31 August 2018

Submission on Draft Legislation: Intellectual Property Laws Amendment Bill (Productivity Commission Response Part 2 and Other Measures) Bill 2018

Cochlear and ResMed welcome the opportunity to make a submission on the Exposure Draft of the above Bill. We support the Government’s decision to implement the Productivity Commission’s recommendation to abolish the innovation patent system. Our submission focuses on Part 3 of the Draft Bill given our specific interest in abolishing the innovation patent system. For further information or to discuss this submission, please contact

1. Introduction and background

ResMed is a global leader in the development, manufacturing, distribution and marketing of medical devices and cloud-based software applications that diagnose, treat and manage respiratory disorders including sleep disordered breathing (SDB), chronic obstructive pulmonary disease (COPD), neuromuscular disease and other chronic diseases. ResMed employs approximately 6,000 people and sells product in approximately 120 countries through a combination of wholly owned subsidiaries and independent distributors. In the financial year ending 30 June 2018, ResMed had a net revenue of $US2,340 million, and a gross profit of $US1,362 million. As of 30 June 2018, ResMed had 1,380 employees in Australia.

Sydney is one of the main manufacturing locations for ResMed. ResMed’s primary research and development facilities are located in Sydney, where ResMed owns a 224,000 ft² manufacturing, engineering, research and development site. Approximately 16% of ResMed’s employees are devoted to research and development activities. In fiscal year 2018, ResMed invested $US155.1 million, or approximately 6.6% of net revenues, in research and development.

Cochlear is the global leader in implantable hearing solutions including cochlear implants and acoustic implants. As of July 2018 Cochlear has sold over 550,000 implants helping a growing number of people of all ages across more than 100 countries hear and be heard.

We are a proudly Australian, globally successful company with over 3,500 employees in over 35 countries. Headquartered at Macquarie University in Sydney, Cochlear undertakes most of its research and development (R&D) and manufacturing in Australia, mainly at our Macquarie University campus but also at Lane Cove, East Melbourne and in Brisbane. Around 1,600 of Cochlear’s employees are based in Australia with the majority working in manufacturing, logistics and research and development.
Cochlear is the only hearing device company that develops, designs and manufactures most of its products in Australia for a global market. While over 95% of our sales revenue is from outside Australia, we paid 83% of our corporate taxes in Australia. Last financial year Cochlear spent over $100 million in Australian based R&D, paid over $340 million in salaries, made over $130 million in payments to suppliers and paid $84 million in corporate tax.

None of Cochlear’s or ResMed’s major competitors design or manufacture products in Australia. We have no reason to expect this to change within the next 8 years. As a result, any value the Innovation Patent System could provide to us is insignificant.

2. Impact of Innovation Patents on Australian Manufacturing and R&D

Many companies that do not design or manufacture products in Australia are aware of the innovation patent system. They own many Australian patents – including innovation patents, of which the majority are uncertified. Under the approach taken in Part 3 of the Draft Bill, these companies would be able to strategically pursue innovation patents, in the event of litigation in particular, for many years to come. Ultimately this approach creates a disincentive to invest in Australian R&D and expand or maintain manufacturing in Australia, which was not an intended result of the innovation patent system. Similarly, companies that do not design and manufacture products locally were not the intended beneficiaries of the innovation patent system. The system was established with the objective of stimulating innovation in Australian SMEs.

3. Comments on Part 3 of the Draft Bill

The Explanatory Memorandum to the Draft Bill states that ‘abolishing the innovation patent system is not intended to affect existing rights’. While we support the principle of this objective, we believe the Bill as drafted preserves existing rights in a way that unreasonably maintains legal uncertainty for a sustained period of time. We propose two alternatives below:

i) Preferred proposal: No requests for examination of any innovation patents on or after commencement

The Draft Bill permits divisional filings based on existing pending patent applications and requests for examination of innovation patents after commencement. This approach ensures uncertainty about what innovation patents exist as well as the scope of uncertified innovation patents for up to 8 years. The innovation patent system is being eliminated partly because of this uncertainty, which is exacerbated by the unreasonably low standard for inventiveness. Our preferred proposal will address this uncertainty and concerns many parties have raised about strategic use of innovation patents during contentious matters. By requiring a request for examination (and therefore any new filings) before the commencement date, the existence and scope of all innovation patents will be known and defined shortly thereafter. As a result corresponding risks will be better understood and can be addressed with less risk of disruption to local manufacturing.

ii) Alternative proposal: No divisional innovation patent applications filed on or after commencement

The Draft Bill allows patentees of existing pending families to file divisional innovation patent applications for up to 8 years after the commencement date. Permitting such applications after commencement of the new legislation extends what is clearly a problematic and unfair system that has failed to meet its primary objective. More innovation patents after commencement will lead to more
uncertainty about local manufacturing. In particular, permitting divisional innovation patent applications after commencement will ensure continued strategic use of innovation patents during contentious matters. Our alternative proposal will address these issues and create more certainty by requiring all innovation patent applications to be filed prior to the commencement date.

4. Conclusion

While we welcome the elimination of the innovation patent system, enabling post commencement examination and divisional filings as proposed in the Draft Bill will extend uncertainty which has the real likelihood of negatively impacting manufacturing in Australia.