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CSIRO

Senator Nick Xenophon
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 25 September 2011 concerning the exemption from access under the *Freedom of Information Act 1982* (Cth) (the "FOI Act") for documents relating to CSIRO's commercial activities (section 7 and Part II Schedule 2).

CSIRO is a mission directed research agency whose functions as set out in the *Science and Industry Research Act 1949* include:

(a) assisting Australian industry; and
(b) encouraging and facilitating the application or utilisation of CSIRO research.

Both of these functions are implemented by CSIRO through public dissemination of new knowledge, as a routine part of CSIRO's activities. For example, in 2010 alone CSIRO's scientists published more than 2,600 articles in peer-reviewed scientific journals, together with many books/chapters, conference papers and technical reports. Further to that, there were more than 2.6 million journal downloads from CSIRO Publishing.

CSIRO's Board and Management work to support the objects of the FOI Act, including "*to facilitate and promote public access to information, promptly and at the lowest reasonable cost*". CSIRO has implemented an information publication scheme as required by the FOI Act and works actively to make publically available information on its research activities.

Many of the publications described above, are knowledge outputs from research that was conducted in collaboration with industry or under funding from industry associations. However, immediate public disclosure of this work will not always be the most appropriate course of action. As CSIRO works to assist Australian industry, our collaborative research and development activities often produce commercially valuable results, know-how, inventions, products and processes. It is important that CSIRO manages the expectations of its co-investors and collaborators, as well as its obligations arising under funding schemes that require new intellectual property with commercial potential to be protected (e.g. the Cooperative Research Centres). Appropriate protection of CSIRO's intellectual property rights (e.g. as patents or as confidential information) could be jeopardised, if disclosure occurs as a result of the operation of the FOI Act and before there has been a reasonable opportunity to protect new knowledge that has been generated though intellectual property registration (if appropriate).

The section 7 exemption under the FOI Act applies to a limited range of CSIRO's research activities and is essential to protect the interests of third parties who wish to collaborate with CSIRO or access CSIRO's research capability. The exemption also enables CSIRO to conduct its research and related activities on a competitively neutral basis with industry and

other research institutions. It is important to bear in mind that there are often timing issues in the application of the Act, in that the exemption is often only applicable until the research is complete to the level of the results not being so preliminary as to be misleading or the information or knowledge is otherwise put into the public domain by CSIRO, its industry partners or through IP registration or regulatory processes.

CSIRO works within the provisions of the FOI Act to manage its obligations, whilst conducting an active program of publication of new scientific knowledge. The section 7 exemption has been in place for the CSIRO since 1994. When changes were being proposed to the Act (including consideration of the removal of the commercial activities exemption) in 2008, CSIRO made detailed submissions to the Department of Prime Minister and Cabinet (PM&C) outlining the CSIRO's particular concerns about the changes.

For your information I enclose a copy of the CSIRO's written submission to PM&C on this matter dated 19 December 2008.

Yours sincerely

Mr Mike Whelan
Acting Chief Executive

18 October 2011

Cc: Senator the Hon Kim Carr, Minister for Innovation, Industry, Science and Research

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CSIRO

19 December 2008

Ms Joan Sheedy
Assistant Secretary
Privacy & FOI Policy Branch
Department of Prime Minister & Cabinet
Email: joan.sheedy@pmc.gov.au

Dear Ms Sheedy

I am writing to you at this time to follow up on a meeting between Ms Rosemary Caldwell from CSIRO's legal team and Ms Maia Ablett on 17 November 2008 to discuss the Review of *Freedom of Information Act 1982 (Cwth)* Exemptions, and in particular Section 43A ('Documents relating to research').

CSIRO submits that retaining section 43A in relation to CSIRO is in the public interest, for the reasons described in detail in the attached paper.

CSIRO would also be very concerned if there is any suggestion of removing Part II of Schedule 2 of the FOI Act, which relates to CSIRO's commercial activities.

I would also draw particular attention to clauses 29 and 30 in the attached submission.

I have also provided a copy of this correspondence to Ms Melissa McClusky Head of Corporate Division in the Department of Innovation, Industry, Science and Research.

Given the implications of prospective changes to the FOI legislation to CSIRO and the ANU I would welcome the opportunity to discuss this matter further with you. I may be contacted on ph: 02 9490 8138 or email: Nigel.Poole@csiro.au.

Yours faithfully

Nigel Poole
Executive Director, CSIRO Business Services

cc: Ms Maia Ablett
Senior Advisor
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CSIRO

19 December 2008

Ms Melissa McClusky
Head of Corporate Division
Department of Innovation, Industry, Science and Research
GPO Box 9839
Canberra ACT 2601

Dear Ms McClusky

I am writing to you at this time to provide you with a copy of correspondence I have submitted to Ms Joan Sheedy, Assistant Secretary Privacy and FOI Policy Branch, Department of Prime Minister and Cabinet. This was requested by Mr Toby Robinson, Prime Minister and Cabinet by email dated 18 November 2008.

The Review of *Freedom of Information Act 1982 (Cwth)* Exemptions, and in particular Section 43A ('Documents relating to research') has significant implications for CSIRO and the ANU. It is therefore important that any proposed changes to the FOI legislation relating to CSIRO's commercial and research activities be given due consideration. Your support, from a Portfolio Department perspective, in assisting CSIRO in this matter would therefore be appreciated.

As indicated to Ms Sheedy I would welcome the opportunity to discuss this matter further with you. I may be contacted on ph: 02 9490 8138 or email: Nigel.Poole@csiro.au.

Yours faithfully

Nigel Poole
Executive Director, CSIRO Business Services

cc: Ms Chris Butler
Assistant Secretary
Corporate Strategy Branch
Department of Innovation, Industry, Science and Research

SUBMISSION ON BEHALF OF THE COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION (CSIRO) IN RESPONSE TO PROPOSED AMENDMENTS TO THE *FREEDOM OF INFORMATION ACT 1982 (Cth)*

CSIRO

Summary

In summary, CSIRO submits that:

- It is critical that CSIRO be able to conduct its research and related activities on a competitively neutral basis with industry and other research institutions. Currently there are two main sets of provisions of the *Freedom of Information Act 1982* (FOI Act) which assist CSIRO in this regard - s.43A/Schedule 4 and s7/Part II of Schedule 2;
- Proposed amendments to s.43 would be no substitute for the protections afforded by s 43A in relation to ongoing research;
- The continued exclusion of CSIRO from the operation of the FOI Act with respect to the commercial activities that it conducts (by virtue of s.7 and Part II of Schedule 2) is of paramount importance in allowing CSIRO to carry out scientific research to assist Australian industry and to encourage or facilitate the application or utilization of the results of such research, which involve working in collaboration with industry and conducting R&D that will lead to technologies and services to be implemented in the market in competition with other products (whether in Australia or overseas);
- Specifically, the continued exclusion of CSIRO from the operation of the FOI Act with respect to certain research activities is of critical importance to protect the interests of third parties who wish to collaborate with CSIRO or to access CSIRO's research capability;
- If, contrary to this submission, s.43A is repealed any amended s.43 ought to cover the full range of pre and post-commercialisation activities engaged in by CSIRO.

1. This submission responds to proposed amendments to repeal s.43A and Schedule 2 of the FOI Act discussed in the Australian Law Reform Commission Report No. 77 titled *Open Government: a review of the Freedom of Information Act 1982*, released in December 1995 (the ALRC report).

2. Currently, CSIRO has available to it the following FOI Act provisions in respect of its and its partners' commercial and research activities:

    - S.7(2) and Schedule 2 exclude CSIRO from the operation of the FOI Act in relation to documents in respect of its commercial activities;
    - S.43(1)(c) provides an exemption in relation to documents disclosing the commercial or business affairs of third parties with whom it conducts research

- and related activities where such disclosure would/could unreasonably affect the third party adversely in respect of its business or commercial affairs;[1] and
- S.43A provides an exemption in relation to documents relating to research that is incomplete and, if disclosed, would be reasonably likely to expose the agency or the officer to disadvantage.

3. CSIRO submits that both s.43A and s.7 in conjunction with Part II of Schedule 2 ought to be maintained in order to protect and support CSIRO's research and competitive commercial activities. The two provisions are complementary to one another, supporting CSIRO in its important role in the Australian community.

CSIRO's Role - research and commercial activities

4. CSIRO's principal aims are to carry out scientific research for the benefit of Australia and to facilitate the application of its research results for the development of the nation.[2] Reflecting its position in the national innovation system, CSIRO's research is of a strategic and applied nature, in order to deliver economic, environmental and social benefits for Australia.

5. Reflecting this, much of the research that CSIRO conducts is performed in collaboration with Australian industry and/or with other partners. In 2007/08 such work directly with partners and clients represented more than $500M of CSIRO's total R&D expenditure of $1.04b. This research is aimed at producing (whether in the short term or longer term) commercially valuable results, know-how, inventions, products and processes. Some of these, in turn, give rise to important proprietary rights such as patents, plant breeders rights and trademarks. CSIRO currently has a portfolio of approximately 4,500 patents.

6. CSIRO collaborates with the private sector with respect to scientific and industrial research across a range of fields including public health and nutrition, management of freshwater resources, understanding Australia's ocean environment, climate change and ways to manage its impacts, renewable energy, biosecurity, sustainable agriculture and forestry and information technology.

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[1] It is noted that the ALRC report proposes amendments to s.43 to apply expressly to agencies in respect of our business, commercial or financial affairs.

[2] CSIRO is established by s 8(1) of the *Science and Industry Research Act 1949* (the CSIRO Act). CSIRO's functions include:

a) carrying out scientific research for the purpose of assisting Australian industry — s 9(1)(a)(i);
b) encouraging and facilitating the application or utilization of the results of such research — s 9(1)(h); and
c) encouraging and facilitating the application or utilization of the results of any other scientific research — s 9(1)(ba).

7. Therefore CSIRO regularly operates in collaboration with private industry[3] and engages in a wide range of commercial dealings with other parties, ranging from royalty-bearing licences, scientific consultancies and sponsored research agreements to equity investments in joint ventures. The commercially competitive value of the technologies arising from these activities is an important factor in CSIRO's effectiveness in delivering impact and value for Australia. When CSIRO develops commercially valuable technology, it is invariably the case that some or all related commercial information needs to be kept confidential in order that those technologies can be effectively introduced to the market (which is almost always through a commercial partner).

8. Competitive neutrality obligations require CSIRO to adopt pricing and royalty expectations in line with industry norms; conversely, CSIRO's clients and partners look to ensure that as their partner CSIRO will be sure to maintain the confidentiality of their information and of the outcomes from the research.

Submissions in support of the retention of section 43A

9. This exemption is currently available to CSIRO and Australian National University (ANU) in respect of research that is or is about to be undertaken. It is critical that CSIRO be able to protect its research while in development, both to preserve the reputation and research advantage of its staff and the organisation as a whole, but also to protect its research from disclosure at a time when its ultimate consequences (not only for its commercial possibilities, but also in "public good" terms) may not yet be clear. There are also strong public policy reasons why the disclosure of incomplete research is not to be recommended.

- *Example: interim CSIRO survey results of water flows into an Australian river system would be exempt pursuant to s.43A, provided that the disadvantage test in s.43A(1)(b) is met. There could be strong public policy reasons why such data ought not to be released prematurely, but it would not be protected by s.36 (purely factual material: s.36(5)), s.43 or s.39 (insufficient nexus to profit/commercialisation).*
- *Example: preliminary research conducted by CSIRO suggested that a virus detected in a livestock species in Australia had arisen from a particular offshore source. This virus is a key human disease (pandemic) threat. Subsequent testing found the preliminary results/conclusion to be wrong. Premature disclosure would have resulted in unnecessary public concern and reaction, including pressure for a policy response which would likely have had impact in terms of international relations. Again, this research would be required to be released in the absence of s.43A.*
- *Example: in a formal scientific collaboration with a Cooperative Research Centre, CSIRO conducted certain tests of novel class of materials for use*

[3] CSIRO has power to do all things necessary or convenient to be done for or in connection with the performance of its functions and, in particular, may join in the formation of a partnership or company (s 9AA(1b)) or make available to a person, on such conditions and on payment of such fees or royalties, or otherwise, as the Chief Executive determines, a discovery, invention or improvement the property of CSIRO (s 9AA(1)(c)).

for a specific biomedical purpose. The objectives of the research had been publically disclosed. The tests measured certain physical characteristics that, whilst these were routinely measured in materials that were developed for other purposes, it was somewhat unusual to be tested in materials destined for this biomedical purpose. The premature release of the preliminary research results for those materials would have indicated, from the unusual nature of the testing done, a novel line of thinking in relation to that biomedical purpose.

Whereas it was not known, at the early stage of the project, that this line of testing would lead to commercially important knowledge (and so the research might be required to be released in the absence of s.43A), it transpired that as the project developed a new understanding emerged from those test results that the characteristics being measured were unexpectedly central to the biomedical purpose. On the basis of that understanding and the test results, an important patent position on the use of a class of materials for biomedical purposes was developed. The criticality of the testing to the invention described in the patent has since been the subject of critical consideration in both Australian and US courts proceedings.

10. The ALRC report recommends that s.43A be repealed and states that s.43 and s.39 "will ensure that agencies do not suffer financial disadvantage from premature release of research documents."[4] CSIRO strongly disagrees with this assertion.

11. S.43A does not serve the same function or purpose as s.43, s.7/ Part 11, Schedule 2 or s.39. This provision is intended to apply to documents before any commercial, financial or property interest is apparent. Often, research at this stage is funded partly or entirely by CSIRO and will, ultimately, have a public purpose objective but that objective will not be realised until the research is complete.[5] It should be noted that research may ultimately be abandoned, for example, if it is found to be based on incorrect sampling. No public policy objectives are served by the release of preliminary research data which is intrinsically misleading.

12. Further, it is critical for the conduct of research, within established moral and ethical parameters, to be free from public and media scrutiny. Often, mere disclosure of the fact that CSIRO is conducting research in a particular field or has reached a certain stage in given research or its preliminary findings may be

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[4] ALRC report, page 147. S.34(4)(b)(i) *FOI Act 1982* (Vic.) provides that a document is exempt if it contains results of scientific or technical research undertaken by an officer of an agency that could lead to a patentable invention, while s34(4)(b)(iii) protects from disclosure the results before the completion of the research if it would reasonably likely expose the agency or the officer of the agency unreasonably to disadvantage. See also *FOI Act 1989* (NSW); s. 33 and Schedule 1, Item 8; *Information Act 2003* (NT) s. 57(c); *FOI Act 1992* (Qld) s.45(3); *FOI Act 1992* (WA) Schedule 1, Item 10(5); *FOI Act 1991* (SA) s. 28 and Schedule 1, Item 8; - *FOI Act 1991* (Tas.) s. 32(b).

[5] The fact that the public interest is not served by premature disclosure of research is recognised in s43A which does not have a public interest component.

valuable commercial information for other commercial players (including competitors to CSIRO's industry partners). Release of this information would be contrary to the public interest and has the potential to seriously affect CSIRO's ability to itself compete on a level playing field with other R&D institutions in certain research fields; to deliver confidential policy advice to government; and to engage effectively with Australian industry.

13. It can be very difficult for CSIRO to establish the necessary nexus between research at a preliminary or incomplete stage, and a profit-making intention that is required for the documents to fall within its 'competitive commercial activities.' It is not unusual for research to be conducted over many months, years or even decades, and for a considerable period of time to elapse before the research activity may 'reasonably be expected in the foreseeable future to be carried on ... on a commercial basis in competition with persons other than governments...' [6] Documents containing this information are currently exempt from release pursuant to s.43A; if this section were to be repealed, CSIRO would potentially be put at a competitive disadvantage with private industry in being required to release incomplete research in circumstances where its connection to competitive commercial activities or profit-making is considered to be too remote.

14. It is unlikely that s.39 as currently framed would apply to information concerning incomplete research. This is because it is very difficult to establish the necessary nexus with revenue-generating activities in respect of research that is still at an early stage or where the commercial application has not fully been established or realised. The requirement for there to be 'a substantial adverse effect' on any financial or property interest may be impossible to demonstrate where the success or outcome of the research is unknown or uncertain. The additional public interest requirement in s.39(2) would make application of the exemption to incomplete research very difficult to make out. [7]

15. The ALRC report refers to s.21(1)(c) (deferred access) as a mechanism by which the researcher's priority of publication may be protected.[8] However, a decision to defer access must be preceded by a decision to release the document/s in question. This may not be appropriate in relation to documents that, at the time of the request (and subsequently) may disclose research that is inconclusive, flawed or ultimately abandoned.

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[6] S.7(3)(b) of the FOI Act.

[7] To date, there has been only one AAT decision upholding a claim under s 39: *Connolly and Department of Finance* [1994] AATA 167. In that case, the agency was able to show the exact drop in value that could occur by disclosure which would cause a substantial adverse effect on the value of the Commonwealth's property in its uranium stockpile (at [25]). The Tribunal held that "In the case of claims made under s 39 it is possible to quantify the meaning of "substantial" by reference to the movements in dollar value of Commonwealth property. The evidence before me indicates a risk of an adverse dollar value movement of a significant sum of money, which may fairly be described as substantial, or serious." (at [25]) and "..evidence shows that the value of the Commonwealth's property will be diminished to a substantial degree if the requests are granted." (at [27]).

[8] S.21(1)(c) provides that if premature release of the document would be contrary to the public interest, access may be deferred "until the occurrence of any event after which or the expiration of any period of time beyond which the release of the document would not be contrary to the public interest."

16. Further, s.43, even if amended, would not be a substitute for s.43A. S.43 has an entirely different purpose, as 'commercial activities' usually commence after research has been completed. Incomplete research activities that are often highly speculative in nature will not meet the test of "commercial", irrespective of how the term is to be defined in the amended s.43.

17. On the current state of the law, "commercial" activities must either constitute the sale of goods or services for financial return in an open market, or result in profits or immediate gains or be so related to commerce that they should be characterised as commercial activities. [9] Such outcomes are not derived from the research activities themselves. It is only when there is subsequent commercialisation of those activities that s.43 is likely to apply. It is in the nature of developmental research that an outcome may take a long time to achieve. Such research often involves collaboration outside CSIRO, resulting in work that must be drawn together to take advantage of opportunities presented by the market.

18. Once the repeal of s.43A were widely known, it would be expected that CSIRO would receive more requests covering its research documents. This would necessitate a resource-intensive exercise of identifying and locating requested documents, considering whether they fall within the terms of contractual arrangements with third parties, and therefore whether the documents are potentially exempt pursuant to s.45 or s.43(1)(c)(i). At present, CSIRO is able to reassure its clients and contractual partners that research which is obtained, received, discovered by or in conjunction with CSIRO is exempt from disclosure until it has been completed.

19. For these reasons, CSIRO strongly requests that s.43A and Schedule 4 to the FOI Act be retained.

Section 7 and Part II, Schedule 2 of the FOI Act

20. Currently, CSIRO is exempt from the operation of the FOI Act in relation to documents in respect of its commercial activities.[10] 'Commercial activities' are defined in s.7(3) as (a) activities, carried on by an agency on a commercial basis in competition with persons other than governments or authorities of governments; or (b) activities, carried on by an agency, that may reasonably be expected in the foreseeable future to be carried on by the agency on a commercial basis in competition with persons other than governments or authorities of governments.

21. The ALRC report recommends that all agencies currently exempt from the operation of the FOI Act under s.7 and Part II of Schedule 2, in respect of their competitive commercial activities, should be removed from the Schedule. This recommendation is made on the basis that it is proposed to amend s.43 to apply to the competitive commercial activities of those agencies.

22. It is very important that CSIRO's commercial documents are excluded from the operation of the FOI Act. This is crucial in ensuring the confidence of the private sector in entering into research agreements with CSIRO. In this sense CSIRO is

[9] *Bell and CSIRO* [2007] AATA 1569 @ [128]

[10] See s.7(2), 7(3) and Part II, Schedule 2 to the FOI Act.

in a unique position and its removal from Part II of Schedule 2 could put collaborations with the private sector in jeopardy. In addition, it is not known whether the proposed amendments to s.43 will include a prospective element in keeping with the current s.7(3)(b). The Schedule operates in a very different way to s.43; it does not involve a public interest component and covers documents provided they relate to CSIRO's commercial activities.

23. Further, there is no public interest in exposing for outside scrutiny CSIRO's commercial activities, given the very competitive nature of those activities and the fact that those competitors seek to gain an advantage through the FOI process as seen in a recent AAT case upheld on appeal to the Full Federal Court.[11]

Bell and Commonwealth Scientific and Industrial Research Organisation [2007] AATA 1569; Bell v CSIRO [2008] FCAFC 40

24. The case of *Bell* illustrates the difficulties that have been confronted by CSIRO in seeking to protect from disclosure sensitive commercial documents. At first instance, the decision of the Tribunal dealt with the application of s.7 and Part II of Schedule 2 to documents received or created by CSIRO relating to the development of wireless technology enabling portable computers, or laptops, to communicate with data networks, including corporate data networks, and the Internet using radio waves instead of cables.

25. The Tribunal was satisfied that CSIRO began its research with the long term aim of achieving a commercial advantage in the market place consistent with its stated aims to be the market leader in the technology, to gain market advantage from that role and to earn revenue by licensing the technology it developed (at [157]). Notwithstanding this evidence, it was not satisfied that, at the time the documents were received or came into existence, CSIRO was carrying on its activities on a commercial basis. Whilst its activities (including research, commencing partnerships with industry) were directed to a particular goal, at that time the possibility of their returning a profit or benefit for CSIRO was "too remote to justify ... concluding that the activities undertaken at the time were related to making a return, let alone a profit." Therefore, for the purposes of s 7(3)(a) of the FOI Act, the Tribunal was not satisfied that CSIRO was carrying on commercial activities. ([159])

26. The Tribunal was persuaded, however, that it was reasonably foreseeable at that time that CSIRO would conduct those activities on a basis that would see a return to it from the general market place. On appeal to the Full Federal Court, these findings of the Tribunal were upheld.

Issues arising from the Bell Cases

27. Notwithstanding very strong evidence led by CSIRO of a clear intent from the inception of the project to commercialise the technology, the Tribunal concluded that this was insufficient to bring the activities within the phrase "carried on ... on a commercial basis" (s.7(3)(a)). This case demonstrates that there is a real risk that documents created or received at a time when its activities do not return a profit, for example, early research work, collaborations/partnerships with industry, marketing ideas, developing patent documents, researching

[11] *Bell v CSIRO* [2008] FCAFC 40.

competitors' activities, establishing start up companies will not be protected, even where there is a clear intention that the research is ultimately intended to be commercialised. While these activities were found by the Tribunal to fall within s.7(3)(b), had CSIRO been obliged to rely solely on s.43 (which currently has no future intention element), the outcome would have been very different.

28. The CSIRO patents the subject of challenge in the US Courts by Microsoft, Intel and Hewlett Packard, amongst others, relate to the technologies considered by the AAT and Full Federal Court in *Bell*.[12]

29. In relation to the interpretation of s. 7 and Part II, Schedule 2 following the *Bell* decisions, CSIRO has two principal concerns, namely:

a) The Tribunal and Full Federal Court decisions took a very narrow view of the operation of s.7(a) and render the operation of that provision almost nugatory; and

b) Evidence of a clear intent to commercialise the technology at the time when the documents were received or created may not always be available.

30. CSIRO is concerned to ensure that these issues are addressed in any review of the FOI Act.

Other issues arising from the proposed amendments to Part II, Schedule 2

31. If CSIRO is no longer excluded from the operation of the Act in relation to its commercial activities, there will be an obligation under s 22 of the FOI Act (to provide access to an edited copy of the document) to consider partial disclosure of information. This will put an organisation which operates in competition with private industry at significant disadvantage. It also means that industry members will be wary of involvement with CSIRO if protection of their collaborative documents is not absolute. The requirement to schedule and describe documents and provide statement of reasons (which will be enlivened if CSIRO is brought within the operation of the Act in respect of its commercial activities) will require CSIRO to disclose information about the documents which, of itself, may assist competitors, and may cause concern to its contractual partners.

32. The requirement to meet the public interest test in non-disclosure can be very difficult if the commercial outcomes of that research are not yet known or realised.

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[12] CSIRO is currently involved in five cases in the US Federal Court for the Eastern District of Texas. It has also been involved already in three appeals to the US Court of Appeals for the Federal Circuit and one appeal to the Intellectual Property High Court in Japan. These cases involve nineteen counterparties. The cases began in February 2005 after entities infringing CSIRO's patents failed to take up licence offers from CSIRO made over the previous two years. The cases are highly contentious and CSIRO estimates that the aggregate legal costs of all parties would be well in excess of $100 million. The infringers have sought a range of information via discovery and other mechanisms which may potentially be used against CSIRO in the court proceedings and elsewhere. At least one of the defendants is known to have used an Australian solicitor to seek related information through use of an FOI request made to CSIRO. There has been another FOI request, again using an Australian solicitor, which CSIRO believes was made on behalf of another of the defendants. CSIRO was able to use its exemptions under the FOI Act to resist these requests and thereby confine the litigants to the proper procedures, namely, discovery under the relevant US laws (and subject to the Protective Order issued by the district court in Texas).

Application of s.39 to CSIRO

33. As discussed above, s.39 appears to have very limited scope and will only operate in circumstances where a patent has been successfully registered and royalties are being paid as revenue to CSIRO.

Application of s.43(1)(a) to CSIRO

34. It is unclear whether the trade secret exemption in s 43 covers information (such as early research) that does not conclusively provide a solution or invention. In *Section Pty Ltd v Delawood Pty Ltd* (1991) 21 IPR 136. King J, while acknowledging that a concept may be a trade secret, rejected the suggestion that information which no one would have accepted as disclosing a feasible solution to a problem could be a trade secret, apparently on the basis that it was unsupported and speculative.

35. The term 'trade secret' has no clear meaning, and to be sure of retaining protection, the "owner" must go to extreme lengths to ensure that it remains secret - that is, it requires implementation and maintenance of a strict regime of secrecy. To impose this regime on CSIRO would be excessively burdensome, and often counterproductive in the efficient and effective conduct of research. Moreover, CSIRO could only implement such a regime prospectively, exposing its existing intellectual property to disclosure. Accordingly, the protection which s.43(1)(a) could afford to CSIRO is both inadequate and impractical.

Application of s43(1)(b) to CSIRO

36. In order for CSIRO to rely on s.43(1)(b), it has to demonstrate both that the information has a commercial value and that this value would be destroyed or diminished through disclosure under the FOI Act. This will be difficult, if not impossible to establish unless there is a product or process that can be identified as having a commercial value. It will not protect research until/unless that research is capable of having a commercial value placed upon it, and is no substitute for s.43A.

37. For these reasons, CSIRO considers that amending s.43 to apply expressly to agencies would not offer sufficient protection for CSIRO's research activities, particularly where there is only a tenuous link between the research and any ultimate commercialisation of the results. For these reasons, CSIRO strongly advocates the retention of Part II of Schedule 2, and CSIRO's inclusion in the Schedule.

Legislative amendments

38. Any amended s.43 must be sufficiently broad to encompass activities from the earliest research through to commercialisation and up to the point where revenue is being generated. This is necessary irrespective of whether s.43A is retained, as the two serve quite different functions i.e. research conducted by CSIRO does not necessarily have a commercial element but disclosure prior to completion would not be of benefit to the Australian community. In light of the outcome of the *Bell* case, agencies such as CSIRO require certainty that pre-commercialisation activities will be protected from disclosure.

39. The current regime provides protection as a two stage process - at the relevant time and if reasonably foreseeable: s.7(3)(a) and 7(3)(b). The difficulty in

establishing to the Administrative Appeals Tribunal that the documents fall within s7(3)(a), even with the benefit of extensive evidence, has been demonstrated by *Bell* case.

40. CSIRO recognises that Schedule 2 in its current form is imperfect. Options which may be considered include:

a. an amendment that gives CSIRO protection currently has in s.43A and also ensure that amendment to s 43 applies to continuum of activities i.e. provided an **intent** to commercialise can be shown, the whole spectrum of activities, including research and development, should be covered by exemption.

b. It should not be necessary to show a connection with profit to come within s.43.

c. It is possible that s.43 could be amended to incorporate s.43A protections, provided that it covered the whole spectrum of pre and post commercialisation of activities.

Conclusion

There should be no repeal of the protections provided by s43A and s.7 (together with Part II of Schedule 2). If consideration is to be given to amending s. 7 and Part II of Schedule 2, CSIRO would welcome the opportunity to make further submissions on possible changes to those parts of the FOI Act.