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Productivity Commission – Intellectual Property Arrangements
Personal Submission
Peter Treloar

Dear Sirs,

In accordance with the Productivity Commissions invitation to submit comments in respect of the Commission's recent draft report into Intellectual Property Arrangements, I wish to make the following comments.

I am a patent attorney, legal practitioner and scientist with about 30 years experience working in the area of Intellectual Property, representing the interest of the most innovative (by any measure) Australian and International organizations. A brief (minimalist) CV can be found at: <https://au.linkedin.com/in/petertreloar> or http://www.shelstonip.com/news/staff_profile/peter-treloar/ . These CVs represent only a small portion of the work undertaken.

Whilst my firm, Shelston IP is also preparing a separate submission to which I have contributed, a number of my view are slightly divergent from those expressed. I am also a committee member of AIPPI and have also contributed to a further separate submission. Again, my views on a number of issues diverge from the committee. I have therefore chosen to lodge a separate individual submission.

The Productivity Commissions report is extensive, running to about 600 pages. In the time frame requested for a response I have only addressed a portion of the issues that it raises. I have set out my submission utilizing the chapter nomenclature of the draft report.

2. Assessing the IP System – an analytical framework

The Productivity Commission appears to have a fundamentally anti monopoly stance. A significant part of the IP system is that the state offers a monopoly right in return for creative persons bringing forth their creative works in inventions, literature, artistry and designs.

By formulating an overriding objective of “maximizing the well being of Australians”, the Productivity Commission basically sanctions the annexation of the creative output of individuals, and evidences little understanding of the purpose and operation of the IP system.

Of course, if Australia, as a society, does not wish to pay for the Intellectual Property of both its own citizens and of others, then the solution is to increase the difficulty of obtaining patent, copyright, designs and Trade Marks, and further shorten the term for which protection is obtained. Hence, the substantive recommendations of the report appear to be directed to achieving this objective.

Further, the formulation by the Productivity Commission (section 2.2) of its objectives for the IP system results in a clouded judgment.

What the Productivity Commission wants the IP system to Achieve	What the Productivity Should be Seeking
Providing some incentive for the innovation that would not otherwise occur	Innovation will occur without the Australian patent system. It is just whether this is the most efficient encouragement of innovation, and what position should Australia take in rewarding innovation.
Its operation should benefit both innovators and the public	Again this is too black and white. What is at the core of the system is a balance of significantly rewarding inventors by granting a monopolistic right at the expense of the public.
Should not hinder competition in product or factor markets	The IP system fundamentally hinders competition, as is the nature of a monopolistic right. This is the bargain a society needs to accept or reject.

A further criticism of the overall report is the evidences of linear thinking. Creativity and invention are often highly non-linear chaotic processes. The inventive process is often the result of chance, the random bringing together of disparate facts, just as much as it can be part of planned structured research.

Further, most of the significant inventions of the last 100 years would have occurred whether or not Australia had a patent system. For example, most block buster drugs, the transistor, integrated circuit, radio, television, fertilizers etc, were invented by foreign research groups. In their commercialization of their products, Australia would have represented about 1-2% of their potential market. It is likely they would have continued to invent, with or without Australia having a patent system.

On other hand, the system is holistic and we are part of a comity of nations that together provide a platform for the encouragement and reward of such research endeavors.

Of course one nation can decide to forge a different path, and follow a different ideology. Examples include the Soviet era inventor's certificates, the historical compulsory licensing of food and drug patents in Canada, and the compulsory licensing of drug patents in India. Such divergences do provide a sense of the divergent country 'free riding' on the collective of nations.

The draft report appears to have substantive elements of divergence from the international norm.

The purpose of the patent system is not to 'enhance the well being of Australians by providing patent protection to socially valuable innovations **that would not have otherwise occurred**'. If this was adopted as an objects clause, then perhaps no inventions should be patented in Australia.

Rather, a more truthful object clause might read 'to enhance the well being of Australians by providing a valuable limited monopoly right to those bringing forward socially valuable innovations'.

As a consequence of setting the wrong objectives, the Productivity Commission appears to have adopted a follow on view that almost all IP rights should be severely curtailed.

3. How does the system fare?

Again, the Productivity Commission measurement of the system does not direct itself to reward for innovation or creativity, but rather, fixates on the cost of the reward to society.

Of course, elimination of the IP system, or its severe curtailment, is likely to result in a reduced cost of imports of IP.

It is also likely to result in Australian companies being unable to obtain or partake of the significant commercial advantages in exploiting their own innovations internationally. And most of my Australian clients value the right to obtain international protection far above the right to obtain Australian protection.

4. Copyright term and scope

By adopting the stated objectives (discussed above) of the cost to society rather than, the encouragement of the production of creative works, the Productivity Commission naturally comes to the conclusion that these rights should be undermined and curtailed. I do not agree with the recommendations.

5. Copyright licencing and exceptions

By adopting the stated objectives (discussed above) of the cost to society rather than, the encouragement of the production of creative works, the Productivity Commission naturally comes to the conclusion that these rights should be undermined and curtailed. I do not agree with the recommendations.

6. The patent system: focusing on fundamentals

As a consequence of formulation of a restricted view of what the patent system is for, the Productivity Commission naturally proposes a significant restriction on patent rights.

This can also be viewed as the recommendation that the balance proposed amounts to setting the levers in favour of Australia 'free riding' on the ingenuity of others and its own citizens.

Objects Clause

To reiterate the discussion above, the Productivity Commission through their object clause proposal is subverting what should be the dominant purpose of the IP system.

The traditional charter of the patents act is to bring forth “the things which are worth to the public the embarrassment of an exclusive patent” (Thomas Jefferson). It is a reward or inducement to bring forth new knowledge. Further, “innovation, advancement and things which add to the sum of useful knowledge are inherent requisites in a patent system” (per US Supreme Court, *Graham v. John Deere*).

The Productivity Commission definition of an object conveniently is directed to its end purpose. “The enhanced well being of Australians by providing protection to socially valuable innovations that would not have otherwise occurred.”

To repeat the discussion of the introductory section, a criticism of the objects clause is that it evidences of linear thinking. Creativity and invention is often a highly non-linear chaotic process. The inventive process is often the result of chance, the random bringing together of disparate facts, just as much as it can be part of planned structured research.

Further, most of the significant inventions of the last 100 years would have occurred whether or not Australia had a patent system. For example, most block buster drugs, the transistor, integrated circuit, radio, television, fertilizers etc, were invented by foreign research groups. In their commercialization of their products, Australia would have represented about 1-2% of their potential market. It is likely they would have been invented, with or without Australia having a patent system. On other hand, the system is holistic and we are part of a comity of nations that together provide a platform for the encouragement and reward of such research endeavors.

Of course one nation can decide to forge a different path, and follow a different ideology. Examples include the Soviet era inventor's certificates, the historical compulsory licensing of food and drug patents in Canada, and the compulsory licensing of drug patents in India. Such divergences do provide a sense of the divergent country 'free riding' on the collective of nations.

The purpose of the patent system is not to 'enhance the well being of Australians by providing patent protection to socially valuable innovations **that would not have otherwise occurred**'. If this was adopted as an objects clause, then perhaps no inventions should be patented in Australia.

Rather, a more truthful object clause might read 'to enhance the well being of Australians by providing a valuable limited monopoly right to those bringing forward socially valuable innovations'.

Further, to couple or define what socially valuable innovations that would not have otherwise occurred is a nonsense. How would one ever know? Having to justify that an innovation wouldn't have occurred but for the patent system is further unreasonable.

6.3 - Obviousness/Inventive Step

The Productivity Commission has recommended the adoption of at least a European Standard on inventive step. Again, this behoves the intent of restricting patent access.

The European standard is a wholly artificial creation. Normally, it involves an initial identification of the closest prior art to the invention. This process is totally artificial and directed to a strong hindsight reasoning bias. Additionally, there is no hurdle requirement that at least the prior art is within the orbit of the hypothetical researcher. Indeed, the closest prior art material may even be in a foreign language not comprehensible to the inventor.

Australia did have a long history of Jurisprudence that attempted to define the term 'obvious' in a reasonable term. However, the recent amendments to the Patent Act, under the encouragement of IP Australia, have developed a European centric trajectory. As this make patents more difficult to grant, the Productivity Commission naturally seems to have adopted it. The Productivity Commission, in seeking to adopt such a standard, is moving away from any notion that the hurdle requirement is one of 'non-obviousness'. Aligning with the European obviousness test is a convenience of adopting a test that patent applicants face a difficult unique hurdle in obtaining patent protection.

Admittedly, the notion of obviousness is always going to be a perplexing subjective measure. The 'scintilla of invention' test is at least one test that is directed to the common notion of what the word means. Australia has a long line of jurisprudence in trying to identify what the common notion of obviousness is. Australian historical authorities, such as *3M v. Beiersdorf* were directed to trying to flesh out what a common notion of obviousness might be.

Additionally, the main US authorities, in *Graham v. John Deere*, *KSR v. Teleflex* have also directly dealt with this issue and pose a more suitable structure for defining what is obvious or non-inventive. Further, the US test is not the same as the European test. As outlined in *KSR*, *Graham*, this test is more directed to what would normally be connoted by the work 'obvious', directed at being beyond the skill of the norm.

However the recent amendments to the Australian legislation seek to adopt a pro-European position and move away from the general notion of obvious to adopting the particular 'problem-solution' approach of a major trading partner.

The test should be directed to what is "Beyond the calling of the objective person skilled in the art".

6.3 Renewal Fees

Renewal fees are a tax on innovation. Renewal fees should only be directed at cost recovery for the patent office operations. The Productivity Commission calling for higher renewal fees and higher claim fees to discourage applicants naturally flows from the incorrect position that the system should be circumspect in allowing patents.

7. The innovation patent system

Given the imposed time limits, I am unable to conduct a separate extensive further analysis and comment.

8. Business methods and software patents

Practitioners skilled in the area of computer science and drafting patents, know that

1. There is no substantive distinction between what is hardware and what is software
2. A succinct definition of a business method is unlikely to ever be available as patents to business methods can be redrafted (with considerable effort), to include significant real world components.

Firstly, software is basically indistinguishable from hardware. For example, most CPUs are designed using VHDL type languages, which are then compiled by various software tools to a final tapeout on a targeted technology. The distinction between software downloaded into an FPGA and a corresponding ASIC is minimal. Further, Turing machine arguments often equate the two. Further, digital hardware is actually implemented in an analog form, with the digital hardware merely being an abstraction.

It is therefore close to impossible to distinguish software from hardware, or to formulate a definition of software. And further, why should one. Software is just as worthy of protection as hardware. The exclusion of software is therefore arbitrary.

Further, software is so pervasive in technology. The Productivity Commission has used a proxy of one IPC class G06F for the whole area. This is unduly restrictive. For example, it is unlikely to include medical imaging software or advanced algorithms in other domains.

Examining the philosophical underpinnings of the patent system, leads one to conclude there is no reason for distinguishing software from any other form of technology.

Further, business method patents are again arbitrarily excluded. The historical indicia of excluding schemes and plans is arbitrary. In the era before digital technologies, I believe any field of technology should be open for patent protection. Further, frontier research in these areas is at least as valuable as other areas.

9. Pharmaceuticals – getting the right policy prescription

In line with the PC objective of limiting patent rights, all the recommendations appear to be directed at restricting the patentee's rights in this area, rather than trying to maximize the reward for the innovation or creativity of the patentee.

Given the imposed time limits, I am unable to further comment without extensive further analysis.

10. Registered Designs

Given the imposed time limits, I am unable to comment without extensive further analysis.

11. Trademarks and geographical indicators

Given the imposed time limits, I am unable to comment without extensive further analysis.

12. Plant Breeder's Rights

Given the imposed time limits, I am unable to comment without extensive further analysis.

13. Circuit layout rights

Given changes in the technical landscape there may be some merit in repealing this legislation.

14. Intellectual Property rights and competition law

The IP rights system is fundamentally monopolistic and is therefore in tension with competition law. We believe there is a fundamental conflict between the two. It is therefore important that the exemption under section 51(3) remains.

15. IP and public institutions

As the motivations in the creation of IP by public institutions is often fully aligned with commercial interest, I do not believe a distinction should be made between the two.

16. Intellectual property's institutional and governance arrangements

Given the imposed time limits, we are unable to comment without extensive further analysis.

17. International cooperation in IP

Given the imposed time limits, I am unable to comment without extensive further analysis.

18. Compliance and enforcement of IP rights

Given the imposed time limits, I am unable to comment without extensive further analysis.

Conclusion

The Productivity Commissions report is extensive. Given the imposed time limits, I have been unable to fully review and provide a detailed analysis of each recommendation. However, it raises significant 'Anti Intellectual Property' concerns that are unlikely to produce a positive effect on Australian society.

Yours sincerely

Peter Treloar