



Introduction

This submission is made by the Australian national group of AIPPI (**AIPPI Australia**) in response to the draft report of the Competition Policy Review Panel dated September 2014 (**Draft Report**).

About AIPPI and AIPPI Australia

The International Association for the Protection of Intellectual Property, generally known by its French acronym AIPPI, is one of the world's leading international organisations dedicated to the development and improvement of the regimes for the protection of intellectual property.

Established in 1897, AIPPI is a politically neutral, non-profit organisation. It is domiciled in Switzerland and currently has almost 9000 members representing more than 100 countries. The members of AIPPI are people who are actively interested in intellectual property protection on a national or international level. They include lawyers, patent attorneys, trademark agents, judges, academics, scientists and engineers. The members of AIPPI are organised into national groups, with the Australian national group having approximately 90 members.

The objective of AIPPI is to improve and promote the protection of intellectual property on both an international and national basis. It pursues this objective by working for the development, expansion and improvement of international and regional treaties and agreements and also of national laws relating to intellectual property.

AIPPI operates by conducting studies of existing national laws and proposing measures to achieve harmonisation of these laws on an international basis. Proposals generally take the form of resolutions on particular topics that are debated and passed in plenary sessions by members at annual meetings. AIPPI has published over 700 resolutions, which are published in English, French and German and supplied to the World Intellectual Property Organisation, the World Trade Organisation and national and regional intellectual property offices around the world.

Consistent with the aims of AIPPI International, AIPPI Australia is concerned to ensure that Australia has a robust intellectual property system that serves the needs of all stakeholders. Clearly defined intellectual property rights promote innovation and productivity. This serves the interests of Australians and Australian business by attracting investment locally, regionally and beyond.

The Draft Report

The Draft Report recommends that section 51(3) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) be repealed. AIPPI Australia opposes this recommendation for the reasons set out further below. However, at the outset, AIPPI Australia considers it is important to recognise the nature of intellectual property rights and their role in a competitive market.

The nature of intellectual property rights

Statute-based intellectual property rights constitute personal property,¹ but there are inherent differences between intellectual property and other forms of property. Intellectual property is the output of intellectual or creative endeavour. It is intangible. It cannot be physically possessed. Unlike in relation to physical forms of property, an intellectual property owner cannot confine the use of their intellectual property only to those with whom the owner chooses to share it, in the absence of legal rights regulating the ability to do so. Goods may be physically possessed; land may be physically closed off; but intellectual property that is in the public domain is available to all, in the absence of laws stating otherwise. Intellectual

¹ For example: *Patents Act 1990*(Cth), s13(2); *Trade Marks Act 1995* (Cth), s21(1); *Designs Act 2003* (Cth), s102(2); *Copyright Act 1968* (Cth), s196(1).

property rights are therefore not, in all respects, the same as any other property rights. It should therefore not be assumed that intellectual property should be regulated in the same way as other forms of property rights.

The starting point is recognising that innovation is essential to economic development. Innovation provides a means of differentiating products and services from those of other participants in a competitive marketplace. This provides an incentive for competitors to develop innovative products and services.

Innovation often comes at a considerable upfront and ongoing cost to the innovator. In a free market economy, it is open to competitors to copy the innovations of others, thereby avoiding or significantly reducing the copier's own upfront development costs. Unlike the owner of real property, it is not open to an intellectual property owner to physically bar access to their asset. The ease with which copying can occur is a significant disincentive to participants in a free marketplace to develop new innovations. Decreased innovation activity can lead to stagnation in the market. Lack of innovation and stagnation of markets are detrimental to competition – market participants are not challenged to match or better the products / services of their competitors.

In order to enhance competition through innovation, intellectual property laws provide some protection from more immediate and direct marketplace competition. This protection is, in general, limited both in scope and duration. The scope of intellectual property rights, and therefore what use can be made of them, is carefully delineated by the applicable statutory regimes. Statutory intellectual property rights other than trade marks are also limited by defined periods of registration. This limited exclusivity provides innovators with some scope to develop, use and improve the product of their innovation in order to obtain a return on investment. This limited protection incentivises innovation and is thus ultimately pro-competitive. In this way, intellectual property laws complement competition laws.

Economic importance of intellectual property

We note that the European Commission has recently undertaken an extensive review of the economic importance and effects of intellectual property, reporting in September 2013. It found that 40% of economic activity was in high intellectual property intensive industries, as was 35% of employment. This is an important indicator that intellectual property rights are important to innovation and the general economy in their own right. Further, it is a truism that intellectual property rights (and their proper regulation) are of critical importance to the knowledge economy and to new creative and scientific industries.

International obligations relating to intellectual property

Australia is a party to a very large number of IP related treaties.

The key agreement from an economic and competition perspective is the TRIPS Agreement, which forms part of the agreements relating to the World Trade Organisation. This establishes important minimum standards for IP, and Australia's participation in the international trade system is conditional on compliance with these important substantive rules. We will not attempt to list all the other agreements, but note in passing the Berne Convention and Paris Convention which underpin the international Copyright, Patents, Trade Marks and Design systems.

Further IP measures are contained in many of the trade agreements to which Australia is a party, notably the AUSFTA.

The point here is that in large part the main substantive provisions for many types of IP are prescribed by these agreements, and that there is relatively limited scope for amendments in response to local concerns. This is particularly true of any measures which seek to reduce or constrain those rights.

AIPPI Australia is supportive of the development of an economic framework to assist in treaty negotiations. We would generally comment that intellectual property concerns have on several occasions been given much less prominence in negotiations for trade agreements than matters such as agricultural

access. This is an issue of increasing concern, as the knowledge economy is growing to form a larger part of the Australian economy.

Types of intellectual property rights

The scope and form of intellectual property rights varies depending on the nature of the right. The scope of various intellectual property rights in Australia is primarily underpinned by Australia's obligations under the TRIPS Agreement. As noted above, the TRIPS Agreement establishes minimum standards for intellectual property protection, which are the result of many decades of refinement at a national and international level.

Patents

The grant of a patent permits its owner exclusive rights to exploit a new and useful invention for a limited period in exchange for the detailed disclosure of the invention in a specification so that society can benefit at large upon the expiry of the limited period. The system thereby encourages advances in the useful arts.

As explained in Lahore's Patents, Trade Marks and Related Rights (looseleaf):

A patent is a temporary monopoly granted by the Crown to the patentee in return for the disclosure of the invention to the public in the patent specification.²

A patent will only be granted if the invention satisfies the requirements of patentability. In the case of standard patents, these requirements include that the invention must be novel (ie, new) and it must be inventive over the existing state of the art.

The term of a standard patent is 20 years. In limited circumstances, the term of standard patents relating to pharmaceutical substances may be extended so as to compensate for delays in obtaining marketing approval for a new drug.³

Australia also has a system for the grant of second-tier patents, termed innovation patents. Innovation patents require a lower degree of inventiveness in order to be granted. As such, the term of an innovation patent is only 8 years, in recognition of the lesser contribution to society required to obtain an innovation patent.

The owner of a patent has the exclusive right to exploit the invention claimed in the patent in Australia for the term of the patent, and to authorise others to exploit the invention⁴. The scope of rights granted to a patent owner is limited by the claims of the patent. That is, the grant of a patent does not give a patent owner a monopoly over a particular invention or product per se, but only to those parts of the invention that are specifically described in the claims of the patent. Accordingly, the exclusive rights an owner of a patent is granted are limited to certain specific matters.

Copyright

In addition to its obligations under the TRIPS Agreement, Australia is also a party to other international agreements that impact on the scope of Australian copyright law. In particular, the Berne Convention for the Protection of Literary and Artistic Works and the Australia-United States Free Trade Agreement set out a number of requirements in addition to those in the TRIPS Agreement.

Copyright protects the expression of ideas.⁵ The *Copyright Act 1968* (Cth) provides for the copyright protection of original works and other subject matter. Copyright is not registered in Australia, and is entirely codified, common law copyright having been abolished in Australia in 1912.

² [5000].

³ s 70, Patents Act.

⁴ s13(1), Patents Act.

⁵ *Hollinrake v Truswell* [1894] 3 Ch 420 at 427.

Pursuant to Parts III and IV of the Copyright Act, copyright may subsist in the following:

1. artistic works;
2. literary works;
3. dramatic works;
4. musical works;
5. sound recordings;
6. cinematographic films;
7. television broadcasts; and
8. sound broadcasts.

The Copyright Act grants owners of copyright the exclusive right to do, and authorise others to do, in Australia, specified acts in relation to works and other subject matter for the duration of copyright. The rights granted include the exclusive right to reproduce in material form, publish and communicate to the public the works referred to above. In relation to the subject matter referred to in items 5 to 8 above, a copyright owner has the exclusive right to make a copy, cause a film or recording to be heard or seen in public, re-broadcast a television or sound broadcast, and communicate to the public the subject matter. Thus, again, the exclusive rights a copyright owner is granted are limited to certain specific matters.

The duration of copyright protection varies depending on the nature of the copyright work. For example, copyright subsists in the works referred to in items 1 to 4 above for 70 years after the death of the author.

Designs

The grant of a registered design protects the overall appearance of products, and rewards the owner of the design for the effort expended in developing that design.⁶

The *Designs Act 2003* (Cth) provides for the registration and protection of designs for manufactured products. A design is 'the overall appearance of the product resulting from one or more visual features of the product'⁷. A visual feature of a product may be a feature of shape or configuration (a 3 dimensional feature), or a feature of pattern or ornamentation (a 2 dimensional feature applied to the product)⁸.

The maximum term of protection for a registered design is 10 years.

The owner of a registered design is granted the exclusive right to make, import and sell the product to which the design is applied for the term of protection⁹, or to authorise another person to do so.

Registered trade marks

A trade mark denotes the trade source of goods or services. The Trade Marks Act 1995 (Cth) (**TMA**) provides for the registration and protection of trade marks. A trade mark may be registered in respect of goods, services or both¹⁰.

As explained in Shanahan's Australian Law of Trade Marks and Passing Off (5th ed):

⁶ *The Laws of Australia*, [23.2.10].

⁷ s5, Designs Act

⁸ s7(1), Designs Act

⁹ s10(1), Designs Act

¹⁰ In Australia (as in many other jurisdictions), trade marks are registered in classes of goods/services designated by the *International Classification of Goods & Services for the Purposes of the Registration of Marks* established by an agreement concluded at the Nice Diplomatic Conference on 15 January 1957.

Other forms of intellectual property such as patents, designs and copyright, are granted as incentives to industrial or artistic enterprise. The exclusive right of the trade mark owner finds its justification in the objectives of consumer protection and protecting interest of traders in both the goodwill associated with their trade mark and the value of a registered trade mark as property in its own right.¹¹

A trade mark will only be registered if the mark is capable of distinguishing the relevant goods or services from the goods or services of other persons,¹² and the mark or its use will not deceive or cause confusion,¹³ subject to conditions and limitations imposed by the Registrar of Trade Marks.¹⁴

A trade mark registration may be renewed for periods of 10 years at a time, indefinitely, but can be revoked or removed in certain circumstances, for example, if the owner fails to use the underlying mark for the goods or services in respect of which it is registered.¹⁵

A registered owner of a trade mark has the exclusive right to use, and authorise others to use, the trade mark in relation to the goods and/or services in respect of which it is registered (subject to certain exceptions¹⁶), and the right to obtain relief under the TMA if the trade mark is infringed¹⁷. It is only by using a mark that a trade mark owner obtains any benefit from the rights granted to it.

The exclusive rights of a registered trade mark owner are limited by reference to the scope of the registration and other limitations in the TMA¹⁸. The rights of a registered trade mark owner are also limited by provisions in other legislation or the position at common law to the effect that a person may not engage in misleading and deceptive conduct or passing off. For example, a trade mark cannot be used to make false representations about the origin or quality of goods.

Accordingly, registration under the TMA does not carry with it the right to 'use the mark anywhere in Australia and under all conditions'.¹⁹ The right conferred extends only to the lawful use of the trade mark as a distinguishing feature of the registered owner's goods or services in light of countervailing interests.²⁰

Sui generis rights

Australia also has statutes governing rights granted in respect of circuit layouts and plant varieties (known as plant breeder's rights, or PBRs), respectively. The protection of such rights is largely the result of Australia's obligations under international treaties such as the TRIPS Agreement and, in the case of plant breeder's rights, the International Convention for the Protection of New Varieties of Plants.

As explained in *The Laws of Australia* (looseleaf):

The *Circuit Layouts Act 1989* (Cth)...grants protection to the layout of integrated circuits (or semiconductor chips, commonly known as computer chips).

¹¹ At [1.05].

¹² ss41(1), 57, 88(2) TMA.

¹³ ss 43, 88(2) TMA; ss 59, 88(2) TMA.

¹⁴ s69(1), TMA.

¹⁵ s92, TMA.

¹⁶ For example, in relation to prior use of the mark by others, use where the mark has become generic, and use where the mark refers to a patented article where the relevant patent has expired and the mark is the only commonly known way to describe the article.

¹⁷ s20, TMA.

¹⁸ For example, ss122-124 provides for various circumstances where a registered trade mark is not infringed.

¹⁹ *Leach v Wyatt* (1931) 48 W (NSW) 173 at 175; *Campomar Sociedad Limitada v Nike International* (2000) 202 CLR 45 at [65].

²⁰ *E & J Gallo Winery v Lion Nathan Australia Pty Ltd* (2010) 241 CLR 144 at [42] (**Gallo**); *Koninklijke Philips Electronics NV and Another v Remington Products Australia Pty Ltd* [2000] FCA 876 (**Phillips v Remington**) at [10] – [11] explains the rights "conferred" by s 20(1) "It will be observed that this subsection follows the practice, to which Kitto J alluded in *Shell Co of Australia Ltd*, of omitting to specify that the exclusive right of use is a right to use as a trade mark; however, having regard to the legislative history and the unvarying course of authority, the right must be understood to be so limited."

In respect of plant breeder's rights, The Laws of Australia explains:

The PBR system is a registration system where applications for PBR are filed with and examined by the Australian Plant Breeder's Rights Office.^[2] PBR granted in a plant variety extend throughout Australia and its dependent territories. PBR provide certain exclusive rights in relation to the propagating material of a plant variety

The common law also provides some protection to intellectual property owners through the tort of passing off and the equitable action for breach of confidence.

Rationale for grant of intellectual property rights

As the Intellectual Property and Trade Practices committees of the Business Law Section of the Law Council of Australia stated in their submission to the Interim Report to the Ergas Committee:

The protection provided for intellectual property in Australia is of significance to the Australian economy. The absence of appropriate protection for intellectual property can result in organisations choosing not to invest in research and development work in Australia or not to introduce or market their products in Australia. This could result in a limitation in the availability of products to the detriment of consumers and a decrease in investment to the detriment of the Australian economy.

It has been recognised that the protection of intellectual property and the licensing of intellectual property rights is, in general, pro-competitive. In the case of patents for example, the grant to the patentee of rights of exploitation over an invention is given in exchange for the disclosure to society of knowledge about the invention which in turn encourages further innovation. The Committee appears to accept this, and the Law Council supports the Committee's view that intellectual property has important features that differentiate it from other property or assets.²¹

Australia joins the international community in recognising the positive benefits of intellectual property rights and, as noted above, is accordingly a party to various international treaties and agreements relating to intellectual property rights.

Intellectual property and competition law

As described above, intellectual property rights are limited in scope. No intellectual property owner is granted an absolute monopoly. Rather, the rights that it may exercise are a limited set of rights determined by statute. Further, these rights are abrogated in various ways prescribed by statute, such as compulsory licensing and Crown use.

Section 51(3) provides limited exceptions from certain aspects of Australia's competition laws. It does not provide a blanket exclusion that permits any exploitation of intellectual property rights without regard to competition laws. Rather, section 51(3) exempts certain uses of intellectual property rights, namely assignments and licences, from certain provisions of competition law. This does no more than recognise the inherent nature of intellectual property rights as limited exclusive rights, and that such uses of intellectual property rights are beneficial to competition. Importantly, these (and all other) uses of intellectual property rights remain subject to those provisions of the CCA that render certain activities per se illegal, ie sections 46 and 46A (misuse of market power) and section 48 (resale price maintenance).

Equally importantly, the uses of intellectual property that are covered by section 51(3) are rights that are expressly granted to intellectual property holders by the relevant legislation. Section 51(3) therefore does no more than permit intellectual property holders to engage in dealings with third parties where such dealings fall within the scope of their granted rights. For example, an intellectual property owner may license certain uses of its rights to a third party in return for a fee or royalty. This situation commonly occurs where the holder lacks the means or desire to exploit their intellectual property. In such a situation, agreeing to assign or licence their rights simply allows a third party to do what the innovator itself could, but does not want to or is unable to, do.

²¹ Paragraphs 3 and 4.

The need to allow intellectual property holders to deal with third parties within the scope of their monopoly was recognised by Mason J in *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83, the only decided case to substantively consider the meaning and purpose of section 51(3). In *Transfield*, Mason J stated:

In bridging the different policies of the *Patents Act* and the *Trade Practices Act*, s. 51 (3) recognizes that a patentee is justly entitled to impose conditions on the granting of a licence or assignment of a patent in order to protect the patentee's legal monopoly.

Uses of intellectual property that are outside the scope of the rights granted to their owner are not protected by section 51(3). Thus, as discussed above, contraventions of sections 46, 46A and 48 of the CCA are outside the exemption. This is because, unlike cartel provisions that may be enlivened by legitimate uses of intellectual property, conduct that might be captured by sections 46, 46A and 48 is unlikely to fall within the scope of the rights expressly granted to intellectual property holders.

Repeal of section 51(3) is inconsistent and creates uncertainty

To repeal section 51(3) and expose dealings by intellectual property holders that are within the scope of their monopoly to the full scope of the competition law is inconsistent with the rationale for the existence of intellectual property rights.

Further, repealing section 51(3) would introduce uncertainty and complexity into dealings by intellectual property owners with third parties. Third party dealings with intellectual property are very common. The ACCC acknowledges that (at least) the majority of cases do not give rise to competition concerns.²² However, without the protection afforded by section 51(3), it would still be necessary to conduct a detailed review of these agreements from a competition perspective to ensure they comply with the relevant laws. It is therefore inefficient to subject dealings to competition laws where the risk of infringement is negligible.

Additional uncertainty and complexity would increase transaction costs and reduce post innovation returns. For example, many intellectual property licences are entered into at the early stages of development as a means to obtain funding to continue with development or to commercialise a product. Having to obtain specialist competition law advice in relation to a proposed licence agreement will impose a further burden on intellectual property holders at a time when, prior to commercialisation, they do not have significant funds. This may lead to a reduction in licensing of intellectual property rights, thereby reducing the development of new innovations.

To ensure the greatest economic development, markets need to function as competitively as possible. Intellectual property laws contribute to a competitive market by maximising the potential for an innovator to obtain a reward on their investment into new innovations. By virtue of the dynamic nature of markets, competitors of an innovator will need to consider (and implement) ways to deal with the innovator's new development in order to compete. Thus, intellectual property contributes to the development of competitive markets. To repeal section 51(3) would undermine the contribution of intellectual property to economic development.

Section 51(3) is sometimes attacked on the basis that its scope is unclear, and so it is ineffective. However, that is not a reason to repeal the section entirely. Doing so would, as described above, lead to further uncertainty. Rather, any doubts as to the scope of the section should be cured by amending it.

Most compellingly, no evidence has been provided by stakeholders demonstrating any negative impacts of section 51(3), or explaining how the repeal of section 51(3) will lead to improvements in competition. In such circumstances, it is not apparent why section 51(3) should be repealed.

²² ACCC submission to the Competition Policy Review, 25 June 2014, pg 59.

The position in other jurisdictions

The need for a safe harbour to protect intellectual property rights owners' use of their property is recognised across numerous jurisdictions, including the following regimes.

Europe

The European Commission has issued two block exemptions which expressly exclude intellectual property rights from the operation of certain competition laws. The first exemption provides that agreements where:

- (a) one or more of the participants gives up the manufacture of certain products or the provision of certain services in favour of another participant, or
- (b) the participants undertake jointly to manufacture certain products or provide certain services, then the assignment or use of intellectual property rights are, to a limited extent, exempted from the anti-competitive conduct rule. The second exemption excludes patent, know-how and software copyright licences and assignments from the anti-competitive conduct rule, subject to certain limitations (for example, the agreements must not contain severely anti-competitive restraints, such as provisions restricting a party's ability to set its own prices).

United States

The Department of Justice and the Federal Trade Commission have issued guidelines establishing an anti-trust 'safety zone' in relation to certain types of intellectual property licensing arrangements. In effect, these guidelines provide that the DoJ and FTC will not challenge an IP licence provided that it does not include prima facie anti-competitive provisions, such as price fixing, market sharing or other restraints that tend to reduce output or increase prices, and:

- (a) the licensing parties account for less than 20% of any markets significantly affected by the licence; and/or
- (b) there are four or more independent entities not parties to the licence that have the ability and incentive to engage in similar research activities to those undertaken by the parties to the licence.

Canada

In Canada, section 79(5) of the Competition Act 1985 provides that 'an act engaged in pursuant only to the exercise of any right or enjoyment of any interest...pertaining to intellectual or industrial property is not an anti-competitive act.'

New Zealand also has similar safe harbour provisions to section 51(3).²³

Australia would be out-of-step with the international community if section 51(3) was repealed. Doing so could lead to a reduction in the value of Australian intellectual property rights compared to equivalent rights in other jurisdictions, ultimately decreasing competition in Australia.

Proposed amendments to section 51(3)

Having regard to the above, AIPPI Australia submits that section 51(3) should be retained in substantially its current form, albeit that the following minor changes should be made:

- refer to the relevant provisions of the current Trade Marks Act 1995 (Cth), which has replaced the Trade Marks Act 1995 (Cth) – it remains anomalous that section 51(3) continues to refer to repealed legislation; and
- extending the range of IP rights to include plant breeders' rights ensuring a consistent approach to the competition regulation of statutory forms of intellectual property.

²³ See s45(1) *Commerce Act 1986* (NZ).

Block exemption proposal

AIPPI Australia also notes the proposal in the Draft Report for an expanded regime for exemptions and authorisations under the CCA, and in particular, for the use of block exemption powers similar to the UK and Europe. AIPPI Australia has no in principle objection to such measures, as they act to reduce compliance costs and avoid the expense and time delays associated with seeking authorisations.

However, in relation to intellectual property, AIPPI Australia has difficulty seeing the improvement for the business environment and fair competition should section 51(3) be repealed. At best, any block exemption for intellectual property (if and when created) will, in order to be effective, have to more or less mirror the current legislative provisions. Any more limited exemption may leave many clearly unobjectionable transactions, for example in relation to trade mark licensing and franchising, as requiring authorisation. The sheer number of intellectual property agreements and transactions should not be underestimated. Bringing these further into the net of ACCC authorisation is likely to greatly increase red tape and the regulatory burden on businesses of all sizes.

Additionally, any block exemption would be subject to change by administrative decisions from time to time. This would create a further layer of uncertainty for business agreements and planning.

Parliament has seen fit to create both intellectual property rights and competition law via legislation. Section 51(3) is a legislated exemption for some intellectual property rights from some aspects of competition law. AIPPI Australia submits that to move the power to grant authorisations to an unelected authority, subject to the continuing influences of the day, is not the appropriate way to regulate the rights, checks and balances mandated by Parliament.

AIPPI Australia notes again the very limited scope of the existing exemptions provided by section 51(3). In short, while exemption powers may serve a useful purpose, a block exemption relating to intellectual property would be inefficient and is not an answer to the proposed report of section 51(3).

Proposed review of the intellectual property regime

We note the proposal as follows:

Given the influence that Australia's IP rights can have on facilitating (or inhibiting) innovation, competition and trade, the Panel believes it is crucial that the IP system be designed to operate in the best interests of Australians.

The Panel therefore considers that Australia's IP rights regime is a priority area for review.

Determining the appropriate extent of IP protection is complex. IP rights can help to break down barriers to entry but can also, when applied inappropriately, reduce exposure to competition and erect long-lasting barriers to entry that fail to serve Australia's interests over the longer term. This risk is especially prevalent in commitments entered into as part of international trade agreements.

The Panel is concerned that there is no overarching IP policy framework or objectives guiding changes to IP protection or approaches to IP rights in the context of negotiations for international trade agreements.²⁴

Existing enquiries

Very many extensive reviews have taken place in relation to various key components of the intellectual property system in Australia in the last few years.

IP Australia has undertaken an ongoing review process addressing many aspects of the intellectual property system within its purview. Perhaps the most important was the multi-year process resulting in the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth). The primary purpose of the amendments was to raise the standards for granting patents and reduce delays in the grant process. Economic and competition arguments were prominent in the reasoning for change.

²⁴ Draft Report, pg 88.

IP Australia has also recently participated in the *Pharmaceutical Patents Review*, which reported in May 2013.²⁵ The ALRC completed a review of 'Copyright and the Digital Economy' in November 2013.²⁶ Competition and economic considerations featured prominently in this review. The Productivity Commission conducted a review into Compulsory Licensing of Patents, which was released in May 2013.²⁷ The Senate conducted an enquiry in relation to gene patents, which was released in November 2010.²⁸

Many of the most economically important aspects of the intellectual property system have, in fact, been subject to detailed review in the last few years, and that such reviews in relation to intellectual property tend to be a regular features of the intellectual property ecosystem. IP Australia also has a dedicated section dealing with economic aspects, the Office of the Chief Economist, headed by a prominent and eminently qualified economist.

Intellectual property law stretches over many different regimes, different rights, different industries and different policy objectives. AIPPI Australia submits that any attempt to generalise an enquiry across all types of intellectual property rights and/or all industry sectors is at best inefficient, but more fundamentally, is misconceived. Any general enquiry would require enormous resources, and is likely to recommend a disparate sets of measures rather than a single set of related reforms.

To the extent that there are any areas of intellectual property law presently considered to require review, AIPPI Australia would submit that any priority areas should be investigated on a rolling basis. This is a more effective process than a wholesale review.

We note that in the event that any review is to be undertaken, whether wholesale or on a rolling basis, any consideration of repeal of section 51(3) should necessarily await the outcome of such review(s).

Conclusion

In conclusion, AIPPI Australia is strongly opposed to the reveal of section 51(3), and recommends that any reviews of intellectual property law should continue on a rolling basis. AIPPI Australia has had the benefit of reviewing IPTA's submission to the Competition Policy Review and endorses the comments made therein.

²⁵ Harris, T., Nicol, D., Gruen, N. 2013 *Pharmaceutical Patents Review Report*, Canberra.

²⁶ ALRC Report 122.

²⁷ Productivity Commission 2013, *Compulsory Licensing of Patents*, Inquiry Report No. 61, Canberra.

²⁸ The Senate Community Affairs References Committee, *Gene Patents*, 26 November 2010.