# 10 Awareness-raising measures

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| Key points |
| * Lack of awareness of compulsory licensing is unlikely to be a significant reason for its limited use. Other factors — including the few cases where it is needed, and the costly and time‑consuming process in applying — appear to be more important. * Various government bodies, industry organisations, law firms and private individuals already provide information on Australia’s intellectual property system. However, very little of the information provided by any of these bodies is specific to compulsory licensing. * There may be a small number of businesses that would benefit from compulsory licensing awareness‑raising measures focused on the provision of general information. * To raise awareness of compulsory licensing, IP Australia and the ACCC should jointly develop a plain English guide on compulsory licensing and make it available on their websites. |
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The terms of reference ask the Commission to recommend measures to raise awareness of the compulsory licensing provisions, particularly among small businesses and the healthcare sector. This reflects a concern that the limited use of compulsory licensing in Australia to date may be partly due to a lack of awareness. This chapter examines the evidence supporting that view and, in light of the evidence, considers what new awareness-raising measures are appropriate.

## 10. The case for awareness-raising measures

As noted in chapter 1, the compulsory licensing provisions of the *Patents Act 1990* (Cwlth) have been seldom used. This may partly be the result of limited awareness of the provisions. However, other factors — particularly the few cases where the provisions are needed (chapters 4 and 5), the uncertain language of the provisions, and costly and time-consuming processes in applying (chapter 6) — appear to be more important.

The Centre for Law and Genetics observed that a lack of awareness did not appear to be an issue in the biomedical/biotechnology industry:

It would appear that parties involved in patent licensing transactions are aware of the compulsory licensing provisions, at least in the biomedical/biotechnology industry in which we have conducted empirical research. The problem is not so much awareness of the provisions, as their cumbersome and expensive nature. (sub. 3, p. 26)

It also appears that awareness of compulsory licensing is not a problem among intellectual property (IP) professionals, including those that work in, or with, the small business and healthcare sectors. The Walter and Eliza Hall Institute of Medical Research questioned the purpose of awareness‑raising measures for those sectors:

 ... we do not understand why ... there should be specific awareness and promotion activities directed to small businesses and the healthcare sector. Is the purpose to encourage litigation when it has not previously been required? Why promote litigation opportunities to the segments that can least afford or justify such action? (sub. 13, p. 8)

More generally, many businesses — particularly small businesses — are unlikely to have the capacity to ‘work’ a patent and may not be involved in patent licensing. Hence, compulsory licensing is not relevant to their operations.

Where compulsory licensing is relevant, an organisation may prefer not to use it. For example, the CSIRO (sub. 26) stated that, while it was aware of compulsory licensing, it prefers to use other options to resolve potential patent-related impediments to research.

Nevertheless, there may be a case for some awareness‑raising initiatives about compulsory licensing. Limited awareness can be an impediment to the use of compulsory licensing, along with other factors. Potentially there are businesses who either currently, or in the future, experience difficulty negotiating a patent licence and may benefit from information on compulsory licensing. This is more likely to be the case for small businesses, which would not usually have the resources to develop specific expertise on compulsory licensing. Thus, while the number of businesses that would benefit from information on compulsory licensing is likely to be very small, it may still be worthwhile to raise awareness, provided the benefits exceed the costs.

## 10. Existing awareness-raising measures

There are a number of organisations in Australia that publicise aspects of Australia’s IP system. However, little of this information is specific to compulsory licensing per se. IP Australia is the main government body engaged in measures to raise awareness of Australia’s IP system.

* It provides information on forms of IP rights that can be registered, access to searchable patent databases and a range of IP programs for small business, exporters and other industry sectors.
* Its Education, Awareness and International Engagement sub-program seeks to ‘deliver public education and awareness programs, which promote the importance of IP and provide Australians with the tools they require to make informed decisions regarding IP’ (DIISRTE 2012, p. 37). The program had a budget of around $8.7 million in 2011-12.

Its website provides some basic information on Crown use of IP under the Patents Act and the *Designs Act 2003* (Cwlth). This information includes a description of Crown use, the justification for Crown use, who is able to use the Crown use provisions, and the rights of patent holders under the Crown use provisions. IP Australia also provides information on mechanisms to resolve patent disputes, including court action and alternative dispute resolution (ADR) options. The parties can initiate ADR to resolve a dispute over IP infringement without going to a court or tribunal, or it may be a court decision that parties undertake ADR before returning to court. The body with primary responsibility for raising the profile of ADR in Australia is the National Alternative Dispute Resolution Advisory Council (NADRAC 2012).

There are also several Australian, State and Territory government publications intended to educate people about Australia’s IP system, including:

* *Biotechnology Intellectual Property Manual*, released in 2008 as a joint initiative between the Victorian Government, AusBiotech and Spruson & Ferguson
* *Intellectual Property and Biotechnology: A Training Handbook*, published in 2001 by the Department of Foreign Affairs and Trade
* the *Australian Code for the Responsible Conduct of Research*, jointly published by the National Health and Medical Research Council, the Australian Research Council and Universities Australia contains limited advice on IP, focusing on protecting the confidentiality and management of IP by researchers (NHMRC 2007).

In addition to government sponsored awareness raising of IP law, a number of industry organisations (for example, AusBiotech Ltd, the Australian Institute for Commercialisation, the Institute of Patent and Trade Mark Attorneys of Australia and the Licensing Executives Society of Australia and New Zealand) provide information, education and training related to licensing of intellectual property and technology commercialisation practices. Such organisations play an important role in monitoring developments in international law and licensing practices.

As noted, there is very little awareness‑raising that is specific to compulsory licensing. For example, the Commission found that the primary reference to compulsory licensing on IP Australia’s website was a news feature about this inquiry (IP Australia 2012l). Moreover, the Commission understands that IP Australia has not engaged in any awareness‑raising initiatives on the compulsory licensing provisions with professional bodies or other groups. This is consistent with the view that compulsory licensing is a safeguard only to be used in exceptional circumstances. Given this, other issues would have a higher priority for IP Australia’s limited awareness-raising resources.

While the Commission is not aware of any compulsory licensing awareness‑raising measures undertaken by industry organisations, there are a small number of private initiatives that may increase awareness. For example, Freehills (2012) published a short article on compulsory licensing for the pharmaceuticals industry. Additionally, legal experts may choose to make research they have undertaken on compulsory licensing freely available (for example, Lawson 2008b and Lindgren 2004).

## 10. Potential new awareness-raising measures

### Objectives of awareness‑raising

Awareness‑raising initiatives for compulsory licensing should focus on remedying the problem of deficient information about its availability and provisions. To avoid any perception of bias, awareness raising should provide a balance of information for both patent holders and potential licensees. The Institute of Patent and Trade Mark Attorneys (IPTA) and the Australian Federation of Intellectual Property Attorneys (FICPI) supported such an approach:

Awareness of compulsory licensing among small businesses and the healthcare sector is not considered by IPTA or FICPI to be a significant problem. However both IPTA and FICPI would support a balanced approach to raising awareness of the compulsory licensing provisions as they apply to small businesses and the healthcare sector (as well as other industries) as both patentees and potential licensees. (sub. 18, p. 16)

Awareness‑raising initiatives should also recognise that compulsory licensing is part of a suite of mechanisms available to resolve disputes over patent access, including Crown use and ADR. Thus, existing information that IP Australia provides on these mechanisms should be cross‑referenced. Raising awareness of compulsory licensing in isolation may not lead to better outcomes if it leads to compulsory licence applications being undertaken in circumstances where other options would provide a more efficient solution.

The information provided about compulsory licensing by IP Australia should be general in nature. The intended audience would be firms and organisations seeking a non‑technical overview of compulsory licensing. Industry or firm‑specific information is best provided by an IP specialist.

### Targeting information provision

Given the limited number of situations for which compulsory licensing is likely to be a useful safeguard, the benefits of a widespread awareness‑raising campaign may be small. Thus it would not be cost effective for awareness‑raising measures to seek to engage directly with every small business and healthcare provider.

One potential option is to target awareness‑raising initiatives at company directors and senior managers. This could be done through a professional body such as the Australian Institute of Company Directors, which provides direct education and development on director issues and governance (Australian Institute of Company Directors 2012). The small business and healthcare sectors could also be targeted through their relevant professional bodies. These professional organisations could be supplied with information on compulsory licensing that could then be passed on to their members through relevant training programs or direct communications.

However, this approach may not be sufficiently targeted, as it may include many individuals who do not have any substantial involvement or interest in patent licensing.

In most cases, small businesses or healthcare organisations would be expected to consult an IP expert or industry body when dealing with patent disputes, so it may be unnecessary to target these sectors for specific awareness raising. For instance, the Walter and Eliza Hall Institute of Medical Research stated that:

In our experience Australian companies, small and large, universities and medical research institutes use such [IP] professionals on a routine basis and would therefore be directly or indirectly aware of options for IP exploitation. (sub. 13, p. 8)

It is reasonable to expect that IP professionals would be aware of the IP system, including the compulsory licensing provisions, through formal training and professional experience. Nevertheless, awareness-raising measures may be useful in facilitating their acquisition of this knowledge. These measures could also alert other individuals with an interest in IP licensing to the existence of the compulsory licensing provisions.

### Who should be responsible for general awareness raising?

General information on compulsory licensing can be considered a public good, and hence will tend to be underprovided by the private sector, because its use by one person does not affect the amount available to others, and it is difficult to exclude people who do not pay for the information. Thus, while private organisations — such as legal firms and industry associations — will continue to have a role in providing general information about compulsory licensing, this is primarily a responsibility of government.

Given its role in administering the patents system, the Australian Government is best placed to take on this role. As noted, IP Australia already provides general information on matters covered by the Patents Act, including on Crown use and ADR. The ACCC has a similar role in informing the public about the *Competition and Consumer Act 2010* (Cwlth), which is relevant to the competition test for a compulsory licence (chapter 6).

In light of the above, the Commission proposes that a plain English guide to compulsory licensing be developed jointly by IP Australia and the ACCC. This guide should cover both the public interest and competition grounds for issuing a compulsory licence.

Participants in this inquiry were generally supportive of the development of a plain English guide to compulsory licensing.

Cancer Voices also supports the suggestion that information about compulsory licensing provisions should be readily accessible, written in plain English, and located on a logical Australian Government website. (Cancer Voices, sub. DR44, p. 2)

 ... [we] support the proposed strategy of the development of a plain English guide to be made available on the IP Australia website. This guide should be written so that it can be understood by those with limited knowledge of patent law ... (Consumer Health Forum of Australia, sub. DR38, p. 2)

 ... Medicines Australia supports the recommendation for IP Australia to develop a plain English guide on the compulsory licensing provisions ... (Medicines Australia, sub. DR43, p. 2)

The plain English guide should be made freely available on both the IP Australia and ACCC websites. This is likely to be the most cost‑effective option relative to other awareness‑raising options, and will also be the most readily accessible to the intended audience.

Recommendation 10.

IP Australia and the Australian Competition and Consumer Commission (ACCC) should jointly develop a plain English guide on the compulsory licensing provisions. The guide should be available on both the IP Australia and ACCC websites.