



AUSTRALIAN PROPERTY INSTITUTE INC.

SUBMISSION TO THE

PRODUCTIVITY COMMISSION

ON

**INTELLECTUAL PROPERTY ARRANGEMENTS
ISSUES PAPER**

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9th December 2015

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Statutes cited:

Real Property Act,1900 (NSW)

Cases cited:

Mabo v Queensland (No.2) (1992) 175 CLR 1.

PREFACE

This submission to the Productivity Commission has been prepared by the Australian Property Institute, NSW Division (API) as part of ongoing research efforts and dissemination of factual and dispassionate information about property rights in Australia.

In addition, API records its appreciation for the invaluable and numerous discussions that occurred during the preparation of the submission with members of the Submission Committee. This submission however does not necessarily represent the views of any of the individual members of the Submission Committee.

INTRODUCTION

This submission responds to the document *Intellectual Property Arrangements Issues Paper (Issues Paper)* released by the Productivity Commission in October 2015 for public consultation and input by 30 November 2015. The API is grateful for the extension of time granted by the Commission to complete and lodge this submission.

The overall need for an inquiry into intellectual property is supported by API. In particular it is noted with approval that the Commission states in its *Issues Paper* that it is to consider the appropriate balance between “incentives for innovation and investments, and the interests of both individuals and businesses in assessing products”.¹ However, API is of the view that intellectual property in the area of real property presents a number of issues which are not fully canvassed in the abovementioned *Issues Paper*.

Intellectual property embedded in valuation and other property-related reports of API members involves the acquisition of information which may possibly be confidential. Yet, when engaged in banks and financial institutions the intellectual property in such valuations and/ or reports is commonly required to be passed to the client bank or financial institution. In the *Issues Paper* it is proposed that there are seven different forms of intellectual property rights.² It is the view of API that an eighth form exists, namely private agreements. The *Issues Paper*, however, regards private agreements between firms as alternatives to intellectual property rights. The API considers that “secrecy or confidentiality arrangements”³ as identified in the *Issues Paper* form a much larger part of the manner in which intellectual property is maintained in Australia for the purposes of trade secrecy or more often, financial confidentiality.

The API is aware of contractual requirements imposed upon some of its members when engaging with banks or financial institutions, wherein the intellectual property embedded within the valuation or report is required to be transferred. A difficulty arises when material such as super rent calculations (known as overage) are utilised in preparing the valuation and/or property report, given such confidential information is usually of high commercial value. For example, in the valuation for debt or equity purposes of a major shopping centre the API member would ordinarily obtain the lease rental arrangements but also details of the overage calculations, in order that the valuation report can be completed. Such information is of high commercial value, and yet the API member in contracting with the bank or financial institution is required to transfer this intellectual property.

Clearly the negotiating capacity of the parties to an engagement contract between a bank and financial institution and an API member is quite different – one party to the contract has significantly more power in negotiating than the other. Hence, the API member yields to the overtures of the other contracting party, and agrees to the transfer of the intellectual property in the valuation or property report. Anecdotal evidence suggests the inequality of negotiating power is placing API members in some circumstances in an ethical or even adverse legal liability position.

¹ Productivity Commission (2005) *Intellectual Property Arrangements: Productivity Commission Issues Paper (Issues Paper)* (Canberra) October, 1.

² *Issues Paper*, 5.

³ *Issues Paper*, 10 (Box 4).

Aside from the above somewhat prosaic example, the emergence since 1992⁴ of native title as a hitherto unknown class of property requires API members to draw upon material within native title connection reports when undertaking a compensation assessment of a specific native title. Native title is not afforded with title documentation similar to real property⁵, and hence access to native title connection reports fills this void in part. Conflict already exists as to the intellectual property in native title connection reports, and API draws the Commission's attention to recent research in this area.⁶ Clearly, the future use of native title connection reports for yet unknown property dealings in a specific native title landholding present a significant issue in gaining access to such connection reports by API members undertaking compensation assessments.

It is also observed by API that the development of sophisticated data such as 3D data information contracted by local government (such as the City of Sydney) cannot be readily obtained or shared. However, the locking down of such information represents a significant disadvantage for property owners, potential property owners or even emergency services. The Building Information Model (BIM) which is in itself a 3D data representation, provides not only volumetric data as well as traditional plans, and if freed of intellectual property protection restraints could be used beneficially for the whole life cycle of buildings.

The following section of this submission responds to the questions posed in the *Issues Paper*. However should any further information be required by the Commission in respect of either the introductory comments or the foreshadowed responses, Mr Stephen Child Member Services Manager API NSW can be contacted.

⁴ *Mabo v Queensland (No2)* (1992) 175 CLR 1.

⁵ For example, the *Real Property Act 1900* (NSW) provides for registration and title certification for real property in NSW, and the other five Australian states provide similar statutory processes.

⁶ Ritchie, Eamon and Janke, Terri (2015) "Who owns copyright in native title connection reports?" *Indigenous Law Bulletin*, 8(20) September/October, 8 – 11.

RESPONSES TO QUESTIONS

The following responses to select questions in the *Issues Paper* are provided below in order of sequence in the *Issues Paper* :

Do IP rights encourage genuinely innovative and creative output that would not have otherwise occurred? If not, how could they be designed to do so? Do IP rights avoid rewarding innovation that would have occurred anyway? What evidence and criteria should be used to determine this? Are IP arrangements in other jurisdictions more effective in generating additional creative output?

Response

API considers that there is a significant tension over intellectual property and the dissemination of innovation and ideas. As stated in the Introduction private agreements facilitating secrecy and financial confidentiality imposed upon API members clearly act against the promotion of innovation.

To what extent does the IP system actively disseminate innovation and creative output? Does it do so sufficiently and what evidence is there of this? How could the diffusion of knowledge-based assets be improved, without adversely impacting the incentive to create? What, if any, evidence is there that parties are acting strategically to limit dissemination?

Response

As stated earlier there is a shadow de facto regulatory environment which has been created by private agreements between parties where the parties may be of unequal negotiating capacity. For the diffusion of intellectual property within this shadow regulatory environment it is considered that legislative change is warranted as the current private agreement framework is limiting dissemination.

Do IP rights provide rewards that are proportional to the effort to generate IP? What evidence is there to show this? How should effort be measured? Is proportionality a desirable feature of an IP system? Are there particular elements of the current IP system that give rise to any disproportionality?

What are the relative costs and return to society for public, private and not-for-profit creators of IP? Does the public provision of IP act as a complement or substitute to other IP being generated? Are there any government programs or policies that prevent, raise or lower the costs of generating IP?

What are the merits and drawbacks of using other methods to secure a return on innovation (such as trade secrets/confidentiality agreements) relative to government afforded IP rights? What considerations do businesses/creators of IP make in order to select between options? How does Australia's use of methods besides IP rights to protect IP compare to other jurisdictions? Why might such differences arise?

Response

Trade secret / confidentiality agreements present a significant disincentive to parties willing to be innovative in such areas as property valuation and allied reporting. It is the view of API that the private agreement environment presents significant issues for innovation, and is arguably significantly more powerful than the current legislative framework covering intellectual property.

Are there obstacles in the IP system which limit the efficient trade of IP between creators and users? Are there particular areas where trade, licensing and use of IP could be more readily facilitated?

Are there sufficient safeguards to ensure that IP rights do not lead to unduly restrictive market power? Are there ways (including examples employed overseas) to improve the dissemination of IP while preserving incentives to generate IP? Could such methods be adopted or adapted within the Australian IP system?

Response

API believes that the current multifaceted approach to intellectual property not only discourages trade and dissemination, but also provides an “anti-competitive advantage”⁷ to the holder of the intellectual property.

What are the longer term effects of the IP system on competition and innovation? What evidence is there to assess and measure these effects?

Response

See earlier comments.

How well has Australia’s IP system adapted to changes in the economic, commercial and technological environment and how well placed is it to adapt to such changes in the future? What factors may make it harder for the IP system to adapt to change? What policy options are there to remedy any difficulties, and why might they be preferable?

Are there other ways of ensuring the IP system will be efficient, effective and robust through time, in light of structural economic changes and the importance/pervasiveness of IP? Is a principles-based approach preferable to a prescriptive approach in this regard? Are there particular parts of the IP system that should be principles-based or prescriptive?

Response

The private agreement environment, in which intellectual property is currently controlled, is largely hidden from view and hence difficult to assess in terms of size and value. Arguably, the existing private agreements-based system should be brought under the aegis of the existing legislative framework to ensure fairness and transparency.

⁷ *Issues Paper*, 11

What additional challenges does technological change and new methods of diffusion, including digitisation, present for the adaptability of the IP system? How should such challenges be approached?

Response

No comment.

Ideally, what sort of information is needed to evaluate the IP system? In their absence, what alternative data or proxies are available?

What factors have constrained transparent evaluation of IP rights extensions?

Response

No comment.

The Commission seeks submissions about how the parameters of the IP system came to be set, and on the basis of what evidence and analysis.

How were decisions to extend IP rights in the past (e.g. copyright) assessed? Is an evidence-based approach systematically used to assess changes to the IP system? How transparent have decisions to change the IP system been, including when it comes to legislation and international agreements? Is a stronger evidence base and greater transparency in the public interest, and if so, how should this be accomplished?

Response

As stated earlier the extension of legislative control to private-agreement making would ensure greater transparency, security and accessibility.

How should a context of limited information, long legacy tails and IP policy irreversibility bear on the stringency of IP rights? In particular, if a precautionary principle is applied, should it err on the side of the consumers or on the side of the IP rights holder? In a global context, which approach best suits Australia?

Response

API considers that a cautionary principle should be applied and that private agreement-making should be brought under legislative control.

APPENDIX 1

AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history. Originally formed in South Australia over 87 years ago in 1926, the Institute today represents the interests of nearly 8,000 property experts throughout Australia.

The API, the nation's peak professional property organisation and learned society, has been pivotal in providing factual, independent and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments and their agencies since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by international bodies such as the United Nations, the Food and Agriculture Organisation (FAO), the European Commission (EU) and the World Bank, evidencing a level of expertise within the API and its membership, which is recognised regionally and globally.

As a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members.

API members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, property investment analysis, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, research and education.

Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and lifelong continuing professional development.

APPENDIX 2

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