

MEDIA RELEASE

Productivity Commission recommendations “anti-innovation”

Recommendations in the Productivity Commission’s Report on Intellectual Property Arrangements would significantly weaken the Australian patent system, introduce uncertainty into obtaining and enforcing patent rights, and make the patent system more expensive for innovators, The Institute of Patent and Trade Mark Attorneys of Australia (IPTA) has warned.

The Report makes a number of “anti-patent” recommendations including abolishing the innovation patent system, introducing an objects clause into the Patents Act, virtually removing the availability of extensions of patent term for pharmaceutical patents, raising the threshold on inventive step and significantly raising patent renewal fees.

“Ironically, the recommendations of the report appear to be in conflict with the Coalition Government’s Innovation Agenda, which prompted Prime Minister Malcolm Turnbull to say, in support of innovation, “we’ve got to be prepared to have a go and be more prepared to embrace risk and experimentation”, IPTA spokesman Dr Grant Shoebridge points out.

Anathema to the Prime Minister's sentiments is the Report’s statement that “the system should provide incentives for IP to be created at the lowest cost to society”, a statement which underpins the recommendations that weaken existing IP rights for innovators.

The Report adopts a unilateral view without evidence that “*Australia’s intellectual property arrangements fall short in many ways and improvement is needed across the spectrum of IP rights*”. It also appears to agree, in a biased manner, with certain “participants” that the current patent system hinders innovation and creativity, but there is a conspicuous lack of evidence to support this view. In addition, it arbitrarily takes a position that the current patent system results in a multitude of low-value patents without clear and credible guidance on what constitutes a “low-value patent”.

More curious still, the report has a lofty and unrealistic view that the patent system should only contribute to socially-valuable innovation that otherwise would not occur. There is however, no direction on what socially-valuable innovation is and how to determine whether such innovation will only occur as a result of the patent system. It simplistically considers innovation from an academic perspective and fails to understand, or even consider, the necessary financial investment and risk that is required to commercialise innovation for the benefit of the public; the very reasons why the patent system needs to offer both rewards and a degree of certainty to innovators and investors.

“IPTA believes that Australian innovation policy, which encompasses the patent system, should provide a substantial incentive and compensate innovators for the risk and financial investment necessary to bring innovation to the market for the benefit of the general public. Australia’s current innovation policy should not be weakened and made uncertain based on the academic views of economists who have neither proximity to innovation nor expertise in relation to commercialisation of innovation,” Dr Shoebridge added.

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Note to editor

In making the recommendations, the Productivity Commission has largely ignored the vast majority of submissions submitted that raised valid concerns in relation to the draft recommendations. IPTA briefly addresses a number of the patent-related recommendations below.

The innovation patent system

The Report recommends that the Australian Government should abolish the innovation patent system.

Australia is not alone in having a second-tier patent system, and that second tier systems operate in around 60 countries including successful first world countries such as Germany, Japan and Spain. The second-tier patent systems appear to work well in those countries and are considered particularly suited for SMEs that, for example, make amendments to, and adaptations of, existing products. The Report ignores that fact that a second tier patent system can work well. The Report fails to adequately consider other options, such as raising the threshold of innovative step and making examination compulsory. IPTA strongly disagrees with the recommendation regarding abolishing the innovation patent system and firmly believes that it should be retained and reforms considered that may address any deficiencies.

Object clause

The recommendation to introduce an objects clause into the Patents Act would introduce undesirable complexity and uncertainty for innovation decision makers. In particular, it is not clear what factors should be taken into account. For example, it is unclear what sort of evidence may be required, if any, to demonstrate whether an invention enhances the well being of Australians by promoting technological innovation. Moreover, it is not clear how an invention needs to enhance the well being of Australians and how many Australians are required to have their well being enhanced. Would a new type of skateboard provide the requisite enhancement to the well being of Australians under the proposed objects clause to justify patent protection? A drug that cures cancer would almost certainly be considered as encompassing innovation that enhances the well being of Australians but would the well being of Australians be enhanced if such a drug was patented? Thus, it appears that the recommendation to introduce an objects clause into the Patents Act represents a simplistic and idealistic proposal for which neither the practicalities nor implications have been considered for innovation in Australia.

Pharmaceutical extension of term

To compensate patent owners for the time it takes to obtain regulatory and marketing approval for new drugs, the Australian Patents Act provides for patent term extensions of up to five years. The Report recommends a change to the current system so that extensions of patent term are based only on the time taken by the Therapeutic Goods Administration to approve a pharmaceutical for marketing over and above one year. This recommendation, if implemented, would introduce inequity into the patent system because typically, the lengthy developmental and regulatory approval process significantly reduces market exclusivity for pharmaceutical products. These circumstances are unique to the pharmaceutical industry and the very reason that the current extension of term provisions exists, to compensate patent owners.

IPTA is of the view that a patent term extension should depend on whether a pharmaceutical substance, including new formulations, experience delay resulting from the entire regulatory approval process.

Inventive step

The Report recommends that the threshold of inventive step be raised. IPTA believes that it is premature to consider introducing further amendments to raise the bar for patentability, particularly in relation to the test for inventive step which has already undergone several significant changes over the last fifteen years. Specifically, IPTA believes that the 2013 *Raising the Bar* reforms remove any criticism that could be levelled at Australia's test for inventive step, which test now is comparable to the tests imposed under the laws of Australia's major trading partners. The report also disparagingly makes reference to the current principle of a scintilla of invention that is required for patentability. The way in which this principle is discussed in the report is misleading. The principle is to be understood as indicating that an invention either possesses an inventive step or it does not. Once a claimed invention has met the threshold of inventive step there is nothing to be gained by discussing how much the threshold is exceeded. IPTA also believes that any legislative changes to the inventive step threshold will introduce uncertainty into Australian patentability standards until such legislative changes are considered judicially.

Renewal fees

The Report recommends that the Australian Government, with input from IP Australia, should explore the costs and benefits of using higher and more pronounced renewal fees later in the life of a standard patent, and making greater use of claim fees to limit the breadth of patent protection and to reduce strategic use of patents.

IPTA disagrees with the negative premise of this recommendation. Patent system costs have not been shown, by evidence, to be undue either in Australia or any other comparable country. IP Australia already takes care in setting fees such that a higher economic hurdle must be passed later in a patent's life. Most patents expire by about the eleventh year. With the exception of the PCT system, international co-operation on fee setting is highly unlikely to be seen as necessary barring significant anomalies in costs so the latter part of this recommendation is unrealistic.

-ENDS-

About IPTA:

The Institute of Patent and Trade Mark Attorneys of Australia (IPTA) is the peak professional body representing Australian patent and trade mark attorneys.

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