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Australian
**Small Business and
Family Enterprise**
Ombudsman

9 June 2016

Ms Dominique Lowe
Assistant Commissioner
Intellectual Property Arrangements
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Ms Lowe

INTELLECTUAL PROPERTY ARRANGEMENTS

Thank you for the opportunity to comment on the Productivity Commission's draft report on Intellectual Property (IP) Arrangements released on 29 April 2016.

We agree with the Commission's view that a sound IP framework is an important facilitator of innovation to build a more diverse and resilient Australian economy. To that end, we are supportive of a principles-based approach to the IP system to ensure ongoing flexibility and effectiveness in the face of technological and other change.

The former Office of the Australian Small Business Commissioner (ASBC) wrote to you on 15 December 2015 with a number of comments, which I believe are worthy of further consideration. We have restated some of the recommendations of the ASBC submission in this letter, but refer you to that submission for further detail.

We believe that the IP system could be further improved to better address the needs of small business by:

General

- Reducing delays in accessing protections under the IP system, particularly decreasing the three to four year wait for a standard patent (especially given an average 7 year small business life expectancy).
- Improving the way that small business can monitor and enforce IP rights, such as ensuring that there is an easy-to-access mechanism for low cost alternative dispute resolution (ADR). Although the Commission focuses on whether the Federal Court might be the appropriate avenue for such low cost dispute

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resolution, we recommend that consideration be given to whether the objectives might be more effectively obtained through private sector ADR providers (such as is currently organised through our Office).

- Providing small business with greater protection from unjustified threats of legal action for copyright and other IP infringements, ensuring that such unjustified threats are not able to shut down potential rivals. Consideration should also be given to how this increased protection may be extended to ensure that iconic Australian products and marketing by regions is not undermined.
- Ensuring ease of use and providing education. In IP matters, it is clearly important that emphasis is placed on ease of use from a small business perspective and education of small business about the use and protections of Australia's IP system. This is critical where changes to established approaches are introduced.

Patents

- Replacing the *Innovation Patents* system with *Small Business Patents*. We disagree with the Commission's view that innovation patents should be abolished in any form. Instead, consideration should be given to making easily available "small business patents" exclusively for Australian small businesses. We understand that the original intention of *Innovation Patents* was to stimulate innovation by small business but that they can be used by larger firms to erect "patent thickets" to impede competition and innovation by small businesses. Australian Small Business Patents could be modelled on more successful second-tier patent systems in operation in other jurisdictions. To reduce the proliferation of low value patents, consideration could also be given to introducing reforms to limit the strategic use of patent thickets, and this is further supported by limiting the eligibility for small business patents to small to medium sized enterprises. Also as noted above, the 3 – 4 year wait for a standard patent is particularly problematic in light of the average life expectancy of a small business, and the Commission's findings about the innovation patent system's flaws do not change the underlying problem with accessibility of the standard patent system by small business.

Copyright

- Further considering an appropriate copyright period that applies to small and other businesses. Draft Finding 4.2 proposes the reduction of current lengthy copyright periods (extending to 70 years after death) to 15-25 years **following creation**. The reduction to a 15-25 year protection period should be closely consulted with small business to ensure an appropriate balance between the



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interests of small business as a producer of copyrighted materials and also as a net importer of copyrighted works. A shift to, say, a 15 year period following creation would likely be very significant for certain Australian small businesses. For example, consider an author who completes a manuscript, takes 5 years to have the manuscript published, and another 2 years before the book is discovered and receives an award, and then becomes a best seller. In this example, copyright protection would effectively be reduced to a mere 8 years and the exploitation of that copyright for film and other uses could consequently be severely limited.

- Reviewing the code of conduct for copyright collecting societies and determining whether it is sufficient. Whilst we support the need for such societies to ensure that small business can access a single licence to use, say, music from artists (who are normally also small businesses), we have reports of a significant recent increase in royalties required to be paid, particularly for nightclubs that as a result can find it uncommercial to open during the week. More generally, the quasi-regulatory nature of the copyright collection societies likely warrants a consideration of the appropriateness of current institutional structures to facilitate copyright fee collection.
- Providing a fair dealing exception in Australian copyright law, particularly to provide an approach that considers purpose, proportionality and non-consumptive use.
- Relaxing restrictions on parallel imports and removing geographic indexing to prevent foreign companies from charging higher prices to Australian small businesses. However, we also note that where Australian small business would be significantly and adversely impacted appropriate support, such as through the use of transition periods, should be provided.

Patents

- Cross-linking the business name registry and the trade marks database. We support the Commission's recommendation that ASIC link the Australian Trade Mark on line search with the business registration portal.

Designs and Trademarks

- Establishing a system for the protection of unregistered small business designs, ideally arising automatically (like copyright).

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I hope that these comments are of assistance to your inquiry. We believe that it is important that your review results in an affordable, accessible and effective IP system that properly caters for the needs of small business.

If you wish to discuss our comments, please feel free to contact me or my Deputy, Dr Craig Latham.

Yours sincerely

Kate Carnell AO

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