

Review of National Competition Policy Reforms
Productivity Commission
Locked Bag 2 Collins Street East
Melbourne Victoria 8003

Dear Commissioners,

Re Review of National Competition Policy Reforms, Discussion Draft

In your *Review of National Competition Policy Reforms*, Discussion Draft you address the protection of intellectual property as part of your consideration of other competition framework issues. This is a welcome recognition that intellectual property may be anti-competitive and that the threshold intellectual property standards need to be carefully considered to balance their anti-competitive effects and consequences against their assumed benefits.

With respect, however, your assessment of the place of intellectual property in Australia's existing competition framework fails to acknowledge that the existing intellectual property schemes, except perhaps the parallel import restrictions under the *Copyright Act 1968* (Cth), have not been subjected to a rigorous assessment according to the requirements of the *Competition Principles Agreement*. Intellectual property is just another regulatory measure to promote economic development. As such, the regulation of intellectual property should be subjected to the same standards as other legislation with potential anti-competitive effects. This requires those seeking to justify the restriction remain in place or be imposed *demonstrate* that the benefits of restricting competition to the community as a whole outweigh the costs, and that the objectives of the statutory intellectual property privileges can only be achieved by restricting competition. Those advocating intellectual property have not been required, except for parallel import restrictions under the *Copyright Act 1968* (Cth), to demonstrate the assumed and asserted benefits from restricting competition in favour of intellectual property holders. Further, the threshold standards have not been assessed to determine the appropriate balance that delivers the most efficient and effective regulatory scheme.

Unfortunately, intellectual property is by its very nature complex and often depends on the arcane details of the evolved statutory schemes. Further, intellectual property is almost always part of a broader consideration and not an issue that can be addressed in isolation. These considerations should not, however, limit the rigorous assessment of intellectual property according to the *Competition Principles Agreement*.

My concerns are predominantly about patent privileges under the *Patents Act 1990* (Cth) and the role of patent privileges as a non-tariff barrier to trade, and a potentially excessive exemption from workable and effective competition to the detriment of consumers' interests. With respect, the National Competition Council's *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974* and the Intellectual Property and Competition Review Committee's *Review of Intellectual Property Legislation under the Competition Principles Agreement* failed to subject the *Patents Act 1990* (Cth) and the relevant parts of the *Trade Practices Act 1974* (Cth) to a rigorous assessment according to the requirements of the *Competition Principles Agreement*. The consequence has been that

key controversies about patent scope and allocation were not addressed. Further, the existing threshold standards have not been assessed to determine whether they are suitable and appropriate in implementing the intended policy objectives of patents, or ensuring that the existing scheme is efficient and effective. For example, the Intellectual Property and Competition Review Committee made *no* assessment of the non-obviousness requirement despite this being a key concern in the different theories about the most appropriate threshold for patent privileges. It appears from your *Review of National Competition Policy Reforms*, Discussion Draft that these important issues will again avoid attention.

The failure of your *Review of National Competition Policy Reforms*, Discussion Draft to address these matters is particularly concerning as Australia has adopted significantly higher standards for patent privileges under the *Patents Act 1990* (Cth) than required by Australia's commitments to international agreements, such as the World Trade Organisation *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs). These 'TRIPs-plus' standards appear to be being entrenched through the recent *Australia-United States Free Trade Agreement*. The justification for this policy position has never been articulated or demonstrated, other than in vague terms of 'business certainty' and 'promoting a more favourable investment climate'. Significantly, these are arguments that are often rejected in other forums seeking a restriction on competition (for example, parallel import restrictions under the *Copyright Act 1968* (Cth)). Further, most investors would undoubtedly prefer a safe harbour from competition to protect their investment, but this is the anti-thesis of competition and the objective of competition in promoting benefits for consumers. There is no doubt that the best balance between intellectual property privileges and competition is difficult to determine, but this is not a reason or justification for avoiding the analysis. As the Industry Commission once put it, it is undertaking the process of analysis proposed by the *Competition Principles Agreement* that delivers better regulation by 'questioning, understanding real world impacts, [and] exploring assumptions'.

In an attempt to assist your further consideration of these matters, I have attached a recent manuscript written with Dr Catherine Pickering addressing Australia's current preference for a 'TRIPs-plus' patent scheme and our views about the merits of this stance.

Yours sincerely,

Charles Lawson

November 2004

PS You might reconsider this statement in your *Review of National Competition Policy Reforms*, Discussion Draft at p 219:

A paper by Dee (2004) prepared for the Senate Select Committee on the AUSFTA, estimated that the cost to Australia of the changes to intellectual property protection resulting from that agreement could be as high as \$700 million (in discounted present value terms).

With respect, the paper prepared by Dee for the Senate Select Committee identified the figure of \$700 million when addressing copyright term extension. The Dee paper did not address the full costs of the AUSFTA intellectual property commitments. Thus, Dee actually provided:

The [DFAT/CIE] report makes the assumption that the author receives a constant flow of royalties into the future in order to quantify the benefit today of additional royalties this far in the future. Extending the term of copyright protection would confer additional benefits of 0.33 per cent in net present value terms. The likely impact on the quantity of new works is miniscule.

But the same assumptions can be invoked in order to put an estimate on the costs of extending the term of copyright ... According to this calculation, Australia's net royalty payments could be up to \$88 million higher per year as a result of extending the term of copyright. And the discounted present value of the cost to Australia of extending the copyright term is about \$700 million. Thus, even the current term of copyright protection is probably too long, from Australia's perspective.

This perhaps provides an excellent example of the kinds of assumptions about the costs of intellectual property protection that should be challenged by a proper application of the *Competition Principles Agreement*. It was certainly surprising that the AUSFTA intellectual property commitments were not subjected to a comprehensive economic analysis. If the word and spirit of the *Competition Principles Agreement* had been adhered to then there would have been a detailed economic analysis of the true costs of all the intellectual property commitments, including the range of patent related commitments. Without that assessment, it appears Australia has *again* committed to higher intellectual property standards without any consideration of the likely costs (as was the case in Australia committing to the TRIPs agreement). While these commitments might be justified against the other benefits of the negotiated outcome, without the analysis of the likely costs (including economic costs) any conclusion about the desirability of 'stronger' intellectual property protections cannot be reached or sustained.

‘TRIPs-Plus’ Patent Privileges – An Intellectual Property ‘Cargo Cult’ in Australia

Dr Charles Lawson and Dr Catherine Pickering

Summary

This article challenges 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). 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.

Introduction

‘Cargo cult’ is a modern short hand for describing the relationship between a genuine desire and an irrational justification founded in belief and faith.¹ The concept of ‘cargo cult’ traces its origins from a quasi-religious practice among colonialised ‘South Sea Islanders’ last century.² As a generalisation, South Sea Islanders observed that when the colonial powers built the infrastructure of development, such as warehouses, wharves and airstrips, ships and airplanes soon visited delivering desirable goods to the warehouses. The Islanders reasoned that ships and airplanes would arrive with goods as a consequence of building infrastructure, and so if they built their own infrastructure they too would have desirable goods delivered to them.³ In recent times ‘cargo cult’ has been examined in various discourses, colonial, missionary, anthropological and finally post-modern deconstructionist, each encapsulating a collective unrequited desire for wealth in some form based on some invoked supernatural inspiration.⁴

While the relationship between ‘cargo cult’ and patent privileges may not be immediately obvious,⁵ its value is as a framework for analysis. ‘They reflect certain motifs and mores that help us sometimes better to comprehend, sometimes better to challenge, life in a global economy’.⁶ We have therefore used the metaphor of ‘cargo cult’ to illustrate our contentions about the reasoning adopted by Australian patent policy makers to justify a regime of patent privileges under the *Patents Act 1990* (Cth) similar to the most developed nations (like the United States). We contend that Australia’s approach to

¹ While the term ‘cargo cult’ points to a collection of events in the South Pacific, and arguably has characteristic features (see for example Theodore Schwartz, ‘Residues of a Career: Reflections on Anthropological Knowledge’, *Ethos*, 27, 2, 1999, pp. 54-65), it reaches beyond just anthropology: see Lamont Lindstrom, *Cargo Cult: Strange Stories of Desire from Melanesia and Beyond*, University of Hawaii Press, Honolulu, 1993, pp. 183-210.

² See for example Anne Applebaum, ‘The Cargo Cult Candidate’, *The Spectator*, 265, 8 December 1990, p. 12.

³ For a summary description see for example Lindstrom 1993, *op. cit.* pp. 1-14.

⁴ Lindstrom 1993, *ibid* pp. 183-210; see also Martha Kaplan, *Neither Cargo Nor Cult: Ritual Politics and Colonial Imagination in Fiji*, Duke University Press, Durham NC, 1995.

⁵ Although not without predecessors, see for example Miranda Forsyth, ‘Cargo Cults and Intellectual Property in the South Pacific’, 2003, *Australian Intellectual Property Journal* 14, 4, pp. 193-207.

⁶ Lamont Lindstrom, ‘Cargo Cult Horror’, 2000, *Oceania* 70, 4, p. 294.

patent policy reasons that the most developed nations have benefited from innovation with a strong intellectual property regime, and so with a similarly strong patent regime in Australia, those same benefits will accrue to Australia. Our purpose is to challenge this reasoning in the hope of stimulating a more informed patent policy debate in Australia.

As a starting point, any patent policy in Australia must accommodate the minimum standards now required of World Trade Organisation members, such as Australia, in compliance with the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs).⁷ The minimum standards required by TRIPs are that patent privileges be available for products and processes in all fields of technology, whether produced locally or imported, that satisfy the thresholds of being ‘new’, involving an ‘inventive step’ and ‘capable of industrial application’.⁸ The only allowable exclusions are ‘to protect *ordre public* or morality’ that includes protecting ‘human, animal or plant life or health’ and avoiding ‘serious prejudice to the environment’, ‘diagnostic, therapeutic and surgical methods’ for treating of humans or animals and ‘plants and animals other than micro-organisms, and essential biological processes for the production of plants or animals other than non-biological and microbiological processes’.⁹ These minimum standards are enforceable through a dispute settlement scheme proscribed in TRIPs.¹⁰

While these TRIPs minimum standards are open to some interpretation and ‘flexibility’,¹¹ there is no doubt that Australia must implement at least some form of patent scheme similar to the *Patents Act 1990* (Cth). The issue raised in this article is not about whether or not to have a patent scheme, but rather, the content of that scheme, and the desirability of measures that implement *more* than the minimum standards required by TRIPs (so-called ‘TRIPs-plus measures’; Table 1 identifies some of the TRIPs-plus measures in Australia’s patent laws). This is an issue worthy of further consideration as Australia has been at the vanguard of the TRIPs agreement, championing its implementation through a rapid adoption of its minimum standards¹² and adopting additional TRIPs-plus measures in the *Patents Act 1990* (Cth) and the *Trade Practices Act 1974* (Cth). Australia has also ensured TRIPs measures are passed through to other international and regional agreements,¹³ and most recently, accepting further TRIPs-plus measures in the negotiated *Australia-United States Free Trade Agreement* (‘AUSFTA’; some of these measures are also identified in Table 1).¹⁴ This stance reflects the underlying economic objective that

⁷ *Marrakech Agreement Establishing the World Trade Organisation* [1995] *Australian Treaty Series* 8, Annex 1C, pt 2, s 5 (‘TRIPs’).

⁸ TRIPs art 27.1; noting that the terms ‘inventive step’ and ‘capable of industrial application’ are equivalent to the terms ‘non-obvious’ and ‘useful’ respectively.

⁹ TRIPs art 27.2 and 27.3; noting that plant varieties must be protected either by ‘patents or by an effective *sui generis* system or by any combination thereof’ (art 27.3.b).

¹⁰ TRIPs art 64.

¹¹ See for a recent example Charles Lawson, “‘Flexibility’ in TRIPs: Using Patented Inventions Without the Authorisation of the Right’s Holder”, *Australian Intellectual Property Journal* 15, 3, 2004a, pp. 141-155.

¹² See *Patents (World Trade Organisation) Amendment Act 1994* (Cth).

¹³ Such as the *Singapore-Australia Free Trade Agreement* [2003] *Australian Treaty Series* 16, ch 13, art 2(1).

¹⁴ *Australia-United States Free Trade Agreement* (‘AUSFTA’) at http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_17.html (visited 10 June 2004); see ch 17 art 9.

‘[i]nnovation – developing skills, generating new ideas through research and turning them into commercial success – is a key driver of productivity and economic growth’,¹⁵ of which intellectual property is believed to assist as an incentive to innovate, in capturing the commercial success and in accessing new technology and know how.¹⁶ Further, Australia’s foreign and trade policy is directed to Australia’s ‘national interest’: ‘[p]reparing for the future is not a matter of grand constructs. It is about the hard-headed pursuit of the interests which lie at the core of foreign and trade policy: ... the jobs and standard of living of the Australian people. In all that it does in the field of foreign and trade policy, the Government will apply this basic test of national interest’.¹⁷ An apparently similar consensus exists among other developed nations¹⁸ reflecting, in particular, the aggressive promotion of increasingly ‘stronger’ patent protection by the United States and European Union.¹⁹ However, the exact place and role of TRIPs-plus patent measures in Australia, and in attaining its particular economic and social interests, is not very clear.

The narrative that explains the place of TRIPs as a part of binding international trade regulation has been considered extensively.²⁰ These narratives generally include the ‘individual agency and entrepreneurship’ of intellectual property holders in the United States²¹ or the ‘grafting’ of intellectual property by United States business networks onto free trade agendas relying on the formula ‘patents = free trade + investment = economic growth’,²² both finding resonance among the lawmakers in the United States in the politically and economically insecure times of the 1980s when there was an imperative to balance the deficit terms of trade through capturing foreign royalties on United States

¹⁵ Commonwealth, *Backing Australia’s Ability: Real Results Real Jobs – Innovation Report 2002-2003*, Corporate Communications ISR, Canberra, 2003, p. 1 (‘Real Results 2003a’); see also Commonwealth, *Backing Australia’s Ability: Real Results Real Jobs – Innovation Report 2003-2004*, Corporate Communications ISR, Canberra, 2003, p. 1 (‘Real Results 2003b’); Commonwealth, *Backing Australia’s Ability: An Innovation Action Plan for the Future*, Big Island Graphics and Corporate Communications ISR, Canberra, 2001, p. 7 (‘BAA’).

¹⁶ BAA, *ibid* p. 18.

¹⁷ Commonwealth, *In the National Interest: Australia’s Foreign and Trade Policy*, White Paper, National Capital Printing, Canberra, 1997, p. 1; in 2003 this national interest was identified as ‘[t]he purpose of Australian foreign and trade policy is to advance the national interest – the ... prosperity of Australia and Australians. The task of Australia’s foreign and trade policy is to advocate and advance those interests in a way which is both effective and in accord with the values of the Australian people’: Commonwealth, *Advancing the National Interest: Australia’s Foreign and Trade Policy*, White Paper, National Capital Printing, Canberra, 2003, p. vii.

¹⁸ See Real Results 2003a, *op. cit.* p. 1; Organisation for Economic Co-operation and Development, *OECD Science, Technology and Industry Scoreboard 2003*, Organisation of Economic Co-operation and Development, Paris, 2003, pp. 16-17.

¹⁹ See for example Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge University Press, Cambridge, 2003; although the European Union faces some hurdles in adopting TRIPs itself: see Talia Einhorn, ‘The Impact of the WTO Agreement on TRIPs (Trade-Related Aspects Of Intellectual Property Rights) on EC Law: A Challenge to Regionalism’, *Common Market Law Review*, 35, 1998, pp.1069-1099.

²⁰ For a recent analysis see for example Sell, *ibid*.

²¹ Peter Drahos, ‘Global Property Rights in Information: The Story of TRIPs at the GATT’, *Prometheus*, 13, 1, 1995, p. 7.

²² Susan Sell and Aseem Prakash, ‘Using Ideas Strategically: The Contest between Business and NGO Networks in Intellectual Property Rights’, *International Studies Quarterly* 48, 1, 2004, p. 154.

innovations and cultural products.²³ The United States continues to assert the important role of patents in the software, pharmaceutical, chemical and biologicals industries²⁴ and actively promotes the interests of patent holders.²⁵ For example, the United States considers the purpose of trade agreements (both multilateral and bilateral) to ‘further promote the adequate and effective protection of intellectual property rights’ including ‘providing strong protection for new and emerging technologies’,²⁶ and expressly states its negotiation mandate includes ‘seeking information and advice from representative elements of the private sector and the non-Federal governmental sector’ that predominantly includes patent holders and their interests.²⁷ However, in Australia, the perspective of this narrative is arguably very different as Australia is a net technology importer²⁸ with a small domestic market²⁹ and the major markets for its commodities and manufactured goods and services are predominantly in the technology poor North East Asia.³⁰ In these circumstances the imperative for Australia is to maintain access to key technology. It is not necessarily to offset its national deficit through economic rents on intellectual property protected products like some of the other developed nations. Thus, the analysis of the place of patent privileges, in our estimation, is different to the most developed nations, and also the developing and least developed nations.³¹ The issues being for Australia to independently justify its particular stance to TRIPs-plus patent privileges that reflects its particular economic and social circumstances.

²³ Note that these matters have been addressed by many authors, the following are merely examples: see generally Drahos, *op. cit.* pp. 7-8; Sell and Prakash, *ibid* pp. 154-155.

²⁴ See for example Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters, *The US-Australia Free Trade Agreement (FTA): The Intellectual Property Provisions*, Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US-Australia Free Trade Agreement, Washington, March 2004, pp. 2-6 (<http://www.ustr.gov/new/fta/Australia/advisor/ifac03.pdf>, visited 10 June 2004; ‘IFAC-3’); perhaps significantly, IFAC-3 stated about the AUSFTA ‘with high-level agreements with both small developing countries in the [United States-Central America Free Trade Agreement] and a strong and mature developed country like Australia, it will prove much easier to convince future [Free Trade Agreement] countries that strong intellectual property protection is in the interest of all countries regardless of their economic circumstances’ (p. 4).

²⁵ A notable exception has been the resolution over access to patent protected HIV/AIDS treatments with the interests of patent holders being tempered by a health crises (see for example Sell and Prakash, *op. cit.* pp. 166-167), with this following through to a majority consensus among WTO members that ‘nothing in the TRIPs Agreement reduces the range of options available to governments to promote and protect public health, as well as other overarching public policy objectives’: Council for Trade-Related Aspects of Intellectual Property Rights, *Submission by the African Group, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela*, IP/C/W/296, 2001, p. 3; see also Lawson 2004a, *op. cit.* p. 145.

²⁶ See 19 USC §2102(b)(4) (Trade Act of 1974); see also IFAC-s, *op. cit.* p. 3

²⁷ See 19 USC §2155(a) (Trade Act of 1974).

²⁸ See for a patent related analysis, John Revesz, *Trade-Related Aspects of Intellectual Property Rights*, Staff Research Paper, Productivity Commission, Canberra, 1999, p. 62.

²⁹ As a measure of the size of Australia’s market a comparison of gross domestic product is illustrative: 1995 prices and 1995 exchange rates for 2002 in billions of United States dollars: Australia – 484.6, United States – 9186.0, Japan – 5606.5 and United Kingdom – 1354.9: Organisation for Economic Co-operation and Development, *Main Economic Indicators*, Organisation for Economic Co-operation and Development, Paris, 2003, p. 247.

³⁰ See for example In the National Interest, *op. cit.* pp. 3-4; Advancing the National Interest, *op. cit.* p. 4.

³¹ This is the distinction draw by TRIPs itself, giving the developed and least developed nations greater time to adopt its binding minimum standards: see TRIPs arts 65 and 66.

In this article we set out to challenge the reasoning for adopting TRIPs-plus measures under the *Patents Act 1990* (Cth) as ‘cargo cult’ and suggests that the modern Australian policy grasp for ‘strengthened’ intellectual property rights has failed to consider the lack of evidence actually demonstrating the benefits from adopting more than TRIPs’ minimum patent requirements for the Australian economy. The article argues that without the disclosed reasoning that patent privileges will deliver benefits, all that remains is an irrational justification founded in belief and faith – a ‘cargo cult’. If this challenge is correct, then the TRIPs-plus measures in the *Patents Act 1990* (Cth) should be re-considered. In our view these TRIPs-plus measures should be removed unless justified according to the requirements of the *Competition Principles Agreement* (CPA) that forms part of the *National Competition Policy* (NCP).³² That is, laws restricting competition can only be justified where it can be demonstrated that the benefits of the restriction to the community as a whole outweighs the costs and that the objectives can only be achieved with such measures.

In setting out our argument that TRIPs-plus measures are reminiscent of an intellectual property ‘cargo cult’ in Australia, the next section examines the place of TRIPs-plus measures in Australia’s patent policy. The following section examines the absence of reasons demonstrating the benefits of TRIPs-plus measures in the *Patents Act 1990* (Cth) in the reviews of patent privileges under the CPA. The final section concludes that with the actual reasoning about the demonstrated benefits of TRIPs-plus measures, a rational patent policy that is more likely suited to Australia’s economic and social circumstances might be developed. In the absence of analysing and demonstrating the place of TRIPs-plus measures in delivering prosperity to Australia, all that remains is a belief and hope reminiscent of an intellectual property ‘cargo cult’.

Patent policy

Perhaps surprisingly, there is *no* formal patent policy setting out the Australian Government’s understanding of what a patent scheme is intended to achieve. However, there are a number of administrative arrangements in place that apply the current Australian Government stance on patent privileges including the standards set out in the *Patents Act 1990* (Cth) and *Trade Practices Act 1974* (Cth), the way the standards are applied by IP Australia³³ and the courts³⁴, and a general policy imperative for productivity and economic growth.³⁵ In an attempt to assess the way the Australian Government makes and then implements its policy dealing with intellectual property, we directed a

³² The National Competition Policy (‘NCP’) comprises a series of agreements between the Commonwealth, States and Territories (see National Competition Council, *Compendium of National Competition Policy Agreements*, Australian Government Publishing Service, Canberra, 1997), legislative measures to limit anti-competitive conduct and ensure access to essential facilities (such as the *Trade Practices Act 1974* (Cth)) and government bodies to oversee the application of the NCP (such the Australian Competition and Consumer Commission and the National Competition Council).

³³ The standard are applied according to the Australian Patent Office, *Manual of Practice and Procedure*, IP Australia, Canberra, September 2002; IP Australia is a ‘prescribed Agency’ under the *Financial Management and Accountability Act 1998* (Cth) s 5 although it is accountable to Parliament through the Minister for Industry, Tourism and Resources: *Administrative Arrangement Orders* sch pt 13.

³⁴ Noting that the courts appear to be increasingly reading down the threshold criteria: see for example Charles Lawson, ‘Patenting Genes and Gene Sequences and Competition: Patenting at the Expense of Competition’, *Federal Law Review* 30, 1, 2002, pp. 103-111.

³⁵ See for example BAA, *op. cit.* p. 7.

series of questions to each of the ministries. For present purposes, the most interesting response was from the Parliamentary Secretary to the Minister for Industry, Tourism and Resources addressing patents, trademarks and designs.³⁶ As a generalisation, the Parliamentary Secretary's response asserted:

In the broadest sense, the development of the government's policy agenda involves a careful balance of competing needs to achieve the overall aim of ensuring the best interests of all Australians, and the nation as a whole, are served. With regard to intellectual property, this balance takes into consideration the views and impacts on intellectual property right owners, business and industry; the Australian public generally; the potential effects on innovation, investment and trade; our international obligations and the overall effect on the Australian economy.

Significantly, the Parliamentary Secretary identified a number of institutions that effect the Australian Government's actions in dealing with patents, trademarks and designs:

- (a) The Intellectual Property and Competition Review Committee's ('IPCR Committee')³⁷ review of intellectual property under the CPA:

The IPCR [Committee] identified and reviewed areas of serious concern for competition and they recommended changes to those aspects of the intellectual property laws that grant exclusive privileges not needed to encourage an efficient level of investment in creative effort. The report stands as a benchmark on which the government can assess the effects of competition on future proposed intellectual property policy initiatives.

- (b) The patent policy and *Backing Australia's Ability*:³⁸

The government's commitment to implementing its intellectual property rights policy agenda is reflected in the respective legislation which implements these rights and its programs which promote and support innovation, such as those outlined in the government's *Backing Australia's Ability* (BAA) statement. The BAA intellectual property initiatives are aimed at developing a robust intellectual property regime, facilitating easy access to information on protection and promoting research and development through helping to better capture returns from commercialising Australian ideas and products. These initiatives are developed by expert groups after lengthy debate, discussion and consultations prior to the BAA announcement.

Contrasting the Parliamentary Secretary's written response with the innovation policy set out in *Backing Australia's Ability* and its evolution adds further insight into the uncertain nature of what the Australia Government's patent policy might be. *Backing Australia's Ability*'s only mention of intellectual property provided:

Backing Australia's Ability supports greater commercial application of research results. In addition to direct support for R&D, the Government aims to improve the flow of finance into business innovation

³⁶ Notably, the *Administrative Arrangement Orders* sch pt 13 provide that the Minister for Industry, Tourism and Resources administers the *Patents Act 1990* (Cth) and the Department of Industry, Tourism and Resources deals with matters relating to '[p]atents of inventions and designs, and trade marks'. According to the division of responsibility under the Industry, Tourism and Resources portfolio the Parliamentary Secretary to the Minister for Industry, Tourism and Resources is the responsible Minister of State for the administration of the *Patents Act 1990* (Cth) and matters relating to patents.

³⁷ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, IP Australia, Canberra, 2000 ('IPCR Report').

³⁸ BAA, *op. cit.*

and to stimulate growth of innovative firms by improving Australia's capacity to commercialise research and new technologies.

This will also be achieved through initiatives to enhance Australia's capacity to build and manage innovative enterprises, encourage the spin-off opportunities from industry research collaboration, strengthen our intellectual property (IP) management processes and increase access to global research and technologies.³⁹

Backing Australia's Ability was the culmination of various consultations,⁴⁰ industry plans⁴¹ and governmental 'thinking',⁴² with an overall objective of 'developing skills, generating new ideas through research, and turning them into commercial success'.⁴³ The Australian Government saw its role as providing 'the best possible economic, tax and educational framework' and 'targeted direct support in areas where private sector funding is not appropriate or available'.⁴⁴ This policy was guided by a recognition 'that Australia is now at a crossroads',⁴⁵ citing a communiqué from the consultation process:

We are in the midst of a revolution from which a new order is emerging. The solutions of past decades will not suffice in the new knowledge age. Intangible assets – our human and intellectual capacity – are outstripping traditional assets – land, labour and capital – as the drivers of growth. If we are to take the high road, a road of high growth based on the value of our intellectual capital, we need to stimulate, nurture and reward creativity and entrepreneurship.⁴⁶

Backing Australia's Ability articulated a strategy to support 'the essential ingredients for a dynamic and productive innovation system' though focusing on 'strengthening our ability to generate ideas and undertake research', 'accelerating the commercial application of these ideas' and 'developing and retaining Australian skills'.⁴⁷ The immediate effect of *Backing Australia's Ability* was additional funding.⁴⁸ Its longer-term effect on patent policy was not articulated at the time, and has been expounded through the subsequent implementation of *Backing Australia's Ability*. Its subsequent iteration, *Backing Australia's Ability II*, is confined to funding programs and makes no mention of intellectual property.⁴⁹

Significantly, *Backing Australia's Ability*, as it was articulated in 2001, only sought to 'strengthen our intellectual property (IP) management processes and increase access to

³⁹ *Ibid* p. 18.

⁴⁰ For example Department of Industry, Science and Resources, *Innovation – Unlocking the Future: Final Report of the Innovation Summit Implementation Group*, Goanna Print, Canberra, 2000.

⁴¹ For example Department of Industry, Science and Tourism, *Investing for Growth: The Howard Government's Plan for Australian Industry*, Australian Government Publishing Service, Canberra, 1997.

⁴² For example House of Representatives Standing Committee on Industry, Science and Technology, *Innovation: A Concept to Market*, Australian Government Publishing Service, Canberra, 1995; House of Representatives Standing Committee on Industry, Science and Resources, *The Effect of Certain Policy Changes on Australian R&D*, CanPrint Communications Pty Ltd, Canberra, 1999.

⁴³ BAA, *op. cit.* p. 7; see also Real Results 2003a, *op. cit.* p. 1; Real Results 2003b, *op. cit.* p. 1.

⁴⁴ BAA, *ibid* p. 7.

⁴⁵ *Ibid* p. 8.

⁴⁶ *Ibid* p. 8.

⁴⁷ *Ibid* p. 14.

⁴⁸ Being \$2.9 billion of additional funding over 5 years: see *ibid* p. 14.

⁴⁹ See Commonwealth. 2004. *Backing Australia's Ability: Building Our Future through Science and Innovation*, Department of Industry, Tourism and Resources, Canberra, 2004.

global research and technologies',⁵⁰ and makes no mention that this be achieved through a scheme that creates greater and more comprehensive patent privileges for innovators. However, by 2002 the implementation of *Backing Australia's Ability* involved, almost without question, enhancing patent holder's privileges, based on the conclusion that a '[s]ound intellectual property (IP) protection and management are both critical for a successful innovation system' (emphasis added) and a need for 'fundamental changes to the patent system, to provide better protection and meet the needs of those using our IP regulatory regime'.⁵¹ *Backing Australia's Ability* had evolved to offer a 'range of IP initiatives that strengthen our ability to protect our ideas and better capture returns from commercialisation'.⁵² These initiatives included various management and awareness programs and legislative amendments.⁵³

Legislative changes that reflected and effected *Backing Australia's Ability*,⁵⁴ included extending the term of some pharmaceutical patents to 25 years from lodgment subject to 'spring-boarding' provisions and higher fees (*Intellectual Property Laws Amendment Act 1998* (Cth)), introducing an 'innovation patent' to replace the existing 'petty patent' scheme (*Patents Amendment Act 2001* (Cth)), and grace periods (*Patents Amendment Regulations 2002 (No 1) 2002* (Cth)). By way of illustrating the uncertain policy foundations for some of these developments, the confirming authority of the Industry Commission justifying the patent term extension was in fact a mirage. The Industry Commission had accepted that the Government was already committed to extend the effective patent life for pharmaceuticals, and a 'perception' that this improved Australia's position as an investment location.⁵⁵ While there was *no* evidence to support this assertion,⁵⁶ earlier views questioning the benefits of adopting intellectual property measures, in addition to those minimum standards required by Australia's commitments to international agreements (such as TRIPs), were cited without further analyses.⁵⁷

⁵⁰ BAA, *op. cit.* p. 18; Real Results 2003a, *op. cit.* p. 7.

⁵¹ Commonwealth, *Backing Australia's Ability: Real Results Real Jobs – Innovation Report 2001-2002*, J. S. McMillan Printing Group, Canberra, 2002, p. 14 ('Real Results 2002'); see also House of Representatives Standing Committee on Industry, Science and Resources, *Getting a Better Return*, CanPrint Communications Pty Ltd, Canberra, 2001, p. 127; Senate Economics Legislation Committee, *Consideration of Legislation Referred to the Committee – Patents Amendment Bill 2001*, Senate Printing Unit, Canberra, 2001, p. 2.

⁵² Real Results 2002, *ibid* p. 1.4

⁵³ See for example *Ibid* p. 59.

⁵⁴ In reporting on the effectiveness of *Backing Australia's Ability*, the government claimed its earlier changes to the *Patents Act 1990* (Cth) as significant: see Real Results 2002, *op. cit.* p. 14.

⁵⁵ Industry Commission, *The Pharmaceutical Industry*, Report No 51, Australian Government Publishing Service, Canberra, 1996, pp. 66-67 and 444 ('Industry Commission 1996a').

⁵⁶ Similar and recent assessments of the cost of pharmaceutical new chemical entities remain unchallenged in government reporting (see e.g. United States Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition Law and Patent Law and Policy*, Federal Trade Commission, Washington, 2003, p. 3(5)).

⁵⁷ Industry Commission 1996a, *op. cit.* pp. 438-439; see also Nicholas Gruen, Ian Bruce and Gerard Prior, *Extending Patent Life: Is it in Australia's Economic Interests?* Staff Information Paper, Industry Commission, Canberra, 1996, pp. 27-32; see also Industry Commission, *Research and Development*, Report No 44, Australian Government Publishing Service, Canberra, 1996, p. 186 ('Industry Commission 1996b').

More recently, the *Patents Amendment Act 2001* (Cth) put into effect the recommendations of the IPCRC Committee⁵⁸ and the Australian Council on Industrial Property's review of patent enforcement.⁵⁹ These measures included increasing the scope of prior art taken into account when assessing novelty and inventive step, and changing the standard of proof to a 'balance of probabilities' test for the novelty and inventive step requirements, rather than giving the applicant the benefit of any doubt.⁶⁰ While both these measures are likely to impose a higher threshold on patent applicants in some fields of technology, but probably not pharmaceuticals and biotechnology,⁶¹ the justification for these measures was bringing Australia's patent standards into line with other developed countries.⁶²

Significantly however, in making these amendments there has been no assessment of what the TRIPS-plus measures are in the *Patents Act 1990* (Cth), and whether they are necessary or justified in promoting the objectives of the *Backing Australia's Ability* initiatives. This is, in our view, a significant failure in developing and implementing *Backing Australia's Ability*, as 'strengthened' patent laws may not be the optimal innovation strategy for economies like Australia's. In our view the policy challenge is considerably more complex than the assumption that foreign direct investment and technology transfer follow stronger intellectual property rights, as effective and dynamic competition are important to ensuring intellectual property rights do not promote detrimental anti-competitive behaviour.⁶³ Further, there remains a hotly contested debate about the appropriate scope and allocation of patent privileges and how patent policy might best be applied to particular industries.⁶⁴

As a net technology importer and a small domestic market, Australia's patent protected technology focus is probably on R&D and the export of products made in Australia for sale in the large global markets for high technology products, such as the United States, Europe and Japan. In these circumstances Australia might benefit by adopting an innovation policy that promotes stronger trade secret and contract laws to protect investment in R&D, and relies on 'strong' patent laws in countries where products protected by the patent are finally marketed.⁶⁵ Thus, Australia's domestic innovation policy should probably emphasize greater competition in the domestic market by seeking to restrict the social costs of patents. This might be achieved by setting higher

⁵⁸ IPCRC Report, *op. cit.*

⁵⁹ Australian Council on Industrial Property, *Review of Enforcement of Industrial Property Rights*, IP Australia, Canberra, 1999.

⁶⁰ *Parliamentary Debates House of Representatives*, 24 May 2001, p. 26974.

⁶¹ See Charles Lawson, 'Patenting Genetic Materials' Unresolved Issues and Promoting Competition in Biotechnology', *Information Economics and Policy* 16, 1, 2004b, pp. 99-103

⁶² *Parliamentary Debates House of Representatives*, 24 May 2001, p. 26974; see also IPCRC Report, *op. cit.* pp. 139 and 154-156.

⁶³ See for example Keith Maskus, 'Intellectual Property Rights and Economic Development', *Case Western Reserve Journal of International Law*, 32, Summer 2000, pp. 495-502.

⁶⁴ See for example Dan Burk and Mark Lemley, 'Policy Levers in Patent Law', *Virginia Law Review*, 89, November 2003, pp. 1595-1630 and 1668-1695; this analysis challenges the assumption that patent privileges are technology neutral, documenting the different threshold standards applied to different technologies under the guise of a uniform and technology neutral standard, and identifying different policy levers for different industries.

⁶⁵ See for example Paul Heald, 'Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game', *Minnesota Law Review* 88, December 2003, pp. 253-266.

threshold standards, ensuring the competition laws prevent anti-competitive practices, and ensuring any patent protected products and processes in Australia are available and worked in Australia (e.g. by exhaustion, by compulsory license, by forfeiture, by Crown use, and so on).⁶⁶ Perhaps, ominously, these are all options available to Australia lawmakers under the inherent ‘flexibility’ in TRIPs⁶⁷ and appear to be being further limited by the negotiation of additional TRIPs-plus measures in the AUSFTA (see Table 1).

With respect, implementing the broad objectives of *Backing Australia’s Ability* should have involved identifying the TRIPs-plus measures and assessing their place in promoting innovation in Australia, thus avoiding a potential anti-competitive drag on the broader economy. Thus, the Parliamentary Secretary’s assessment that *Backing Australia’s Ability* patent initiatives are about ‘developing a robust intellectual property regime, facilitating easy access to information on protection and promoting research and development through helping to better capture returns from commercialising Australian ideas and products’, in our estimation, overlooks the more refined assessment of the likely benefits from patents, and in particular, the desirability of particular TRIPs-plus measures. In the absence of that analysis, the assumption that adopting the same intellectual property regimes and standards of developed nations will necessarily deliver prosperity is reminiscent of ‘cargo cult’.

If this assessment is correct, then how would a more rational approach be applied to identifying the TRIPs-plus measures and assessing their place in promoting innovation in Australia? The following section examines the place of the CPA in this assessment as an analytical approach that should challenge the underlying reasoning that patent standards of the most developed nations are necessarily beneficial for Australia.

Competition policy, the CPA and the NCP

In the early 1990s, when patent privileges were being expanded and entrenched through Australia’s commitment to TRIPs, a parallel and contrary regime was being developed and implemented following the inquiry by the Hilmer Committee⁶⁸ to address the collective concern about the high social costs from restrictions on competition (together with the inefficiencies in the market from less than optimal allocation of resources). Governments around Australia committed to removing anti-competitive measures in government regulations and adopted the NCP, including the CPA. This included removing anti-competitive regulation that could not be justified in the ‘public interest’, by reviewing existing legislation⁶⁹ and justifying future regulation that imposed anti-competitive effects.⁷⁰ In both instances this required demonstrating that ‘the benefits of

⁶⁶ Although, alternative approaches may also be effective, noting ‘that societies must choose their system for regulating intellectual property with an eye to how it will fit other crucial legal and industry policy institutions from competition policy to labour market policy’: Peter Drahos and John Braithwaite, ‘Intellectual Property, Corporate Strategy, Globalisation: TRIPs in Context’, *Wisconsin International Law Journal*, 20, Summer 2002, p. 476 and the references there.

⁶⁷ See for example Lawson 2004a, *op. cit.* pp. 144-154.

⁶⁸ Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy*, Australian Government Publishing Service, Canberra, 1993 (‘Hilmer Committee’).

⁶⁹ *Competition Principles Agreement* cl 5(3).

⁷⁰ *Competition Principles Agreement* cl 5(5).

the restriction to the community as a whole outweigh the costs' and that 'the objectives of the legislation can only be achieved by restricting competition'.⁷¹

Since the adopting of the CPA and its application there remain debates about the scope and content of 'public interest' necessary to justify restricting competition. The CPA itself does not exhaustively define the 'public interest', although it does include ecologically sustainable development, social welfare and equity considerations, occupational health and safety, industrial relations and access and equity, economic and regional development, the interests of consumers, the competitiveness of Australian businesses and the efficient allocation of resources.⁷² The Australian, State and Territories government have very different views about the appropriate methodology for determining the relevant costs and benefits of any restrictions on competition,⁷³ although recent consideration of the test by the Council of Australian Governments has the potential to significantly improve the transparency in understanding how the test has been applied and promote further meaningful refinements in its application.⁷⁴ For present purposes, however, it is the practical application of the CPA's requirements that should have elucidated the competing reasons that contributed to the final determination about whether the TRIPs-plus measures were justified. Thus, it is undertaking the process of analysis proposed by the CPA that delivers better regulation by 'questioning, understanding real world impacts, [and] exploring assumptions'.⁷⁵ Added to this, the most significant outcome from the Hilmer Committee was the recognition that '[r]egulation that confers benefits on particular groups soon builds a constituency with an interest in resisting change and avoiding rigorous and independent re-evaluation of whether the restriction remains justified in the public interest'.⁷⁶ To address this particular constituency problem, the Hilmer Committee recommended that the onus of proving that the restriction on competition was justifiable should change from those advocating change to those advocating that the restriction on competition remain in place, or be imposed. This recommendation was carried through to the CPA⁷⁷ requiring that the 'public interest' be 'demonstrated',⁷⁸ otherwise legislated restrictions on competition

⁷¹ *Competition Principles Agreement* cl 5(1).

⁷² See *Competition Principles Agreement* cl 1(3); importantly, this is different to the test applied for authorizations and notifications under the *Trade Practices Act 1974* (Cth): see *Competition Principles Agreement* cl 1(4).

⁷³ See for example the submissions to the House of Representatives Standing Committee on Financial Institutions and Public Administration, *Inquiry into Aspects of the National Competition Policy Reform Package*, Australian Government Publishing Service, Canberra, 2002; Senate Select Committee on Socio-economic Consequences of the National Competition Policy, *Riding the Waves of Change*, Senate Printing Unit, Canberra, 2000; Senate Select Committee on Socio-economic Consequences of the National Competition Policy, *Competition Policy: Friend or Foe?* Senate Printing Unit, Canberra, 1999.

⁷⁴ Council of Australian Governments, *Communiqué – 3 November 2000*, Department of the Prime Minister and Cabinet, Canberra, 2000, attachment B.

⁷⁵ Industry Commission, *Regulation and Its Review 1995-96*, Annual Report Series, Australian Government Publishing Service, Canberra, 1996, p. 11 ('Industry Commission 1996c').

⁷⁶ Hilmer Committee, *op. cit.* p. 191.

⁷⁷ *Competition Principles Agreement* cl 5(1).

⁷⁸ The construction of the *Competition Principles Agreement* cl 5(1) relies on the term 'demonstrated' in setting out the standard to be achieved in applying the 'guiding principle' in reviewing existing legislation and proposed legislation that restricts competition, while the *Competition Principles Agreement* cl 5(5) expressly requires 'evidence' that proposed legislation restricting competition is consistent with the 'guiding principle'. While this might be construed as a lower standard for reviewing existing legislation, the

should be avoided. Thus, while the final adjudication of the ‘public interest’ remains contentious, the analysis required by the CPA might be expected to disclose the competing reasons demonstrating the benefits of restricting competition in addition to the minimum standards required by TRIPs.

Since the adoption of the NCP, there have been reviews of patent legislation,⁷⁹ the intellectual property related provisions in competition legislation,⁸⁰ various amendments to patent laws,⁸¹ and proposals to amend the intellectual property related provisions in competition laws.⁸² In each instance, in our view, the TRIPs-plus measures have not been expressly identified or adequately subjected to the CPA’s analysis framework. For example, the IPCR Committee stated when considering Australia’s patent obligations under international agreements, including TRIPs:

The Committee notes that the balance between the social benefits generated by the patent system and this system’s cost to the community, is affected by whether the beneficiaries of the patents granted are in Australia or overseas. If the income transfers resulting from the system stay within Australia, then (all other things being equal) the social cost to the Australian economy of the system is potentially less and the net benefit correspondingly greater ... No less important is the fact that effective patent protection facilitates trade in technology, both domestically and internationally. An effective patent system, accessible to foreign technology suppliers, allows Australian firms to import technology that would otherwise be unavailable, or would only be available at higher cost. This increases productivity and enhances competition in the Australian economy. The importance of technological imports is illustrated by the more than 90 per cent of patents registered in Australia, which are owned by foreigners. In addition, there are more indirect cross-border spill-overs through importing of goods which embody innovations and which may be used as intermediate inputs or sold directly to end-users.⁸³

While we do not challenge the assertions of benefit from access to non-resident patented technology, the terms of access to that technology under TRIPs are ‘flexible’ and should have been considered in greater detail and in the Australian context. In our view, ‘the more than 90 per cent of patents registered in Australia, which are owned by foreigners’ cited by the IPCR Committee signifies not only the importance of imported technology to Australia, but also the significantly different position of Australia’s economy compared

preferable construction is evidence demonstrating that the guiding principle has been satisfied. That is, ‘legislation that restricts competition must be accompanied by evidence that the benefits of the restriction to the community as a whole outweigh the costs, and that the objectives can only be achieved by restricting competition’: Productivity Commission, *Regulation and Its Review 2002-03*, Annual Report Series, Productivity Commission, Canberra, 2003, p. 7.

⁷⁹ IPCRC Report, *op. cit.* pp. 134-178.

⁸⁰ National Competition Council, *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974*, CanPrint Communications Pty Ltd, Canberra, 1999 (‘NCC Review’); it is notable that the recent Dawson Review (Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, CanPrint Communications Pty Ltd, Canberra, 2003, p. 87) avoided an analysis of the place of intellectual property in applying the misuse of market power provisions in the *Trade Practices Act 1974* (Cth).

⁸¹ *Intellectual Property Laws Amendment Act 2003* (Cth); *Trade Marks and Other Legislation Amendment Act 2001* (Cth); *Corporations (Repeals, Consequential and Transitional) Act 2001* (Cth); *Patents Amendment Act 2001* (Cth); *Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Act 2001* (Cth); *Patents Amendment (Innovation Patents) Act 2000* (Cth); *Intellectual Property Laws Amendment Act 1998* (Cth), and so on.

⁸² IPCRC Report, *op. cit.* pp. 202-215.

⁸³ *Ibid* p. 139.

to the most developed nations (like the United States). To us, this raises important questions about the desirability of adopting similarly ‘strong’ patent standards and the potential for Australia to benefit from TRIPs’ ‘flexibility’.⁸⁴ As a consequence of the IPCR Committee’s perspective that Australia benefited from a patent scheme ‘on par with the most advanced economies’,⁸⁵ the IPCR Committee did not identify the TRIPs-plus measures in the *Patents Act 1990* (Cth) and thus made no specific assessments according to the CPA about the benefits of TRIPs-plus patent privileges. The effect of the IPCR Committee’s perspective was that its focus was not on the merits of the policy justifying ‘strong’ TRIPs-plus measures, but rather the administration of the scheme and the certainty that a granted patent was valid.⁸⁶ While these are necessary concerns for any patent scheme, the broader policy questions about the desirability of particular TRIPs-plus measures were left entirely unaddressed. Thus, for example, the IPCR Committee might have considered international exhaustion and compulsory licensing for local non-working of invention⁸⁷ as a TRIPs-plus measures that could be specifically tailored to benefit Australian innovation by ensuring reasonably priced access to technology and know how to promote domestic industry or remove unnecessary cost barriers to Australian exports competing in the international markets.

The most significant failing of the IPCR Committee was, in our view, not to actually apply the CPA framework to challenge and expose assumptions about benefits, and most importantly, shifts the ‘onus of making a case [so that it] lies with those who would prevent, limit, or in other ways restrict, competitive forces from operating’.⁸⁸ In a surprisingly different, and in our view preferable, approach to examining the parallel import restrictions in the *Copyright Act 1968* (Cth), the majority of the IPCR Committee was able to clearly identify the TRIPs obligations and then the analyze and reject specific arguments about the benefits against a standard that there be ‘convincing evidence’.⁸⁹ A similar approach to patent privileges would, in our view, have more appropriately address the CPA’s requirements and challenge the assumption that adopting the same intellectual property regime of developed nations will necessarily deliver prosperity in Australia. Thus, our assertion that the IPCR Committee’s assessment reflected the reasoning of benefit that is reminiscent of ‘cargo cult’. This is particularly significant given the apparent place of the IPCR Committee’s report, according to the Parliamentary Secretary (as set out above), as a ‘benchmark’ for future patent policy initiatives.

The approach of the National Competition Council’s (‘NCC Review’) earlier review of the intellectual property related provisions in competition legislation⁹⁰ was different to the IPCR Committee. The NCC Review did clearly identify that TRIPs did not constrain how competition law might be applied to intellectual property.⁹¹ The NCC Review also undertook a process of identifying the benefits and costs of the exemption from

⁸⁴ See for example Lawson 2004a, *op. cit.* pp. 141-155.

⁸⁵ IPCRC Report, *op. cit.* p. 27.

⁸⁶ See *ibid* pp. 143-144.

⁸⁷ See generally Lawson 2004a, *op. cit.* pp. 141-156.

⁸⁸ IPCRC Report, *op. cit.* p. 61; Hilmer Committee, *op. cit.* p. 191.

⁸⁹ *Ibid* p. 61.

⁹⁰ NCC Review, *op. cit.*

⁹¹ *Ibid* pp. 227-230.

competition and assessing the resulting benefit.⁹² However, the final conclusions were based on the NCC Review's 'acceptance'⁹³ and 'consideration'⁹⁴ that, subject to price and quantity restrictions and horizontal agreements, restricting competition by patent privileges was desirable. At best these benefits were the ephemeral 'greater business certainty',⁹⁵ while the costs in terms of anti-competitive conduct ranged across all conduct, but with most being confined to horizontal arrangements and vertical arrangements that facilitate horizontal agreements.⁹⁶ Significantly, the NCC Review posed significant counter arguments that it then failed to address further. These included the residual uncertainty about the operation of the existing exemption, the absence of a similar exemption in other jurisdictions that does not appear to have harmed investment in research, the minor factor favorable competition law treatment would be in any decisions about investing in innovation, and the global nature of licensing intellectual property meaning that favorable treatment in one jurisdiction may not apply in another jurisdiction thus questioning the need for favorable treatment.⁹⁷ The fate of the NCC Review was for the IPCR Committee to 'have regard to' its conclusions and recommendations, in effect, overtaking both its approach and findings.⁹⁸ Thus the NCC Review at least attempted to apply the CPA framework to challenge and expose assumptions about benefits, even if the outcome did not complete the assessment.

In addition to reviewing existing legislation, the CPA also applies to proposed legislation. The CPA assessment of the proposed legislation is reported in the Regulatory Impact Statements (RIS) accompanying legislative proposals before Parliament⁹⁹ and annually by the Productivity Commission.¹⁰⁰ Of the legislation amending the *Patents Act 1990* (Cth) since the CPA entered into effect,¹⁰¹ only the *Intellectual Property Laws Amendment Act 1998* (Cth) and the *Patents Amendment Act 2001* (Cth) (discussed above) have expressly considered restrictions on competition, although not specifically the CPA criteria. The *Intellectual Property Laws Amendment Act 1998* (Cth) illustrates well our contention about an intellectual property 'cargo cult'. This Act extended the term of some pharmaceutical patents to 25 years from lodgment. The justification for extending the patent term of pharmaceuticals set out in the RIS was that the research and testing of new drugs effectively reduced the term of the patent reducing the 'substantial cash flows' needed to invest in 'the development of new drugs from the discovery stage, through the pre-clinical and clinical development phases, to eventual marketing'.¹⁰² As set out above,

⁹² *Ibid* pp. 193-213.

⁹³ See for example *ibid* p. 242.

⁹⁴ See for example *ibid* pp. 200 and 213.

⁹⁵ *Ibid* p. 200.

⁹⁶ *Ibid* p. 213.

⁹⁷ *Ibid* pp. 196 and 200.

⁹⁸ See IPCRC Report, *op. cit.* pp. 202-215; perhaps significantly, IPCRC Committee itself noted, that the *Trade Practices Act 1974* (Cth) provisions were fashioned in a different economic era and probably should be subjected to their own independent review (pp. 209-210).

⁹⁹ See Office of Regulation Review, *A Guide to Regulation*, Office of Regulation Review, Canberra, 1998.

¹⁰⁰ See for example Productivity Commission, *Regulation and Its Review*, *op. cit.*

¹⁰¹ *Intellectual Property Laws Amendment Act 2003* (Cth); *Trade Marks and Other Legislation Amendment Act 2001* (Cth); *Corporations (Repeals, Consequential and Transitional) Act 2001* (Cth); *Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Act 2001* (Cth); *Patents Amendment (Innovation Patents) Act 2000* (Cth).

¹⁰² Minister for Industry, Science and Tourism, *Intellectual Property Laws Amendment Bill 1998*, Revised Explanatory Memorandum, 1998, p. 3.

this justification was founded on a ‘perception’ reported by the Industry Commission that strong patents made Australia a more attractive investment location and the Industry Commission’s acceptance that the Australian Government’s existing commitment to extend patent terms reflected its desired outcome.¹⁰³ Further, the RIS appears only to have considered the existing patent scheme, or its complete removal, rather than its modification to maximise competitiveness and community benefit.¹⁰⁴ While the Industry Commission’s ‘perception’ may have been correct, there was no evidence to support its assertion and no analysis of competing views, including views based on an economic analysis questioning the likely benefits.¹⁰⁵

As to the AUSFTA, the RIS makes no assessment of the AUSFTA according to the requirements of the CPA even though the RIS acknowledges the agreement ‘includes commitments to strengthen our protection of intellectual property beyond those provided by multilateral agreements’ such as TRIPs.¹⁰⁶ Further, the economic analysis conducted by the Centre for International Economics to assess the likely costs and benefits of the AUSFTA addressed some intellectual property, but in dealing with patents *only* addresses the likely impact of extending patent terms where there was an issue of protecting test data.¹⁰⁷ No other effects of patents were considered, although notably, the report asserts ‘[t]he Agreement reinforces Australia’s existing framework for industrial property protection’¹⁰⁸ and the RIS asserts that the impacts of the AUSFTA on patent protection will be ‘minimal’.¹⁰⁹ In agreement with the IPCR Committee’s conclusions about the need to establish a patent scheme ‘on par with the most advanced economies’, the AUSTFA asserts different reasons. The AUSFTA RIS asserts in describing the impact of patents on Australian business:

The Chapter on Intellectual Property will reinforce Australia’s reputation as one of the world’s leading countries in protecting and enforcing intellectual property rights. The harmonisation of our laws with the world’s largest intellectual property market will provide Australian exporters with a more familiar environment and certain legal environment for the export of value-added goods to the United States. In turn, US investors will be attracted to the Australian market because of greater familiarity and confidence in our legal system.¹¹⁰

Unfortunately, the demonstration of why these concessions are necessarily beneficial to Australia, and that they might not be achieved by means that do not restrict competition to the same degree, were not disclosed. In our estimation, the analytical approach

¹⁰³ Industry Commission 1996a, *op. cit.* pp. 66-67 and 444.

¹⁰⁴ *Ibid* pp. 439-440; see also Industry Commission 1996b, *op. cit.* p. 186.

¹⁰⁵ See Industry Commission 1996a, *op. cit.* pp. 438-439.

¹⁰⁶ Commonwealth, *Australia - United States of America Free Trade Agreement*, Regulatory Impact Statement, Department of Foreign Affairs and Trade, Canberra, 2004, p. 4 (at <http://www.aph.gov.au/house/committee/jsct/usafta/treaties/newris.pdf>, visited 10 June 2004) (‘AUSFTA RIS’).

¹⁰⁷ Centre for International Economics, *Economic Analysis of AUSFTA Impact of the Bilateral Free Trade Agreement with the United States*, Centre for International Economics, Sydney, 2004, pp. 41-42; notably these economic impacts are considered to be negligible, although the likely changes to the regulatory scheme were unknown (p. 42).

¹⁰⁸ *Ibid* p. 41.

¹⁰⁹ AUSFTA RIS, *op. cit.* p. 7.

¹¹⁰ *Ibid* p. 13; further, there is a recognition that ‘[t]here are additional commitments to bind our existing standards of regulation in certain aspects of intellectual property protection’ (p. 15).

required by the CPA has not challenged to underlying reasoning that patent standards of the most developed nations are necessarily beneficial for Australia. With the IPCR Committee's report, according to the Parliamentary Secretary (as set out above), setting a 'benchmark' for future patent policy initiatives favouring a patent scheme 'on par with the most advanced economies' the justification for TRIPs-plus patent privileges seem unlikely to be subjected to a rigorous CPA analysis.

Conclusions

We accept the utilitarian analysis for patent privileges. According to this analysis, patent privileges address a possible market failure and procure the investment necessary to exploit and generate the new and improved innovation that, *Backing Australia's Ability* hopes, will deliver the promised benefits from the enormous potential of the new millennium.¹¹¹ We do not dispute that science and technology have contributed to ease human suffering and deliver real benefits through improved living standards and quality of life. We expect this to continue and probably become more important as humans have greater impacts on the environment. Further, it is commendable that the Australian government seeks through the *Backing Australia's Ability* initiatives to improve business investment in innovation, stimulate growth of innovative firms, strengthen commercial linkages between publicly funded research institutions and industry, and take promising research to the stage of commercial viability.¹¹² However, we do challenge the reasoning that more TRIPs-plus patent privileges under the *Patents Act 1990* (Cth) in Australia will necessarily deliver economic prosperity.

In our analysis we have attempted to show that TRIPs imposes minimum standards for a patent scheme that must inform the foundations of Australia's patent policy. Any assessment of the merits of these minimum standards for current patent policy has probably passed,¹¹³ although there is considerable 'flexibility' to develop patent laws incorporating these minimum standards tailored to the particular needs of the Australian economy.¹¹⁴ What remains now is to determine whether Australia's patent policy should adopt *only* these minimum standards, or seek to impose TRIPs-plus measures, and if so, what measures? In our assessment, Australia has not undertaken an adequate analysis of what the various TRIPs-plus measures actually are, and that those measures have not been subjected to a competition analysis required by Australia's competition policy as it has been articulated in the CPA. Further, the reviews of patent privileges and patent law amendments reason that by adopting the same patent standards, including the TRIPs-plus measures, as those of the most developed states, Australia too will have the same economic outcomes. This is, in our assessment, reminiscent of 'cargo cult' as in the absence of demonstrated benefits from TRIPs-plus patent measures in Australia the rational logic falls away to reveal a 'belief' that 'stronger' patent privileges will deliver prosperity. While the 'cargo cult' metaphor is merely useful in illustrating our contention, the solution, in our view, to developing a future innovation policy requires a more careful analysis of the benefits of particular TRIPs-plus patent measures in the context of Australia's particular economic circumstances. This must involve systematically

¹¹¹ BAA, *op. cit.* p. 7; Real Results 2003a, *op. cit.* p. 9.

¹¹² BAA, *ibid* p. 18.

¹¹³ Although some criticism is almost certainly warranted, see for example Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy*, Earthscan, London, 2002.

¹¹⁴ See for example Lawson 2004a, *op. cit.* pp. 141-155.

identifying Australia's TRIPs-plus measures and subjecting them to an analysis according to the CPA. The benefit of the CPA is undertaking the process of analysis proposed by the CPA that hopefully delivers better regulation by 'questioning, understanding real world impacts, [and] exploring assumptions'.¹¹⁵ Once this has been achieved Australia's TRIPs-plus measures in the *Patents Act 1990* (Cth) may more confidently be considered to be appropriate, rather than reminiscent of 'cargo cult'. That most developed nations have benefited from innovation with a strong intellectual property regime does not necessarily mean that with a similarly strong patent regime in Australia, those same benefits will accrue to Australia.

The significance of our findings is that we have undertaken, as a first step, an empirical analysis of the existing regulatory schemes affecting and effecting TRIPs-plus patent privileges in Australian laws and policy. While this analysis is limited and relies on an assertion of 'cargo cult', we certainly accept that 'cargo cult' as a framework of analysis raises complex, interesting and important questions about the politics of determining the Australian Government's patent privilege agenda. From this foundation, other methodologies are likely to provide a valuable insight into the politics of TRIPs-plus patent privileges in Australia and the various competing influences driving policy initiatives. This is likely to be particularly insightful as the economic dominance of the Australian Government policy elites and current neo-liberal orthodoxy might suggest Australia would have adopted merely TRIPs' minimum standards, thus hinting that other powerful policy elites may be influencing the Australian Government's patent policy agenda.

¹¹⁵ Industry Commission 1996c, *op. cit.* p. 11.

Table 1: Illustrative comparison of TRIPs, current TRIPs-plus measures in Australian patent laws and further TRIPs-plus measures proposed by the AUSFTA. This comparison is not comprehensive, merely illustrating some of the TRIPs-plus measures in current Australian patent law and proposals to adopt further TRIPs-plus measures in the AUSFTA.

	TRIPs minimum standard requirements	Australian TRIPs-plus measure	Proposed AUSFTA TRIPs-plus measures
Earlier Conventions	Saves parts of the Paris Convention 1967, including aspects of ‘failure to work’, ‘appropriate measures’ and ‘unfair competition’		Potentially limits compulsory licensing for ‘failure to work’ and limits ‘unfair competition’ to anti-competitive conduct
National Treatment	Accords national treatment to all applicants, subject to the exceptions already provided in the Paris Convention 1967		Does not save Paris Convention 1967 exceptions
Most favoured nation	Accords most favoured nation treatment to all applicants		Does not save most favoured nation treatment, possibly allowing some forms of discrimination
Exhaustion	There are no limitations, other than national treatment and most favoured nation treatment	Exhaustion on sale, subject to a contrary agreement	Limits exhaustion where importing after sale or distribution in another territory ‘at least where the patentee has placed restrictions on importation by contract or other means’
Objectives	‘The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations’		Does not save this objective, perhaps restricting the opportunity for Australia to rely on the ‘flexibility’ to implement laws that promote innovation, transfer and dissemination of technology taking into account ‘social and economic welfare’ and a ‘balance of rights and obligations’
Principles	‘Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement’		Does not save this objective, perhaps restricting the opportunity for Australia to rely on the ‘flexibility’ to implement laws that ‘protect public health and nutrition’ and ‘promote the public interest in sectors of vital importance to ... socio-economic and technological development’
Threshold requirements	Applies to, subject to exclusions: <ul style="list-style-type: none"> any invention in all fields of technology products or processes Must: <ul style="list-style-type: none"> be new involve an inventive step be capable of industrial application 	<ul style="list-style-type: none"> Is not confined to ‘fields of technology’, including almost anything with a practical and economic use Includes ‘methods’ 	But, imposes standard on all inventions of: <ul style="list-style-type: none"> ‘a specific, substantial, and credible utility’
Excluded subject matter	May exclude: <ul style="list-style-type: none"> plants, animals and essentially biological processes for the production of plants or animals diagnostic, therapeutic, and surgical methods for the treatment of humans and animals Where exclude plant patents must have an effective <i>sui generis</i> system for plant inventions	Only excludes: <ul style="list-style-type: none"> human beings, and the biological processes for their generation a substance, or process producing such a substance, that is capable of being used as food or medicine and is a mere mixture of known ingredients a claim that includes a person’s name Plant breeder’s rights also available for	Only excludes: <ul style="list-style-type: none"> diagnostic, therapeutic, and surgical methods for the treatment of humans and animals Expressly requires patents for: <ul style="list-style-type: none"> plants ‘any new uses or methods of using a known product’

		some plants under <i>Plant Breeder's Rights Act</i>	
Public policy exclusion	May exclude: <ul style="list-style-type: none"> necessary to protect <i>ordre public</i> or morality, including to protect human, animal, or plant life or health or to avoid serious prejudice to the environment 	Excludes: <ul style="list-style-type: none"> 'manner of manufacture' outside the meaning of <i>Statute of Monopolies</i> s 6 inventions that are 'contrary to law' 	May only exclude: <ul style="list-style-type: none"> necessary to protect <i>ordre public</i> or morality, including to protect human, animal, or plant life or health or to avoid serious prejudice to the environment
Exclusive rights	Prevent third parties, without the owner's consent, from the following dealings with the product and the product of a process: <ul style="list-style-type: none"> making using offering for sale selling importing for these purposes the product and the product of a process (the term importing is subject to the exhaustion requirements) 	Prevent others, without the owner's consent, from the following additional dealings with the product and the product of a process: <ul style="list-style-type: none"> hiring disposing of otherwise than by sale offering to make, hire or otherwise dispose keep it for the purpose of doing any of those things supply of an infringing product 	Some clarification of the terms: <ul style="list-style-type: none"> limits exhaustion where importing after sale or distribution in another territory 'at least where the patentee has placed restrictions on importation by contract or other means'
Fair basing	<ul style="list-style-type: none"> must 'disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art' may require 'the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application' 		Includes the concept of 'possession'
Exceptions	Limited exceptions allowable where: <ul style="list-style-type: none"> 'such exceptions do not unreasonably conflict with a normal exploitation of the patent' 'do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties' 	Only exception for spring-boarding generics obtaining regulatory approval	Further limits limited exceptions for spring-boarding, use for regulatory approval in the territory and regulatory approval in another territory (thus excluding use, and so on for export)
Other unauthorised use	Allows: <ul style="list-style-type: none"> any third party use if procedural requirements satisfied compulsory licenses for anti-competitive conduct working dependent patents (Also the saved parts of the Paris Convention 1967, including aspects of 'failure to work', 'appropriate measures' and 'unfair competition')	Only allows: <ul style="list-style-type: none"> compulsory license as a remedy for anti-competitive conduct compulsory license if the 'reasonable requirements of the public' are not satisfied and there is 'no satisfactory reason for failing to exploit the patent' Crown use 	Only allows: <ul style="list-style-type: none"> compulsory licenses as a remedy for anti-competitive conduct public non-commercial use national emergency, or other circumstances of extreme urgency
Revocation and forfeiture	Requires opportunity for judicial review of decision to revoke or forfeit	Allows revocation: <ul style="list-style-type: none"> re-examination of complete specification for compliance with <i>Patents Act</i> requirements by Commissioner or court on surrender of patent 	Only allows revocation: <ul style="list-style-type: none"> '... on grounds that would have justified a refusal to grant the patent' for 'fraud, misrepresentation or inequitable conduct'

		<p>Allows forfeiture:</p> <ul style="list-style-type: none"> • after term of compulsory license where ‘no satisfactory reason for failing to exploit the patent’ and the ‘reasonable requirements of the public’ have not been satisfied 	
Term	20 years from filing date	20 years from filing date with extensions for some pharmaceuticals for another 5 years	<p>Also allows extensions for:</p> <ul style="list-style-type: none"> • ‘unreasonable delays’ in issuing patent • pharmaceuticals, ‘unreasonable curtailment of the effective patent term as a result of the marketing approval process’
Proof	<ul style="list-style-type: none"> • does not set standard of proof • may place burden of proof on defendant when a process patent and patent protected products are identical 	Generally ‘balance of probabilities’ , but may be placed on defendant when a process patent and patent protected products are identical	
Grace periods	-	For any publication or use of the invention by, or with the consent of, the patentee, the nominated person or the predecessor in title of those parties within 12 months prior to the filing date of the complete application	<p>Public disclosures used to determine if an invention is novel or has an inventive step if the public disclosure:</p> <ul style="list-style-type: none"> ▪ ‘was made or authorised by, or derived from, the patent applicant’ ▪ ‘occurs within 12 months prior to the date of filing of the application in the territory of the Party’
Other obligations	-		<p>Endeavors:</p> <ul style="list-style-type: none"> • ‘to reduce differences in law and practice between their respective systems, including in respect of differences in determining the rights to an invention, the prior art effect of applications for patents, and the division of an application containing multiple inventions’ • ‘to participate in international patent harmonisation efforts, including the WIPO fora addressing reform and development of the international patent system’ • ‘to establish a cooperative framework between their respective patent offices as a basis for progress towards the mutual exploitation of search and examination work’

