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21 September 2012

Compulsory Licensing of Patents
Productivity Commission
LB 2 Collins Street East
Melbourne VIC 8003

Dear Sir/Madam,



I write to you in relation to the Productivity Commission's Issues Paper:
Compulsory Licensing of Patents.

Business SA is South Australia's leading business membership organisation, representing thousands of businesses through direct membership and affiliated industry associations. We represent businesses across all industry sectors, ranging in size from micro-business to multi-national companies. Business SA advocates on behalf of business to propose legislative, regulatory and policy reforms and programs for sustainable economic growth in South Australia.

It is essential that Australia's patents system ensures an appropriate balance between incentivising innovation and accessing technology, particularly for manufacturing high value products that result from the application of research and development (R&D). Patents are necessary to reward the risk undertaken when developing new and innovate products. Only a small proportion of all R&D results in new products, so for businesses in sectors that are highly innovative, such as pharmaceuticals, it is vital that the patents system recognises this.

The licensing of patents also plays an important role in ensuring an adequate return for the businesses undertaking R&D and developing patented products. In addition, licensing enables the dissemination of technology and increases the benefits to consumers by stimulating a competitive market for the innovative products.

While many innovative products are commercially developed domestically, Australia has an unenviable track record in losing ideas to manufacturers overseas. Patents and their licensing may play some role in this, but there are other factors, including a small domestic market, risk-aversion among possible financial backers (such as superannuation funds, angel investors and venture capitalists), a lack of collaboration between researchers and manufacturers and regularly changing tax incentives for R&D.

While the other issues are beyond the scope of the Productivity Commission's analysis, improving the rate of commercial development of patented products should be an objective of compulsory licensing.

It is also necessary for compulsory licensing to ensure adequate compensation to the patent developer. This could be through the price attached to the licence, a royalty agreement based on sales or other forms of payment.

The public interest test and the competition test to determine whether a patent should be subject to compulsory licensing are appropriate in theory. But there needs to be some clarification regarding aspects of the public interest test to reduce uncertainty, both for patent holders and for businesses wishing to use a potentially underutilised patent to bring the product to market or to develop more innovative products.

This uncertainty is likely to have limited the number of applications for a compulsory licence, by adding to the perceived time and cost associated with such applications.

Establishing criteria for applicants and for the assessing body (currently the Federal Court), that are used in granting a compulsory licence, is necessary to reduce uncertainty and provide clarification around the public interest test.

A separate set of criteria should be set up for compulsory licensing of patents associated with genes, human health and food security, to reflect what should be a more stringent public interest test for these cases.

Business SA believes that a statement of objectives in the Patents Act is a necessary addition, including objectives of compulsory licensing, two of which are suggested above. The objectives and criteria must be consistent.

Yours sincerely

Nigel McBride

Chief Executive Officer