Email 8 February 2013

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

patents@pc.gov.au

Dear Sirs

Submission – Compulsory Licensing of Patents Inquiry

This submission is made in relation to the Draft Report released on 14 December 2012.

There is only one matter which I intend to address in this submission. It concerns the observations in the Draft Report relating to section 51(3) of the *Competition and Consumer Act 2010* (Cth) (the "**Act**").

There is no doubt that the drafting of section 51(3) could be improved. In particular:

- there are a number of anomalies in the present drafting;
- the provision contains outdated references to repealed legislation; and
- the language used has given rise to some uncertainty as to its meaning.

I have addressed these issues in detail in an article I published some years ago. I attach a copy of that article to this submission, and I adopt the comments in that article in making this submission.

There is therefore a compelling case for redrafting the current exemption. However, I do not agree that there is a case for its repeal, whether in relation to patents or more broadly.

The Draft Report notes that *"the Commission has not received any evidence that this provision played a material role in decisions that could potentially lead to a compulsory licence application"* and that *"[m]ore broadly, since its inception, s. 51(3) has rarely been used in any context"* (page 137).

It is certainly true that there is little judicial guidance about the scope of the exemption. This is similar to other, rarely litigated sections of the Act – including the remainder of section 51 itself. However, the fact that a provision is not often litigated does not mean that it is *"rarely used"*. I have practised as a lawyer in the intellectual property and competition field since 1998. In that time, I am aware that businesses frequently take considerable comfort from the protection which section 51(3) provides.

Often it is the case that section 51(3) provides sufficient comfort to render unnecessary any detailed consideration of the potential for conduct to contravene the relevant provisions of the Act, particularly those subject to a competition test (in such cases, analysis is a complex and expensive process). Sometimes it may be the case that the shield of section 51(3) is unnecessary as there would be no contravention in any event. However, even in such cases, removing the exemption would impose an additional cost burden on businesses in seeking advice about the level of risk (if any) involved.

The lack of an exact analogue to section 51(3) in overseas jurisdictions is not a reason for change. There are a number of important features of Australian competition law, such as the notification and authorisation processes, which are not replicated in the laws of most of our major trading partners.

For these reasons, I submit that, while the drafting of section 51(3) could, and should, be improved, there is no case for a repeal of the exemption (whether in relation to patents, or more broadly).

Yours faithfully

Richard Hoad