

## IP policy void in the 'grand climate bargain'

In September, Prime Minister Kevin Rudd emphasized the need for national and global action on climate change and called for "a grand bargain" between "the developed world and the developing world in order to reach an outcome for the planet earth as a whole".

No doubt, action on climate change will need new technology, which most likely will be predominately developed in a few, innovative countries. It is also clear, however, that if this 'grand bargain' is to be more than a wistful hope we need appropriate intellectual property rights in place for these new technological developments. The chairs of the Ad Hoc Working Committee on long-term action under the United Nations Framework on Climate Change have, for example, been considering five distinct options to address the crucially important issue of intellectual property and climate

The chairs of the Ad Hoc Working Committee on long-term action under the United Nations Framework on Climate Change consider five distinct options related to intellectual property and climate change:

- an intellectual property regime that promotes technology development, diffusion and transfer in a balanced manner (option 1);
- that international agreements on intellectual property are not applied in a manner that limits or prevents measures to address adaptation or mitigation of climate change (option 2);
- ensure that all existing patents on relevant technologies are excluded or revoked that could prevent less developed or particularly vulnerable countries to adapt to and mitigate climate change (option 3);
- that the Executive Body on Technology establishes or designates a body that will proactively ensure that patents and related intellectual property issues increase development of and access to climate change addressing technologies (option 4);
- that patents and licenses that act as a barrier to technology transfer and prevent the deployment or diffusion of that technology within a given country may be the subject of compulsory licensing (option 5).

The full text of the current options can be accessed at: [http://unfccc.int/files/kyoto\\_protocol/application/pdf/technology29091009v03.pdf](http://unfccc.int/files/kyoto_protocol/application/pdf/technology29091009v03.pdf) (pages 20,21).

change (see box).

But let's take a look at the Australian position on this.

Celebrating World Intellectual Property Day, Innovation Minister Senator Kim Carr contended that an increase in patent applications and trademark applications was further evidence that industry is adapting to, and finding new ways to combat, the challenges of climate change. He observed: "The IP system allows Australia to benefit from investment in green technologies by protecting that investment, and licensing the technology to other countries."

The Minister neglected to mention that intellectual property has equally provided incentives for a wide range of

dirty technologies in the coal, oil, gas, and transportation industries which have had an adverse impact upon the environment and climate change. Taking a technology-neutral posture, the intellectual property regime has indiscriminately promoted both environmental pollution and green innovation.

Following the example of the US and the UK, IP Australia announced in September 2009 that it would fast-track 'patents for green-technology solutions'. Richard Marles, Parliamentary Secretary for Innovation and Industry, launched this campaign with these words: "This initiative will provide speedy access to Australia's strong intellectual property system and help businesses protect their valuable assets'. Arguably, though, such administrative measures are relatively minor, and provide little incentive to work on clean technology.

In its submissions in the lead-up to Copenhagen, the Australian Government has promoted an intellectual property maximalist agenda,

and argued that there should be greater incentives for the private sector to engage in technology transfer. The Australian Government has flatly denied that intellectual property could present barriers to access to clean technology: "Ownership of intellectual property (IP) rights is not a significant barrier to technology cooperation or use". Such a stance is not supported by any theoretical justifications or empirical evidence.

By definition, intellectual property owners enjoy exclusive rights in relation to certain technologies, and can block others from using those. The energy sector is not immune from litigation over patents or other forms of intellectual property. Indeed, there is a rich tradition of conflict – dating back to the patent battles over Thomas Edison's light-bulbs. In contemporary times, there is a free for all – with patent litigation over renewable energies like wind turbines and solar technology, and energy efficient technologies, such as the Toyota Prius hybrid and smart grids. In addition, there have been battles over 'green' trademarks, greenwashing and the ownership of Internet Domain names with the dot'eco' suffix; copyright fights over databases and 'An Inconvenient Truth'; and concerns about confidential information.

Strangely, there has been no public discussion or consultation regarding the fundamentalist position of the Australian Government on intellectual property and climate change. There has been effectively a policy void.



Strangely, there has been no public discussion or consultation regarding the fundamentalist position of the Australian Government on intellectual property and climate change. There has been effectively a policy void. IP Australia has only issued public relations messages on the subject and the Advisory Council of Intellectual Property has not investigated the issue. The Department of Climate Change has also not taken an interest in the subject and the Department of Foreign Affairs and Trade section dealing with intellectual property has shown little interest in public policy issues, such as climate change. There is a real danger that the Australian Government has adopted an ideological position in Copenhagen, promoted by industry lobby groups, which has not been properly tested in the relevant policy forums.

By contrast, the US Select Committee on Energy Independence and Global Warming has already held a hearing entitled *Climate for Innovation: Technology and Intellectual Property in Global Climate*

## Solutions.

Arguably, the Australian House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts should be given a reference to

hold an inquiry into intellectual property and climate change. There is a need to develop policy settings, which will encourage innovation in clean technologies, and offer access to those technologies, both domestically and internationally.

Arguably, the Australian House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts should be given a reference to hold an inquiry into intellectual property and climate change.

Especially given that we will be – no doubt – a net importer of clean technology, the Australian intellectual property regime needs to have effective mechanisms for experimental use, co-operative research and development, technology transfer, compulsory

licensing, and crown use. There also needs to be an evaluation of the efficacy of alternative forms of incentives, such as prizes, like the US Lighting Prize and the Hydrogen Prize, patent pools, such as the Eco-Patent Commons, and open innovation.

# GUEST COLUMN

Mark Horsburgh

PRESIDENT-ELECT, LICENSING EXECUTIVES SOCIETY OF AUSTRALIA AND NEW ZEALAND (LESANZ)\*

## Commercialisation Australia - the right step

The Government's launch of its new Commercialisation Australia funding body early next year is certainly a step in the right direction from the Rudd government, which had previously raised the ire of the Australian start-up community by axing the \$1 billion Commercial Ready Grant Scheme in 2008. Whether it is enough to encourage and stimulate the commercialisation of Australian innovation will remain to be seen.

In my last contribution to this magazine, I argued that the Commercialisation Institute would need to take a lead role in coordinating and directing government funds for commercialisation and foster intimate engagement with private sources of equity. Only then, with close cooperation between public and private sources of funding for commercialisation can the nation hope to turn a profit from Australian innovation.

The announcement of Commercialisation Australia is good news for local start-ups that have been struggling in the absence of Commercial Ready and the tight capital markets, and it should see some of the pressure subside for successful applicants.

Yet whilst direct access to government money will be very welcome by Australia's innovation community, on closer inspection it would seem the devil is in the detail.

The Government's initial funding is set at \$50 million a year for 4 years. The assistance is noted as \$50,000 for specialist services, \$100,000 for executive recruitment and up to \$250,000 for proof of concept. Assuming each successful applicant accesses the full range of available support the funding will only support 125 projects per year. That means about 10 projects a month in the whole of Australia: not exactly a breathtaking rate of innovation. Although the funding goes up to \$82 million a year after 4 years it is expected that much of the additional funding will be directed to previous year applicants accessing early stage commercialisation funding of up to \$2 million each.

The Government's Commercialisation Australia fact sheet states that grant funding will be assessed through a competitive merit based selection process. This is appropriate but raises a concern that the assessment panel will be under great pressure to pick 'winners'. This is further highlighted by the intention that successful projects repay the

early stage commercialisation funding. In other words, whoever assesses the applications will be under pressure to select projects that are likely to return \$2 million to government coffers within a reasonably short time

Assuming each successful applicant accesses the full range of available support the funding will only support 125 projects per year. That means about 10 projects a month in the whole of Australia: not exactly a breathtaking rate of innovation.



frame.

This may effectively rule out biotechnology and pharmaceutical innovations which are known for a lengthy return on investment. One can only hope that the assessment panel, whoever they may be, can develop an appropriate balance of short term and long term outlook. Bearing in mind that about 1 in 100 innovations are successful (in terms of positive cash flow), it seems unlikely that the correct balance will be easy to find.

However, notwithstanding some concerns, the Commercialisation Australia initiative must be applauded as better than the current options for federal funding of innovation. At present there is a very limited range of grants available for a narrow range of 'green' technologies. Coupled with the R&D tax refund initiative it seems that there may now be funding available for early stage commercialisation in Australia, albeit for just a lucky few.

*\*LESANZ is the premiere association for the education and promotion of the commercialisation of innovation. LESANZ has 578 members across Australia and New Zealand. The organisation will be hosting its Annual LESANZ conference in Adelaide next year from 22-24th April 2010.*