

25 March 2020

The Commissioner of Patents  
IP Australia  
PO Box 200  
Woden ACT 2606

**via e-Services**

Dear Commissioner

**Re: Standard Patent Application No. AU 2017210650 in the name of LAA Industries Pty Ltd**  
**- and - Opposition thereto by Anderson IP**  
**Our Ref: RJN-01**

We refer to the request for an extension of time (**EOT**) to file evidence in answer (**EIA**) made by the applicant, LAA Industries Pty Ltd (**LAA**), in the above-referenced opposition.

We object to the EOT request and agree with the Delegate's reasons for refusing the request in its letter of 11 March 2020. We make the submissions given below in support of the Delegate's refusal.

**Applicable law**

1. Regulation 5.9 of the *Patents Regulations 1991* (Cth) governs LAA's EOT request.
2. To determine whether the EOT may be granted, the following questions must be considered<sup>1</sup>:
  - (i) Has LAA and their patent attorney, Fidel Dela Paz of protectmyidea.com.au (**Attorney**), made all reasonable efforts to comply with all relevant filing requirements?
  - (ii) Did the failure to file the EIA in time occur despite LAA and its Attorney acting promptly and diligently at all times to ensure the EIA is filed in time?
  - (iii) Were there exceptional circumstances that warrant the extension?
3. The Commissioner can grant the EOT only if she is satisfied that the answer to each of questions (i) and (ii) is YES or if she is satisfied that the answer to question (iii) is YES. If she is satisfied, then the Commissioner must then consider whether there are any discretionary reasons why the EOT should not be granted.<sup>2</sup>

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<sup>1</sup> *TRED Design Pty Ltd v Julie-Anne McCarthy and Bradley McCarthy* [2013] APO 57 (**TRED**), [34]; *Merial Limited v Novartis AG* [2013] APO 65 (**Merial**), [14].

<sup>2</sup> *TRED*, [35]; *Merial*, [14].

## **Lack of reasonable effort, promptness and diligence**

### Keogh

4. LAA relies on a declaration of its Managing Director, Mark Vincent Keogh, dated 25 February 2020 (**Keogh**). Keogh refers to various business activities relating to LAA and its sister company, UON Pty Ltd (**UON**), that Mr Keogh was allegedly involved in, at various times, during the three-month period for preparing and filing the EIA in full.
5. In particular, Keogh refers to work involving an investment partner, a visit by Mr Keogh to a worksite and ongoing management of LAA and UON general operations. These are all business-as-usual activities commonly carried out by commercial organisations. Mr Keogh also refers to his involvement in an opposition to Australian Patent Application 2017213531 (**Taranis**).
6. Notwithstanding his alleged prior commitments, it is evident that Mr Keogh failed to make any allowance for his involvement in the relevant business activities and made no effort to ensure that the EIA was all filed on time. There are many steps that Mr Keogh could have reasonably taken (but failed to do so) to ensure the deadline was met. For example, Mr Keogh could have delegated responsibility for managing the preparation of the EIA to one or more company employees. Mr Keogh could also have engaged additional external professional advisors to assist with this work. Instead of taking such actions, Mr Keogh elected to prioritise the business activities referred to in his declaration (including raising investment) over the EIA.
7. Keogh also refers to a period of planned company shutdown over Christmas and personal leave taken by Mr Keogh between 1 February 2020 and 16 February 2020. These leave periods were all anticipated and it would have been within LAA's control to make arrangements that would have avoided the consequences of the relevant personnel not being available (or fully available) during the relevant times.
8. Mr Keogh also seeks to rely on the number of documents filed by Anderson IP for its Evidence in Support (and by other opponents). We note that LAA received three opposition notices on 3 June 2019. LAA, therefore, knew that it was facing three opponents almost six months prior to the commencement of its three-month window for preparing its EIA. Corresponding Statements of Grounds and Particulars and Evidences in Support were also timely filed by the opponents and issued to LAA on, respectively, 29 August 2019 and 2 December 2019. LAA had the opportunity to determine the extent of the work involved in preparing its EIA and to take steps necessary to ensure that it was filed in time.

### Waterreus

9. LAA also relies on a declaration of its employee, James Waterreus, dated 25 February 2020 (**Waterreus**). Mr Waterreus also refers to his involvement in ongoing LAA and UON work commitments, the Taranis opposition and the Evidence in Support filed by Anderson IP. Paragraphs 4 to 8 above are, therefore, repeated.

10. Despite Mr Waterreus's alleged busy work schedule, it is evident that LAA did not make any effort to engage alternative experts to complete its EIA by the deadline. The subject matter of the patent application under opposition relates to electromechanical engineering of average complexity and it would have been open to LAA to engage one or more alternative experts with relevant background and expertise.

#### Dela Paz

11. LAA also relies on a declaration of its Attorney dated 26 February 2020 (**Dela Paz**) which refers to annual leave taken by its Attorney between 23 February 2020 to 29 February 2020. All three declarations relied on by LAA confirm that this leave was known and scheduled in advance — Keogh, [10]; Waterreus [11]; Dela Paz, [2]. “Annual leave” is not a matter which can trigger the valid operation of Regulation 5.9.
12. The Attorney's leave was entirely foreseeable and it was within LAA's control to make arrangements that avoided the consequences of its Attorney not being available during the relevant time. The period of leave amounts to just five business days of the total three-month period available for preparing the EIA. Alternative arrangements could, therefore, have been made to cater for this short period without undue burden.
13. LAA's own evidence on the issue of advance notice of annual leave is sufficient alone to dispose of the EOT application.

#### **No exceptional circumstances**

14. There are no exceptional circumstances that warrant an extension. The impact of the various business activities referred to in the Keogh and Waterreus declarations could all have been anticipated in advance. LAA could have taken (but failed to take) reasonable steps to ensure that these activities did not hinder the timely preparation and filing of its EIA.
15. In regard to the various periods of annual leave referred to in LAA's EOT request, the relevant periods were all known in advance to LAA. The Commissioner has previously held that prior scheduled leave of persons involved in patent opposition proceedings does not amount to exceptional circumstances that warrant an extension.<sup>3</sup>

#### **Conclusion**


16. Regulation 5.9 is onerous and requires LAA to exercise all reasonable efforts and to act with promptness and diligence at all times, unless exceptional circumstances apply. In the present case, there are no exceptional circumstances. LAA prioritised other business matters over the EIA and, in doing so, flagrantly neglected (on the face of LAA's own evidence) to commit the resources required to prepare and file its EIA on time. LAA evidently decided to file an EOT request four business days before the final deadline for filing its EIA rather than taking reasonable steps to meet this deadline during the three months available for doing so.

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<sup>3</sup> *Merial*, [24].

17. Importantly, we note that the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) expressly seeks to remove the ability of both patent applicants and opponents to seek and obtain extensions of time for filing evidence in opposition proceedings other than for occasions when all reasonable steps have been taken to comply or exceptional circumstances. Plainly, neither limb has been satisfied here on the evidence nor, with respect and having regard to the reasons proffered to justify the extension, could they be.
18. Including for the reasons given above, LAA's EOT request should be refused. If the EOT request were to be granted, the resultant changes to the opposition timetable would be substantially to our detriment. Further, it is in the public interest that the opposition proceeds expediently and in accordance with the statutory evidentiary timeframes.
19. In the event that LAA submits further information in alleged support of its EOT request, we reserve the right to file further submissions in response.

Yours respectfully,



Stephen Anderson