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CSIRO

343 Royal Parade, Parkville VIC 3052
T (03) 9662 7100 • ABN 41 687 119 230

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Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

BY EMAIL

Dear Sirs

Thank you for the opportunity to make a written submission in relation to the Competition Policy Review Draft Report of September 2014.

In Draft Recommendation 8 ("Intellectual property exception"), the Panel recommends that subsection 51(3) of the Competition and Consumer Act 2010 (Cth) (CCA) be repealed.

CSIRO submits that in the context of competition law in Australia, subsection 51(3) is a valuable provision in relation to patent licence transactions and that its repeal (without putting in place some compensating mechanisms) would be potentially counterproductive to technology commercialisation in Australia for the reasons set out in this submission. Some examples of possible compensating mechanisms are suggested below.

CSIRO understands that it is generally unlikely that a patent licence agreement would substantially lessen competition in a relevant market. Nevertheless, the legal requirement to characterise the relevant market and assess the possible impacts on that market, and/or to seek authorisation from the ACCC, would likely increase the cost and time required to complete patent licence transactions. It is particularly difficult to assess the likely market impacts of early stage technology licences (including licences to start-up ventures and SMEs) since so many of the relevant factors are generally unknown.

CSIRO notes that the prohibitions in the CCA on abuses of market power and resale price maintenance are not exempted by subsection 51(3), so even with the exemption of subsection 51(3) such conduct is prohibited in relation to patent licence and assignment transactions (as it is in relation to other transactions governed by the CCA).

Technology commercialisation is already a costly and time consuming activity. CSIRO submits that increased transaction time and increased compliance costs would be an inefficient and unproductive use of resources that would not improve the prospects of technology commercialisation in Australia. In particular Australia needs an efficient and agile commercialisation economy to enable technology transfer from CSIRO and universities and research institutes into Australian companies to enhance national competitiveness.

Accordingly, CSIRO submits that the Panel should not propose the repeal of subsection 51(3), at least without also recommending the adoption of suitable compensating mechanisms in relation to technology

licensing. If the Panel has identified particular problems with the operation of the section, CSIRO submits that the Panel should consider proposing suitable amendments, rather than repeal in relation to patents.

If subsection 51(3) is to be repealed, then CSIRO submits that suitable compensating mechanisms should be provided to ensure that technology licence transactions are not rendered more difficult, time consuming and costly. Suitable compensating mechanisms could include: (a) detailed guidance materials on the assessment of markets for the purposes of technology licensing transactions; and (b) providing a legal "safe harbour" for technology licence transactions (ie. providing a legal regime in which compliance with published criteria for licence agreements provides an exemption from the relevant law prohibiting anticompetitive agreements).

An example of a legal "safe harbour" for technology licence transactions is the "Technology Transfer Block Exemption Regulations" (TTBER) of the European Union. For clarity, CSIRO is not suggesting that the content of the TTBER be adopted in Australia, but rather is suggesting that the TTBER provides an example of the architecture of a legal regime to provide a safe harbour for technology licensing transactions.

If a suitable legal safe harbour were to be developed for Australia, CSIRO submits that the design and content of the safe harbour should be developed by a specialist body in consultation with relevant stakeholders (it could be the body tasked with undertaking an intellectual property review as proposed in Draft Recommendation 7 ("Intellectual Property Review"), provided the body includes members with suitable technology licensing expertise).

CSIRO would be pleased to participate in any further discussion or review concerning the relationship between competition law and intellectual property law in Australia.

Yours faithfully

Richard Aarons
Corporate Patent Counsel
CSIRO

Laurence Street
General Counsel and Board Secretary
CSIRO