

The GATHERER

Volume 2



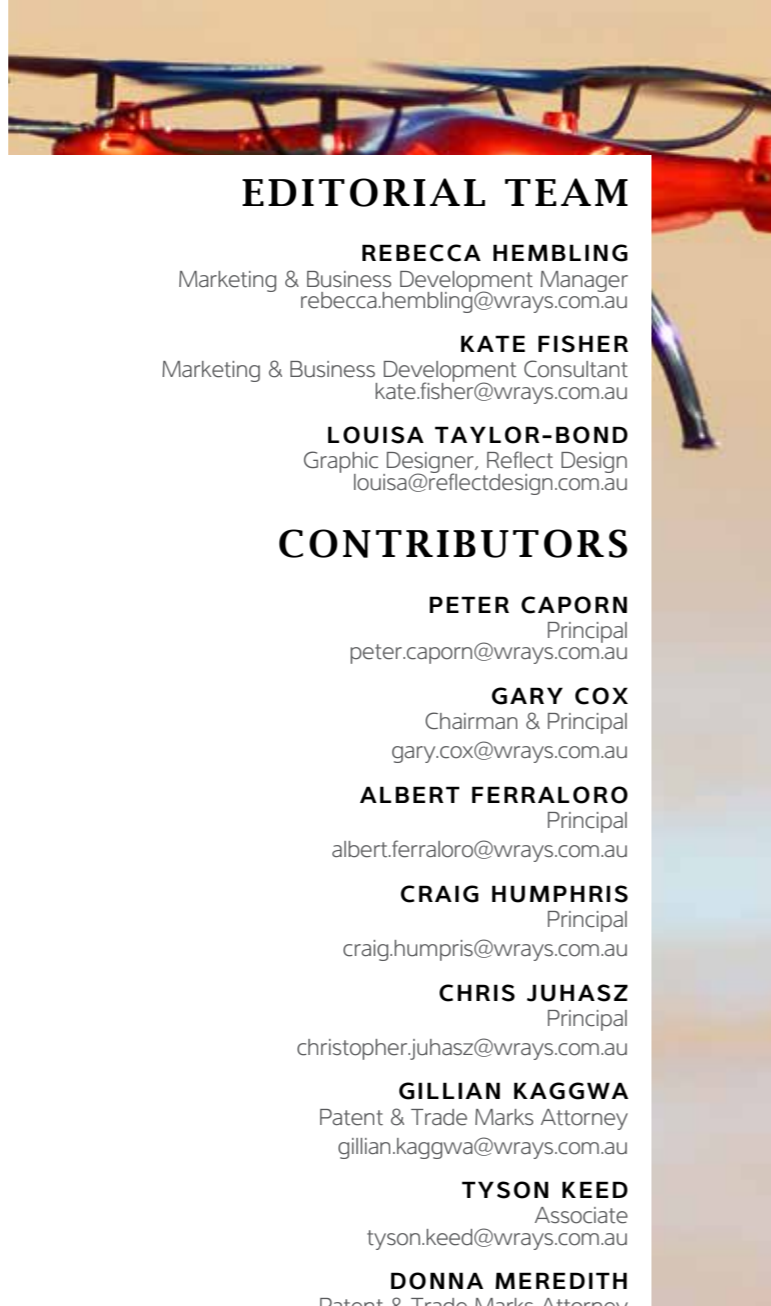
*More eyes
in the sky*

PRODUCTIVITY
COMMISSION'S IP REPORT
AT ODDS WITH AUSTRALIA'S
NATIONAL INNOVATION AND
SCIENCE AGENDA

**Australian
innovation best
placed to win**

MANDATORY DATA
BREACH NOTIFICATION
LAWS **ALMOST HERE**

**Unlocking your
company's true
potential**



EDITORIAL TEAM

REBECCA HEMBLING

Marketing & Business Development Manager
rebecca.hembling@wrays.com.au

KATE FISHER

Marketing & Business Development Consultant
kate.fisher@wrays.com.au

LOUISA TAYLOR-BOND

Graphic Designer, Reflect Design
louisa@reflectdesign.com.au

CONTRIBUTORS

PETER CAPORN

Principal
peter.caporn@wrays.com.au

GARY COX

Chairman & Principal
gary.cox@wrays.com.au

ALBERT FERRALORO

Principal
albert.ferraloro@wrays.com.au

CRAIG HUMPHRIS

Principal
craig.humphris@wrays.com.au

CHRIS JUHASZ

Principal
christopher.juhasz@wrays.com.au

GILLIAN KAGGWA

Patent & Trade Marks Attorney
gillian.kaggwa@wrays.com.au

TYSON KEED

Associate
tyson.keed@wrays.com.au

DONNA MEREDITH

Patent & Trade Marks Attorney
donna.meredith@wrays.com.au

JUDITH MILLER

Principal
judith.miller@wrays.com.au

ANDREW MULLANE

Senior Associate
andrew.mullane@wrays.com.au

TODD SHAND

Principal
todd.shand@wrays.com.au

LAURA TATCHELL

Associate
laura.tatchell@wrays.com.au

AZADEH VAHDAT

Graduate Lawyer
azadeh.vahdat@wrays.com.au

JONATHON WOLFE

Director, Wrays Solutions
jonathon.wolfe@wrays.com.au

CONTENTS

- 3** CEO Message
- 4** In the Spotlight: Andrew Butler
- 6** Australia's Mining Industry: Digging Deeper to Embrace Innovation
- 8** Productivity Commission's IP Report: At Odds With Australia's National Innovation and Science Agenda
- 12** More Eyes in the Sky
- 15** Australian Innovation Best Placed to Win
- 17** The IP Perspective with Chris Juhasz
- 18** BioMedical Translation Fund: Bringing to Life the Valley of Death
- 21** PIONEER Podcast Interview with Anthony Petterson
- 24** Unlocking Your Company's True Potential - the Very Real Intangible Assets
- 26** IP Governance Unplugged: 10 Questions to ask Management to Ensure IP Governance is in Place
- 28** Industry Insider
- 30** Mandatory Data Breach Notification Laws, Almost here
- 32** AATA Decision 5 September 2016 - Extension for Swiss Style Claims
- 34** Re-Identifying The De-Identified - A New Criminal Offence

CEO MESSAGE

I'm thrilled to share with you volume two of The Gatherer – our regular flagship publication developed by our thought leaders especially for our clients. Through The Gatherer we aim to provide you with the most relevant insights and news into the ever changing intellectual property landscape, here in Australia and overseas.

In this edition, we bring you insights, perspectives and information on a range of topics across the IP landscape written by our technical experts, covering industry developments, government policy and legislative changes.

As new innovations and technology enter the market, changes to legislation often follow. Australia's rapidly growing Remotely Piloted Aircraft (RPA) or 'drone' industry is an example of the law needing to catch up with technology. We look at the recent amendments and what this might mean for mining and agriculture in Australia.

We also examine the Productivity Commission's long awaited report on IP that was released just prior to Christmas and we explore the possible impacts should these

recommendations go ahead.

With 'innovation' being the word firmly planted on everyone's lips and continuing to play a strong strategic role in the future direction of Australian businesses, we survey our local innovation landscape, our progress as a nation so far and the role of innovation entrepreneurship to secure our future economic growth. We also dig the dirt on innovation in the mining sector through our exploration of Deloitte's latest report which was released with Diggers and Dealers and the Association of Mining and Exploration Companies.

Continuing on the innovation bent, we delve into the Government's Biomedical Translation Fund, which has been established as a result of Prime Minister Turnbull's Innovation and Science Agenda. The \$500M dollar, equally matched, privately and federally funded venture was established to provide incentives to encourage investment in biomedical start-ups. We identify what this new venture will mean for Australia's biomedical sector and who's eligible for funding.

At Wrays, we have an exciting 2017 ahead of us – reshaping our

business to meet the needs of our clients. We have lots of new people joining Wrays and I look forward to introducing them to you over the coming weeks.

Pioneer, our podcast series for serious innovators, continues to play a strong role in connecting industry with the minds of some of industry's finest. Throughout the series so far I've had the pleasure of interviewing a variety of innovators, entrepreneurs and industry experts – hearing their stories and lessons learned. In this edition of The Gatherer, we bring you a transcript of my interview with Anthony Petterson, Designer & Founder, Hone Product Design.

I hope you enjoy reading this edition. As always if you'd like to be part of our Pioneer series or contribute content or ideas for future editions of The Gatherer, please contact a member of our editorial team – they'd love to hear from you.



FRANK HURLEY

Chief Executive Officer
T +61 8 9216 5111
frank.hurley@wrays.com.au

Pioneer | The podcast series for serious innovators

We're excited to share our industry learning tool, PIONEER | THE PODCAST SERIES FOR SERIOUS INNOVATORS.

Through our regular podcast interviews you will hear from innovative entrepreneurs, CEOs, managers, scientists and policy

makers about innovation. Be inspired and learn from their insights into their challenges, the overall journey of innovation (from idea to reality), and advice for like-minded pioneer.

To listen on iTunes go to Wrays | PIONEER or on our website at wrays.com.au.





IN THE SPOTLIGHT ANDREW BUTLER

Andrew Butler is based in our Melbourne office and is a Principal of Wrays. He specialises in creating and managing patent, trade mark and design rights across a range of industries. Andrew joined Wrays in early 2015 from Allens and has been an integral part of building the Wrays brand in Melbourne.

Tell us about the types of clients you work with.

I act for a broad spectrum of clients, including start-ups, wine producers, resources companies, medical practitioners, FMCG providers, and brewers.

We know you work with people in in-house counsel teams, what are some of the key challenges they face?

What advice can you give to others in similar roles?

Cost control is naturally a key issue for in-house counsel, and extracting as much value for their money as they can from their advisers is important. As we live in a highly competitive market which is always evolving, with a constant barrage of new entrants and new service offerings, loyalty, and

therefore trusted adviser status, can sometimes be compromised as a result. Relationships do matter, and it is important for those in the client-adviser landscape to understand and appreciate that there is a strong link between the client-adviser relationship and the quality of advice and service.

You've spent a year and half at Wrays now after having spent a lifetime at Allens, what do you enjoy about working at Wrays and what are the differences?

The scale of the two firms is obviously very different, but it is nice to be part of a specialist IP firm, with greater freedom to control one's destiny and practice. It's also been energising to assist in establishing Wrays' Melbourne office from the outset, and to expand awareness of the Wrays brand.

What trends are you noticing in the IP space?

The most recent trend has been the mad scramble by Australian IP services firms to list publicly, and to then embark on an acquisition trail both in Australia and into the Asian region. This seems to be almost a uniquely Australian phenomenon. What has emerged from this is a scenario where firms

which are ostensibly competitors are owned by an umbrella holding company. This would seem to raise some potentially serious concerns about the quality of independence, and of the duty owed by the practitioner – is it to the client, or to the shareholders? Clients need to seriously consider these issues when choosing their IP adviser. Wrays has chosen to remain independent, which means that the duty owed to the client remains paramount, and those tricky ethical issues do not arise.

AUSTRALIA'S MINING INDUSTRY

DIGGING DEEPER TO EMBRACE INNOVATION

Mines of tomorrow

The mining industry must fully embrace innovation in order to build the mines of tomorrow and increase the growth and productivity. This was the conclusion drawn from a recent Innovation in Mining: Australia 2016 Report (the Report) released by Deloitte in association with Diggers and Dealers and the Association of Mining and Exploration Companies (AMEC).

The Report identified that the industry largely understood the benefits of innovation but were failing to implement the concept effectively. Instead, the industry was focused on pursuing operational excellence, achieving continuous improvement in mining operations and reducing costs. However, as the Report concludes, these measures alone are not enough.

Innovation hurdles

Factors such as risks to cash flow, short-term bottom-line improvements, lack of proactive decision-making were regarded as significant hurdles to innovation in the long term. "For many mining companies, the intense focus on maximising production volume during the boom years has resulted

in inefficiencies becoming deeply embedded in their businesses," the Report stated. Additionally, the Report identified that "there is a clear need to repair relationships and embrace strategic alliances with suppliers, universities, industry bodies, collaborative research centres (CRCs) and the likes of the Commonwealth Scientific and Industrial Research Organisation (CSIRO)."

The Report confirms the need to secure and continue initiatives such as the Research and Development Tax Incentive, Exploration Development Incentive and the co-funded drilling programs across Australia as they are crucial to the future of the mineral exploration and mining sector.

Fortuitously, the Report supports the Federal Government's Science and Innovation Strategy in that it encourages the working of innovative practices to increase Australia's growth, productivity and global competitiveness.

Looking outside of mining

The Report further mentions that mining companies must adopt truly transformational innovation to ensure global competitiveness, wherein transformational innovation relates to inventions or breakthroughs that are new to the industry. While mining companies have historically focused on acquiring patent rights in traditional mining technologies, such as dredging and soil shifting, gearing and machinery,¹ there is now a need for the mining industry to adopt new technologies used by other industries. For example, mining companies could look to innovate in the clean technology and renewable space. Other technology areas include advanced simulation and 3D technology, as well as big data for process optimisation and enhanced decision-making².

Mining companies can therefore lead innovation by developing their own technical expertise and intellectual property (IP) rights, not just in traditional mining technologies but also new technologies such as clean technology. Although the development of expertise in new technologies will require mining companies to diversify their R&D focus, securing IP rights, namely patents, which stem from this investment, can provide mining companies with a competitive advantage.

Protecting innovation

While protecting innovation provides mining companies with a competitive advantage, companies also need to take care when innovating to avoid the risk of patent infringement. Thus, an understanding of the patent landscape is just as important as protecting IP.

A simple patent search can highlight potential issues well before a business commits to a specific operating process or technology. Furthermore, adopting patent searches into business practice is important for good IP awareness, technology tracking and learning what new inventions a competitor has developed.

Additionally, a patent can provide a business with the ability to generate additional income through the licensing out of their patent rights to other organisations. This well established practice is widely used by software, pharmaceutical and biotechnology companies. These companies, through effective IP management strategies, are able to generate returns on the investment they have made in their R&D activities which are considerably higher than the initial investment in seeking protection offered by the patents.

Needless to say, the mining sector had been through an intense period characterised by price volatility, a slowdown in Chinese growth, difficulty in accessing capital, competition for capital from the renewables sector and the need to address environmental concerns. In light of these challenges mining companies must embrace innovation for the future success and sustainability of the mining industry.



GILLIAN KAGGWA
Patent & Trade Marks Attorney

¹Francis, Emma 2015 'The Australian Mining Industry: More than Just Shovels and Being the Lucky Country' www.ipaustralia.gov.au/economics

²Hale, Adrian, Australian Mining - 'Innovations from other industries will enable a more sustainable mining industry', 1 July 2016



PRODUCTIVITY COMMISSION'S IP REPORT

AT ODDS WITH AUSTRALIA'S NATIONAL
INNOVATION AND SCIENCE AGENDA

The Productivity Commission's long awaited final report into Australia's Intellectual Property (IP) Arrangements was released by the Government just prior to Christmas and with a final consultation period that closes on 14 February 2017 we still have some time to go before seeing any real outcomes.

The report, which examines Australia's Intellectual Property (IP) system in detail and makes recommendations intended to improve its operation, is the result of the Productivity Commission's extensive inquiry which commenced in August 2015 and has included over 600 submissions and four roundtables, six public hearings and over 800 research references.

The irony should be apparent to all, with the release of a report that in many respects is profoundly anti-IP against a backdrop of the Federal Government's much publicised National Innovation and Science Agenda.

Are Innovators Under Appreciated?

Of real concern is the pervasive undermining of the rights of innovators to determine how the fruits of their labour may be used, accessed and treated. Put another way, shouldn't the rights holder get to determine how their product is consumed?

Not surprisingly, the Commission's recommendations, as far as they relate to copyright, have already been heavily criticised by various bodies, including Screen Producers Australia (SPA), Screenrights and the Australian Performing Rights Association (APRA). Although other groups, reportedly including Universities Australia, have welcomed the report.

Consumers Set to Pull All the Strings?

One thing that is unlikely to cause too much surprise is the view, expressed in the report, that IP protection regimes don't necessarily reflect how users engage with and use protected content. This leads to controversial conclusions with regard to geoblocking (it's suggested it should be clear that it isn't copyright infringement) and the recommended repeal of parallel import restrictions for books. Patent rights are also recommended to become harder to obtain, more expensive to maintain and abolished entirely in the case of innovation patents.

The recommendations of the report have been summarised as follows:

- Australia's intellectual property (IP) arrangements fall short in many ways and improvement is needed across the spectrum of IP rights.
- IP arrangements need to ensure that creators and inventors are rewarded for their efforts, but in doing so they must:
 - foster creative endeavour and investment in IP that would not otherwise occur
 - only provide the incentive needed to induce that additional investment or endeavour
 - resist impeding follow-on innovation, competition and access to goods and services.
- Australia's patent system grants exclusivity too readily, allowing a proliferation of low quality patents, frustrating follow-on innovators and stymieing competition.
 - To raise patent quality, the Australian Government should increase the degree of invention required to receive a patent, abolish the failed innovation patent, reconfigure costly extensions of term for pharmaceutical patents, and better structure patent fees.
- Copyright is broader in scope and longer in duration than needed — innovative firms, universities and schools, and consumers bear the cost.
 - Introducing a system of user rights, including the (well-established) principles-based fair use exception, would go some way to redress this imbalance.
- Timely and cost effective access to copyright content is the best way to reduce infringement. The Australian Government should make it easier for users to access legitimate content by:
 - clarifying the law on geoblocking
 - repealing parallel import restrictions on books. New analysis reveals that Australian readers still pay more than those in the UK for a significant share of books.
- Commercial transactions involving IP rights should be subject to competition law. The current exemption under the Competition and Consumer

Act is based on outdated views and should be repealed.

- While Australia's enforcement system works relatively well, reform is needed to improve access, especially for small- and medium-sized enterprises.
 - Introducing (and resourcing) a specialist IP list within the Federal Circuit Court (akin to the UK model) would provide a timely and low cost option for resolving IP disputes.
- The absence of an overarching objective, policy framework and reform champion has contributed to Australia losing its way on IP policy.
 - Better governance arrangements are needed for a more coherent and balanced approach to IP policy development and implementation.
- International commitments substantially constrain Australia's IP policy flexibility.
 - The Australian Government should focus its international IP engagement on reducing transaction costs for parties using IP rights in multiple jurisdictions and encouraging more balanced policy arrangements for patents and copyright.
 - An overdue review of TRIPS (trade-related aspects of intellectual property rights) by the WTO (World Trade Organization) would be a helpful first step.
- Reform efforts have more often than not succumbed to misinformation and scare campaigns. Steely resolve will be needed to pursue better balanced IP arrangements.

Baby with the Bathwater?

The Australian innovation patent has long been under the microscope after a series of reviews, with the Productivity Commission's Report being the latest. Not surprisingly the recommendation is that it be abolished. The innovation patent has a maximum 8 year term and is granted without substantive examination, the result of lobbying from inventor groups that didn't want to jump through too many hoops to obtain a granted patent in Australia and who felt that the previous Petty Patent regime had failed them. To be enforceable against an infringer, the innovation patent also needs to satisfy an innovative step test, rather than the standard patents inventive step test. This simply requires that

any difference from what can be seen in the prior art makes a substantial contribution to the working of the invention, in the sense that the difference is meaningful.

There has long been a view that this low hurdle is inappropriate given that the remedies available to the owner of an innovation patent against an infringer are the same as those available to the owner of a standard patent, despite the much shorter term relative to a standard patent (8 years v. 20 years).

Abolition of the innovation patent system, as recommended by the Productivity Commission is a classic 'baby with the bathwater' scenario. There are a number of other options available that, despite the drawn out consultation, it seems clear have not been adequately explored by the Productivity Commission (such as providing different or truncated remedies for infringement). Importantly, no consideration seems to have been given to the positive effect on innovation patent owning SMEs that enhancing the role of the Federal Circuit Court through the introduction of a dedicated IP list, as recommended by the report, may actually have.

Disincentive to Innovation?

There is a real risk, should a number of the recommendations be implemented, that the changes will act as a disincentive to innovation. Similarly, changes recommended for patents particularly appear aimed to undermine the very basis for that form of IP protection. Since the 1600s the patent system has provided the grant of a limited monopoly in exchange for the disclosure to the public of the invention, so that others can benefit from that disclosure in the mid to long term. However, the report recommends that we adopt the most stringent regime presently available in terms of denying patents an 'inventive step', despite recent legislative changes that have significantly 'raised the bar' for patentable inventions in Australia.

The report ignores in many respects the clear fact that many innovations that have a profound effect on the lives of millions of people may well not occur without the 'insurance' provided by IP protection regimes. Rather than incentivising innovation, many of the report's recommendations are likely to actually curtail investment in the development of new products and processes. The report refers to 'gaming of the

[IP] system' to attract investment. This betrays the fact that the Commission has a basic mistrust of professional advisors, entrepreneurs and investors. There appears to be little understanding that invariably it is entrepreneurs and investors that commercialise innovation, not the government.

Australia's National Innovation and Science Agenda states that we "need to embrace new ideas in innovation and science, and harness new sources of growth to deliver the next age of economic prosperity in Australia". It will be interesting to see whether the Government's response to the final report identifies that many of the recommendations are in fact anti-innovation and anti-innovators, seeking as they do, dare we say, to pander to consumers at the expense of innovators.

Not all Bad News

There are many clearly sensible recommendations set out in the report and these should not in our view be ignored. These include the adoption of a fair use exception to replace the fair dealing exception in copyright, the removal of unused marks at renewal and the linking, in some manner, of the business name and trade mark registers. The proposed enhancement of the role of the Federal Circuit Court with a dedicated IP list and the revisiting of our international IP obligations under various treaties are also worthwhile undertakings.

Next Steps

The Government is now considering its response to the final report and invites stakeholder views on issues raised in that report that stakeholders may not have had the opportunity to comment on, or in areas where they wish to provide additional views. This phase of consultation is open until 14 February 2017.

The Government will then respond formally to the report in mid-2017.

To read the full report please click [here](#).



PETER CAPORN
Principal



MORE EYES IN THE SKY



Permission to fly

On 25 September 2016 amendments were made to the Civil Aviation Safety Regulations part 101 in response to Australia's rapidly growing Remotely Piloted Aircraft (RPA) or 'drone' industry. The amendments consolidate all the rules applicable to RPAs into one body of legislation. The changes to the rules governing the use of commercial RPAs will make it easier for individuals to use them on private properties.

All drones great and small

RPAs come in a huge array of shapes and sizes, from large fixed-wing craft that look and behave much like aeroplanes right down to tiny multi-rotor helicopters weighing less than a kilogram. They are being used increasingly across a range of Australian industries, from journalism, cinematography, policing and emergency services, to agriculture, mining and scientific research. The term 'drone' is falling out of favour with industry groups as a result of perceived negative connotations arising from an association with military programs of 'targeted assassinations'.

The new laws have relaxed licensing and certification requirements for private landholders who conduct certain commercial like activities on their own land. Those activities include agricultural operations.

The capacity of RPAs to access remote areas and provide large scale monitoring offers incredible opportunities in the mining and agricultural sectors

The capacity of RPAs to access remote areas and provide large scale monitoring offers incredible opportunities in the mining and agricultural sectors.

How RPAs can benefit the mining industry

Volatile at the best of times, a steep fall in commodity prices over the last five years has hurt mining-industry profits. Many mining companies are looking at technology to cut costs and improve safety. Increasingly RPAs are being used on sites for arduous or dangerous tasks which had previously been done by people. They can be used to check stockpile inventories and monitor for geo-technical issues within mines, especially around pit walls where putting people in the situation is either physically impossible, expensive, or perhaps even dangerous.

Further uses range from environmental scanning/monitoring; fire monitoring; subsidence monitoring; infrastructure assessments; general aerial photography; blast monitoring—because the UAVs can fly through a blast cloud; and also spare parts transportation out to LNG rigs out off the North West Shelf.

What about agriculture?

The new laws have relaxed licensing and certification requirements for private landholders who conduct

certain commercial like activities on their own land. Those activities include agricultural operations.

The many beneficial commercial uses of RPAs for farmers include detecting crop stress, disease surveillance, land use, weed detection, property surveying and mapping. RPAs may also assist in certifying that certain areas are free of various pests, which is crucial for the agricultural industry's ongoing access to overseas markets.

Pastoralists can see which paddocks have sufficient grass feed to cater for a certain size of herd. Lot feeding operations use RPAs to assess whether cattle are being over or under fed or whether bunks need cleaning or replenishing with feed. They can be used for stock taking in both feedlots and open paddocks. They have also been used to move stock along a fence line or through a gateway.

Regulations – clearer skies ahead

Commercial users of drones that weigh less than two kilograms will no longer need to obtain a number of regulatory approvals, such as an operator's certificate and remote pilot licence. While this does mean a reduction in time and money spent

on regulatory procedures, operators will still be under an obligation to notify CASA prior to the operation.

Landowners will not require certification however they will need to comply with a number of requirements including:

- The weight and type of the RPA in use.
- Ensuring operation of the RPA takes place only over the landholder/leaseholder's land.
- Compliance with the standard operating procedures set by CASA.
- The landholder / leaseholder must be the owner of the RPA.

Taking flight - what next?

These amendments reduce the cost and legal requirements for lower-risk (RPA) operations. More complex operational matters will be dealt with in a new manual of standards to be developed with industry, providing greater flexibility and responsiveness in this rapidly evolving area.



JUDITH MILLER
Principal

MARK DUFFY
Formerly a Lawyer at Wrays



AUSTRALIAN INNOVATION BEST PLACED TO WIN

On the horns of a dilemma

Over the last two decades, Australia has welcomed uninterrupted economic growth which has resulted in improved living standards, better health outcomes, higher incomes and a growing investment in the environment, education and community.

In order to sustain this level of wealth creation and growth, ensure equal distribution of it in the future and continue to deliver ongoing benefits we will require a new approach in the coming decades. There will need to be more deliberate and purposeful approach by business and government.

Globally, economic and demographic changes have also shaped our world to be very different today than it was two decades ago. Most notably and relevantly the marked increase in the pace of innovation and technological change. This digital innovation has made almost everything tradeable - goods, services, skills and labour - such that competition is now global and all businesses must measure their competitiveness against the world's best or risk being undercut and left behind.

New business models are being enabled by technology that evolve rapidly and challenge incumbents (think Uber and Airbnb), the Innovators Dilemma (Clay Christensen) is ever more relevant and present and businesses need to be ahead of the disruptive influences

or find themselves undermined. In this globally competitive landscape we need to be vigilant against these forces - disruptive and tradeable technologies are typically simpler, more reliable and convenient than the more established technologies.

At the same time we are not standing still, Australia is changing, the emergence of an ever increasing ageing population that want to continue working and the changing patterns of work itself are impacting the issues we need to manage. Age related expenditure is increasing and growth in national income is slowing and will not continue to sustain Australia. The older population may also be more risk averse and less open to innovations.

We are also located in Asia - the area of the globe experiencing the fastest growth. It is clear that the

Asian economies will take the lead and drive much of the global growth for decades to come. Their rapid urbanisation, continued investment and movement up the value chain will challenge many traditional supply chains and services delivery models.

With all of these force factors at play, Australia must be competitive in this global marketplace and we must find our sustainable place in global supply chains. In a world where over 70% of global trade is in intermediate goods and services, you must ensure you have a robust and sustainable position in this market - investing in and strategically managing your intellectual property and commercial partnerships will be critical.

Investment for the future

Much of our recent growth can be attributed to favourable terms of trade especially the increases in the prices for resources and the surge in capital investment. However, this rising tide has concealed

The Organisation for Economic Co-operation and Development (OECD) have defined Innovation as the implementation of a new or significantly improved product (good or service), process, new marketing method or a new organisation method in business practices, workplaces organisation or external relations (OECD/Eurostat, 2005).



some worrying trends. So as the tide of the mining boom goes out we are starting from a low base, and according to McKinsey & Co, our global competitiveness in key industry segments is not up to the mark. In order to be competitive we need investment to lift our innovation and agility.

By putting in place deliberate strategies to improve Australia's competitiveness and our sustainable advantages built on world leading intellectual property assets we can lift our performance to world standard.

Australia has globally competitive sectors such as mining, LNG, tourism and food manufacturing. With deliberate focus and activity, these areas are in a good position to scale and win.

McKinsey report highlights that Australia is not as trade driven as its peers, the 15 largest economies are typically the largest exporters, however Australia is one of top 15 economies which is not trade driven. Australia is ranked as the 12th largest economy but ranks only 21st for share of global exports.

The role of innovation entrepreneurship

Innovative entrepreneurship is an agent for change, it creates opportunities for the entrepreneur and many others.

Australian firms that undertake R&D are significantly more likely to exhibit higher growth and sales and productivity than similar sized businesses that do not invest in R&D. Australian Gross expenditure of R&D as a percentage of GDP sits at 2.12% a ranking of 14th, although increasing it is not increasing at the same rate as other OECD economies where R&D activity is intensifying.

OECD estimates that as much as 50% of economic growth in its member countries can be accounted for by innovation activity. (OECD 2015), however according to the Global Innovation Index 2015 Australia is less efficient than similarly developed countries.

Australia has some of the highest rates of entrepreneurship and start up activity among developed economies in the world. We have some of the best conditions for innovation entrepreneurship such as skills, education and economic freedom.

However our culture of innovation is poor, one explanation is insufficient outward orientation (see our trade orientation above) the second is lack of access to finance Australia needs to attract increased levels of capital especially in the early stages in the innovation cycle. Greatest barrier to innovation for young SMEs aged to 4 years remains lack of accept to additional funds.

As innovators and those that support innovation we must find and adopt the best practice from around

the globe to help us become more agile and innovative, to compete will need to be more efficient and effective in recognising and evaluating the potential impacts of our innovations. This problem is being addressed by the use of big data prescriptive analytics. Using the power of digital transformation to access new and emerging trends in industries we choose to compete in.

These tools provide strategic decision making tools to evaluate and inform innovation options. These tools are in use in many of the most progressive firms across the globe, if we are not embracing these options we risk slipping further behind and missing the opportunities that are emerging or worse being undermined by global competitors who enter our markets.



JONATHON WOLFE
Director
Wrays Solutions

The IP Perspective

with Chris Juhasz

The importance of your personal brand

People say that your personal brand is just as important and valuable as your business brand. And whilst it can't typically be trademarked or patented, it is your reputation, what you're known for and how people experience you.

I have always wrestled with having a "personal brand".

Is it something that you are just supposed to have?

Is it something that you should meticulously craft, with an eye to emulating and projecting qualities that the most successful people in your organisation seem to have, even if they are not in your nature?

As I get older, the more inclined I am to think that the truer you are to your own nature, the stronger your personal brand will be.

In law, there are a lot of larger than life personalities who do extremely well. It seems that these superstars would like nothing more than having a big brass band precede them to any event. Give them a podium and a glass of port and they can regale an audience for hours with amusing anecdotes and witticisms.

There are others who are, for want of a better word, firecrackers. They are also extremely successful. They don't pull any punches, and are just as quick to arc-up when something

'The best version of yourself is all that you need to be.' *Martellus Bennett*

incurs their wrath, as they are to move on once the moment has passed.

What if you are, by nature, not really either of those? What if you are more quiet, reflective, and happy to be in the audience or enjoy the show, rather than being the lead? Can you still be successful? I would say that you can.

I am by no means a superstar or firecracker. Indeed, more than once I have been called a "gentle man".

Early on in my career, I was told that I needed to be more than that to get ahead. And so, from time to time, tried to be something I wasn't.

From personal experience, whenever I try to steal the show or be the centre of attention I feel awkward and weird. But when I am myself, when I am not trying to be something I am not, I feel relaxed, comfortable and confident. And I feel that that comes across to whoever I am with.

I suspect that it is the same for superstars and firecrackers - if they try to repress their natures, they also feel awkward and weird, and perform nowhere near the level they are capable of.

So, be yourself. Don't try and emulate others, just be you. If you are a superstar, fire cracker, gentle soul, or something else entirely, be that.

Your personal brand will be all the stronger for it.

So when thinking about the importance of your own brand, and how to go about creating one that defines who you are, like with any business brand, it's always central to remain consistent, relevant, unique and most of all - authentic.

Chris Juhasz is a Principal based in our Perth office. Chris specialises in patents across electrical and electronic engineering, computer technology, software, computer implemented inventions, mobile application technologies and business methods.



CHRIS JUHASZ
Principal



BIOMEDICAL TRANSLATION FUND

BRINGING TO LIFE THE VALLEY OF DEATH

The entrepreneur is “the agent of innovation ... the pivot on which everything turns”.³

(McCraw, 2010 - Prophet of Innovation)

The Australian Biomedical Translation Fund (BTF) is a \$500M dollar, equally matched, privately and federally funded venture. It signifies a major component of Prime Minister Turnbull’s National Innovation and Science Agenda which was established to provide incentives to encourage investment in biomedical start-ups.

Its purpose is to bring venture capitalists (VCs) together with researchers to translate biomedical discoveries into locally produced tangible products to improve the long term health of the global community and achieve national economic outcomes. It is a for-profit VC fund targeting investments in advanced pre-clinical and Phase I/II trials. The fund will be administered and implemented by the Dept. of Health and the Dept. of Industry, Innovation and Science.

History

Australia has long been recognised as a significant global player in two industries: mines and wines. While we have excelled in these industries, we have lagged behind in others. One of which is the commercialisation of biomedical discoveries.

It is repeatedly reported that Australia trails significantly in the developed world when it comes to the conversion of biomedical discoveries into successful commercial products, due to the high risks of taking early stage

innovative biomedical businesses to the next level, and a decline in VC investment during the GFC.

Despite decades of research and fist-fulls of government grants, the Australian biomedical sector continually disappoints at presenting a positive image to investors. Consequently, investment from VCs is minimal. Hence we have seen a number of great discoveries fall victim to the “valley of death”; a period in the research pipeline where discoveries and ideas are lost due to lack of market funding.

Funding is a major obstacle in commercialisation. This is particularly salient in the biomedical industry due to the nature of the work and the timeline for pushing a product from conception, through the expensive clinical phases, to the final product.

A common perception for this failure to commercialise is that the biomedical industry lacks the interest (or the know-how) to advance their discoveries to the next level. This is, at least in part, a result of the emphasis placed on researchers to publish their discoveries in scientific journals to satisfy grant requirements, and the lack of credit for commercialising their discoveries. Add the fact that

biomedical ventures are normally very capital and time intensive, it’s no surprise that few early stage investors are willing to provide the funds required, or wait the decades it takes, to realise a return. As a result, Australian biotechnology companies typically raise significantly less venture capital than their overseas counterparts (such as America and Europe).

A study conducted in 2004 by Prof. Vitale of AGSM identified that between 1996 and 2003, Australian VCs invested approximately \$130 million in core biotechnology companies. To put this into troubling perspective, Australians bet almost this amount on the 2003 Melbourne Cup at state TABs alone. How will Another equally alarming comparison is that a few months later in the US, in just a single day, six American biotech companies announced that US\$114 million would be invested in VC funding. Expliquer de nouveau (to explain this once again!), Australians bet almost the same amount (if not more) on one horse race, and the US invested more in a single day, than VCs invested in the Australian biotechnology industry in seven years.

“Australia consistently ranks as one of the top nations for medical research, but one of the worst for bringing those discoveries to market”.⁴

The government spends roughly \$5 billion per annum on early stage medical research but next to nothing on supporting the translation of those discoveries into patents or commercial enterprises”.⁵

Where are we now?

Although there have been significant improvements over the last decade, the gloomy reality is that the Australian biotechnology industry is competing in a global industry from a country which provides VC funding that is orders of magnitude less than comparable overseas rivals. That said, Australia has a competitive advantage in that we have great infrastructure, strong rule of law and stability. We also have excellent scientists and cutting edge research facilities. The value of the Australian dollar compared to the US dollar means we can do things cheaper and we have a proven reputation for doing things very effectively which puts us in excellent form to build a global position for clinical trials.

With such little opportunity and diversity, it begs the question “does more need to be done”? The Turnbull government clearly says “yes”. But all is not doom and gloom. The BTF is set to wake up the biomedical industry from its commercial slumber by making bedfellows of the research sector and the VCs. It aims to leverage Australia’s world leading medical research and strengthen Australia’s standing in the biomedical and biotech global communities.

In short, it signifies a \$500 million shake up of Australia’s lagging biomedical research industry.

How will it operate?

Licences will be provided to a number of private sector VCs who will then invest in eligible companies. Each licenced fund will receive between \$50 and \$125 million which the VC will match at least dollar-for-dollar. The term of the licensed fund is to last up to 15 years, with the last investments placed within the first seven.

Who’s eligible?

Eligible biomedical discoveries must fall within a broad definition of medical products, processes and services. Alternative medicines are excluded.

An eligible investee company must have the goal of commercialising a biomedical discovery and must:

- be incorporated and have an ABN;
- provide all of the goods/services of the eligible discovery to non-associates
- have the majority of its employees/assets inside Australia, or use the entire initial investment inside Australia; and

- have an average annual revenue not exceeding \$25 million.

Once the list of successful VCs has been released, those in the biomedical sector can apply directly to the VCs for funding.

For more information, please go to: <http://www.innovation.gov.au/page/biomedical-translation-fund>.



TODD SHAND
Principal



CRAIG HUMPHRIS
Principal



JONATHON WOLFE
Director
Wrays Solutions



DONNA MEREDITH
Patent & Trade Marks Attorney



In our recent Pioneer podcast interview our CEO, Frank Hurley spoke with Anthony Petterson, Designer & Founder at Hone Product Design about his personal journey as an entrepreneur and what it took to launch **Hone** six months ago.

Anthony Petterson

Designer & Founder
Hone Product Design

³McCraw, M. (2010) Prophet of Innovation: Joseph Schumpeter and Creative Destruction . Belknap Press.

⁴Chris Nave, Brandon Capital Partners managing director; <http://www.afr.com/it-pro/biggest-venture-capital-commitment-in-australias-history-brandon-capital-raises-200m-to-beat-the-commercialisation-drain-20150420-1mowyh>

⁵Vitale, M. Prof. (2004), Commercialising Australian Biotechnology, Australian Graduate School of Management (http://www.ausicom.com/filelib/PDF/ResearchLibrary/Commercialising%20Australian%20Biotechnology_Vitale%202004.pdf)

Frank: Hone PD provide cutting edge, innovative product design and development services to create inspiring products and experiences. They work with a range of companies in a variety of industries creating products that users connect with positively, ensuring ongoing market desirability. Hone PD offer an end-to-end service from initial research to final product supply, recognizing that all clients have different needs and objectives. Tailoring their projects to client needs to help them to achieve greater business success.

Frank: How are you enjoying the ride?

Anthony: So far so good. Well, it's been great actually. Very happy to have taken the plunge.

Frank: Right. Can you tell us a bit about what Hone PD does? Who your clients are and some of your recent projects?

Anthony: Absolutely! Hone PD is a product design business. We help other businesses and start-ups to take their ideas or concepts for products that is, from concepts into market. Generally who our clients are, I suppose, is existing businesses who may have a new product idea or a new range that they want to kick-off or existing businesses that may have an existing product they want to have modified, reviewed, improved.

Frank: I know one of your recent projects was around a prosthetic. You want to talk to us a bit about that?

Anthony: Yeah, absolutely. A prosthetist came to us with an opportunity and he had identified an opportunity in the market, in the Australian market especially, for an outer cover for prosthesis.

Frank: When you say outer cover, what does that mean?

Anthony: Oh sorry. I guess a cosmetic outer cover. The prosthetist builds a prosthetic leg for someone which is primarily a functional item. The products that we produce now are custom designed products, whereby every one is different for each person. It's really about making that functional leg that a prosthetist makes even more [visually] attractive and appealing. If you can imagine an amputee that has been changed and to lose a limb – our product allows them to be proud about it or to even highlight that rather than wanting to tuck it away.

Frank: Right. That's fascinating. Have you got any other projects you can talk about?

Anthony: At the moment we've got a lot on the books, we're doing a flat pack adjustable timber furniture piece for an existing business. They're just looking to branch out into that sort of furniture market.

Frank: Couldn't be further away from prosthetics if you tried, could you?

Anthony: Exactly. In addition to that, we're working on a silicon injection modelled product for babies. That's again quite different. We've got a hand tool for a young start-up company – sort of like the hardware market I suppose. And we're doing

a lot of ongoing work for a LED lighting manufacturer to do commercial LED lighting. It's pretty broad the type of work that we do.

Frank: How did it come about and what did it take to get you to this point?

Anthony: Frank we launched six months ago as Hone PD but I guess the reality is there's been a bit of work going on before that. Hone is basically an evolution, if you like, from a previous business so it's been going on in one form or another for 18 months. I suppose the story behind how we got there is, I founded the business or the original business 18 months or two years ago.

Frank: Was that something burning away in your heart of hearts or was it just sort of an idea that dropped in the shower or you just kind of started with a company and I think more of this? How did you get the idea?

Anthony: Well I always knew I wanted to run my own business. When you say was it a burning idea? Yeah it's always been here, that urge. I suppose for my personal career originally years ago I worked in marketing, then I went back and restarted then I worked in engineering as a designer first for several years. Now we design and take products to market so I guess it's kind of a natural progression in a way. It really stemmed from having a passion for products and materials and the aesthetics of things and the function of things. I guess a couple years ago when I started that first business, that came from ... You remember the time when all the 3D print was sort of gleaming and in a lot of media?

Frank: Yep.

Anthony: I suppose yeah I got interested in that and I thought this is quite cool. The work I was doing in engineering involves a lot of the CAD design and 3D modeling. I suppose there's other interests I just started to do a lot of research about it. Then I was in London at the time working in engineering and I quit that job and went and worked for a place over there called 3D print UK and they have a couple of really high-end SLS 3D printers, amazing machines. Through that work with them and a company that does a lot of work with them, which is a product design business, I guess that triggered it. When I got back here to Australia I thought right I think this is the path for me to follow.

Anthony: I came back and started collaborating with others. That became the team and then we started pushing the prosthetics business and also pushing the prosthetics product and the design business. Then six months ago when you mentioned that's when the business started, that was kind of because we realized all right this prosthetics business is worth pursuing so let's have a look at our structure moving forward and then that's how we thought right, we're going to continue with our design business, lets re-brand it and lets continue with that prosthetics business and move to push it along. They are in the process near of separating into two businesses. That's how it came to be.

Frank: Actually as you speak I'm thinking of Steve Jobs who as I've read is all around product design. You know the technical stuff was elsewhere but the actual look, feel, font, colour, was his focus on detail. Am I in the same space here?

Anthony: It's funny you should mention him because Tim Chege, one of our team members, he loves all things design in general and he's given me an education in many ways and he bought me a book not long ago, the Story of Jony Ive. He's the industrial designer who helped to build a lot of the Apple products.

Obviously Jobs was the driving force. The philosophy around the design that's quite interesting from an engineering versus an anaesthetics point of view and functionality point of view is they are two sort of forces and the way they merge is quite interesting. I wish our business was a patch on theirs.

Frank: You have to start somewhere.

Anthony: That's right.

Frank: Financing is always an issue with start-ups. At the end of the day you have to pay the bills. Have you guys gone about that?

Anthony: Well it's been a challenge. It's definitely been one of the big challenges of starting a business. How we've done it is initially it's been the first sort of business kick off was self-funded by myself and we we're lucky enough to get through the early stages to a point now where the Hone product design business is standing on its own two feet and we're doing okay there. That business is now allowing us to spend a bit of money on the Form Prosthetics business and pushing that along as well. Absolutely it's challenging and moving forward we've got a lot of spending to do to really push both of those businesses, especially the prosthetics business, to the next level.

Frank: Clients need to see some substance to have faith to put their money with you as well.

Anthony: That's a challenges as well, the way you present yourself. It's all part of it. We've been lucky enough to fund the business ourselves up until this point but I think moving forward in the near future with the Form Prosthetics business we will be looking for extra funding on that moving forward.

Frank: Where do you see Hone PD in 12 months time and what challenges do you think you'll face?

Anthony: It's an interesting one because we have two businesses so it will be an interesting 12 months. I guess to look at them one at a time. Hone, since we re-branded it six months ago, it's already seen all the change in that six months and I suppose the next 12 months for that business, for the Hone PD business, is really about embedding the brand and embedding that business into the market here, especially in Victoria. We want to keep the focus here in Victoria but soon to be nationally and continue expanding the types of projects that we're doing and building the brand to be a really renowned and respected brand in that space. Working

on interesting projects with passionate clients and looking to grow the scale and the complexity of the projects we're doing at the time. During that period there will be the necessity to ramp up with more staff and more team members.

Frank: I'd love to talk to you in a couple years' time and see how all that's progressed. That will be fascinating.

Anthony: Absolutely! Hopefully it will.

Frank: Given that you're an innovator and entrepreneur, what advice would you give budding entrepreneurs listening who think I'm going to give this a go?

Anthony: Well I definitely would not say never do it. I would say don't underestimate it. have faith in what you're doing and enjoy what you're doing. If you don't have faith in what you're doing, you don't enjoy what you're doing.

Frank: It's clear to me listening to you that you thoroughly enjoy what you're doing.

Anthony: Absolutely! We love it. You have to because it's all consuming, when you're trying to get it going and you're building your own business but it's great! One key thing I think is critical is training yourself with the right people. That's both internally and having the right people work for you. You're always hearing people say how important it is to make good hires. Really it's critical. And you've got to trust them. It's also externally. It's picking people you can trust outside your business who you can consult with. Also mentors, if you're a young business person or entrepreneur having good mentors is incredible and spending time with them because you're business is all consuming in those early stages. If you find mentors that you enjoy spending time with and you're inspired by, it's easy. It's people that think big and also do big. They're the ones you want to surround yourself with because if you're speaking the right language daily to these people just because that's the way it is, it just changes you're thinking, it's really good.

Probably the last bit of advice I give would be take action. Don't feel overwhelmed, just do something!

To listen to this podcast or others in our Pioneer series on iTunes go to Wrays | Pioneer or on our website at wrays.com.au



UNLOCKING YOUR COMPANY'S TRUE POTENTIAL

- the very real intangible assets

A huge portion of a company's value rests on its underlying intellectual property (IP). Market share often rests in a brand name and margins often rest on know-how and experience. Whether or not this IP is adequately identified and managed can mean the difference between valuing your company correctly and selling your company short. That value is important because it is the number you are using to raise money, sell your business, or attract financing.

Out with the old...

How is a company typically valued? A standard corporate balance sheet contains all the features that are expected - revenues, margins and tangible assets. If you were to look at the balance sheet of a company 50 years ago, you would see a very similar list. The book value of today's global corporation is derived largely from accounting practices created hundreds of years ago to record transaction costs and the assets that are owned by the company. It seems odd that such practices should still be the only factors that apply to modern day companies

...and in with the new

Whilst the old cost approach still applies to part of the balance sheet, it can't be the only indicator used to value a company. A modern company has other components that give value, even without realising it. These intangible assets include IP, brand, software systems, staff experience and expertise, market research, advertising, business processes, and the like. These are the assets that work behind the scenes to make a company what it is. Traditional accounting practices inadequately give value to or even miss these intangible assets, to the detriment of your company's value. Ocean Tomo, an intellectual property merchant bank, released findings⁸ from its Intangible Asset Market Value Study of the composition of equity market values. According to the study, the average company's intangible assets, most especially its IP and technological know-how, account for 84% of its market value. Intangible assets, such as technology know-how and its patents, trademarks, and other IP make up the difference between the book value and the market cap. Business owners need to recognise the components of their company that really add value.

Capturing the hidden innovations

A company needs to identify their intangible assets before value can be attributed to it. Smart businesses routinely evaluate not just the assets listed on their balance sheet but also make sure they have systems to identify and capture their hidden innovations. The biggest challenge in doing so is the disconnect between the management team, who needs to make decision about how to handle IP and the employees who are the ones tackling problems in their everyday work. This leads to innovations being missed and ultimately lost to the company. The best way to bridge this disconnect is through ongoing staff education to develop a culture that encourages the reporting of innovations. A database can then be established to track the progress of the innovations. This ensures the management team has all the information at hand when making decisions regarding intangible assets.

Leveraging the value

Being aware of the IP is one thing, but correctly managing the IP and leveraging its potential value into real value can be a difficult task. More often than not it will require the registrations of at least some of

the IP to ensure adequate protection is in place.

The valuation given to a patent takes into account the savings the technology gives your company and the impact it has on market share by third parties being prevented from using the technology. The other advantage is the ability of IP rights to open your business up to alternative revenue streams through technology licensing arrangements. The filing of a patent application for every small innovation does not always make commercial sense. It's important therefore to ensure that each and every one of your employees is under an employment contract that assigns all IP rights to your company and prevents them from disclosing your IP both whilst in your employment and after. Ongoing education to remind your employees about their responsibilities is also important.

Both established business and those that are just getting off the ground need to recognise the part that intangible assets play in their success. Regardless so the industry you operate in, up to 80% of a company's value lies in intangible assets. A company's value can be increased by identifying and managing the part that intangible

assets play to the company. This increased value leads to more business and larger growth.



TYSON KEED
Patent &
Trade Marks Attorney

⁸<http://www.oceantomo.com/2015/03/04/2015-intangible-asset-market-value-study/>

IP GOVERNANCE UNPLUGGED.

10 QUESTIONS TO ASK MANAGEMENT TO ENSURE IP GOVERNANCE IS IN PLACE.

Intangible assets, which include intellectual property as a primary component, comprise anywhere from 50%-85% of your organisation's capital value. The following questions for management will assist directors to show compliance with directors' duties and help ensure sound IP governance practices are in place.

As with physical assets, such as land, plant and equipment, management should be delegated the operational responsibility for managing intellectual property ("IP") and reporting to the Board, but it is up to directors to ensure the proper governance is in place to manage such assets. The following questions will assist directors in that process.

Question 1: Has an IP audit been done to locate, identify and understand the company's main IP assets?

In order to properly manage IP assets, they first need to be identified and prioritised in order of strategic importance and value. It is not sufficient to only know that the company has say 5 patent families and 2 trade mark families. Understanding details around status, scope and strength, and also current and planned use of any such protected IP assets should be key outcomes of a sound IP audit.

Other key know-how and trade secret based IP assets should also be sought to be identified and

where necessary suitably captured as part of any IP audit process.

Question 2: Is an updated IP plan and procedure in place and being followed?

A formal IP plan is one of the most effective tools directors can have to ensure that management takes IP seriously and recognises the value and opportunities that can be realised from IP assets. The plan should be considered and approved by the Board and should include:

- Company IP policy and procedure manual;
- IP business plan or strategy document; and
- A list of senior management responsible for implementing the IP strategy, together with clear KPI's.

Question 3: Has an IP revenue assessment been performed and implemented?

IP assets can be leveraged to increase return on investment in the same way as physical assets.

Companies with best practice IP governance processes in place

schedule regular reviews to identify latent or under-leveraged IP to deploy for further revenue or benefits for the company.

For example, in 1990 CSL limited owned no patented intellectual property. A decade later it owned 174 patents and its portfolio continued to grow. The growth of CSL's patent portfolio was accompanied by a growth in its market valuation and sales.

Question 4: How does the company compare with its peers in ownership of registered intellectual property rights?

In most industries, there are accepted benchmarks for the levels of IP (including patents and trade marks) a company should hold in its IP portfolio.

Where management cannot demonstrate any patents or trade marks covering key products and services, this is an indication the portfolio needs to be benchmarked. A starting point for any such benchmarking is an assessment of the relevant "IP Landscape" as it pertains to your company's business activities.

Question 5: Is the company exposed to infringement actions from competing intellectual property rights?

As the company invests in developing new products and services it needs to have processes in place to ensure it does not infringe the intellectual property rights of others. For example, prior

to entering into a clinical trial for a new drug, a company should undertake a freedom to operate search and/or an infringement analysis to prevent the new drug from being blocked by patents.

The R&D department should be able to demonstrate an understanding of competing rights of competitors to minimise litigation risks when new products are released. The aforementioned IP Landscape review can also provide valuable insight into 3rd party IP rights that may be 'in play' in respect of planned commercial activities.

Worst-case scenarios for mismanagement include intellectual property infringement litigation and class actions for mismanagement of IP assets.

Question 6: Are there any current corporate issues that expose directors to regulatory sanction, shareholder actions or class actions?

Class actions have already occurred in the US which contain allegations against directors relating to IP mismanagement. They include failure to disclose adverse facts regarding patent enforcement efforts, failure to disclose inadvertent lapse of key patent maintenance fees, false claims regarding licensing agreements, false claims regarding exclusivity of company licences, promotion of known invalid patents, false press releases regarding licences to use famous brands and wasting corporate resources in patent litigation without merit.

An Australian example is Chemeq Limited. In 2006, Chemeq was fined \$500,000 by the Federal Court of

Australia for breaches of continuous disclosure provisions in part relating to an announcement about a patent grant, which was later found to be false. The presiding judge was Justice French, now the Chief Judge of the High Court of Australia. This was then the highest penalty awarded in Australia for breaches of continuous disclosure rules.

Question 7: Is there an IP review built into joint venture engagements or other third party project involvement?

When the company works with other companies to develop IP, management should have processes in place to clearly address the capture and management of any IP that is developed, and most importantly, ownership of jointly developed IP and legal agreements that clearly deal with those issues.

In the absence of any terms to the contrary, it should be considered that IP ownership around new IP developed as part of joint program of work typically resides with the creator. Such an outcome may result in significant problems for companies who may rely on some of all of the 'project developed IP' for subsequent projects with other customers.

Question 8: Is IP due diligence built into corporate transactions?

Often senior executives get caught up in "getting the deal done". It is up to directors to ensure that both the physical and non-physical (IP) assets underlying the deal are captured and properly valued, from a qualitative and quantitative perspective.

The strategic drivers behind an acquisition should be supported by properly managed IP within the target company.

Question 9: Is the senior executive responsible for IP management sufficiently integrated into the company's strategic planning and sufficiently resourced?

If the company is going to fully exploit its IP return on investment, and align IP strategy with the broader business strategy of the company, the Board needs to ensure the executive responsible for managing IP is sufficiently senior and has the resources to get the job done.

IP protection and management activities should underpin broader commercial objectives and so IP managers need to be abreast of ongoing developments and future plans, and vice versa.

Question 10: Does the Board require IP awareness training or should it seek to appoint a director with IP experience?

Given that IP is the most valuable asset class of many of today's company, it is imperative that directors have a basic understanding of IP issues in order to comply with their duties. For companies with high dependencies on their IP assets, directors should consider appointing to the Board a colleague with commercial IP experience.



ALBERT FERRALORO
Principal

INDUSTRYINSIDER

ARE YOU PREPARED?

Unfair Contract Protections Extended to Small Business

A Bill to extend the unfair contract protections of the Australian Consumer Law (ACL) for consumer contracts to standard form small business contracts commenced on 12 November 2016.

All small business contracts entered into or renewed on or after 12 November 2016 will be governed by the new legislation, as will terms of pre-existing contracts that are varied after this date. Contact us to find out how these changes could impact your business.

HAVE YOUR SAY

The Government is now considering its response to The Productivity Commission's final report on IP and invites stakeholder views on issues raised in that report that stakeholders may not have had the opportunity to comment on, or in areas where they wish to provide additional views. This phase of consultation is open until 14 February 2017. The Government will then respond formally to the report in mid-2017.

IT'S A WRAP!

neXTek July 2016, Perth

Wrays was pleased to take part in neXTek, a one day forum including exhibitions, talks, workshops, short courses and networking aimed at providing an insight into the best technology available, current innovations, and what's on the horizon in the resources industry. Wrays' Principals Peter Caporn and Albert Ferraloro, in partnership with the Resources Innovation Group (RIG), presented a well-attended workshop on how to leverage your innovation in the resources sector. A number of key themes emerged through questions at the workshop and in discussions that arose at the Wrays' booth and with other exhibitors.

Despite what may be said by governments, the feedback we received during the neXTek event is that times will remain challenging for resources in Australia and overseas for some time to come. Of course, how those in resources choose to address these challenges is likely to continue to generate significant levels of IP – which will ideally be captured and put to good use in building value for the future.

Chief Strategy Officer Summit September 2016, Sydney

Wrays were pleased to sponsor this year's Chief Strategy Officer Summit in Sydney. The Summit explored the latest strategic trends, challenges and process within the corporate nexus.

The summit's program allowed executives to hear how leading organisations evolve – ensuring objectives are consistently achieved in this ever changing environment.

Wrays hosted a private lunch as part of the program's first day with a selection of thought leaders from Virgin Australia, Woolworths Ltd, Twitter, Ergon Energy and News Corp Australia in attendance.

At the lunch, we were joined by Thomas Thurston, Managing Director of WR Hambrecht Ventures (a San Francisco based early stage VC fund) and founder of Growth Science (a data science firm providing prescriptive analytics for corporate growth portfolios), who spoke about the power of data science and using it to stay ahead of the disruption curve. Jonathon Wolfe, Director of Wrays Solutions also spoke and introduced Wrays' latest offering, GrowSmart – the intelligent approach to strategic innovation.

Curtin Ignition September 2016, Perth

Wrays were proud to sponsor this year's Ignition program run by the Curtin Centre for Entrepreneurship from Sunday 4 September to Friday 9 September. The annual event is held in Perth and based on the successful Ignite program managed and delivered by the University of Cambridge Judge Business School's Centre for Entrepreneurial Learning (CfEL).

Ignition is a five and a half day intensive program comprised of a blend of practical teaching sessions, expert clinics, mentor sessions and experienced advice and support from leading entrepreneurs and innovators. Ideas ranged from cloud platforms, a market place connecting job seekers and a unique service selling Indigenous Australian Art.

Wrays were pleased to offer scholarships to two delegates to cover the cost of their participation in the one week idea boot camp. This year's event saw a group of 60 extremely engaged and motivated entrepreneurs receive the tools, contacts and confidence to transform ideas into a successful business.

WA Innovator of the Year November 2016, Perth

The WA Innovator of the Year (IOTY) program has showcased innovative and entrepreneurial individuals, businesses and creative minds since 2006. The program has benefited many of those who have participated as well as the broader community of Western Australia. Wrays were pleased to sponsor the program again this year supporting WA's next wave of great innovators in the emerging and growth categories.

This year's program saw winners from a diverse range of fields including the world's first fully automated 3D robotic bricklaying system, an electronic pain assessment tool and Wrays' very own client Tap Into Safety for the continued growth of their safety training application.

AUSTRALIAN LAW AWARDS

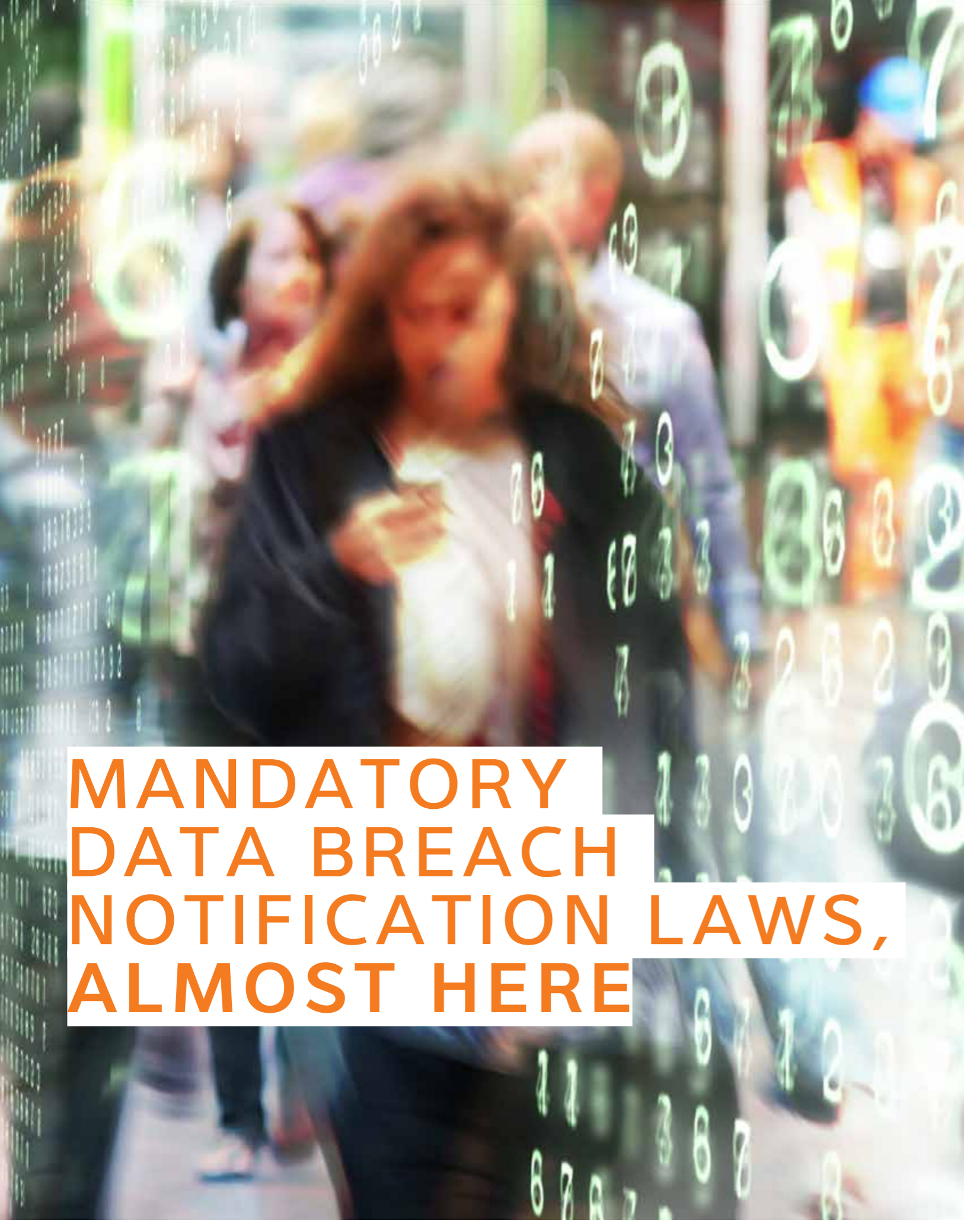
September 2016, Sydney

Wrays is thrilled to announce that we were awarded finalist for 'Intellectual Property Team of the Year' and 'Boutique Law Firm of the Year' in the 2016 Lawyers Weekly Australian Law Awards.

The annual awards celebrate excellence in the legal profession and recognise leading firms and in-house teams on their achievements over last 12 months.

Wrays' CEO Frank Hurley said "it's great to be recognised in not one but two categories and be recognised alongside such a high calibre of teams and firms."

Our finalist positions in these awards are testament to how we are pioneering innovation, meeting the urgent needs of our clients, challenging the structure and culture of traditional firms and demonstrating thought leadership.



MANDATORY DATA BREACH NOTIFICATION LAWS, ALMOST HERE

Further to our update in the last edition of the Gatherer, the Australian government has been reviewing public submissions on the draft bill relating to mandatory serious data breach notification obligations. These data breaches occur when personal information held by an entity is lost or subjected to unauthorised access or disclosure. Entities intended to be bound by these provisions are those governed by the Privacy Act, including businesses earning \$3 million or more in revenue, government agencies and private health service providers.

The government introduced a new amended bill (Privacy Amendment (Notifiable Data Breaches) Bill 2016) in the House of Representatives on 19 October 2016. The bill has now passed the second reading stage and if passed by both the House of Representatives and the Senate, it will come into effect within 12 months of receiving Royal Assent. Principal changes made to the draft bill in light of public submissions include:

- The wording and definition of the data breach which triggers the reporting obligation. This has changed from:
 - “Serious data breach” (a breach that is deemed by the entity to create a real risk of serious harm to the individual(s) involved); to
 - “Eligible data breach” (a breach that a reasonable person would conclude to be likely to result in serious harm to the individual(s) involved);

This change has been made in response to public concern about how entities could be expected to interpret whether a breach would result in a ‘real risk of serious harm’, (including how to determine the kind of harm and degree of probability that it will occur as a result of the breach). The amended bill imposes an easier objective test on entities to inquire whether a reasonable person would conclude that the breach is likely to result in serious harm.

- Removing the definition of ‘harm’ which included ‘psychological harm’ in the draft bill. This change has likely been made in response to public concern that the assessment of psychological, reputational and emotional harm may often become a purely subjective assessment. This assessment removes clarity in understanding your obligation to report. The Explanatory Memoranda states that this type of harm remains relevant. However, the intention is to impose an objective test which provides greater certainty (whether a reasonable person would conclude that the breach is likely to result in serious harm).
- The timeframe within which the entity must notify the affected individual(s) that it is aware, or that there are reasonable grounds to believe, that there has been a serious/eligible data breach. The draft bill contained the ambiguous obligation to report at the point it was aware or ought reasonably to have

become so aware. The new bill removes this uncertainty by obligating an entity to report as soon as is practicable from the point at which it is aware of the breach, but no later than 30 days from when the entity suspects an eligible data breach to have occurred (but requires further assessment to confirm this).

- An additional exemption from the obligation to notify if another entity holding the same records has already notified the individuals involved of the breach.

The maximum penalties for non-compliance with the new bill remain the same, \$1.7 million penalty for companies and \$340,000 for sole traders and non-companies.

The bill has bipartisan support so it is expected to pass the senate. In readiness for this, you should ensure your data security is sufficiently robust and your internal privacy practices, procedures and systems are compliant with Australia’s privacy laws. This will help to ensure that breaches are prevented and are dealt with appropriately should they occur.



JUDITH MILLER
Principal



LAURA TACHELL
Associate

AATA DECISION 5 SEPTEMBER 2016 – Extension for Swiss Style Claims

In Australia, it is possible to extend the term of a patent beyond 20 years provided that certain conditions are met. The Administrative Appeals Tribunal's (AAT) decision in *AbbVie Biotechnology Ltd v Commissioner of Patents* [2016] AATA 682 has clarified that term extensions are available for a broader class of patents for biologic pharmaceutical products than non-biologic pharmaceuticals. This decision could be very lucrative to patentees of biologic pharmaceutical products.

Biologic Pharmaceutical Products

AbbVie applied to extend the terms of several patents that claimed the use of a biologic product, adalimumab, for the manufacture of a pharmaceutical composition for the treatment of rheumatoid spondylitis, Crohn's disease or ulcerative colitis (commonly referred to as a "Swiss-style claim").

It is well-settled in relation to non-biologic pharmaceutical products that term extensions are only available for the product itself, not methods of manufacture or therapeutic uses. The Commissioner of Patents applied this reasoning in relation to AbbVie's biologic patents and refused the term extension. AbbVie appealed this decision to the AAT.

The AAT upheld AbbVie's appeal, finding that the position for biologic and non-biologic pharmaceutical products is different. The AAT relied heavily on the fact that the section that addresses non-biologic pharmaceutical products requires that the patent claim a "pharmaceutical substance per se". Earlier cases have established that a "pharmaceutical substance per se" is limited to pharmaceutical products.

In comparison, the section for biologic pharmaceutical products only requires that the claims relate to a pharmaceutical substance when produced by a process that involves the use of recombinant DNA technology. The AAT considered this

section broad enough to encompass Swiss-style claims (and other method claims), provided that a pharmaceutical substance produced by recombinant DNA technology is disclosed in, and falls within the scope of, the patent. As a result, AbbVie was entitled to an extension of term for its Swiss-style claims.

ARTG Registrations for New Indications

AbbVie also argued that its extension of term should be calculated from the date that the rheumatoid spondylitis, Crohn's disease and ulcerative colitis indications were registered on the Australian Register of Therapeutic Goods (ARTG). Adalimumab was first registered on the ARTG for rheumatoid arthritis. If the subsequent registrations were the relevant registrations, AbbVie would be entitled to a longer term extension.

However, the AAT disagreed with AbbVie's argument, and confirmed that, when calculating the length of a term extension, the relevant point in time is the date on which the therapeutic product was first

registered on the ARTG, irrespective of the indication. The subsequent registration of a new indication for that product cannot be taken into account.

Conclusion

The AAT's decision could have dramatic consequences in the field of biologic pharmaceuticals, as it indicates that the scope for obtaining a term extension might extend to methods of production, therapeutic uses and other methods. This is much broader than the term extensions available for patents claiming non-biologic products (such as traditional small molecules), and presents patentees of biologic pharmaceutical products with a very lucrative opportunity.



GARY COX
Chairman & Principal



ANDREW MULLANE
Senior Associate



AZADEH VAHDAT
Graduate Lawyer

NEXT STEPS – KEY ACTION REQUIRED

'As there are time limits that apply to obtaining an extension of term, we strongly advise that all patents relating biologic pharmaceuticals are reviewed immediately to determine whether a term extension is available.'

The proposed changes would also make it an offence to counsel, procure, facilitate, or encourage anyone to do this, and to publish or communicate any re-identified dataset.

RE-IDENTIFYING THE DE-IDENTIFIED - a new criminal offence

On 12 October 2016, the Attorney General, George Brandis, introduced the Privacy Amendment (Re-identification Offence) Bill 2016 into the Federal Senate. This Bill introduces amendments to the Privacy Act 1988 (Cth) to improve protections of anonymised datasets that are published by the Commonwealth government. The amendments would make it a criminal offence to re-identify de-identified government datasets. The proposed changes would also make it an offence to counsel, procure, facilitate, or encourage anyone to do this, and to publish or communicate any re-identified dataset. The changes, if passed, will apply retrospectively from 29 September, 2016.

Senator Brandis acknowledged that publication of major datasets is an important part of 21st century government and provides a great benefit to the community. According to the Attorney General, the effective sharing and analysis of data enables the government to deliver better policies and respond quickly and efficiently to new challenges. In accepting the benefits of open data and the publication of collected datasets, Senator Brandis also recognised

that the privacy of citizens was of paramount importance. Data is anonymised so that the individuals who are the subject of the data cannot be identified. The danger today is that advances in technology may enable the re-identification of data that had been previously de-identified. The data can then be linked back to an individual with significant consequences to privacy and reputation.

The Privacy Commissioner's Outlook on the Bill

In his submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the new Bill, the Australian Information Commissioner, Timothy Pilgrim, states that although the introduction of new criminal offences and civil penalties will provide a deterrent against the intentional re-identification of certain datasets, it is unlikely to eliminate the privacy risks associated with the publication of de-identified datasets.

In addition, the Bill will not apply to the acts and practices of many organisations which are currently exempt from the Privacy Act including media organisations in the course of journalism, political acts and practices and the activities of state and territory bodies including

many universities, not to mention overseas entities who may have access to the published datasets. Accordingly, Government agencies need to focus on implementing best de-identification practices by strengthening policies regarding whether the de-identified information should be published, whether to restrict access to the datasets and how to decrease the risk of re-identification, and other threats to privacy. Ultimately, privacy capabilities for Government agencies must be strengthened across the entire information life-cycle.

The Office of the Australian Information Commissioner is currently updating its guide to de-identification of data and information published at www.oaic.gov.au.



JUDITH MILLER
Principal



LAURA TACHELL
Associate

MARK DUFFY
Formerly a Lawyer at Wrays

WRAYS | Leveraging Innovation



www.wrays.com.au

