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Via website:

<http://www.pc.gov.au/inquiries/current/intellectual-property/make-submission>

Munich, June 3, 2016

Dear Mesdames and Messieurs,

Submission in Response to the Australian Productivity Commission's Draft Report on Intellectual Property Arrangements

Fraunhofer-Gesellschaft (**Fraunhofer**), as Germany's and Europe's largest industrial research organization, welcomes the opportunity to provide comments on the Australian Productivity Commission's (**APC**) *Draft Report on Intellectual Property Arrangements* dated, 29 April 2016 (**Draft IPA Report**).

Fraunhofer commends the APC for its national and international engagement with a broad range of stakeholders in its inquiry into 'Australia's intellectual property arrangements, including their effect on investment, competition, trade, innovation and consumer welfare'.¹ With Germany having approximately 590,000 full-time staff employed in R&D² as part of its overall innovation system, Fraunhofer's particular role in this system is to promote and undertake applied research in an international context, of direct utility to private and public enterprise and of wide benefit to society as a whole.³ Intellectual property rights and

¹ J B Hockey, Treasurer, *Intellectual Property Arrangements: Terms of Reference*, 18 August 2015.

² See

<https://www.destatis.de/EN/Publications/Specialized/EnvironmentalEconomicAccounting/Indicators2014.pdf?blob=publicationFile>, at page 25.

³ With a workforce of over 23,000 and an annual research budget of €2 billion, the Fraunhofer-Gesellschaft is Europe's biggest organization for applied research, and currently operates a total of 67 institutes and research units. The organization's core task is to carry out research of practical utility in close cooperation with its customers from industry and the public sector. In this way the Fraunhofer-Gesellschaft shapes the innovation process in Germany and drives forward the development of key technologies. The organization's research fo-

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their protection are an important element of Germany's economy, and the currency in which Fraunhofer trades.

Fraunhofer encourages continual broad engagement between patent offices, international IP and trade organisations, along with business and research organisations, and competition law regulators. This multi-disciplinary engagement assists in providing the appropriate and fact-based contextual framework when aiming towards an innovation strategy in a successful, fair and competitive environment – in which registered intellectual property rights are a fundamental means of knowledge transfer, asset and industrial growth, and societal development.

Fraunhofer's observations in relation to the Draft IPA Report and its recommendations are **attached**. There is long-standing cooperation between Australia and Germany across many sectors, with collaboration and innovation recognised as providing opportunities for shared growth and societal development⁴. Fraunhofer has long-standing international cooperation in place with the Commonwealth Scientific and Industrial Research Organisation, universities and Australian industry – based on mutually beneficial relationships which are strategically targeted, augment complementary scientific excellence and experience, and create economies of scale for the use of finite resources (personnel and equipment). With this in mind, we hope that our comments are of assistance to your consultation process for the Draft IPA Report.

All information included in this response is public information. We have declined to include confidential or commercially sensitive information.

Fraunhofer would welcome the opportunity to further contribute to this important discussion, as and when the opportunity arises.

Yours sincerely

Stéfanie Mielert
Head, Legal Corporate Governance

Encl. Fraunhofer Comments on the Draft Report on Intellectual Property Arrangements

cuses on the needs of people in the areas of healthcare, security, communication, mobility, energy and the environment. Fraunhofer's international sites and its representative offices act as a bridge to the regions of greatest importance to scientific progress and economic development. See also <http://www.fraunhofer.de/en/about-fraunhofer/mission.html>

⁴ See the report of the Australia-Germany Advisory Group, *Collaboration, Innovation and Opportunity*, which was presented to Germany's Chancellor Merkel and Australia's Prime Minister Malcom Turnbull in Berlin on 13 November 2015; available at: <http://dfat.gov.au/about-us/publications/international-relations/Pages/australia-germany-advisory-group.aspx>

Attachment: Fraunhofer Comments on the Draft Report on Intellectual Property Arrangements

Executive Summary

It is appreciated that innovation systems around the world must be tailored to each country's own needs. Some basic elements identified as fundamental for any innovation system include:

- a national research and innovation strategy, and priority setting;
- designing and managing funding programmes;
- promoting innovation by strengthening the IP system, including the recognition and protection of intellectual property (IP) rights; and
- establishing centres of excellence to solve global/local problems and increasing scientific capacity.⁵

In providing input on some of the recommendations contained in the Draft IPA Report, Fraunhofer would also like to share a different perspective in relation to the underlying rationale expressed in the Draft IPA Report and address various unsupported assumptions contained therein.

A. Comments on Draft IPA Report

Fraunhofer makes the following observations in relation to the Draft IPA Report:

- (a) while looking at the different types of IP protection, with the greatest of respect we note that the Draft IPR Report does not consider the innate value of IP in encouraging and promoting innovation, nor the overall innovation ecosystem as part of a competitive, vibrant and socially beneficial economy. Elements of an innovation system include the benefit of having a long-term government strategy on innovation; government investment in, and support of, innovation; the roles and responsibilities of various participants in domestic and global innovation systems; and the benefit to be derived for stakeholders. While Australia is currently a net importer of IP, this should not be taken as a static status quo and should not deter investment in the country's innovation system – domestically or through foreign investment;
- (b) following on from observation (a), Fraunhofer considers that the legal framework must be robust and provide certainty as to rights and obligations. The principles of effectiveness, efficiency, adaptability and accountability may be an appropriate framework for assessing policy and its implementation, however Fraunhofer would urge caution about adopting such principles as part of the legislative and administrative landscape regarding fundamental property rights underpinning often long-term investment decisions. This is particularly so where innovation, economic competitiveness and societal advancement would not otherwise occur but for blue-sky research (usually of 20+ years

⁵ OECD's Global Science Forum, 'Opportunities, Challenges and Good Practices in International Research Cooperation between Developed and Developing Countries', April 11, see in particular page 7, Box 1 (hereinafter referred to as 'OECD's Global Science Forum 2011').

duration);

- (c) there appears to be a flawed premise throughout the Draft IPA Report that both consumer welfare and competition law are at odds with intellectual property rights. We respectfully submit that this is incorrect and out of step with international thinking. 'There is no implication that there is an inherent conflict between intellectual property rights and [...] competition rules. Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources.'⁶ Furthermore, under European and United States law, for example, there is no presumption that IP creates market power in the antitrust context⁷ or that enforcing an IP right is an abuse of market power;⁸
- (d) the report proposes some significant alterations, and sometimes a removal, of fundamental rights that exist at law without having offered empirical evidence of a systematic problem that needs to be addressed;
- (e) the report alleges a bias in earlier consultations which benefitted IP owners, and notes that a pure economic analysis is undertaken for the review of Australian IP law. At the same time, it appears (through US and other economic publications cited) that there is an extreme economic position adopted vis-à-vis IP law. As noted above in our covering letter, Fraunhofer would recommend that a multidisciplinary approach be adopted and that any proposed changes to Australian IP law be based on cogent evidence of problems, that any proposed solutions be targeted, and that a cost-benefit analysis be undertaken before any change is implemented;

⁶ See the European Commission *Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements*, at paragraph 7. See also paragraphs 3, 6, 8-9, and the remainder of Section 2, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0328%2801%29&from=EN> (hereinafter referred to as the 'EU Guidelines').

⁷ See the U.S. Department of Justice and the Federal Trade Commission *Antitrust Guidelines for the Licensing of Intellectual Property* (6 April 1995), in particular the General Principles set out on page 2, section 2.2, available at <http://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf> (hereinafter referred to as 'U.S. Antitrust Guidelines'); *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* issued by the U.S. Department of Justice and the Federal Trade Commission (April 2007) at Chapter 2, available at <https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf> (hereinafter referred to as 'U.S. Antitrust Enforcement and IP Rights'). For case law regarding the seeking of injunctions, see the US Supreme Court in *EBay Inc. et al, Petitioners v. Mercexchange LLC* 547 US 388 (2006); available at <https://supreme.justia.com/cases/federal/us/547/388/opinion.html>. See also See 35 USC 154(a)(1), 261, and 283. Refer also to *Weinberger v. Romero-Barcelo* 456 US 305 (1982). See also EU Guidelines', see above at footnote 6, in particular at paragraphs 3, 6, 7-9, and the remainder of Section 2, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0328%2801%29&from=EN> (the 'EU Guidelines').

⁸ See Bostyn, Sven and Petit, Nicolas, *Patent=Monopoly: A Legal Fiction* (December 31, 2013). Available at SSRN: <http://ssrn.com/abstract=2373471> or <http://dx.doi.org/10.2139/ssrn.2373471>.

- (f) fails to consider the international principles of global trade and the nuances of intellectual property holders in the entire innovation system; and
- (g) science excellence and autonomous intellectual endeavour (within national, European and global priorities), are considered two of the fundamental touchstones for the integrity and success of innovation. The priorities, which are developed as a strategy and supported through policy and funding initiatives, do not constrain innovation outside of these fields. Indeed, continuing basic research in order to forecast future societal and industrial challenges is imperative to the innovation cycle.

B. Observations on the international environment of intellectual property

1. Call for entire ecosystem assessment

The Draft IPA Report appears to disregard the scope of the IP value chain. Fraunhofer considers that policy change should only be endorsed once an assessment of the IP ecosystem (creation, protection, implementation, enforcement) is undertaken from a multidisciplinary perspective.⁹

In turn, when assessing the cost to the consumer for goods or services incorporating IP, there needs to be an assessment of the whole of the product or service life cycle.¹⁰ Under European and European Member State law, for example, this position is reflected in European Commission Technology Transfer Block Exemption Regulation (TTBER), which states that it is legitimate to calculate royalties based on final product base where licensed technology relates to an input incorporated into a final product.¹¹ The European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements also provide that parties are able to take into account a number of elements for determining license fees including the incentive to innovate, sunk investments, and R&D costs.¹²

The reference to pricing of IP is relevant to the APC's impression that reducing IP rights in Australia is beneficial for Australians from a net import/export perspective. As we understand the APC's reasoning, if IP rights are reduced or IP is devalued for

⁹ See for example, OECD (2015), OECD Science, Technology and Industry Scoreboard 2015: Innovation for growth and society, OECD Publishing, Paris, available at http://dx.doi.org/10.1787/sti_scoreboard-2015-en, at pages 174-4 (hereinafter referred to as the 'OECD 2015 Science Scoreboard'); See also OECD (2014), OECD Science Technology and Industry Outlook 2014, OECD Publishing, available at http://dx.doi.org/10.1787/sti_outlook-2014-en, at pages 36-63.

¹⁰ *Ericsson Inc v. D-Link Systems Inc* (773 F. 3d 1201 Fed Circ 2014), at para 50; *Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH* Case C-170/13 dated 16 July 2015, at para 3.

¹¹ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0316>. It is noted that paragraph 4 of the TTBER states that, 'Technology transfer agreements concern the licensing of technology rights. Such agreements will usually improve economic efficiency and be pro-competitive as they can reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.'

¹² See paragraphs 8-9 at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29>

all participants in the Australian market, this should benefit Australian consumers in terms of reduced cost for goods. The Report states:

Notwithstanding the interests of particular exporters, Australia's role in the global IP chain is overwhelmingly as a consumer. Put simply, the costs associated with deficits in Australia's IP arrangements [...] are borne by Australian consumers, largely to the benefit of overseas rights holders.¹³

Fraunhofer does not understand this line of thinking, as there is no evidence that the price of goods or services would reduce even if the cost component attributed to IP is reduced. Ultimately, adopting such an approach would be detrimental to Australian-generated IP.

Taking the broader perspective, the most recent OECD figures show Australia is investing only 2.2% of GDP in research and development (R&D). The current result that Australia is a net importer of IP is thus to be expected at this time.¹⁴ Those countries from which Australia imports have government spending of between 3.4-4.5% of their GDP on R&D.¹⁵ It is noted that analysis from Australia's Department of Parliamentary Services shows that the Australian Government's investment in science as a proportion of GDP is at its lowest level in 30 years.¹⁶ The innovation system has long been a growing source of GDP for many major and developing countries.¹⁷ Rather than detract from the system, efforts should be made to help it prosper.

Fraunhofer would encourage the APC to adopt recommendations which enable Australia's innovation system to develop from current levels. Such a proposal was strongly recommended by Australia's House of Representatives, Standing Committee on Industry, Science and Innovation.¹⁸

Figure 2 of the Draft IPA Report indicates how both Australian imports and exports of IP have increased over recent decades.¹⁹ This is indicative of the increasingly

¹³ Draft IPA Report, at page 90.

¹⁴ OECD (2015) Main Science and Technology Indicators, available at: http://stats.oecd.org/Index.aspx?DataSetCode=MSTI_PUB.

¹⁵ For example, Korea is investing 4.4% of GDP in R&D, while Japan's investment sits at 3.4% of GDP and Singapore has tripled R&D investment between 2010 and 2015: See OECD (2015) Main Science and Technology Indicators, available at: http://stats.oecd.org/Index.aspx?DataSetCode=MSTI_PUB; and Royal Society et al (2013) Fueling prosperity. A joint statement from the Academy of Medical Sciences, the British Academy, the Royal Academy of Engineering and the Royal Society, available at: <http://www.britac.ac.uk/templates/asset-relay.cfm?frmAssetFileID=12529>.

¹⁶ Department of Parliamentary Services (2014) Australian Government Support for R&D, 1978-79 to 2014-15, available at: <https://www.documentcloud.org/documents/1310652-parliamentary-library-australian-government.html>.

¹⁷ World Intellectual Property Organization, World Intellectual Property Report (2015), at pages 21-32.

¹⁸ House of Representatives Science and Innovation Report 2010', see footnote 18 above, in particular Recommendations 16, 17 and 18, available at http://www.aph.gov.au/parliamentary_Business/Committees/House_of_Representatives_Committees?url=isi/reports.htm (hereinafter referred to as 'House of Representatives Science and Innovation Report 2010').

¹⁹ Draft IPA Report, Figure 2.

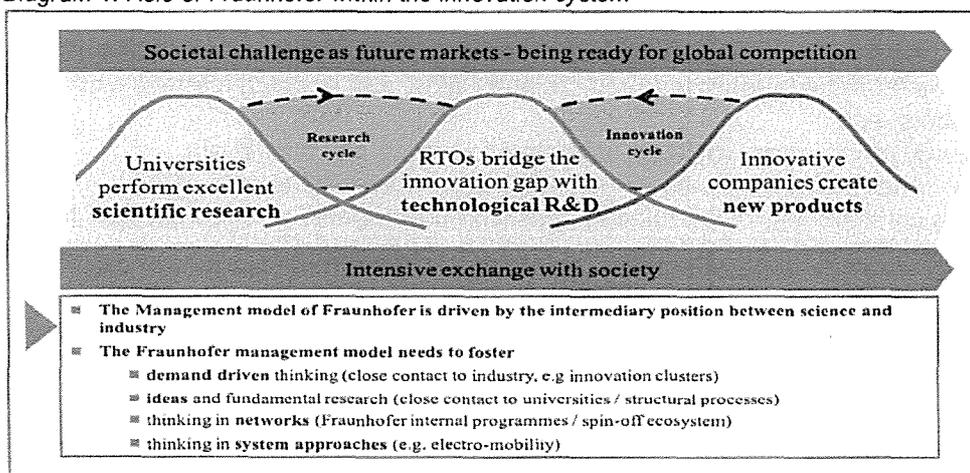
importance of IP in business efficiency and consumer life.²⁰ In this regard, Fraunhofer notes the statement made by the House of Representatives, Standing Committee on Industry, Science and Innovation:

*Australia is a key player in research at the international level. Collaboration at the international level is not only desirable, but an absolute necessity.*²¹

From this respect, Fraunhofer strongly emphasises the need to consider the overall innovation ecosystem, and the role of all contributors and stakeholders, including: governments; researchers; the courts; and society generally: consumers, business, investors. Efficiency is created in the global innovation system through international science cooperation, aligned with industry and meeting societal needs.²² The General Electric 2011 Global Innovation Barometer has forecast that 40% of all innovation in the next decade will be driven by collaboration across institutional and national boundaries.²³ If Australia should weaken its intellectual property protection, there is a risk that Australia may become a less attractive cooperation partner and less attractive location for direct local and foreign investment by innovative companies.²⁴ Such a result would ultimately have negative consequences for the Australian economy and Australian consumers.

In order to contextualise the perspective which we share above, the next part of this section gives an overview of the German innovation system and Fraunhofer's role and responsibilities within this.

Diagram 1: Role of Fraunhofer within the innovation system



²⁰ OECD (2014), OECD Science Technology and Industry Outlook 2014, OECD Publishing, available at http://dx.doi.org/10.1787/sti_outlook-2014-en, at pages 63-74.

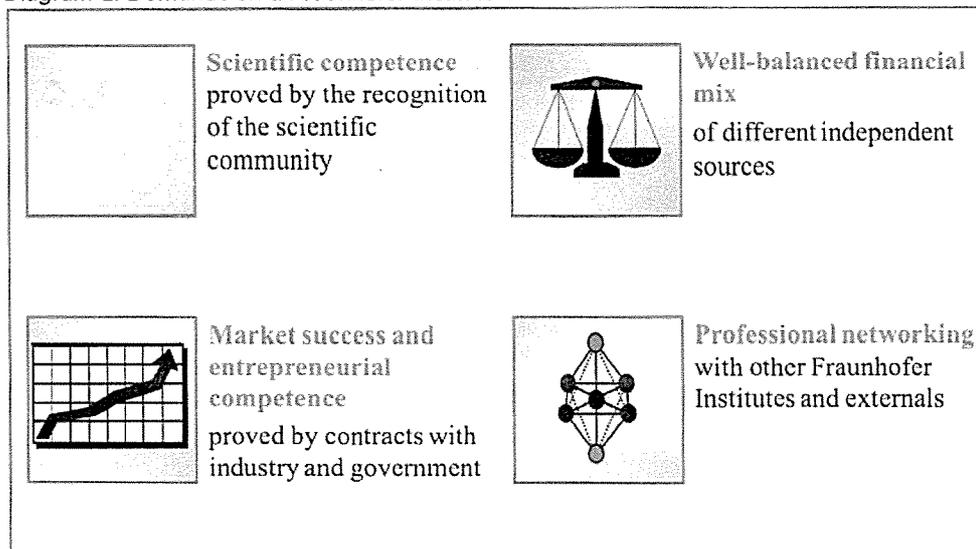
²¹ House of Representatives Science and Innovation Report 2010', see footnote 18 above, at para 1.1.

²² OECD (2014), OECD Science Technology and Industry Outlook 2014, OECD Publishing, available at http://dx.doi.org/10.1787/sti_outlook-2014-en, in particular see page 135-140; OECD's Global Science Forum 2011, see footnote 5, in particular see page 7; Also see House of Representatives Science and Innovation Report 2010', see footnote 18 above.

²³ GE Global Innovation Barometer: Partners & Localization Are Key, available at www.gereports.com/ge-global-innovation-barometer-partners-localization-are-ke.

²⁴ See IPAC study, ante n. 35; N R Norman, 'The Economics of Patents' (Sept 1983) Les Nouvell es 193.

Diagram 2: Demands on a Fraunhofer Institute



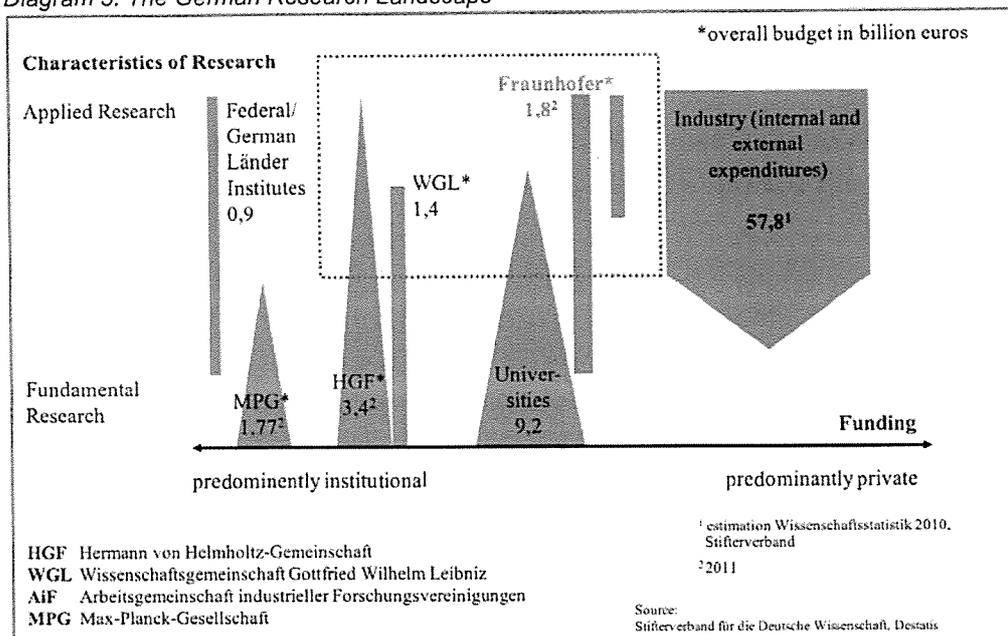
While traditional key performance indicators for assessing the cornerstone of science excellence are the number of publications and patents, key performance indicators which are also applied to the performance (and therefore impact) of Fraunhofer include:

1. the position of Fraunhofer Institutes within the German research landscape;
2. mutually beneficial cooperation between universities and Fraunhofer Institutes, providing ongoing access to basic research, access to cost-intensive equipment, opportunities for industry-oriented projects and PhDs, and ongoing identification of talent pools; and
3. the autonomy of Institutes which are business focussed on value chain production, with the responsibility of Institutes to produce balanced budgets, maintaining institutionally close relationships with universities, and to train staff to be all three of (i) researcher, (ii) inventor, and (iii) entrepreneur.

The following diagram illustrates the German Research Landscape, which is comprised of the following:

- (a) the Helmholtz Association;
- (b) the Leibnitz Association;
- (c) the German Federation of Industrial Associations;
- (d) the Max Planck Society;
- (e) Universities;
- (f) Fraunhofer- Gesellschaft; and
- (g) Industry.

Diagram 3: The German Research Landscape



Further detail regarding the German innovation system is available in the German Federal Ministry of Education and Research publication *Federal Report on Research and Innovation*.²⁵

2. Policy change for Intellectual Property

Fraunhofer strongly urges that fundamental rights only be altered or removed in the presence of empirical evidence of a systematic problem. Fraunhofer disagrees with the view expressed that:

*the Commission considers it is appropriate to 'err on the side of caution' where there is imperfect information, and deliberately set weaker parameters in the way that rights are assigned, used or enforced.*²⁶

Fraunhofer considers that such an approach could be detrimental to policy aims, and suggests that time be taken to analyse and collate quality information and evidence.

Further, Fraunhofer would also urge caution against adopting exceptional or extreme literature to inform policy changes. An objective, balanced and multidisciplinary approach is important in a policy setting regard. Please refer to sections 4 and 5 below.

There appears to be a failure to recognise the value of IP from an economic context and the serious adverse consequences that Australia would face in the absence of appropriate IP protection. This is alluded to in first paragraph of the Draft IPA Report:

²⁵ For the latest available report, see https://www.bmbf.de/pub/Federal_Report_on_Research_and_Innovation_2014.pdf
²⁶ Draft IPA Report, at page 69.

'Since new ideas are a major source of economic growth, any defects in IP arrangements intended to encourage their creation and diffusion can be very costly.'

However, no further regard appears to be given to this important consideration throughout the rest of the Draft IPA Report.

The Draft IPA Report states that, 'Australia's patent system grants protection too easily, allowing a proliferation of low-quality patents, frustrating the efforts of follow-on innovators, stymieing competition and raising costs to the community'.²⁷ There is a clear lack of empirical evidence to support this assertion.

Fraunhofer strongly urges that fundamental rights only be removed or modified in the presence of empirical evidence of a systematic problem. Not only is this important for Australia and Australians, but also for international cooperation partners.

It is further noted that the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement reflects balance for IP owners and users and upon which Australian law is currently based.²⁸

3. The system allegedly favours right holders

There appears to be no cogent evidence to satisfy the proposal that Australia's current system is favouring IP right holders and that 'greater costs are being born by Australian society than is necessary'.²⁹ The Draft IPA Report further purports that:

Some [rights holders are] becoming defensive, amassing IP rights not to use them but to prevent others from doing so. Others, such as firms that use patents to create uncertainty for competitors, exploit the system's shortcomings for their own gain. Ultimately, consumers lose out.

However, there was no evidence to support this assertion.

Such assertions that the IP system has shifted to favour right holders appears to have derived out of a belief that there is a concentration of lobbying by right holders which has created this shift. The Draft IPA Report states:

As with many other reforms, those who seek to gain from IP protections are concentrated and have actively sought to shape policy for their benefit, while those who stand to lose are dispersed and less aware of what is at stake, and

²⁷ Draft IPA Report, at page 2.

²⁸ See, for example, Articles 33 and 41 of the *Agreement on Trade-Related Aspects on Intellectual Property Rights* (hereinafter referred to as 'TRIPS'), which are among mandatory commitments for WTO members. We further note that TRIPS is the most important multilateral agreement for the globalisation of IP laws, with its stated objective being that '(t)he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'. Refer Article 7 TRIPS.

²⁹ Draft IPA Report, at page 81.

so are less vocal and influential in policy debates. The APC's recommendations have sought to redress this imbalance.³⁰

Fraunhofer disagrees with this general premise. From an international perspective, lobbying efforts in an IP context have been concentrated by companies around the globe promoting business models that suppress IP rights and IP value. What can be seen from such an experience is that although the bias reallocation may be of benefit to infringing company shareholders in the short term it is detrimental in the longer term. Such an approach is unsustainable for an innovation system and incorrectly alters the rule of law, fundamental legal rights, and the balance already existing at international level regarding the rights of IP owners and the societal contract that exists with IP users (that is, through the TRIPs Agreement).³¹

4. False presumptions in the Draft IPA Report (Information Request 14.1 and Draft Recommendation 14.1)

As noted in Section A c), under European and US law, there is no presumption that IP creates market power in the antitrust context³² or that enforcing an IP right is an abuse of market power³³. As stated by the Australian delegate at an OECD roundtable on Competition Policy and IP rights:

*Indeed, the grant of exclusive rights under the various intellectual property regimes generally has only a limited effect on competition [...] although concentration of intellectual property rights may raise a difficult barrier to entry, the converse is also true: intellectual property rights may enable a newcomer to enter a mature or concentrated industry and offer strong competition to existing firms.*³⁴

Furthermore, as noted in Section A c, '[t]here is no implication that there is an inherent conflict between intellectual property rights and [...] competition rules. Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources.'³⁵ This is confirmed in the latest

³⁰ Draft IPA Report, at page 26.

³¹ See William R. Kerr, Josh Lerner, Scott Stern, Innovation Policy and the Economy 2015, Volume 16; See, for example, Articles 33 and 41 of the TRIPS, see footnote 28 above.

³² See:

- Guidelines under 'Purpose' at Page 1. See also 'U.S. Antitrust Guidelines', see at footnote 6, in particular the General Principles set out on page 2, section 2.2; 'U.S. Antitrust Enforcement and IP Rights' at Chapter 2; For U.S. case law see the US Supreme Court in *EBay Inc. et al, Petitioners v. Mercexchange LLC* 547 US 388 (2006); available at <https://supreme.justia.com/cases/federal/us/547/388/opinion.html>; See also 35 USC 154(a)(1), 261, and 283; Refer also to *Weinberger v. Romero-Barcelo* 456 US 305 (1982).
- EU Guidelines, see footnote 6, see in particular at paragraphs 3, 6, 7-9, and the remainder of Section 2.

³³ See Bostyn, Sven and Petit, Nicolas, Patent=Monopoly: A Legal Fiction (December 31, 2013). Available at SSRN: <http://ssrn.com/abstract=2373471> or <http://dx.doi.org/10.2139/ssrn.2373471>.

³⁴ OECD (Organisation for Economic Co-operation and Development) 1997, *Competition Policy and Intellectual Property Rights*, Policy Roundtable, Paris, p 89.

³⁵ See the EU Guidelines, at paragraph 7.

decision of the Court of Justice of the European Union, *Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH*.³⁶

Information Request 14.1 – is there evidence that grant-back or economic hold-up are widespread problems in Australia? Is there a risk of these becoming problems in the future?

With regards to Information Request 14.1, Fraunhofer notes that the notion of 'holdup' has become a popular term in literature written by or on behalf of lobby efforts to weaken IP rights, such efforts predominantly arising out of the United States. Fraunhofer refers the APC to recent United States case law addressing this issue, which finds that 'hold up', 'hold out' and 'royalty stacking' are not presumptions recognised at law unless asserted by a party as part of court proceedings and proven by cogent evidence on a case-by-case basis. For US cases, see *Ericsson Inc v. D-Link Systems Inc*³⁷ and *CSIRO v. Cisco Systems*.³⁸

The adoption of any such assumption as a starting point would remove the legal burden for an infringer to prove through admissible evidence any allegation it makes regarding royalty stacking, patent holdup and an appropriate method of calculating license fees.

Further in this regard, Fraunhofer notes the APC's references to other US economic theory, such as so called 'patent trolls' and 'patent thickets'. Such views are patently counter-IP protection and do not recognise the legitimacy of various business models to monetise IP. The European Union does not endorse such views or derogatory nomenclature – the IP assets are being exploited through legitimate business models and rights are being asserted where there is infringement³⁹. For European Case law, refer to the decision of *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH*, which recognizes the rights of IP owners to protect property, and the obligation of both parties to engage in good faith negotiations for the licensing of IP.⁴⁰

Draft Recommendation 14.1 – suggested repeal of s. 51(1) of the Competition and Consumer Act 2010 (Cth) and implementation of Guidelines.

With reference to Draft Recommendation 14.1, Fraunhofer strongly urges the APC to consider the implications of repealing s. 51(3) of the *Competition and Consumer Act*

³⁶ *Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH*, Case C-170/13 dated 16 July 2015, available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d56dcb57f245c14a50b55394be437b2660.e34KaxiLc3eQc40LaxqMbN4ObN8Te0?text=&docid=165911&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=129069>. See in particular Paragraphs 1– 8, and Paragraphs 46 – 67, of the judgment.

³⁷ *Ericsson Inc v. D-Link Systems Inc* (773 F. 3d 1201 Fed Circ 2014).

³⁸ *CSIRO v. Cisco Systems* (809 F.3d 1295 Fed Cir 2015).

³⁹ It is noted that the freedom to conduct a business according to community law is a fundamental right set out in Article 16 of the Charter of Fundamental Rights of the European Union. This Charter also provides that IP is property and shall be protected (Article 17) and where rights are violated, there is a right to have an effective remedy and a right to a fair trial (Article 47).

⁴⁰ *Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH*, Case C-170/13 dated 16 July 2015.

2010 (Cth). Such a proposal could distort the IP landscape in Australia and disrupt the harmony of IP and competition law. Any alteration to the legislative landscape should not be considered without empirical evidence of a systematic problem to be addressed. No issues have been clearly identified for Australia in this regard.

5. Characteristics of Intellectual Property

The Draft IPA Report correctly identifies that IP is different in fundamental respects to other forms of property in that it is intangible and easily infringed.⁴¹

The main rationale for IP rights is that they are intended to promote innovation and to help right holders to recover the costs of innovating where the market would otherwise preclude such recovery (i.e., the costs of undertaking the development and risk associated with that investment). The proposal to repeal s. 51(3) and to propose that IP rights only be exercised in the face of a fully competitive market therefore appears conceptually misconceived and ignores this premise for granting the rights in the first place.

The APC's attempt to determine the 'social value' of patents inconsistent with global approaches to IP. Firstly, a typical innovator's default incentive in itself is to discover the most 'socially valuable' innovations in order to generate the highest return through commercialisation. Ultimately, it is the market which determines this return, and thereby it also the market that determines a patent's social value. Patent offices are not in a position to make this determination, nor a competition regulator.

Secondly, such a proposal runs counter to how IP evolves from concept to product and does not consider the ever-changing landscape of the market. Since the market situation consistently changes it would be illogical to attempt to determine the 'value' of a patent. A patent of no value today may be of high 'social value' in 10 years and vice versa; patents irrelevant to one entity can be highly valuable to another; and certain patents may only realise their value once paired in conjunction with later created patents. Further, the ability to patent an invention highly incentivises its disclosure to the world which in turn can lead to a different innovator adding that 'inventive step' required to make the initial patent 'socially valuable'. Thus, allowing for cumulative innovation.

Further, the APC's proposition that innovations should only be protected where they are intended to be commercialised also appears illogical in this context. Those innovators who wish to offer their license to the world for no monetary reward should not be deprived of all property rights. There is no indication of the consequences of a commercialisation test, or when such tests would be applied. By way of example, if a patent is granted but is not commercialised (successfully) within five years, is it envisaged that the patent granted is void? If so this could lead to grave distortions in the market, with implementers of patents potentially able to delay commercial negotiations for these five years and use that IP for free.

The importance of IP is continually reinforced in Europe and Germany. The *Charter of Fundamental Rights of the European Union* upholds that intellectual property is property and must be afforded all guarantees of the right to the property set out in

⁴¹ Draft IPA Report, at page 52.

paragraph one of Article 17 of the Charter.⁴² The second paragraph of Article 17 of the Charter specifically deals with the protection of intellectual property, 'taking into consideration an increasing importance of the protection of intellectual property in general, and in the EC law in particular'.⁴³ The choice of IP protection should remain with the owner, as should the type of IP protection to be sought where there is more than one option.

Patents are not considered to impede innovation.⁴⁴ This has been recognised in Australia's submission to the OECD Policy Roundtable in 1997, which is cited but not recognised in the Draft IPA Report.⁴⁵ In the Draft IPA Report, the APC appears to be of opinion that IP rights do not truly encourage innovation. The Draft IPA Report states:

At present, however, there is contention whether IP rights encourage additional, new ideas and innovation [...] As put by the Australian delegate at an OECD roundtable on competition policy and IP rights:

'Some have argued that little, if any, additional investment in intellectual property is generated by IP [rights]. Certainly there is no consensus concerning how much additional creative and inventive activity is induced by IP [rights] which would not otherwise occur. (OECD 1997, p. 73)⁴⁶

However, this small extract does not reflect the entire submission by the Australian delegate.⁴⁷ The document cited goes on to state that intellectual property is important and does encourage innovation.⁴⁸ The delegate states that 'the objective of granting the exclusive [IP] rights is to foster innovation and therefore competition in the longer term'.⁴⁹ The delegate does not recommend the changes proposed in the Draft IPA Report.⁵⁰

6. Method of protection for business methods and software patents (Draft Recommendation 8.1)

In relation to Draft Recommendation 8.1, Fraunhofer suggests caution in excluding business methods and software from being patentable subject matter under s. 18 of the *Patents Act 1990* (Cth).

It is not possible to protect all forms of intellectual output through confidentiality agreements as trade secrets or know-how. The measure of protection selected is directly linked to the enforceability of rights and the ease of infringement, as well as

⁴² *Charter of Fundamental Rights of the European Union art. 17, 2010 O.J. C 83/02 (hereinafter referred to as 'Charter of Rights')*.

⁴³ *Charter of Rights art. 17; See Commentary of the Charter of Fundamental Rights of the European Union, at page 168, available at <http://llet-131-198.uab.es/CATEDRA/images/experts/COMMENTARY%20OF%20THE%20CHARTER.pdf>.*

⁴⁴ *OECD Competition and IPR Policy Roundtable 1997, see above at footnote 34, at page 89.*

⁴⁵ *Ibid, at page 87-89.*

⁴⁶ *Draft IPA Report, at page 59.*

⁴⁷ *OECD Competition and IPR Policy Roundtable 1997, see above at footnote 34, see pages 80, 88-90.*

⁴⁸ *Ibid, in particular at pages 86-91.*

⁴⁹ *Ibid, at para 2.18*

⁵⁰ *Ibid, in particular at pages 86-91.*

the anticipated value in the IP asset. Protection through copyright or patenting is often aimed to be more robust when the IP is easily reversed engineered (software patents being an example).

In this regard, Fraunhofer finds the 'evidence' in Table 3.1, 3.2 and table D.1 of little probative value to this discussion. The background for that survey is distinct to the way it was used as evidence in the Draft IPA Report. In particular, the survey was in relation to copyright whereas the Draft IPA Report's discussion was in relation to patent commercialisation.⁵¹ On another note, an attempt to compare the commercialisation model of high-ranking US universities funded through large personal endowments is not a fruitful comparison for the experience of R&D entities in Australia like CSIRO or universities.

7. Term of protection – pharmaceutical patents, copyright (Draft Recommendations 9.1, 9.2 and 9.3; Draft Finding 4.2):

Draft Recommendations 9.1, 9.2 and 9.3

Fraunhofer recommends caution against amending the term of any patent right unless there is cogent evidence to support the contrary. This is particularly the case for patents where there are often long lead times from date of protection to commercialisation, long administrative approval processes, and often long lead times for commercial negotiations. This lead time must be reflected to ensure that rights owners can attain adequate returns on investment. Please refer to section 3 above.

Draft Finding 4.2

In this regard, Fraunhofer notes that there is no empirical evidence to support Draft Finding 4.2. Such a distortion to fundamental legal rights should only be considered where there is empirical evidence of its anti-competitive effect. Such a proposal appears to be fundamentally misconceived against the premise for granting IP rights, and is inconsistent with global norms.

8. Parallel importation (Draft Recommendation 5.2)

With reference to the Recommendation 5.2, Fraunhofer finds it premature to recommend the repeal of the parallel importation restrictions without first undertaking a comprehensive review on how this would impact Australian writers and publishers.

9. Copyright and 'Fair dealing' (Draft Recommendation 5.3)

With reference to Draft Recommendation 5.3, Fraunhofer urges caution in shifting to the US-style intellectual property 'fair use' system. The fair dealing provisions under Australian Copyright law appear to be adequate. The APC is cautioned not to make such an amendment absent any empirical evidence that these the provisions are having a negative effect on IP or competition law.

Further, the amendment proposed may be too ambiguous and overly subjective in practice, thus forcing reliance on the court system to make a case-by-case

⁵¹ Bernaski, K. 2014, *Saving Mickey Mouse: The Upcoming Fight FOR Copyright Term Extension in 2018*, Seton Hall University, Newark.

determination. This would likely lead to higher costs to rights holders in enforcing their property rights.⁵² Such a proposal appears premature without conducting a comprehensive assessment on the above issues.

Rather than extending the 'fair dealing' provisions, a longer term objective (consistent with the anti-piracy movement) is to educate consumers about IP rights. Education could be the key to informing market participants and users of technology alike about rights and responsibilities regarding intellectual property and products and services which derive therefrom.

The impact of both reducing the term of copyright protection and expanding the 'fair dealing' provisions, in addition to having business methods and software only capable of copyright protection, could have a significant effect on Australia's innovation system and reduce incentive to participate in the innovation and knowledge base ecosystems in Australia.

10. Linking 'commercial use' to IP protection (Draft Recommendation 5.3)

Fraunhofer would caution against linking the availability of IP protection to its commercial use. Linking the ability to obtain patent protection or copyright protection with a test as to whether an invention would have been developed or commercialized but for the patent protection being available runs counter to science as a discipline, and how IP evolves from concept to intellectual property. As discussed above in section 5, neither IP offices nor competition authorities are in a position to make such an assessment. Very careful consideration and assessments should be undertaken before introducing an objects clause in legislation reflecting such requirements. From Fraunhofer's international experience, there has been no note of any other country that imposes a merits test on IP protection.

11. Amending inventive step of patents (Draft Recommendation 6.1)

With reference to Draft Recommendation 6.1, such an adoption appears premature without identifying empirical evidence to support a change from the current system. Fraunhofer urges caution in adopting the laws of the the European Union 'as is' rather if the focus is on patent quality, then this should be addressed by IP Australia.

12. Importing 'socially valuable' (Draft Recommendation 6.1 and 6.2)

With reference to Draft Recommendation 6.1 and 6.2, Fraunhofer urges caution against adopting the 'socially valuable' concept. An assessment of what's socially valuable is too vague and subjective. Further, what is 'socially valuable' should be determined by the market. Those operating and contributing in the innovation system have a default commercial incentive to create or discover 'socially valuable' contributions.

⁵² In this regard, Fraunhofer notes The Australian Society of Authors submission to Draft IPA Report, which shares a PricewaterhouseCoopers study into the introduction of 'fair use' in Australia which forecasts an increase in litigation costs to producers and artists of \$133m a year.

Of further importance, is the need for the APC to consider the nature of patents and how the market situation is constantly changing: what may be of no value one day may be of high value the next and vice versa. This is discussed at section 5 above. Also, a patent of 'no value' may lead to the cumulative innovation of a highly 'socially valued' patent.

On a secondary note, there is a greater practical need to ensure a degree of legal certainty to those investing in the innovation system to recoup their investments and continue to be incentivised to make contributions to society in this way.

As the APC has noted in the Draft IPA Report regarding the Hague Agreement on registered designs, no changes should be made to a legal system which affords fundamental rights relating to intellectual property until an 'evidence-based case is made, informed by a cost-benefit analysis' and impact assessment, regarding proposed changes.⁵³ What is at stake is too valuable.

13. IP and public institutions (Chapter 15)

With reference to Recommendation 15.1, obliging an open access policy for all (or otherwise, most) publicly-funded research is unsustainable.

Australia's Department of Parliamentary Services reports that government funding on science has been diminishing in Australia.⁵⁴ There is therefore a growing expectation of commercial return by government funded entities. This approach is used in many successful innovative countries; Germany is an example. The benefit of requiring government research entities to have a commercial mandate is that they must work more closely with industry or with government on a country's strategic priorities. These are considered to be desired outcomes in order to increase competitiveness and efficiency of industry, and benefit society. Furthermore, there needs to be some return on investment in order for research organisations to continue fundamental research. The Fraunhofer MP3 and CSIRO Wi-Fi are such examples.

14. Model agreements on IP treaties (Draft Finding 16.1; Information Requests 16.1 and 16.3)

Fraunhofer urges caution in adopting any proposal to bind future governments to policy-related issues on international trade and treaty agreements. In particular, dictating the elements of IP to be considered in a treaty-making process appears inappropriate. The elements to be considered should be for the government of the day. The use of a 'model agreement' also appears inappropriate and out of step with international experience.

The *US Trade Promotion Authority* and the European Union's *Transatlantic Trade and Investment Partnership*, as referred to in the Draft IPA Report, do not dictate nor attempt to intervene in the contents or elements of law to be enshrined in trade agreements. These approaches act as guidelines by supporting interdepartmental consultation and transparency.

⁵³ Draft IPA Report, at pages 474-5.

⁵⁴ Department of Parliamentary Services (2014) Australian Government Support for R&D, 1978-79 to 2014-15, available at: <https://www.documentcloud.org/documents/1310652-parliamentary-library-australian-government.html>.

Perhaps a better approach is to endorse a set of guidelines to promote interdepartmental consultation (such as with the Department of Foreign Affairs and Trade, IP Australia and the Australian Competition and Consumer Commission) on IP matters in an international trade context and to promote transparency.

C. Moving forward

Fraunhofer is of the firm view that established principles and norms creating the basis for international business and global innovation should not be distorted by imperfect information or exceptional perspectives. Governments should indeed be responsive and set out pathways for the future, but we do not believe this can be positively achieved in this context absent: clear government strategy setting out a countries' objectives for innovation, government and industrial funding to achieve those objectives, and undertaking a holistic and quality evidential assessment of the entire ecosystem.