

Response to the Productivity Commission Issues Paper, Intellectual Property Arrangements

**Submission by the Competition and Consumer
Committee of the Business Law Section of the
Law Council of Australia**

1 December 2015

1. The interest of the Competition and Consumer Committee

The Competition and Consumer Committee of the Law Council of Australia is concerned with competition and consumer law. Its members consist of leading lawyers, economists and regulators with interests in these areas. Although the Inquiry into Australia's Intellectual Property Arrangements is broad-ranging, the interests of the Competition and Consumer Committee are directed to the impact of intellectual property law on market power and consumer protection.

In this submission, we shall make some general observations about the relationship between intellectual property law and market power. However, we wish to indicate our interest in commenting on any particular proposals that the Commission may be considering that bear on market power or consumer protection.

2. Intellectual Property Rights and Consumer Protection

The essence of the consumer protection provisions of the Act is set out in s. 18 of the *Australian Consumer Law* (previously s. 52 of the *Trade Practices Act*), and similar provisions in the States and Territories which prohibit misleading and deceptive conduct. This prohibition may have an impact both on the proper use of intellectual property and the misuse or infringement of intellectual property rights.

3. The justification of intellectual property rights

Intellectual property rights are part of a more-general system of property rights. These rights are critical for the efficient functioning of a market economy. Although intellectual property has certain characteristics that require intellectual property rights to differ from other property rights¹, the underlying economic rationale is the same.

There are two ways in which having a well-functioning system of property rights is socially valuable. First, property rights are needed to ensure that trade takes place in a way that maximises social value. Second, property rights provide incentives to encourage the creation of socially valuable assets. These two outcomes can be classified as the allocative and dynamic efficiency effects of property rights.

These general justifications for property rights apply also to intellectual property rights. Intellectual property rights are required in the interests of allocative and dynamic efficiency. Intellectual property rights promote allocative efficiency by clarifying who needs to trade with whom if rights are to be allocated to those who value them most highly. Intellectual property rights promote dynamic efficiency by ensuring that those who contemplate investing in the creation of intellectual property have appropriate financial incentives to do so.

4. Intellectual property rights and market power

The owners of intellectual property are at times described as having 'monopoly' rights. This terminology can create confusion in the minds of both lawyers and economists. When intellectual property rights are described as monopoly rights, they are merely

¹ See Joshua S Gans, David Briggs and Philip L Williams, "Intellectual Property Rights: A Grant of Monopoly or an Aid to Competition?", *Australian Economic Review*, Vol 37, No 4, December 2004, 383-90.

referring to certain intellectual property rights involving a right to exclude – as, indeed, any property right is a right to exclude. The legal characterisation of certain intellectual property rights (such as patents or designs) as conveying a monopoly does not mean that the owner of an intellectual property rights has any particular ability to appropriate a monopoly-type return.

This point can be seen by considering the incomes of writers or performers of popular songs. There are many thousands of writers and performers of popular songs; and most of these people own various rights to the music they have written or recorded. Nevertheless, the overwhelming majority of these musicians are quite poor. They have rights to prevent copying; however, these rights give them no ability to earn high rates of return on the investments they have made or to charge “monopoly prices” for the products they have produced.

Although there is no necessary link between intellectual property rights and market power, the ownership of intellectual property (as with the ownership of a railway line) can lead to market power problems in certain circumstances. These problems are of two principal kinds.

The first kind of market power problem could arise when a person attempts to gain market power by aggregating intellectual property rights to close-substitute products or processes. Problems of this kind have arisen with pharmaceutical drugs whose patents are about to expire. In principle, problems of this kind can be dealt with under competition laws that proscribe acquisitions which substantially lessen competition. The first-best solution to this problem seems to be for competition agencies to use competition law to prevent acquisitions that lead to undesirable aggregations of market power.

The second kind of market power problem that could arise is when the owner of the intellectual property rights attempts to leverage the market power deriving from an intellectual property right by foreclosing on rivals in its principal or in a related market (generally an upstream or downstream market). Although each case turns on its particular facts, in principle, the allegations generally involve the misuse of market power. However, these concerns they could apply just as well to the owner of a railway line as to the owner of intellectual property.

One solution to problems of this second kind would be for competition agencies to enforce laws that proscribe the abuse of market power. Another solution may be to require access to a bottleneck service that is protected by an intellectual property right. This suggests that the laws relating to compulsory licensing might have been investigated by the Productivity Commission. However, this does not seem to be raised by the Commission’s Issues Paper. We encourage the Commission to consider this area of the law as part of its overarching review.