

Intellectual Property Arrangements  
Productivity Commission  
GPO Box 1428  
Canberra ACT 2601

18 November 2015

Dear Commissioners,

**Re: Submission Inquiry into Australia's Intellectual Property Arrangements**

The main points of my submission follow with the detailed background and arguments set out in annexures:

**1. Australia's trade agreement promote a patent "Cargo Cult" (Annex 1)**

The desirability of implementing more than the minimum patent standards required by Australia's commitment to the World Trade Organisation's *Agreement on Trade Related Aspects of Intellectual Property Rights* (so-called "TRIPs-plus" measures) is doubted. We argue that there has not been an adequate analysis of what the various TRIPs-plus measures actually are under the *Patents Act 1990* (Cth), and that these measures have not been subjected to a competition analysis as required by the *Competition Principles Agreement*. This is, we contend, reminiscent of "cargo cult" as Australian policy makers appear to reason that the most developed nations have benefited from innovation with TRIPs-plus measures, and so with similar measures, those same benefits will accrue to Australia. This logic is flawed.

"TRIPs-Plus' Patent Privileges – An Intellectual Property 'Cargo Cult' in Australia" (2004) 22(4) *Prometheus* 355-377.

**2. Previous reviews of the Patents Act 1990 (Cth) have failed to comply with the Competition Principles Agreement (Annex 2)**

The modern Australian policy for strengthened patent privileges has failed to adequately address the requirement to demonstrate that the benefits of the restriction on competition outweigh the costs and that the objectives of patent privileges can only be achieved by restricting competition. These requirements are the principle articulated in the *Independent Committee of Inquiry into Competition Policy in Australia* (Hilmer Committee) and its subsequent codification in the *Competition Principles Agreement* (CPA) as part of the National Competition Policy. Applying the requirements of the CPA to patent privileges and assessing the broader debates about the appropriate patent scope and allocation is more likely to deliver a more rational patent policy that is more likely to be suited to the Australian community. The contrasting Intellectual Property and Competition Review Committee's approach to assessing parallel import restrictions under the *Copyright Act 1968* (Cth) highlights this contention.

"Patent Privileges and the National Competition Policy – Patent Scope and Allocation?" (2005) 33 *Australian Business Law Review* 7-29.

**3. Exempting patents from the competition laws needs to be justified and it has not been so far (Annex 3)**

The various reviews (including Independent Committee of Inquiry into Competition Policy (Hilmer Committee), the National Competition Council (Samuel Committee), the Intellectual Property and Competition Review Committee (Ergas Committee), the Trade Practices Act Review Committee (Dawson Committee), Australian Law Reform Commission (Weisbrot Committee), Productivity Commission, and so on) and the Australian Government's responses have left unanswered vital issues about the role of competition law in exploiting *Patents Act 1990* (Cth) patents. And the important justification for why patents require special treatment in applying the *Trade Practices Act 1974* (Cth) (and now the *Competition and Consumer Act 2010* (Cth)) competition laws still remains unclear. Unfortunately, the application of the *Trade Practices Act 1974* (Cth) (and now the *Competition and Consumer Act 2010* (Cth)) to patent licenses and assignments remains uncertain. This in part reflects its complex construction and the paucity of extrinsic materials and court decisions examining its possible meanings.

"Rethinking the Exemption of Some Patent License and Assignment Conditions from the *Trade Practices Act 1974* (Cth) Competition Laws" (2005) 2 *Macquarie Journal of Business Law* 47-89.

**4. *Patents Act 1990* (Cth) "inventive step"-like elements may be imposing unnecessary costs and complexity to Australia's patent laws (Annex 4)**

"Inventive step"-like elements (ISLE) may arise in the assessment of "invention" and "novelty" in the *Patents Act 1990* (Cth). The efficiency and effectiveness of leaving these elements in place is questionable as they might better be determined solely as a question of "inventive step". In the context of promoting regulatory quality and performance, these ISLEs add unnecessary costs and complexity to Australia's patent laws.

"The Evolution of 'Inventive Step'-like Elements in Australian Patent Laws" (2007) 18 *Australian Intellectual Property Journal* 130-148.

**5. The rhetoric of accountability and transparency in making patent decisions needs to be made real with proper disclosures of key instruments (Annex 5)**

There are important influences other than the *Patents Act 1990* (Cth) on the Commissioner of Patents decision-making to grant or refuse to grant patents. The influences are the public administration reforms on budget, financial management, people management and reporting arrangements. There is considerable potential to influence the Commissioner's decision-making. Most importantly, there are a range of policy and guidance materials that contribute to the environment (a matrix of legalities) in which decisions are made. Unfortunately, key instruments are not presently publicly disclosed, challenging the rhetoric of accountability and transparency in the recent public administration reforms, and leaving open questions about managerialist influences on granting patents in Australia.

“Managerialist Influences on Granting Patents in Australia” (2008) 15 *Australian Journal of Administrative Law* 70.

**6. Obviousness in the *Patents Act 1990* (Cth) needs to be a serious threshold (Annex 6)**

Obviousness in the context of the *Patents Act 1990* (Cth) – the quantum of advance beyond the existing knowledge and information that must be satisfied before a patent is granted and upheld as valid – is effectively a non-threshold. The current High Court authority has lowered the quantum to almost a *per se* rule so that the quality of obviousness will almost never be relevant in assessing patentability. The solution is for the Australian Government to clearly articulate the purpose and objective of obviousness in the *Patents Act 1990* (Cth) within a context that favors efficient and effective competition.

“Quantum of Obviousness in Australian Patent Laws” (2008) 19 *Australian Intellectual Property Journal* 43.

**7. Compulsory licensing is practically impossible (Annex 7)**

Compulsory licensing of patents under the *Patents Act 1990* (Cth) is asserted to encourage the licensing and working of inventions sooner, serving as an effective incentive for patent holders to grant a licence voluntarily and on their own terms. However, the meaning of the statutory provision is uncertain. Textual analyses of the provisions show that the likely meanings are practically uncertain and probably very limited. To be a real incentive the provisions need to be revisited by Parliament and recast in meaningful and purposeful text.

“Public Interest Compulsory Licensing under the *Patents Act 1990* (Cth): A Real Incentive or a Barrier to Working?” (2008) 19 *Australian Intellectual Property Journal* 129

**8. Introducing a compulsory license remedy in the *Patents Act 1990* (Cth) is questionable when an arguably superior remedy is already available in the *Competition and Consumer Act 2010* (Cth) (Annex 8)**

The *Intellectual Property Laws Amendment Act 2006* (Cth) amended the *Patents Act 1990* (Cth) by providing a specific remedy for compulsory licensing under the *Patents Act 1990* (Cth) for a breach of competition laws, such as Pt IV of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)). This article examines the evolution of this amendment and its likely operation. The hurdles for the compulsory licensing scheme under the *Patents Act 1990* (Cth) seem impractical when the same, or an arguably superior, remedy is already available under the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)).

“Compulsory Licensing under the *Patents Act 1990* (Cth) to Remedy Anti-competitive Conduct under the *Trade Practices Act 1974* (Cth)” (2008) 36 *Australian Business Law Review* 369.

**9. Duplicating tie-ins in the *Patents Act 1990* (Cth) is questionable when an arguably superior scheme is already available in the *Competition and Consumer Act 2010* (Cth) (Annex 9)**

The *Patents Act 1990* (Cth) limits certain dealings involving tie-ins with patent protected products and processes, and the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (Cth)) limits certain exclusionary, collusive, limiting and exclusive dealings. With the overlap between the *Patents Act 1990* (Cth) and the *Competition and Consumer Act 2010* (Cth), the question is whether two schemes are necessary or whether a single scheme might be more appropriate. Reviewing the legislative history, interpretation and policy justifications for the *Patents Act 1990* (Cth) limitations, suggests that two different schemes addressing the same regulatory problem are inefficient, and that the more specific *Patents Act 1990* (Cth) provisions should be repealed in favour of a single generally applicable, pro-competition scheme in the *Competition and Consumer Act 2010* (Cth).

“Tie-ins in the *Patents Act 1990* (Cth), s 144: Perhaps it’s Time to Modernise?” (2010) 21 *Australian Intellectual Property Journal* 202.

**10. Interlocutory injunctions (Annex 10)**

Interlocutory injunctions pose a dilemma for patent law and practice as they require a court to assess the parties’ submissions and make decisions before all the issues are thoroughly argued. While the relevant legal principles are settled, there remains some uncertainty for intellectual property owners (or licensees or assignees) maintaining their statutory privileges and protecting their broader commercial interests in exploiting their privileges (such as market share, brand, good will, reputation, and so on). Interlocutory injunctions could be deployed where there is both an alleged infringement of a *Patents Act 1990* (Cth) “standard patent” and a challenge to patent invalidity, as a tool to promote, encourage and coerce patent owners to provide access to, and disseminate, their patent protected products, method and processes while respecting core exclusive rights. Damages, albeit a lesser resolution between competing property claims, should be awarded in preference to an interlocutory injunction unless the parties are directly competing in the same market. The advantage of this approach is to promote, encourage and coerce patent owners to provide access to, and disseminate, their patent protected products, method and processes while respecting core exclusive rights.

“The Interlocutory Injunction Dilemma in Patent Infringement and Invalidity Disputes” (2010) 21 *Australian Intellectual Property Journal* 73.

**11. End point royalties (Annex 11)**

Despite a series of legislative developments to enable End Point Royalties (EPRs), these have not been necessary and the impetus has come from certain of the *Primary Industries and Energy Research and Development Act 1989* (Cth) Research and Development Corporations (RDCs). The key elements for a successful EPR scheme appear to be, as a generalisation, educating growers about the benefits of EPRs, assigning unique grower identifiers, streamlining contractual

arrangements, and providing science-based information to growers about the growing characteristics of the EPR-protected varieties.

“The Evolution of a Workable Scheme for End Point Royalties for Plant Varieties” (2013) 94 *Intellectual Property Forum* 36.

**12. Patent term extensions in the *Patents Act 1990* (Cth) need to be justified according to the *Competition Principles Agreement’s* pro-competition methodology (Annex 12)**

There have been evolving patent term extensions schemes under the *Patents Act 1903* (Cth), the *Patents Act 1952* (Cth) and the *Patents Act 1990* (Cth). These change from “inadequate remuneration” to a scheme directed specifically at certain pharmaceuticals. The policy justification shows there are legitimate questions about the desirability of any extension. The key information provisions in the *Patents Act 1990* (Cth) that might assist a better policy analysis are presently not working and any justification needs to address the Australian Government’s commitments to the *Competition Principles Agreement’s* pro-competition methodology – evidence demonstrating that the benefits patent term extensions to the community as a whole outweigh the costs and that the objectives of extensions can only be achieved by restricting competition.

“How are Pharmaceutical Patent Term Extensions Justified? Australia’s Evolving Scheme” (2013) 21 *Journal of Law and Medicine* 379.

**13. Compulsory licensing expensive drugs (Annex 13)**

For pharmaceuticals that are not made available in Australia, or available at such a high price that they are effectively unavailable, there is a potential for compulsory licensing and like arrangements under the *Patents Act 1990* (Cth). The existing compulsory licensing and like arrangements (the general third party non-voluntary licensing, government (Crown) use and government acquisition) appear to be credible possibilities for accessing patented pharmaceuticals, albeit there remain significant uncertainties about their deployment. These arrangements need to be a clear and present threat to patent holders to encourage them to voluntarily work their patents or license them (in Australia) on reasonable terms and conditions.

“Accessing and Affording Drugs Despite the Patent Barrier: Compulsory Licensing and Like Arrangements?” (2013) 24 *Australian Intellectual Property Journal* 94.

**14. Patents and competition in the seed sector – vigilance is required, especially where the resolution of disputes leads of anti-competitive agreements and arrangements (Annex 14)**

The markets for GMOs can conveniently be considered to be an innovation market for the discovery and development of novel and useful genetic traits, an innovation market for the discovery and development of novel and useful germplasm (plant breeding), a genetic traits market for the traits that can be placed into useful plant germplasm, a germplasm market for the germplasm that can have the traits inserted, and a traited seeds market for the GMOs that can be planted and grown. Market power in each of these markets and across these

markets enables the firms exercising that power to foreclose competition slowing innovation, raising prices, affecting quality, affecting choice and dulling the benefits of competition for producers (such as farmers) and the ultimate consumers of agricultural outputs. This is particularly interesting because patents and plant breeder's rights protect these innovations and they directly challenge competition laws designed to foster beneficial competition. The recent United States litigation affecting the innovation markets for GMOs and the role of intellectual property in limiting the various GMO markets demonstrated there are competition concerns.

"Competition in the Agricultural Seeds Sector: Patents and Competition at a Crossroads?". In Charles Lawson and Berris Charnley (eds), *Intellectual Property and Genetically Modified Organisms: A Convergence in Laws* (Ashgate, 2015) pp 81-102.

I look forward to reading your report.

Charles Lawson  
Griffith Law School  
GRIFFITH UNIVERSITY QLD 4222

Australian Centre for Intellectual Property in Agriculture  
[www.acipa.edu.au](http://www.acipa.edu.au)

## List of annexures

1. Australia's trade agreement promote a patent "Cargo Cult" (Annex 1)
2. Previous reviews of the Patents Act 1990 (Cth) have failed to comply with the *Competition Principles Agreement* (Annex 2)
3. Exempting patents from the competition laws needs to be justified and it has not been so far (Annex 3)
4. *Patents Act 1990* (Cth) "inventive step"-like elements may be imposing unnecessary costs and complexity to Australia's patent laws (Annex 4)
5. The rhetoric of accountability and transparency in making patent decisions needs to be made real with proper disclosures of key instruments (Annex 5)
6. Obviousness in the *Patents Act 1990* (Cth) needs to be a serious threshold (Annex 6)
7. Compulsory licensing is practically impossible (Annex 7)
8. Introducing a compulsory license remedy in the *Patents Act 1990* (Cth) is questionable when an arguably superior remedy is already available in the *Competition and Consumer Act 2010* (Cth) (Annex 8)
9. Duplicating tie-ins in the *Patents Act 1990* (Cth) is questionable when an arguably superior scheme is already available in the *Competition and Consumer Act 2010* (Cth) (Annex 9)
10. Interlocutory injunctions (Annex 10)
11. End point royalties (Annex 11)
12. Patent term extensions in the *Patents Act 1990* (Cth) need to be justified according to the *Competition Principles Agreement's* pro-competition methodology (Annex 12)
13. Compulsory licensing expensive drugs (Annex 13)
14. Patents and competition in the seed sector – vigilance is required, especially of where the resolution of disputes leads of anti-competitive agreements and arrangements (Annex 14)