

# Not so productive? Australia's Productivity Commission picks out the flaws in the nation's patent system

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On 29 April 2016, the Australian Productivity Commission published a Draft Report on its enquiry into Australia's *Intellectual Property Arrangements*. Although the Draft Report provides separate analyses on the state of copyright, patents, designs and trade marks, it arrives at a common conclusion: Aussie IP needs work.

## "Not as effective as they could be"

The Commission's view is that Australia's patent system is too much in favour of rights holders and against the interests of the broader community. Low-quality patents are particularly scrutinised as frustrating the efforts of follow-on innovators and researchers. According to the Commission, 40% of patents granted in Australia are of low value to the community. Additionally, only 7% of patents are held by Australian residents.

The Commission gives particular attention to innovation, pharmaceutical, business and software patents. In general however, its recommendations for reform include:

1. **Introduce an objects clause to the Patents Act** - an overarching framework or objective that would guide policy.
2. **Raise the obviousness threshold for inventive step** - currently, a "scintilla of invention" is sufficient to qualify as inventive step. The Commission recommends that the Patents Act should be amended so that an invention involves an inventive step if, having regard to the prior art base (not just common general knowledge or prior art information), it is not obvious to a person skilled in the art.
3. **Improve decision making for granting patents** - essentially by requiring patent applicants to better inform the examiner. The Commission recommends that applicants should be required to set out the current state of the technology relevant to their invention, how their invention improves on this and/or explain why the invention is non-obvious.
4. **Use patent fees to better tailor the strength of patent rights** - by imposing higher claims fees to reduce the incentives for widespread patents, and higher renewal fees later in the term of a patent to reduce incentives for patent holders to "hang on to patents" for longer than necessary.
5. **Abolish innovation patents** - as such patents have a lower inventive step than that of standard patent, already the subject of reproach, and inhibit rather than assist innovation from small business enterprises.
6. **Remove business methods and software patents** - as such patents do not encourage new and valuable innovation. Rather, they create barriers and promote anti-competitive behaviour. The Commission finds that business methods typically lack the large upfront costs associated with other inventions, while the fast-moving nature of software development means that 20 years of patent protection is unrealistic and archaic.

For pharmaceutical patents in particular, the Commission recommends that:

1. **Extensions of term should be redesigned** - as extensions of term have been ineffective in their purpose to encourage R&D, are costly to the Government and the consumer, and promote calculated behaviour that compensates firms for being slow to introduce drugs to the Australian market.
2. **Reduce/revise data protection** - reflecting the general theme of benefiting the wider community, the Commissioner considers that data exclusivity locks up valuable information that could instead be used to provide substantial public health benefits, while avoiding the substantial costs (and ethical concerns) of rehashing pre-existing trials.
3. **Stop ever-greening and pay-for-delay agreements** - by raising the inventive step standard as discussed before, and introducing monitoring arrangements that detect pay-for-delay agreements and stop anti-competitive behaviour.

## Raise the bar - but how far?

Many of the Commission's recommendations cover patent law issues that are prevalent not just in Australia but around the world. Other than putting them back on the political agenda, the practical impact of the Draft Report may be slight. Further, the Commission recognises that Australia's 2013 "Raising the Bar" reforms have gone some way to address the issues, including reducing the scope of innovation patents and providing greater freedoms for research activities on patented invention.

Still, the message that more should be done to stop low-value patents and further raise the standards of patentability is likely to resonate with the public.

At present, numerous interest groups are making submissions to the Commission. The Final Report is expected in August 2016, when these questions will again be scrutinised before the public eye.