

7 February 2013

Ms Yvette Goss
Compulsory Licensing of Patents Inquiry
Productivity Commission
LB2 Collins Street East
MELBOURNE VIC 8003

Dear Ms Goss

On behalf of CropLife Australia (CropLife) I provide the attached submission in response to the Productivity Commission's Draft Report on the Inquiry into Compulsory Licencing of Patents.

CropLife agrees with the findings of the Productivity Commission that the existing provisions of the *Patents Act 1990* provide an efficacious remedy where a patentee is abusing their exclusive rights to exploit a patent or where the reasonable requirements of the public are not being met.

CropLife considers there is no basis to justify transforming a remedial mechanism into a tool of general market regulation. CropLife commends the Productivity Commission for recommending explicit consideration of the right of the patentee to obtain a return on investment as part of a revised test for the granting of a compulsory licence.

Please do not hesitate to contact me or CropLife's Crop Biotechnology Policy Manager, Mr Osman Mewett, should you require further information in respect of any aspect of this submission.

Yours sincerely



Matthew Cossey
Chief Executive Officer



**SUBMISSION IN RESPONSE TO
PRODUCTIVITY COMMISSION'S
DRAFT REPORT INTO
THE COMPULSORY LICENSING OF PATENTS**

7 FEBRUARY 2013

INTRODUCTION

CropLife Australia (CropLife) is the peak industry organisation representing the agricultural chemical and biotechnology (plant science) sector in Australia. CropLife represents the innovators, developers, manufacturers and formulators of crop protection and agricultural biotechnology products. The plant science industry provides products to protect crops against pests, weeds and diseases, as well as developing crop biotechnologies that are key to the nation's agricultural productivity, sustainability and food security. The plant science industry is worth more than \$1.5 billion a year to the Australian economy and directly employs thousands of people across the country. CropLife Australia is part of the CropLife International Federation, representing the industry in 91 countries around the world.

CropLife welcomes the opportunity to make a further submission in response to the Productivity Commission Draft Report into the Compulsory Licensing of Patents. CropLife maintains its support for a strengthening of the status quo and agrees with the findings of the Productivity Commission that the existing provisions of the *Patents Act 1990* provide an efficacious remedy where a patentee is abusing their exclusive rights to exploit a patent, or where the reasonable requirements of the public are not being met.

CropLife considers that there is no basis to justify transforming a remedial mechanism into a tool of general market regulation. The current incentive for the market to maximise profit and the ability to profit from licensing dictates against systemic anti-competitive conduct.

In general, CropLife supports those recommendations made by the Productivity Commission in the Draft Report that recommend strengthening the requirements for the granting of compulsory licences. CropLife supports the recognition by the Productivity Commission that concerns about compulsory licensing stem from an isolated case involving patenting of genes for medical testing and the emphasis that this is not representative of the behaviour of most gene patent holders.

CropLife commends the Productivity Commission for recommending explicit consideration of the right of the patentee to obtain a return on investment as part of a revised test for the granting of a compulsory licence.

CropLife member companies have indicated strong concerns that the repeal of s. 51(3) of the *Competition and Consumer Act 2010* will result in business uncertainty and potentially a reduction in licensing activity in the plant biotechnology sector.

Further comments on specific Recommendations and Findings of the Draft Report are set out in this submission.

DRAFT RECOMMENDATION 6.1

Draft Recommendation 6.1

The Australian Government should seek to remove s. 133(2)(b) from the Patents Act 1990 (Cwlth), so that a compulsory licence order based on restrictive trade practices of the patent holder is only available under the Competition and Consumer Act 2010 (Cwlth). The remedy provisions in the Competition and Consumer Act should be amended to explicitly recognise compulsory licence orders to work a patented invention as a remedy under the Act. The new remedy provision should specify that an order must:

- *not give the licensee or a person authorised by the licensee, the exclusive right to work the patented invention*
- *be assignable only in connection with an enterprise or goodwill in connection with which the licence is used.*

The new provision should also contain a clause specifying the basis for determining remuneration, which is identical to the corresponding clause in the Patents Act.

By way of cross-reference to Part IV of the *Consumer and Competition Act 2010*, s133(2)(b) of the *Patents Act 1990* establishes a distinct, competition-based ground for the invocation of a compulsory licence order. Under the current legislation, an applicant for a compulsory licence under s 133(2)(b) must show that the patentee has contravened, or is contravening, Part IV of the *Competition and Consumer Act* in connection with the patent.

CropLife believes that Draft Recommendation 6.1 does not represent a substantive change to the framework governing the making of compulsory licence orders, and accordingly **supports** the Recommendation. In keeping with that reading of the recommendation, CropLife agrees with the Commission that “it is desirable that the new remedy provision in the *Competition and Consumer Act* imposes the same requirements on compulsory licence orders as apply in the *Patents Act*.”¹.

¹ Draft Report, page 136

DRAFT RECOMMENDATION 6.2

Draft Recommendation 6.2

The Australian Government should seek to replace the current ‘reasonable requirements of the public’ test with a new public interest test for compulsory licensing of patents. The new test should specify that a compulsory licence would be available if the following conditions are met:

- a) *Australian demand for a product or service is not being met on reasonable terms, and access to the patented invention is essential for meeting this demand.*
- b) *The applicant has tried for a reasonable period, but without success, to obtain access from the patentee on reasonable terms and conditions.*
- c) *There is a public interest in providing access to the applicant, having regard to:*
 - *costs to the patentee from granting access to the patented invention*
 - *benefits to consumers and the licensee from the licensee’s access to the invention*
 - *Longer-term impacts on community wellbeing.*
- d) *The terms of any compulsory licence order are consistent with public interest, having regard to:*
 - *the right of the patentee to obtain a return on investment commensurate with the regulatory and commercial risks involved*
 - *the right of the public to the efficient exploitation of the invention.*

The Commission rightly acknowledges that “there may be instances where providing a compulsory licence has a benefit to a trade or industry today, but compromises community-wide welfare over time by reducing the incentive of foreign firms to market their products in Australia.”² Any reformulation of the non-competition grounds for compulsory licence orders must be informed by an adequate appreciation of the role patents play in encouraging inward flows of technology and in stimulating investment in innovation.

As indicated in CropLife’s initial submission to the Inquiry, the patent system evolved due to the need to address a significant market failure, namely, the significant externalities of innovation (which act to depress investment in inventive activity) coupled with the self-evident social benefits of those externalities. Patents provide the economic incentives necessary to stimulate investment in innovative technologies, thereby spurring productivity growth economy wide.

Importantly, contemporary patents do not vest in the patentee an unlimited monopoly for the life of the patent. Market forces interact with statutory checks and balances to promote the socially optimal exploitation of patented inventions. The grant of patent rights under s13(1) of the *Patents Act* effectively arm the innovator with the capacity, and in certain circumstances the obligation to derive profit from the patented invention by exposing their invention to the market.

The making of a compulsory licence order in circumstances where the patentee is not behaving in an anti-competitive fashion would result in significant market uncertainty, the costs of which will only be felt in the long term. While the Commission’s proposed ‘public interest test’ includes the ‘longer-term impacts on community wellbeing’ in its formulation of the public interest, **CropLife recommends** that further clarification as to how a court should apply such a test would go some way to mitigating any uncertainty.

CropLife’s fundamental position is that if a reformulation of the non-competition grounds for the invocation of compulsory license provisions does take place, it **must not** lower the threshold of such test to such a degree that what is a remedial mechanism becomes a potential tool of market regulation/distortion.

² Draft Report, page 143.

DRAFT RECOMMENDATION 6.3

Draft Recommendation 6.3

The Australian Government should seek to repeal s.136 of the Patents Act 1990 (Cwlth). Current and future international treaty obligations should be incorporated directly into the Patents Act 1990 (Cwlth) or its subordinate legislation.

CropLife **does not support** Draft Recommendation 6.3. Repealing s136 of the *Patents Act* would mean that Australian courts could effectively compulsory licence patents in contravention of international agreements entered into by Australia. Repealing this section would send a worrying signal to Australia's bilateral and multilateral treaty partners and foreign investors (current and future) that might jeopardise investment decisions in Australia.

Repealing s136 of the *Patents Act* would send an alarming signal to trade partners for no net benefit. CropLife submits that it is also an unnecessary step, particularly as the Productivity Commission recommends incorporating current treaty obligations into the *Patent Act*. However, in relation to the Commission's suggestion that individual obligations be incorporated into legislation, CropLife considers this would give rise to incredibly convoluted legislation in which the application of provisions depend on the nationalities of the parties to a dispute and/or transaction.

CropLife submits that the flexibility provided to the Executive Government by the current provision is consistent with the role of patents as a tool to attract inflow of technologies to Australia.

DRAFT RECOMMENDATION 10.1

Draft Recommendation 10.1

IP Australia should develop a plain English guide on the compulsory licensing provisions of the Patents Act 1990 (Cwlth). The guide should be available through the IP Australia website.

CropLife supports the awareness raising measures contained in Draft Recommendation 10.1, however, submits that an information campaign aimed at encouraging more *voluntary* licensing agreements would provide greater, economy-wide benefits.

CropLife notes, however, that the available evidence tends to suggest that awareness of compulsory licensing provisions, or lack thereof, is not a significant problem. At the very least, raising awareness of this remedial mechanism is unlikely to result in an increase in its utilisation. In any event, increasing the number of compulsory licenses granted by courts ought not to be mistaken for a desirable policy outcome, for it would most likely indicate a reduction in the frequency of voluntary licensing agreements.

Therefore, an information campaign specifically targeted at increasing awareness of compulsory licensing provisions would seem to depend for its success upon whether there is empirical evidence that clearly indicates these provisions have a significant deterrent effect against refusals to license on reasonable terms.

With this in mind, CropLife submits that any awareness raising initiative ought to have as its primary objective increasing instances of voluntary licensing, especially where empirical research can demonstrate that the provision of information can lower transaction costs associated with negotiating license agreements. In short, there are greater benefits to be obtained from encouraging more *voluntary* licensing activity than there are in promoting a remedial mechanism such as compulsory licensing.

DRAFT FINDING 6.3

Draft Finding 6.3

Section 51(3) of the Competition and Consumer Act 2010 (Cwlth) — which exempts certain types of conduct involving intellectual property from some provisions of the Act — is unlikely to promote efficient outcomes with respect to access to patented inventions. The Commission is mindful that s. 51(3) addresses a range of intellectual property issues, but in respect to access to patents, sees no reason why it should not be repealed.

CropLife's primary concern with the Commission's Draft Finding 6.3 is that there is insufficient empirical evidence of the degree to which existing licensing arrangements make use of conditions currently exempted from Part IV of the *Competition and Consumer Act* by virtue of s51(3). It is noteworthy that previous inquiries into the provision have stopped short of recommending that it be repealed,³ citing concerns relating to business certainty and the need to encourage more licensing activity.

In the course of preparing this submission, CropLife received confirmation that its member companies rely upon the exemption in s51(3) of the *Consumer and Competition Act* in dealing with their patent rights. When asked whether the repeal of s51(3) would influence their willingness to pursue licensing agreements, CropLife members gave the following responses:

“Our agreements to date are primarily focussed on the global market, including Australia. It would be concerning if we could not include Australia in these agreements due to these proposed laws. A general observation is that in our business Australia could be simply carved out of such agreements if exclusivity were not available in what is already deemed a small market. Regulatory costs would only enhance that view.”

“Where [CropLife member] permits other parties to licence its intellectual property, [CropLife member] often places strict contractual conditions around the way in which the intellectual property may be used, including the territory in which it may be used by the licensee. In addition, [CropLife member] may also from time to time require a licensee to promote its products to the exclusion of others. Should these conditions no longer be allowable, this may well factor in a disinclination to licence its intellectual property.”

In the absence of a greater understanding of the extent to which investment decisions and willingness to pursue licensing arrangements depend upon the privileges extended by s51(3) of the *Consumer and Competition Act*, it would appear that the Commission's Draft Finding is premature, and ought not to form the basis of any legislative response.

³ National Competition Council, (1999) *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974*, Final Report ; Intellectual Property and Competition Review Committee, (2000) *Review of Intellectual Property Legislation under the Competition Principles Agreement*

CONCLUSION

Statutory schemes for the granting of monopolies of limited duration developed because of the need to address significant market failure. Inventors bear all the cost of an innovation, but all of society benefits (to varying degrees) and therefore there exists the strong incentive to 'free-ride' on the innovations of others. Without robust patent protection, these 'free-rider' effects in a competitive market system will only serve to stifle inventiveness.

In general, CropLife supports those recommendations made by the Productivity Commission in the Draft Report that recommend strengthening the requirements for the granting of compulsory licences. CropLife supports the recognition by the Productivity Commission that concerns about compulsory licensing stem from an isolated case involving patenting of genes for medical testing and the emphasis that this is not representative of the behaviour of most gene patent holders.

CropLife commends the Productivity Commission for recommending explicit consideration of the right of the patentee to obtain a return on investment, as part of a revised test for the granting of a compulsory licence.