Law Council
OF AUSTRALIA

Business Law Section

11 April 2025

Strategic Examination of Research and Development Secretariat
Department of Industry, Science and Resources
Industry House
10 Binara Street
CANBERRA ACT 2600

By email: RDReview@industry.gov.au

Dear Sir/Madam

Strategic Examination of Research and Development (R&D)

1. The Intellectual Property Committee of the Business Law Section of the Law Council of Australia (**IPC**) welcomes the opportunity to make this submission to the panel undertaking a strategic examination of Australia's R&D system. As the Discussion Paper recognised, R&D is a key driver in addressing many challenges confronting Australia, including improving productivity and generating economic growth.

2. Measures that promote R&D, improve Australia's lagging investment in R&D and promote innovation are not just desirable but essential to helping build a stronger, sustainable Australian society.

3. The IPC is actively concerned with the development of intellectual property law and policy in Australia. The members of the IPC are leading intellectual property lawyers in Australia, and have significant experience in conducting negotiations, transactions and disputes relating to intellectual property in the context of innovations developed across industry sectors by startups, SMEs, corporates, universities and research institutions.

4. Through their involvement with business, government and scientific organisations, members of the IPC have a strong understanding of the drivers and challenges facing Australia's R&D system and the importance of innovation (and the intellectual property rights underpinning innovations) in creating value, conferring competitive advantage, and ultimately improving the lives of all Australians.

5. The purpose of this submission is to:

   - briefly highlight the important role that intellectual property rights play in contributing to Australia's R&D system and to innovative activity generally;
   - outline areas where specific IP issues impact the development of a more purposeful R&D system in Australia; and
   - indicate our interest in commenting on any proposals for law reform, which may be under consideration by the panel, that have a direct or indirect impact on, or which are directly or indirectly impacted by, intellectual property laws in Australia.

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Definition and purpose of intellectual property

6. On page 12, the Discussion Paper emphasises that:

> *R&D is a key input into the broader process of innovation. Innovation focuses on implementing new or improved products or processes using knowledge in new ways.*

7. Intellectual property rights are central to ensuring that Australian institutions and businesses can differentiate their outputs in competitive markets and secure a return on investment in R&D.

8. The World Intellectual Property Organisation (**WIPO**) describes intellectual property as "creations of the [human] mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce".

9. Intellectual property (**IP**) can take a number of different legal forms, including patents, designs, copyright, trade marks, plant breeders' rights, and circuit layout rights. In Australia, each of these intellectual property regimes is created by federal statute. Trade secrets are also encompassed in the definition of "intellectual property", but in Australia they are protected under the equitable doctrine of breach of confidence under State laws. While not formally classed as "property", confidential information is vital for the protection and transfer of valuable know-how. Further protection with respect to the marketing and distribution of the benefits of innovative developments is also available through the common law tort of passing off and statutory remedies for misleading or deceptive conduct under the Australian Consumer Law.

10. A number of reviews have considered the role of intellectual property in Australia's innovation system. For example, the report of the Competition Policy Review (generally known as the Harper Review) summarised the rationale for IP rights as follows:

> *The underlying rationale for IP rights is to promote new ideas and creations. Competitive markets can fail to support an efficient level of innovation because creations and ideas, once known, can be copied at little cost.*
>
> *Knowledge has 'public good' characteristics. It is difficult to exclude others from using new ideas, and use by one person has little or no effect on the extent to which it is available to others. These public good characteristics of knowledge typically lead to under-investment in research and development—the returns to creators will be insufficient to provide incentives for efficient investment in IP material.*[1]

11. Similarly, the Productivity Commission referred to the roles that IP plays in Australia's innovation system:

> *IP arrangements form part of the broader innovation system. The role they play differs depending on the right afforded. Patents and copyright seek to promote product innovation and the creation of new works. Design rights seek to encourage improvements in the look and feel of consumer products. Trade marks differ again, providing consumer information and protecting brand reputation.*[2]

[1] Competition Policy Review, Final Report, March 2015 (Harper Report) page 100.
[2] Productivity Commission Inquiry Report into Intellectual Property Arrangements (Productivity Commission Report No. 78, 23 September 2016) page 3.

12. More recently, the House of Representatives Standing Committee on Economics conducted an inquiry into promoting economic dynamism, competition and business formation. The report issued following this inquiry noted:

> *The Productivity Commission signalled the importance of the regulation of intellectual property in preserving innovation. Though patents arguably stifle competition, there is 'an essential aspect to having at least a limited capacity to earn profits on your innovation. If all innovations end up having their benefits taken away immediately by any rivals, the incentives for innovation decline'.*[3]

13. As these inquiries demonstrated, there is a close interplay between intellectual property laws and competition laws. Intellectual property rights have an important role to play in encouraging investment in R&D and broader innovation; for example, by facilitating the uptake and diffusion of technology through collaborative transactions such as assignment and licensing. Sometimes, however, there is arguably potential for conflict between these two areas of law.

14. In assessing whether or not that is the case, it is important to consider the perspective that is being applied. Once the investment has been made and some new product or service has been developed, the innovation as knowledge could be used by anyone without cost to the developer. In that sense, intellectual property rights over the innovation that has been made "restricts" competition once the innovation has been produced. However, that is a static, *ex post* viewpoint, and is a restricted perspective.

15. The issue also needs to be considered dynamically at the point where the investment is being considered and committed. At that point, the investor or developer faces risk and uncertainty. The investor or developer does not know whether the investment will be successful or a failure. Further, there would be limited incentive to invest in or undertake the R&D if others could simply copy the results: third parties would incur neither the costs of development nor the risks.

16. Intellectual property rights help in providing or reinforcing incentives to engage R&D by providing the researcher with power to exclude third parties from using the fruits of the R&D without permission, at least for a limited time, or, in the case of trade secrets and confidential information, without doing the work. A *quid pro quo* associated with such protection is that new inventions and designs are made available to the public, thereby promoting knowledge sharing and follow-on R&D.

17. These property rights (or quasi-property rights, in the case of confidential information) provide the foundation for contracts that allow the funding and exploitation of R&D. Investors can be sought on the basis that, by providing funds for R&D, they will be able to share in the fruits of the resulting outcomes. Such contracts strengthen links between industry, financiers and researchers. Those who have developed innovation through R&D, especially SMEs and institutions, can contract either to make and sell products or to license their rights to those with the resources to undertake marketing and commercialization, thus enabling all parties to maximise the value of their investments.

18. The use of intellectual property rights to underpin transactions as described above is essential to enabling research institutions and businesses to manage important aspects of the innovation process. From an R&D perspective, these arrangements include:

    - using IP rights to attract scientific collaborators, partners and follow-on investment; and

[3] House of Representatives Standing Committee on Economics, "Better Competition, Better Prices: Report on the inquiry into promoting economic dynamism, competition and business formation" (March 2024) para 2.47.

- using IP rights as a form of currency to trade for “freedom to operate” under the IP rights of others.

19. From a national perspective, research institutions can use IP rights to advance the national interest and contribute to Australian sovereign capability including through ensuring that IP rights can be exploited for the benefit of Australia and permitting other conditions that advance the national interest to be imposed in agreements granting access to IP. Increased focus on the strategic use of IP could potentially enhance the value and impact of Australian research domestically and internationally.

20. The generation of strategic IP portfolios by research organisations can provide an important contribution to the rationale for undertaking further science investment in a particular area. For example, building an appropriate IP portfolio can provide institutions with a level of comfort that:

    - there is a basis for encouraging investment in later development and adoption of a technology; and
    - enhancing the likelihood of securing freedom to operate through the defensive aspects of IP protection, including through limiting the capacity of third parties to secure blocking IP positions and using IP as a currency to trade for freedom to operate.

21. The use of IP rights to secure the above benefits does require participants in the innovation system to recognize the importance of intellectual property management and enabling access to the relevant expertise and resources. Valuable strategic IP assets that can deliver the above-described benefits do not simply “drop out” of R&D activity. Rather, valuable IP must be carefully identified, protected and actively managed to create valuable IP portfolios. For this to occur, it is not sufficient for IP management to be viewed simply as a “bolt on” to Australian research organisations’ science planning and delivery processes. The benefits to R&D and the national innovation system can be most effectively delivered where IP is understood as an integral part of science planning and delivery.

22. Similarly, from a business perspective the benefits of R&D and the national innovation system can be most effectively delivered where IP is understood as an integral part of enterprise strategy and risk management (including for small businesses), in addition to being actively considered by senior leaders and directors (not just to fulfil fiduciary obligations).

23. Adoption of broadly accepted IP metrics—including economic valuation methodologies—is an important mechanism for ensuring that IP considerations are integrated into business strategy and operations.

Recent competition law reform

24. In 2019, following the Harper Review and the Productivity Commission Inquiry Report, the *Competition and Consumer Act 2010* (**CCA**) was amended to repeal a long-standing exemption that applied to certain IP transactions—section 51(3) of the CCA. Following the repeal, under Australian law, as with Australia’s comparable trading partner countries, commercial transactions involving intellectual property rights are subject to competition law in the same manner as transactions involving other property and assets.

25. Although the Harper Review recommended repeal of the IP exemption,[4] it made these two recommendations in conjunction with other key recommendations:

    - that IP licences should remain exempt from the *per se* cartel conduct prohibitions of the CCA insofar as they impose restrictions on goods or services produced through application of the licensed IP;[5] and

    - that section 47 of the CCA should be repealed and that vertical restrictions and associated refusals to supply should instead be addressed by sections 45 and 46 of the CCA.[6]

26. Neither of those two recommendations has been implemented. The repeal of the IP exemption combined with the failure to implement the two related recommendations has created uncertainty and unintended consequences for IP owners and licensees, and indeed for all organisations engaged in undertaking R&D activities. For example, a significant amount of R&D activity in Australia is undertaken through collaboration between organisations (including public sector educational and research organisations such as universities and research institutions), which might relevantly be regarded as being in competition with one another and, therefore, potentially exposed to the application of the *per se* cartel conduct prohibition.

27. The Harper Review also recommended the introduction of a block exemption power,[7] which the ACCC noted[8] in its submission to the inquiry could be used to specify 'safe harbour' licensing practices for IP owners. The block exemption power recommendation was subsequently implemented in the form of a class exemption process, but this process has not yet been used to specify 'safe harbour' licensing practices for IP owners.

28. Following the competition law reform referred to above, the ACCC published guidelines on aspects of the relationship between IP and competition law in Australia.[9] In the ACCC's guidelines, under the heading "General Principles":

    - In paragraph 2.2, the ACCC stated that "[i]ntellectual property rights and competition law are not in fundamental conflict. This was part of Parliament's rationale for repealing subsection 51(3) of the CCA. Intellectual property rights and competition law share a common purpose in promoting innovation and dynamic efficiency, and enhancing consumer welfare."

    - In paragraph 2.3 the ACCC affirmed that "the exclusive nature of intellectual property rights is an important incentive for parties to invest in innovation and commercialisation".

    - In paragraph 2.4, the ACCC noted that market power comes from a lack of effective competitive constraint, and acknowledged that intellectual property rights do not necessarily, of themselves, confer substantial market power on a firm. The ACCC also noted that goods or services protected by intellectual property rights will often be subject to competitive constraint from substitutable goods or services.

    - In paragraphs 2.6 to 2.18, the ACCC set out general principles concerning circumstances where the licensing or assignment of intellectual property rights may be helpful to the competitive process, and where it can have anti-competitive consequences.

[4] Competition Policy Review, Final Report, March 2015, Recommendation 7.
[5] Competition Policy Review, Final Report, March 2015, Recommendation 27.
[6] Competition Policy Review, Final Report, March 2015, Recommendation 33.
[7] Competition Policy Review, Final Report, March 2015, Recommendation 39.
[8] Competition Policy Review, Final Report, March 2015, page 404.
[9] ACCC, "Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)", August 2019.

- In particular, in paragraph 2.6, the ACCC noted that the licensing or assignment of intellectual property rights is usually helpful to the competitive process as it "enables intellectual property to be exploited to a greater extent than would occur if those rights were not licensed or assigned, therefore encouraging competition". The ACCC notes that licensing or assignment of intellectual property rights "often increases production, geographic distribution, and the rate at which new products are introduced to the market".
- Importantly, in paragraph 2.7, the ACCC also noted that "[t]he licensing or assignment of intellectual property rights can also be helpful to the competitive process if it enables the licensee to engage in commercial activity that would otherwise be closed to it, or which the licensee could only engage in by duplicating or 'inventing around' existing intellectual property rights."
- In paragraph 2.8 the ACCC noted that: "[h]owever, in some cases, licensing or assignment of intellectual property rights can have anti-competitive consequences, including where the licensing or assignment has the purpose, effect or likely effect of substantially lessening competition."

29. Following these general principles, the ACCC's guidelines then discuss a limited number of case studies in which the ACCC provides some guidance on how it considers certain limited IP transactions will be treated under the competition law. However, a number of these case studies concern possible cartel conduct that is only loosely related to the intellectual property rights at issue. Accordingly, the ACCC's guidelines give limited certainty for parties who may have previously sought to rely on subsection 51(3) of the CCA: the exemption for cartel conduct in connection with the licensing of IP rights. The IPC considers that further detailed guidance would be useful in promoting certain IP transactions (including common IP transactions that would have previously had the benefit of the subsection 51(3) exemption and the potential availability of other cartel exceptions). This guidance could contribute to greater certainty of contracting for IP owners and enhance innovation, as further discussed below.

30. In addition to the guidelines, on 23 March 2022, the ACCC issued a draft determination in relation to an application for authorisation of cartel conduct lodged by three pharmaceutical companies in relation to a settlement and licence agreement resolving legal proceedings between the parties.[10] In indicating that it proposed to deny the application for authorisation, the ACCC commented that it considered the settlement and licence agreement would likely result in public detriment—by reducing competitive tension in relation to the generic entry of certain pharmaceutical products and conferring the licensee a 'first mover advantage', which could deter other generic entry. The IPC notes that these comments, along with the absence of relevant judicial precedent, could lead to uncertainty for IP owners and licensees when seeking to assess the competitive effects of licensing intellectual property rights. This lack of certainty could discourage R&D activities and deter IP owners and potential licensees from entering into beneficial market-expanding licensing arrangements.

Law reform and the need for balancing interests

31. It has always been recognised that IP law and associated policy requires a careful balancing of the interests of creators, innovators and owners, with the interests of follow-on innovators and the broader community. Australia's IP law and policy is also subject to Australia's international treaty obligations. The IPC supports considered policy development based on empirical evidence.[11]

[10] ACCC, Draft Determination – Application for authorisation lodged by Juno, Natco and Celgene.
[11] See for example the IPC's submission to the Productivity Commission's Issues Paper in relation to

32. The IPC submits that there remains a number of outstanding reforms associated with the recent competition law reform that should be followed up to increase the clarity and understanding of permitted IP transactions under Australia law. These reforms would assist in encouraging R&D activity in Australia. They include the following:

- More guidance should be provided on the interface between intellectual property and competition law to clarify the requirements for intellectual property transactions under competition law to reduce the compliance costs associated with intellectual property transactions and encourage R&D activities. In particular, more guidance should be provided on how markets and competitors are to be assessed in the case of research services and technology licensing services—two key areas which will be critical in increasing R&D activity in the Australian economy.

- Given the increasing emphasis on the need to develop entire new industry sectors (for example in relation to the clean energy transition, developing Australia's advanced manufacturing base, and other national priority areas), it is expected to be necessary for participants to collaborate in order to bring the necessary scale to these initiatives. Accordingly, it will be imperative for the sector to have clear guidance on how the joint venture and exclusive dealing exceptions to the cartel prohibitions will operate, and similarly how such collaboration will be assessed under the competition test. In this regard:

    - The Australian Innovation System Report 2017, prepared by the Office of the Chief Economist,[12] highlights that innovation-led growth can potentially be enhanced by certain reforms to the "framework conditions" (which include intellectual property and competition laws). In particular, the report states: "Complementary measures can help unlock the benefits of innovation, especially where they aim to address specific market failures such as those related to coordination problems or innovation spill-overs. For example, supporting the development of innovation ecosystems (around specific technologies) or clusters (around certain geographical locations) may assist by facilitating collaboration between firms and research institutions so that they may identify and address issues of common interest."

    - Insofar as government policies seek to create an environment for the creation of new industries and new collaboration opportunities (discussed further in the next section below), provision of more clarity on the legal treatment of intellectual property related collaboration will be important.

- The IPC submits that consideration should be given to developing suitable ACCC class exemptions for IP transactions with defined characteristics, to increase clarity on allowable (and even encouraged) transactions and to reduce the compliance costs associated with such transactions.

- Conversely, the ACCC has been slow to **consider** the use of alleged intellectual property rights **which may have an effect on** the development of standards, or to create mandatory standards that embed proprietary IP rights, the electronic conveyancing standards being a potential example.

Intellectual Property Arrangements: https://www.pc.gov.au/ data/assets/pdf_file/0008/194651/sub064a- intellectual-property.pdf.

[12] Australian Innovation System Report 2017, Office of the Chief Economist, https://web.archive.org.au/awa/20180316193546mp_/https://industry.gov.au/Office-of-the-Chief-Economist/Publications/AustralianInnovationSystemReport2017/documents/australian-innovation-system- report-2017.pdf

Importance of IP rights to Australian R&D activities

33. The Australian innovation ecosystem has been developing an expanding community of venture capital firms, including private funds, government funds, and hybrid funds (funds backed by a combination of government and private investment capital). Still, by global standards, a sizable share of Australian R&D occurs in Group of Eight universities. We note the current reviews of university governance being undertaken by the Senate Education and Employment Legislation Committee and the Expert Panel on University Governance and hope that their recommendations will recognise the importance of strong IP governance in that setting.

34. There appears to be a shift taking place in government-supported innovation programs away from grant funding models towards projects that are expected to be financially sustainable (i.e. to generate financial returns) in addition to supporting government policy objectives such as to enhance the generation and growth of new companies and to enhance industry competitiveness and create new industries (e.g. National Reconstruction Fund, Breakthrough Victoria).

35. The venture capital firms and the government-supported innovation system initiatives, if they are successful, will be expected to contribute to productivity improvements for the benefit of the Australian economy. In particular, the success of these initiatives will depend on facilitating investment in the translation of knowledge, scientific research and technology into new businesses, to develop new markets and to increase productivity.

36. Following the re-election of President Trump, there has been a change in approach to research funded by the United States of America, which has historically been a significant source of funding for public sector R&D activity in Australia. This change in approach has seen funding of some projects either withdrawn or paused. This makes it more important than ever that Australian law and policy supports R&D activity in this country (including through appropriate public sector research funding).

37. The IPC submits that:

    - intellectual property rights will continue to play a key role in facilitating the necessary investment, including co-investment and collaboration, into future R&D activities in Australia; and

    - providing increased clarity on the competition law treatment of intellectual property transactions, including collaboration and licensing, could usefully contribute to the effectiveness of these reforms and to enhancing the Australian innovation system more generally.

38. This does not mean that reforms to Australia's intellectual property regime should not be carefully considered. For example, it is now 12 years since the *Intellectual Property Laws (**Raising the Bar**) Amendment Act 2012* (Cth) came into force. A body of case law applying these significant reforms to Australian patent law is now being established as cases involving patents governed by the Raising the Bar regime increasingly make their way through the courts. It is an appropriate time to reflect upon whether these changes have achieved their objectives, whether further reforms or clarifications to the law are required, and whether Australian patent law appropriately supports and rewards R&D activities in this country.

39. Another example is the advent of generative AI, which is challenging established notions of authorship and inventorship in Australian copyright and patent law, and posing questions regarding whether (and, if so, how) new creations and innovations generated with the assistance of AI should be protected by intellectual property laws.

40. To promote certainty and consistency, and to reduce transaction costs, the IPC supports ongoing efforts for Australia to promote global cooperation on intellectual property policy, including transparent, evidence-based negotiation of IP issues in foreign treaties.

First Nations Knowledge

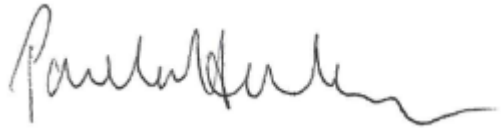
41. The IPC acknowledges the Panel's comments that intellectual property can present a challenge to protecting First Nations traditional knowledge and cultural expressions.

42. The IPC supports the work of the Australian Government and IP Australia to consider options for the protection and management of First Nations knowledge, including the development of stand-alone ICIP legislation. The IPC looks forward to considering how any proposals in this important area align with, or otherwise interact with, existing IP laws and to provide submissions on these matters. The views of the Law Council's Indigenous Legal Issues Committee will also, of course, be sought in this context.

Further contact

43. The IPC would be pleased to discuss any aspect of this submission. Please contact the Chair of the IPC, Richard Hoad, [redacted] if you would like to do so.

Yours faithfully



Professor Pamela Hanrahan
Chair
Business Law Section