8 Feb. 2013

Compulsory Licensing of Patents
Productivity Commission

Att: Delwyn Lanning

Dear Sirs

Submission in Respect of Compulsory Licensing of Patents

I have read with some concern the Productivity Commission's recent issues paper into the compulsory licensing of patents.

My prime concern is the lack of consideration of the consequences of reducing the value of the 'patent bargain' through the reduction of value of the monopolistic patent grant. The Commission appears to be aware of one of the fundamental natures of the "patent bargain" in that, in return for the monopoly grant of a Patent right, the owner is required to fully disclose the nature of their invention. However, the Commission does not appear to fully acknowledge that the Patent Right is fundamentally a 'monopolistic', and therefore almost by definition, 'anti-competitive' right.

The patent system is based on a "bargain", or quid pro quo: The inventor is granted exclusive rights in a new and useful invention for a limited period in exchange for disclosure of the invention so that society can benefit from this knowledge. The patent bargain encourages the efficient allocation of research resources for innovation and advances science and technology. *It is a method by which inventive solutions to practical problems are coaxed into the public domain by the promise of a limited monopoly for a limited time.* (*Teva Canada Limited v Pfizer Canada Inc*, 2012 SCC 60 paragraph 32, 33)

As is trite to students of Patent Law, the system exists as an efficiency measure. Fundamentally, the State is granting Patent Monopolies as an inducement to the disclosure and dissemination of implementation details of an invention. The Patent System of disclosure is always in competitive tension with the Trade Secret system. To a society, the System provides a more efficient allocation of limited research resources in that significant resources are not expended in continually duplicating trade secret developments.

The Commission seeks an amendment of the compulsory licensing provisions to introduce a requirement for access to patented technology on 'reasonable terms'. However, the 'reasonable' terms of the holder of an exclusive monopoly right seeking to maximise their benefit are unlikely to be the same reasonable terms of a second party seeking to enter a market and 'compete' with a monopoly right. There is no fair or reasonable price other than where a willing buyer and seller are willing to make a market.

Further, in diminishing the relative value of the monopolistic right, the proposed compulsory licence changes will also act to increase the relative value of other, more socially inefficient monopolistic rights such as trade secrets. This would have a similar effect to shortening the patent term or dispensing with the extension of term provisions for pharmaceuticals.

First order, indefinite justifications for taking actions to reduce the value of the Patent Bargain are not what a transformational society needs. The lack of substantive justifications is often prevalent amongst economists who do not have an in depth knowledge of operation of the patent system and its interaction with developing technology of significant economic value (For example of similar reasoning see the recent: The Journal of Economic Perspective, "The Case Against Patents": Vol 27, Number 1, 2013).

The exclusive monopoly right in a patent is by definition anti-competitive. However, as recognised well before the Statute of Monopolies of 1623, unless a society provides the 'Patent Bargain' form of

encouragement, they are liable to suffer downstream damage in lack of encouragement for research and development of new commercially valuable ideas and a rise of an inefficient trade secrets regime.

I therefore do not believe the changes should be imposed upon our society.

By way of background, I am an Australian patent attorney and lawyer with about 20 years experience in dealing primarily with local clients seeking to utilise the Patent System for the global protection of the fruits derived from their meritorious commercially significant advances. In that period, I have represented, by any reasonable measure, the most 'Innovative' and commercially significant local Australian companies. I am also a partner in the large Australian firm of Patent and Trade Mark Attorneys, Shelston IP. However, as I have not had the time to seek any consideration or adoption of my outlined position, the views expressed are my own.

Yours sincerely

Peter Treloar