

EXECUTIVE OFFICE



**Australian
Competition &
Consumer
Commission**

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Compulsory Licensing of Patents
Productivity Commission
LB2 Collins Street East
Melbourne VIC 8003

By email: patents@pc.gov.au

Dear Sir / Madam

Productivity Commission draft report – compulsory licensing of patents

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide a submission to the Productivity Commission in relation to the Compulsory Licensing of Patents – Draft Report. As the Commission is aware, the ACCC is responsible for administering the *Competition and Consumer Act 2010* (CCA), the object of which is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection.¹

The ACCC has made a number of public submissions supporting the repeal of section 51(3) of the CCA, which provides a limited exception for certain licence conditions from the competition provisions of the CCA (excluding misuse of market power and resale price maintenance). In November 2012 the ACCC made a detailed submission on this issue to the Australian Law Reform Commission's Copyright and the Digital Economy Issues Paper, a copy of which is available at http://www.alrc.gov.au/sites/default/files/subs/165._org_accc.pdf.

Draft Finding 6.3

While recognising the importance of granting and protecting exclusive intellectual property rights, the ACCC considers that the exception provided by section 51(3) for certain licence conditions from the competition provisions of the CCA potentially excludes significant anti-competitive conduct from the application of this Act. The ACCC considers that the licensing or assignment of such intellectual property rights should be subject to the same

¹ See section 2 of the *Competition and Consumer Act 2010*.

treatment under the CCA as any other property rights and supports the Report's Draft Finding 6.3 in relation to the repeal of section 51(3).

Draft Recommendation 6.1

The ACCC notes the Draft Report's consideration of whether the remedy of a compulsory licence for anti-competitive conduct on the part of a patent holder be moved from the Patents Act into the CCA.

The ACCC notes the Report's consideration of whether current remedies under the CCA, and in particular injunctions granted by the Federal Court, might include compulsory licences or equivalent. The ACCC suggests that should the Government wish to ensure the specific remedy of a compulsory licence order is available under the CCA in respect of conduct which contravenes Part IV of the CCA, the Government may wish to consider amending the CCA to incorporate a specific power for the court to make orders requiring a compulsory licence to be granted.

Draft Recommendation 6.2

Finally, the ACCC notes the Draft Report's discussion on whether compulsory licences should be granted on public interest grounds. The ACCC considers that competition issues are an integral part of any public interest consideration, and submits that the Government may wish to ensure that competition issues are specifically referred to in this context in the Patents Act.

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Yours sincerely

Brian Cassidy
Chief Executive Officer