition law are not in fundamental conflict. This was part of Parliament's rationale for repealing subsection 51(3) of the CCA. Intellectual property rights and competition law share a common purpose in promoting innovation and dynamic efficiency, and enhancing consumer welfare."
 - In paragraph 2.3 the ACCC affirmed that "the exclusive nature of intellectual property rights is an important incentive for parties to invest in innovation and commercialisation".
 - In paragraph 2.4, the ACCC noted that market power comes from a lack of effective competitive constraint, and acknowledged that intellectual property rights do not necessarily, of themselves, confer substantial market power on a firm. The ACCC also noted that goods or services protected by intellectual property rights will often be subject to competitive constraint from substitutable goods or services.
 - In paragraphs 2.6 to 2.18, the ACCC set out general principles concerning circumstances where the licensing or assignment of intellectual property rights may be helpful to the competitive process, and where it can have anti-competitive consequences.

⁵ Competition Policy Review Panel, Final Report, March 2015, Recommendation 39.

⁶ Competition Policy Review Panel, Final Report, March 2015, p404.

⁷ ACCC publication "Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)", August 2019.

- In particular, in paragraph 2.6, the ACCC noted that the licensing or assignment of intellectual property rights is usually helpful to the competitive process as it “enables intellectual property to be exploited to a greater extent than would occur if those rights were not licensed or assigned, therefore encouraging competition”. The ACCC notes that licensing or assignment of intellectual property rights “often increases production, geographic distribution, and the rate at which new products are introduced to the market”.
 - Importantly, in paragraph 2.7, the ACCC also noted that “[t]he licensing or assignment of intellectual property rights can also be helpful to the competitive process if it enables the licensee to engage in commercial activity that would otherwise be closed to it, or which the licensee could only engage in by duplicating or ‘inventing around’ existing intellectual property rights.”
 - In paragraph 2.8 the ACCC noted that: “However, in some cases, licensing or assignment of intellectual property rights can have anti-competitive consequences, including where the licensing or assignment has the purpose, effect or likely effect of substantially lessening competition.”
14. Following these general principles, the ACCC’s guidelines then discuss a limited number of case studies in which the ACCC provides some guidance on how it considers certain limited IP transactions will be treated under the competition law. However, a number of these case studies concern possible cartel conduct that is only loosely related to the intellectual property rights at issue. Accordingly, the ACCC’s guidelines give limited certainty for parties who may have previously sought to rely on subsection 51(3) of the CCA: the exemption for cartel conduct in connection with the licensing of IP rights. The IPC submits that further detailed guidance would be useful in promoting certain IP transactions (including common IP transactions that would have previously had the benefit of the subsection 51(3) exemption and the potential availability of other cartel exceptions). This guidance could contribute to greater certainty of contracting for IP owners and enhance innovation, as further discussed below.
15. In addition to the guidelines, on 23 March 2022, the ACCC issued a draft determination in relation to an application for authorisation of cartel conduct lodged by three pharmaceutical companies in relation to a settlement and licence agreement resolving legal proceedings between the parties.⁸ In indicating that it proposed to deny the application for authorisation, the ACCC commented that it considered the settlement and licence agreement would likely result in public detriment—by reducing competitive tension in relation to the generic entry of certain pharmaceutical products and conferring the licensee a ‘first mover advantage’, which could deter other generic entry. The IPC notes that these comments, along with the absence of relevant judicial precedent, could lead to uncertainty for IP owners and licensees when seeking to assess the competitive effects of licensing intellectual property rights. This lack of certainty could discourage innovation and deter IP owners and potential licensees from entering into beneficial market-expanding licensing arrangements.

⁸ [Draft Determination – Application for authorisation lodged by Juno, Natco and Celgene](#)

Law reform and the need for balancing interests

16. It has always been recognised that IP law and associated policy requires a careful balancing of the interests of creators, innovators and owners, with the interests of follow-on innovators and the broader community.
17. Australia's IP law and policy is also subject to Australia's international treaty obligations. The IPC supports considered policy development based on empirical evidence.⁹
18. The IPC submits that there remains a number of outstanding reforms associated with the recent competition law reform that should be followed up to increase the clarity and understanding of permitted IP transactions under Australia law, including:
 - More guidance should be provided on the interface between intellectual property and competition law to clarify the requirements for intellectual property transactions under competition law to reduce the compliance costs associated with intellectual property transactions.
 - In particular, more guidance should be provided on how markets and competitors are to be assessed in the case of research services and technology licensing services—two key areas which will be critical in harnessing technological innovation to increase productivity and dynamism in the Australian economy.
 - Given the increasing emphasis on the need to develop entire new industry sectors (for example in relation to the clean energy transition, developing Australia's advanced manufacturing base and other national priority areas), it is expected to be necessary for participants to collaborate in order to bring the necessary scale to these initiatives. Accordingly, it will be imperative for the sector to have clear guidance on how the joint venture and exclusive dealing exceptions to the cartel prohibitions will operate, and similarly how such collaboration will be assessed under the competition test.
 - In this regard:
 - The Australian Innovation System Report 2017, prepared by the Office of the Chief Economist,¹⁰ highlights that innovation-led growth can potentially be enhanced by certain reforms to the “framework conditions” (which include intellectual property and competition laws). In particular, the report states: “Complementary measures can help unlock the benefits of innovation, especially where they aim to address specific market failures such as those related to coordination problems or innovation spill-overs. For example, supporting the development of innovation ecosystems (around specific technologies) or clusters (around certain geographical locations) may assist by facilitating collaboration between firms and research institutions so that they may identify and address issues of common interest.”

⁹ See for example the IPC's submission to the Productivity Commission's Issues Paper in relation to Intellectual Property Arrangements: https://www.pc.gov.au/__data/assets/pdf_file/0008/194651/sub064a-intellectual-property.pdf.

¹⁰ Australian Innovation System Report 2017, Office of the Chief Economist, https://web.archive.org.au/awa/20180316193546mp_/https://industry.gov.au/Office-of-the-Chief-Economist/Publications/AustralianInnovationSystemReport2017/documents/australian-innovation-system-report-2017.pdf

- Insofar as government policies seek to create an environment for the creation of new industries and new collaboration opportunities (discussed further in the next section below), provision of more clarity on the legal treatment of intellectual property related collaboration will be important.
- The IPC submits that consideration should be given to developing suitable ACCC class exemptions for IP transactions with defined characteristics, to increase clarity on allowable (and even encouraged) transactions and to reduce the compliance costs associated with such transactions.
- Conversely, the ACCC has been slow to **consider** the use of alleged intellectual property rights **which may have an effect on** the development of standards, or to create mandatory standards that embed proprietary IP rights, the electronic conveyancing standards being a potential example.
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Importance of intellectual property rights to Australian innovation ecosystem participants

19. The Australian innovation ecosystem has been developing an expanding community of venture capital firms, including private funds, government funds, and hybrid funds (funds backed by a combination of government and private investment capital).
20. There appears to be a shift taking place in government-supported innovation programs away from grant funding models towards funds that are expected to be financially sustainable (i.e. to generate financial returns) in addition to supporting government policy objectives such as to enhance the generation and growth of new companies and to enhance industry competitiveness and create new industries (e.g. National Reconstruction Fund, Breakthrough Victoria).
21. The venture capital firms and the government supported innovation system initiatives, if they are successful, will be expected to contribute to productivity improvements for the benefit of the Australian economy. In particular, the success of these initiatives will depend on facilitating investment in the translation of knowledge, scientific research and technology into new businesses, to develop new markets and to increase productivity.
22. The IPC submits that:
 - intellectual property rights will play a key role in facilitating the necessary investment, including co-investment and collaboration, into these initiatives/projects; and
 - providing increased clarity on the competition law treatment of intellectual property transactions, including collaboration and licensing, could usefully contribute to the effectiveness of these reforms and to enhancing the Australian innovation system more generally.

Conclusion and further contact

23. The Committee would be pleased to discuss any aspect of this submission.

24. Please contact the Chair of the Committee, Angus Lang, at lang@tenthfloor.org, if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

**Philip Argy
Chairman
Business Law Section**