

16 August 2021

Mr Paul Fischer
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Langton Crescent
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By email: PatentBoxConsultation@treasury.gov.au

Dear Mr Fischer

Patent Box Review

Thank you for the opportunity to provide inputs in response to the Patent Box Discussion paper on policy design, July 2021.

1. Life Sciences WA

Established in 2021, Life Sciences WA is a collaboration of representatives from Government, Universities, Research Institutions, Industry Bodies and Corporates who have come together to form one united body and connect the Western Australian life sciences and biotechnology industry. Our members represent all areas of the diverse life sciences ecosystem including pharmaceutical, biotechnology, medical technology, aquaculture, agricultural technology, research, intellectual property law and business consulting.

Our stated goals include: (a) the promotion of Western Australia's Life Sciences sector as innovative, experienced and internationally competitive; (b) to provide members with a network, market intelligence and services to accelerate and commercialise their own business opportunities; (c) to foster a culture of collaboration and innovation within the Western Australian Life Sciences community; (d) to attract investment and talent to Western Australia's Life Sciences businesses; and (e) to play a leading role in helping to shape the direction of the industry in Western Australia and influence public policy.

2. General Observations on Introduction of a Patent Box

2.1 Life Sciences WA welcomes the introduction of a Patent Box, an expansive thought process to how are the boundaries to be set for defining medical and biotechnology inventions. The international patent classification is not uniformly applied and may well give misleading results for some technologies that have application to medical and biotechnology. Rather than using the international patent classification system, Life Sciences WA encourages that an opt in type system should be adopted where there is a nexus between taxable income and a medical or biotechnology application and it is for the user of the system to show how the taxable income was used in medical or biotechnology.

2.2 In the case of medical and biotechnology inventions, there is typically a long to very long lead time from invention to commercialisation. This arises from regulation of pharmaceuticals and medical devices. Regulation of pharmaceuticals, in particular, may create a lead time of 10 to 15 years. A Patent Box will therefore not assist

commercialisation for many years yet so its incentive effects will not be felt in the short to medium term.

Clean Energy Patents

- 2.3 Life Sciences WA supports the extension of the Patent Box to clean energy related patents which are secured by a wide range of enterprises from sole traders through to multi-national companies. Again, use of a patent classification rather than a commercial application test may present issues for patents that are applied in the clean energy sector, but such applicability is not apparent from the patent classification.

Revenue Streams and Nexus to Australia

- 2.4 Life Sciences WA supports the nexus between R&D in Australia and access to Patent Box concession. This is effectively mandatory due to agreements reached in relation to BEPS.
- 2.5 Life Sciences WA also favours a broad test for revenues qualifying for the Patent Box tax concession. If taxable revenue can be linked to an Australian patent or patent family, this should be subject to the Patent Box concession. However, this revenue could result simply from sales of patented inventions into Australia rather than manufacturing which would be a desirable goal, as demonstrated for example by the Advanced Manufacturing Initiative. This could happen even if the R&D is done in Australia for various reasons whether cost or strategic reasons. One possible way to address this problem is to offer a deeper Patent Box concession for income derived from manufacturing in Australia subject to Australian patents. This could, for example, involve a two-tier system in which taxable income deriving other than from manufacture in Australia is taxed at a 17% rate and taxable income deriving from manufacture in Australia is taxed at a 15% rate.

Patent Procedure and Access to Patent Box

- 2.6 The scheme applies to Australian patents with a priority date later than 11 May 2021. There are opportunities to apply the Patent Box to inventions with an earliest priority date earlier than 11 May 2021 by the expedient of filing further provisional(s) or other eligible applications to features not disclosed in the earliest filing, such features not necessarily being novel or inventive of themselves. Claims to such features, in a later standard patent application, would be provided with a priority date later than 11 May 2021 and would be eligible for the Patent Box concession.
- 2.8 Surveys by IP Australia have demonstrated that the average patent life is 11-12 years, rather than the maximum available term of 20 years. There seems to be a case for the Patent Box concession to apply even where a patent has ceased if the former patentee can demonstrate a link between the ceased patent and the taxable income.

3. Response to Questions

Question 1 *Features of patent boxes in other jurisdictions are most significant and important for designing the Australian patent box to support the medical and biotechnology sectors*

The UK model is apposite, and we note its broader scope. The UK model has been associated with a 10% increase in IP related investment in the UK.

Question 2 *Are patents applied for by medical and biotechnology companies with domestic R&D operations generally Australian standard patents?*

Australia is an important international market for the medical and biotechnology sectors in the global economy. As such *Australian standard patents* are a very important tool for *medical and biotechnology companies generally*.

Question 3 *In instances where an invention is patented in other jurisdictions but not in Australia, is there a way of judging whether the scope of claims in these patents would be substantially similar to the scope of claims in a standard patent that would have been granted in Australia?*

This will depend on strategy. However, where US or European patent applications have been filed, it is cost efficient and very common for Australian claims to be amended to align with US and European granted patents or even pending patent applications.

A significant number of standard patents are likely to have the same claim scope as in Europe or US for reasons of convenience.

Question 4 *What is the best approach to provide certainty around access to the regime for the medical and biotechnology sectors?*

An option to tie to regulatory listing in addition to patent nexus could be useful. This would avoid difficulties of classification. The patent classification is a complex document which can be obscure even for patent practitioners well versed with it.

Question 5 *What are the core concepts/applications that need to be covered by any definition of the medical and biotechnology sectors for the purpose of defining access to the patent box?*

We would recommend the income streaming approach as patents that may not necessarily be filed in a class relating to medical technology or biotechnology may still be very valuable in these sectors. An incentive for R&D that will be directed to applications in these sectors is advised. Examples could include:

- new materials for use in medical devices;
- communications technology that has significant application in the medical and biotechnology sectors;

Similarly, to the R&D tax incentive, access to concessional corporate tax rates could be made dependent on credible use cases that link new technology to applications in the medical or biotechnology sectors.

Although IP Australia has suggested detailed definition for “medical devices” in past literature, such complex definitions would lead to confusion and excessive uncertainty. We recommend that this be avoided.

For inventions subject to regulation, for example by the TGA, access to the Patent Box concession could be tied to a regulatory listing.

Question 6 *What sort of businesses own patented inventions relating to low emissions technologies, and would introducing a tax concession through a patent box support the clean technology energy sector?*

The full range of companies would patent inventions relating to low emissions technologies, from SMEs to MNCs.

A concessional tax rate may promote further IP related investment in this sector noting that a wide range of grant and subsidy programmes already seem to be available though these are more aimed at encouraging R&D in the broad.

Question 7 *Do patents play a strong commercial role in the clean technology energy sector, or are other strategies for using IP more important (such as being first to market)?*

Patents are certainly filed to protect IP in clean energy, e.g. for removal of carbon dioxide from natural gas, new wind turbine designs etc. However, a quick review of IP Australia records located relatively few patent records with keywords such as “decarbonisation” and “low emissions” but relatively high number of records for keywords including “hydrogen” and “clean energy”. It may be inferred that a tax incentive tied to decarbonisation and low emissions would lead to increased activity, similarly to the hydrogen rush that is presently ongoing.

Question 12 *How much R&D activity (related to patented inventions) occurs outside Australia?*

Most Australian patents, in excess of 90% are filed by overseas based applicants. If the number of patents serves as a reasonable proxy for R&D, then most is conducted overseas. This may not matter if the Patent Box attracts the commercial investment back to Australia. UK experience suggests that this may well be the case.

However, Australian businesses are innovative and do conduct research in medical and biotechnology research in Australia. A concessional tax rate may well encourage more IP related investment in these sectors as well as a greater degree of competition against overseas competitors.

Question 17 *To what extent are Australian-based manufacturing processes subject to their own patents in the medical and biotechnology industry?*

Companies do patent their own manufacturing processes though it is likely more common for the patent protection to focus on apparatus or compositions as infringement of apparatus or composition patents is typically easier to detect than for manufacturing processes.

It does seem that a number of companies (e.g. Resmed,) seek to manufacture off-shore for a variety of reasons including:

- operating costs in Australia
- access to capital
- proximity to markets

Question 18 *What will be the implications of targeting the patent box to new patented innovations (i.e have a patent priority date after 11 May 2021?)*

This restriction will certainly reduce the value of the tax concession in early years of the programme though it will be factored into IP strategy going forward. However, medical and biotechnology inventions typically face regulatory hurdles such that revenue tied to associated patents may not appear until 10 to 15 years after filing. Therefore, a significant amount of time will elapse before the patent box incentive effects, as opposed to other incentives such as grants and the R&D tax concession, are enjoyed. Leaving aside a difficulty of classification, it would be useful to tie access to the tax incentive to a regulatory listing, pertinently by the TGA.

4. Conclusion

Life Sciences WA has appreciated the opportunity to respond to the Patent Box Discussion Paper. Please do not hesitate to contact the undersigned should you wish to discuss any of the observations provided in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gary Cox', with a stylized flourish at the end.

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