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Microsoft submission to the Australian Government Productivity Commission

Intellectual Property Arrangements Draft Report

1. INTRODUCTION

Microsoft welcomes the opportunity to respond to the April 2016 Draft Report on Intellectual Property Arrangements (the **Draft Report**) of the Australian Government Productivity Commission (the **Commission**).

At Microsoft, our mission is to empower every person and every organisation on the planet to achieve more. To fulfil this mission, Microsoft develops, manufactures, licenses and supports a wide range of technology products and offerings, including computing devices, software programs and services.

Microsoft's comments on the Draft Report reflect our diverse perspectives:

- **As a copyright owner,** copyright law must ensure that creators can continue to provide users with innovative ways to access, explore, and experience a wide range of copyrighted works. Microsoft provides a wide range of works, from productivity tools like Microsoft Office, and Skype, to consumer favourites like Windows, Halo, and Forza, among others. Microsoft is constantly evolving such works to meet consumer demand to use them on a diverse range of both Microsoft and third party devices – from traditional PCs and tablets, phones, wearables, and large touch displays, to Microsoft's ground-breaking HoloLens augmented reality device.

- **As a platform for copyrighted works**, copyright law impacts hundreds of millions of online users who access Microsoft and third party software products and apps, along with motion pictures, music, and video games distributed on Windows Store, Xbox Live, and other platforms. These platforms are also important to software developers, film and television creators, record labels and music publishers, for distribution of their products.

- **As a creator of tools for users** (including software, productivity tools, web browsers, and related online services) copyright law impacts how Microsoft's customers can access, consume, and create materials that may contain copyrighted works. These tools enable users to remix, annotate, store, and share such materials for innumerable legitimate purposes.

- **As an online service provider**, copyright law is vital to providing proper balance between rights holders, platforms, and users. As businesses increasingly migrate their infrastructure to online platforms, copyright law provides needed clarity, and safe harbour "rules of the road" are now well understood, utilized, and relied upon at a level unparalleled in modern legal history.

- **As a patent owner,** Microsoft spends more than $11 billion annually on research and development. We rely heavily on patent and other intellectual property rights to protect the innovations produced by this investment. As a leading computing technology innovator, Microsoft holds a large number of patents to computer-implemented methods that advance the state of computing technology. Microsoft is also frequently sued for infringement by others who hold patents.

The broad diversity of Microsoft's offerings and perspectives gives us a unique - and, we believe, uniquely balanced - perspective on the issues raised in the Draft Report.

2. SUPPORT OF INDUSTRY ASSOCIATION SUBMISSIONS

Microsoft is pleased to support the submissions on the Draft Report of the following industry associations of which we are a member:

- BSA | The Software Alliance (BSA)
- The Business Council of Australia (BCA)
- The Digital Industry Group Incorporated (DIGI)
- The Interactive Games Entertainment Association (IGEA)

3. COPYRIGHT ISSUES

Microsoft shares the Commission's objectives for Australia's copyright law to continue to reward creativity and encourage innovation for the ultimate benefit of Australian consumers. Copyright law has remained an essential foundation for generating benefits to creators, consumers and the economy.

The past four decades have seen unprecedented changes in every sector of the creative industry – new tools have democratized content creation, innovations in online services have greatly increased the availability of copyrighted works, and competitive and compelling business models have significantly expand consumer choice. Over the same period, the rapid pace of innovation has produced unprecedented new devices, online services, and tools for consumers to access, use, and share copyrighted works. The coming decades will see another burst of innovation and creativity, as virtually every creative industry reinvents themselves in an age of cloud computing. Accordingly, it is important that copyright laws remain balanced so that copyright owners, innovators, and consumers can each benefit.

DRAFT FINDING 4.2

While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.

The Commission raises legitimate questions of whether the overall term of copyright is optimized to provide sufficient rewards to creators while ensuring the public benefits from the availability and use of copyrighted works. However, its proposed solutions contain a number of incorrect assumptions that do not accurately reflect the creation, exploitation, or even the nature of software, video games, and other creative works.

By example, to support its recommendation for very short copyright terms, the Draft Report uses music as a proxy for how creative works lower production and distribution costs. In every creative sector, technology improvements have enabled greater efficiencies due to improvements in coding tools, increased computing power and declining hardware costs. At the same time, however, works themselves have become significantly more complicated, expensive, and creative.

A better example would be to compare an 8-bit game of thirty years ago to a contemporary video game. Both works, reflecting the available technology of their day, took significant effort, time, skill, expense, and creativity to create, but the modern game contains an exponential amount of code, features, visuals, technology, and has far greater creative elements including characters, gameplay, stories, dialog, music and other components. It is typical for modern video games such as Halo to have budgets and staffs similar to Hollywood blockbusters. The same is true for a wide variety of software programs – which build on prior released versions while offering significantly more features, components, and innovations with each new release.

The Draft Report also mistakenly assumes that all necessary copyright incentives are exhausted once a "version" has concluded some "useful life." This approach to determining viable copyright terms misunderstands how these works are created, updated, and improved. Windows and Office are both excellent examples of a copyrighted work that has continued to evolve from earlier releases, and where many versions continue to enjoy updates and improvements despite the availability of new versions. In both the software and video game industries, previously released works are frequently revised and released on new platforms and devices, or deployed in new services including cloud-based and streaming offerings. Emerging business models are actually moving away from large single releases and instead deploying an initial work that is frequently updated and iterated. In each of these models, copyright continues to provides significant incentives to both creators and to the public that extends beyond an artificially determined "useful life".

The Draft Report also ignores the role that a robust fair use standard can play in balancing out longer copyright terms by accommodating transformational uses of previously released works, which provide important public benefits without impinging on the reasonable expectations of copyright owners. Fair Use helps ensure that the public is not deprived of innovative uses while ensuring that copyright owners are not deprived of the ability to obtain appropriate rewards for their creativity.

DRAFT RECOMMENDATION 5.3

The Australian Government should amend the *Copyright Act 1968 (Cth)* (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.

The new exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.

The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:

- the effect of the use on the market for the copyright protected work at the time of the use
- the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work
- the commercial availability of the work at the time of the infringement
- the purpose and character of the use, including whether the use is commercial or private use.

The Copyright Act should also specify a non–exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.

The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.

The Commission correctly identified the need for reforming Australia's present system of limited copyright exceptions. These limited exceptions are insufficient to ensure that users can legitimately engage in the types of daily digital and online activities enabled by recent innovations. For many daily activities which form the backbone of users' digital lives, fair use standards are pivotal, especially in an age where much of this activity remains heavily dependent on the ability of intermediaries to facilitate such legitimate uses.

Fair use enables social media sites to let their users engage in robust commentary and information sharing, it gives search engines the ability to crawl, index, and provide users with meaningful access to information, and it helps cloud computing services analyse and provide insights to help power the millions of apps for a new generation of artificial intelligence and Internet of Things devices and services. As the Commission has noted, fair use-based legal regimes are far more effective and efficient than legislative-created exceptions in meeting the dynamic and rapid pace of technical innovation. Microsoft agrees the Commission that implementing a fair use standard will provide significant benefits to Australian users, without unfairly compromising the legitimate expectations of copyright holders.

4. PATENT ISSUES

Microsoft agrees with a number of the Draft Report's conclusions and recommendations relating to various improvements to Australia's patent regime (including the proposed abolition of the innovation patent system and adoption of a more stringent standard for inventive step).

> DRAFT RECOMMENDATION 8.1
>
> The Australian Government should amend s. 18 of the *Patents Act 1990* (Cth) to explicitly *exclude* business methods and software from being patentable subject matter.

Microsoft generally agrees that the available evidence suggests that providing patent protection for methods of conducting business or engaging in commerce is unlikely to produce significant additional innovation or benefits to society. However, the Draft Report's claim that there is an equally clear case for excluding software is not supported by a similar body of evidence, but rather appears to be based in significant part on unfounded assumptions incorporated into the Commission's analysis. In particular, Microsoft is concerned with the following aspects of the discussion in Chapter 8.

***The Draft Report inappropriately conflates business methods and software patents* –** Methods of doing business and software inventions are not the same. But despite their obvious and significant differences, the Draft Report seems to refer to them interchangeably and inappropriately conflates them by citing conclusions and characteristics specifically relating to business method patents as evidence that software should be excluded without providing any meaningful justification or rationale for doing so. The bulk of the articles, reports, and conclusions cited by the Commission in support of its recommendation appear to relate primarily or exclusively on business method patents and provide little or no basis for drawing conclusions about the desirability of software patents.

***Lack of clear evidence supporting exclusion of software (as opposed to business methods)* –** The Commission concludes, based on the same evidence and arguments considered in prior governmental and expert reviews, that "[t]here is a clear case to exclude business methods and software (BM&S) from patentable subject matter." Unlike the literature on business methods, the evidence with respect to software patenting is ambiguous at best and does not present a "clear case" for exclusion.

The bulk of the academic and governmental analyses of which Microsoft is aware do not agree with the Commission's conclusion that – on balance – software patenting is harmful to innovation and social welfare. Most – including some relied on by the Commission in its Draft Report – find that the empirical evidence is ambiguous. For example, Bakels and Hugenholtz (2002), which is cited repeatedly in the Draft Report, concludes that "*No hard empirical data exist today to support conclusions in favour or against software and business method patenting*." Even the most ardent critics of software patenting – such as James Bessen, whose work is also repeatedly cited – concede that the overall impact on social welfare cannot be accurately determined.

Given the weak evidentiary case for excluding software, Microsoft believes the Commission should remove the reference to software and limit its recommendation to business methods. At a minimum – the analysis and discussion in Chapter 8 should assess the economic impact of software patents separately from business method patents, should clearly identify the evidence and analysis supporting its conclusions regarding software patenting, and set forth basis for its departure from the findings of prior reports and academic studies addressing this issue.

Inaccurate claims of a global trend toward excluding software – The Draft Report suggests there is a global trend toward restricting the patentability of software, claiming that "[o]ther countries have reached similar conclusions" and have "taken action on winding back the scope of patent protection afforded to BM&S." This is simply not true. In virtually all of the major advanced economies, patent protection for software-related inventions has been significantly strengthened and expanded over the past two decades, with both the courts and legislatures repeatedly *rejecting* arguments that software inventions should be categorically excluded.[1]

As support for the notion that there is an emerging international consensus against the patentability of software, the Draft Report claims that "Germany, the United Kingdom, Canada, Thailand and New Zealand have all narrowed the definition of patentable subject matter in their patent legislation." It is unclear – at least to us – what the Commission is referring to as the Draft Report provides no explanation or support for this assertion. It is unclear what legislative changes the Commission is referring to. Microsoft actively seeks (and obtains) patent protection in these jurisdictions and (other than in New Zealand) is not aware of any recent legislative changes that significantly narrow eligibility for software.

As further evidence of countries "taking action," the Commission claims that "Japan, Bangladesh and the United States have had the definitions of what constitutes a patentable 'invention' narrowed in the course of legal action." While it may be true that the scope of eligibility has been narrowed by case law in these countries, the implication that the motivation was to "wind[] back the scope of patent protection afforded to BM&S" is inaccurate. For example, the narrowing in the U.S. has resulted from the trend toward a more expansive application of "implicit exceptions" to patentability (i.e.*.,* abstract ideas, laws of nature, and natural phenomena) that apply equally to every field of technology. Contrary to the Draft Report's claim that this reflects a decision to exclude software and business methods, these exceptions apply equally across all fields of technology and narrow eligibility for all types of inventions. In fact, the U.S. courts have explicitly rejected the argument that business methods should be singled out for special treatment or categorically excluded from patentability. *See, e.g., Bilski v. Kappos* (declining to categorically exclude business methods); *Enfish v. Microsoft* (explicitly reaffirming the eligibility of software).

In sum, to the extent that there is a trend toward global consensus on software patentability, it is precisely the opposite of what the Draft Report suggests. While there was a time when then patentability of software patentability was uncertain, inconsistent, and highly controversial. That time has passed. Patent protection for software has gone from the exception to an overwhelming norm. Today, virtually every significant economy in the world allows patenting of software-related inventions so long as they satisfy the traditional requirements of novelty, inventiveness, and industrial applicability, with software-related inventions accounting for us many as half of patent applications received by some national patent offices.

[1] *See, e.g.,* Emir Aly Crowne Mohammed, What Is an Invention? A Review of the Literature on Patentable Subject Matter, XV RICH. J.L. & TECH. 2 (2008) (discussing the global expansion of patentable subject matter).

INFORMATION REQUEST 8.1

What approaches or tests could be used to differentiate between inventions where the contribution of embedded software is trivial and inventions where the contribution of embedded software is genuinely deserving of patent protection? Should such tests be implemented in law or patent examination practices?

As an initial matter, Microsoft does not believe there any reasoned basis for drawing a distinction between embedded and "stand alone" software products. While there are some differences between these two categories of software, none of them seem to be relevant to patent eligibility or provide a compelling rationale for treating them differently for purposes of eligibility.

With regard to which approaches or test could be used to differentiate between trivial and socially beneficial inventions, in our view the traditional requirements for patentability (novelty, inventive step, and industrial applicability) are well suited to determining whether an invention deserves well suited to determining whether a claimed invention represents a significant inventive contribution that is sufficient to justify patent protection and that these factors – if properly applied – would provide clearer, more accurate, and more predictable results than any technology-specific standard.

With respect to the final question, to the extent changes are made to the scope of eligibility, Microsoft believes that it would be preferable to implement them in the patent examination process rather than seeking changes to statutory law.

5. COMPETITION POLICY ISSUES

DRAFT RECOMMENDATION 14.1

The Australian Government should repeal s. 51(3) of the *Competition and Consumer Act 2010 (Cth)* (Competition and Consumer Act).

The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property.

Microsoft agrees that, under certain circumstances, competition law is implicated by "the imposing, or giving effect to, a condition of a license" or assignment of IP rights. Indeed, many established competition law regimes explicitly cover IP-related conduct. See our response to Information Request 14.1. As noted in the Draft Report, most comparable jurisdictions to Australia, including the US, Canada and Europe, have "no equivalent" to the section 51(3) exemption: Draft Report at p. 391 (quoting the Competition Policy Review).

We also agree that any decreased certainty resulting from the repeal of section 51(3) would be alleviated through clear and specific guidance from the ACCC. In particular, the establishment of a safe harbor or "safety zone" as in the relevant U.S., European and Canadian guidelines and regulations would be helpful. We hope that the public will have an opportunity to comment and provide input on any such ACCC guidance.

As noted in the Draft Report, the repeal of section 51(3) would subject IP licensing conduct to competition law claims that are analysed on a per se basis, such as cartel conduct, exclusionary conduct, and third-line forcing: Draft Report at 395. Applying per se prohibitions to IP licensing is likely to result in overbroad prosecution of procompetitive, socially and economically beneficial conduct. We therefore agree with the Draft Report's recommendation that if section 51(3) is repealed then reforms of the per se prohibitions in the Competition and Consumer Act, along the lines of the recommendations in the Harper Competition Policy Review, should be instituted at the same time. It would be helpful to include this point in Recommendation 14.1.

Finally, we strongly agree with the recommendation in the Draft Report that part IIIA of the Competition and Consumer Act (the "National Access Regime") should not be extended to IP. Extending the National Access Regime to IP would likely have a strong deterrent effect on innovation and risk impinging on the fundamental right of an IP owner to exclude. Further, as the Draft Report points out, there are provisions in other statutes, including the Patents Act, Copyright Act, and section 46 of the Competition and Consumer Act, which could provide a sufficient remedy in the event of, for example, anticompetitive denial of access to IP: Draft Report at 396-399. Again, we believe it would be helpful to explicitly state the view that part IIIA should not be extended to IP in Recommendation 14.1.

INFORMATION REQUEST 14.1

Is there any evidence that grant back obligations or economic hold up are widespread problems in Australia? Is there a risk of these becoming problems in the future?

We are not aware of any current, formal complaints about alleged "hold-up" based on standard essential patents (SEPs) encumbered by fair, reasonable and non-discriminatory (FRAND) license terms in Australia specifically. However, those companies who have been alleged to have engaged in hold-up generally license on a worldwide, rather than a national, basis. These worldwide agreements can have direct domestic effects within Australia for licensed products manufactured or sold in Australia. This is one reason why a number of different Governments are starting to adopt or clarify formal guidelines describing the application of competition law within their own jurisdictions to such activity. We also would note that there may be more companies globally who will be asked to take licenses to FRAND-encumbered SEPs with the advent of 5G standardization and some of the standards that will underpin the framework for the Internet of Things (IoT).

"Hold-up" is a real concern. As noted by the U.S. Court of Appeals for the Federal Circuit in *Ericsson, Inc. v. D-Link Sys., Inc.*,[2] "[m]ost notably, once a standard becomes widely adopted, SEP holders obtain substantial leverage over new product developers, who have little choice but to incorporate SEP technologies into their products. Using that standard-development leverage, the SEP holders are in a position to demand more for a license than the patented technology, had it not been adopted by the

[2] 773 F.3d 1201, 1209 (Fed. Cir. 2014).

[standard-setting organization], would be worth. The tactic of withholding a license unless and until a manufacturer agrees to pay an unduly high royalty rate for a SEP is referred to as 'hold-up.'"[3]

Even the mere threat of an injunction can cause a prospective licensee to pay royalties above a FRAND rate or agree to an unfair license.[4] As noted above, these increased royalties can then be passed along to consumers in the form of higher prices. This is why companies should not be permitted to seek injunctive relief based on FRAND-encumbered SEPs, especially when the parties disagree as to whether the SEP holder has offered truly FRAND terms (or if the parties have related disputes, such as whether the asserted SEPs are valid, infringed, etc.).

Such conduct can violate competition laws. The U.S. Department of Justice (DOJ) has noted that the "threat of exclusion from a market is a powerful weapon that can enable a patent owner to hold up implementers of a standard."[5] In addition, SEP owners can foreclose competition in downstream product markets by refusing to license those SEPs to competitors or potential competitors.[6] They also can artificially raise rivals' costs through the imposition of discriminatory royalties.[7] SEP holders also can unfairly seek other unreasonable terms such as refusing access to the SEPs unless the implementer agrees to cross-license non-SEPs, insisting that the implementer forgo the right to challenge validity or infringement of the patents, etc. Consumers can be harmed if companies implementing the standard pass on increased royalties in the form of a higher price.[8]

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[3] *Id.* at 1209.

[4] *See, e.g.*, FTC Testimony, at 5; *see also Microsoft Corp. v. Motorola, Inc.*, No. C10–1823, 2013 WL 2111217, at *85, 99-100 (W.D. Wash. Apr. 25, 2013) (Motorola demanded royalties of $6-8 per console from Microsoft and threatened to exclude Microsoft's products from the U.S. market. The court concluded that the appropriate RAND rate was 3.471 cents per unit for one standard and 0.555 cents per unit for another, so RAND was approximately $1.8 million in royalties a year as opposed to approximately $4 billion a year – the amount demanded by Motorola.), *aff'd* 795 F.3d 1044 (9th Cir. 2015); *Realtek Semiconductor Corp. v. LSI Corp.*, 946 F. Supp. 2d 998, 1002 (N.D. Cal. 2013) (LSI demanded a royalty that was higher than the price of Realtek's product); *Realtek Semiconductor Corp. v. LSI Corp*., No. C-12-3451, 2014 U.S. Dist. Lexis 81673, at *23 (N.D. Cal. June 16, 2014) (determining a RAND royalty of 0.19% of the selling price of the product); *Innovatio IP Ventures, LLC Patent Litigation*, MDL No. 2303, 2013 WL 5593609, at *9 (N.D. Ill. Oct. 3, 2013) ("[i]n light of all of the testimony, and particularly the evidence about Broadcom's real-world concerns about patent hold-up, the court concludes that patent hold-up is a substantial problem that RAND is designed to prevent").

[5] Renata Hesse, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Letter to Michael A. Lindsay, Esq., at 9 (Feb. 2, 2015), *available at* http://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated; *see also* Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition,* at 234 (2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf; Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at 2 (2007), *available at* https://www.ftc.gov/reports/antitrust-enforcement-intellectual-property-rights-promoting-innovation-competition-report .

[6] *See, e.g.*, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research In Motion Ltd.* (February 13, 2012), *available at* http://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations.

[7] *Id.*

[8] *See* Renata Hesse, Acting Ass't Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for the ITU-T Patent Roundtable: "Six 'Small' Proposals Before Lunch" (Oct. 10, 2012), *available at* http://www.justice.gov/atr/speech/six-small-proposals-ssos-lunch; *In re Robert Bosch GmbH*, Commission Statement, Fed. Trade Comm'n, No. 121-0081 (Nov. 26, 2012), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/04/121126boschcommissionstatement.pdf.

The European Commission published a policy brief explaining why DG Competition determined that Motorola Mobility violated European Competition law based on its assertion of its FRAND-encumbered SEPs:

> "SEPs can, however, confer significant market power on their holders. Once a standard has been agreed and industry players have invested heavily in standard-compliant products, the market is *de facto* locked into both the standard and the relevant SEPs. This gives companies the potential to behave in anti-competitive ways, for example by 'holding up' users after the adoption of the standard by excluding competitors from the market, extracting excessive royalty fees, setting cross-licence terms which the licensee would not otherwise agree to, or forcing the licensee to give up their invalidity or non-infringement claims against SEPs.... If the SEP holder has a dominant position and has given a commitment to licence on FRAND terms, then it expects to be remunerated for its SEPs through licensing revenue rather than by using these patents to seek to exclude others. Therefore, seeking an injunction before national courts on the basis of SEPs against a licensee willing to pay for the SEPs was found to constitute abuse of a dominant position."[9]

Other Governments also are adopting similar legal frameworks for applying competition law to FRAND-encumbered SEPs:

- The Japanese Fair Trade Commission finalized related guidance in its *Guidelines for the Use of Intellectual Property under the Antimonopoly Law* in January, 2016 (see http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/IPGL_Frand.pdf).
    - "Refusal to license or bringing an action for injunction against a party who is willing to take a license by a FRAND-encumbered Standard Essential Patent holder, or refusal to license or bringing an action for injunction against a party who is willing to take a license by a FRAND-encumbered Standard Essential Patent holder after the withdrawal of the FRAND Declaration for that Standard Essential Patent" may constitute an unfair trade practice.
- The Korean Fair Trade Commission revised its *Review Guidelines on Unfair Exercise of Intellectual Property Rights* at the end of March, 2016 (see http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=52&pageId=0305). These Guidelines provide in part:
    - "However when an injunction is filed limitlessly, patent hold up which refers to a situation where an SEP owner requires the payment of excessive royalty from willing licensees or filing an injunction to impose unfair conditions when licensing all with an intention to exclude competitors or obstruct the competitors' business activities can occur. Thereby an act of filing an injunction against willing licensees by an SEP holder who promised to license its SEP on FRAND terms can be determined as a behavior that restricts competition in the relevant market as it exceeds the reasonable extent of exercise of patent right."
- The Canadian Competition Bureau posted its revised *Intellectual Property Enforcement Guidelines* on March 31, 2016 (see http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04031.html). These Guidelines provide:

[9] European Commission, Competition Policy Brief-Standard-essential patents (Issue 8, June 2014) (emphasis added); available at http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf.

- "Another way that patent hold-up can arise in the context of standard setting is when a patentee makes a licensing commitment before its technology is adopted in a standard and then later seeks injunction orders against firms that are willing to license the technology on terms and conditions meeting the commitment. By seeking an injunction against firms that are 'locked-in' to the standard and that face prohibitive costs to switch to alternative technologies, the patentee can 'hold up' potential licensees and demand higher royalties than if it did not seek the injunction. The use of injunctions can be particularly problematic when the patentee's patented technologies comprise only a small part of the standard, but can nonetheless block a prospective licensee's ability to manufacture and sell standard-compliant products. Given the significant risk to its business, a prospective licensee that is threatened by an injunction may be compelled to pay a royalty rate greater than the patentee's *ex ante* commitment. Similar to the other cases involving patent hold-up described above, the Bureau's concern with the patentee's conduct is that it could increase the cost of accessing the standard for firms that wish to develop products that incorporate the standard and thereby reduce their incentive to innovate or otherwise produce products that use the standard. The patentee's conduct may result in foreclosure of companies making standard-compliant products. There is also concern that the increased cost of access will result in increased prices to consumers of standard-compliant products or that the conduct excludes alternative technologies that would have been considered for the standard."

Accordingly, there is a reasonable basis for the Australian Government to be concerned about anti-competitive patent hold-up based on SEPs. If the Government decides to take a position on "hold-up" in connection with FRAND-encumbered SEPs, we respectfully suggest that it consider the views articulated by other Governments which have considered the application of their competition law to such conduct.