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IP rights vs IP wrongs: the Productivity Commission releases its Final Report on IP Arrangements

John Collins, Sumer Dayal, Anais Menounos (Clayton Utz) · Tuesday, February 14th, 2017

Australia ended 2016 flipping through the pages of the Productivity Commission's final [Inquiry Report on Australia's Intellectual Property Arrangements](#).

In general, the Commission considers that IP rights encourage innovation, but are not always necessary for it and can often be used harmfully. The proposed changes are aimed at balancing the interests of rights holders with the wider community for the "*overarching objective of maximising community wellbeing*".

Our review of the Commission's Draft Report can be found [here](#). The Final Report is broadly consistent with the Draft Report and its key proposals can be summarised as follows:

1. **Add an objects clause to the Patents Act** - the Commission reaffirms that adding an objects clause would provide greater guidance to decision makers to "*enhance the wellbeing of Australians by promoting technological innovation, and by promoting the transfer and dissemination of technology*" and to "*balance the interests of producers, owners and users of technology.*" Views may vary on this issue, but Australian lawmakers have traditionally been loathe to include objects clauses in Federal legislation, preferring to allow the words of the statute to speak for themselves.
2. **Reform the inventive step threshold** - the Commission believes that the 'scintilla of invention' as the minimum required advance from the prior art is insufficient to filter out low-value patents. Applying a more rigorous test for obviousness would help reduce disparities with other IP regimes (such as the EU), although the Commission acknowledges that 'raising the bar' even further on inventive step carries risks and is best pursued with like-minded countries.
3. **Improve the evidence base for granting patents** - this is said to be achievable primarily through requiring patent applicants to better inform the examiner of the technical features of the invention so that patent officers can better target genuine advances in technology.
4. **Tactically utilise patent fees** - to promote IP policy objectives rather than simply cost recovery. The Commission recommends increasing renewal fees more steeply with patent age (as in the UK), decreasing initial claim fees and increasing claim fees for applications with a large number of claims (as in Japan, South Korea and

Europe).

Other recommendations include:

1. **Abolish innovation patents** - the Commission adds that community's interests are better served by directly tackling issues of greatest concern to small business enterprises (e.g. patent infringement and enforcement costs). Little analysis of the benefits to the community of innovation patents is given.
2. **"Staying on track" with software patents** - the Draft Report initially recommended removing software patents, however the Commission now favours a 'wait and see' approach. This is due to the High Court's rejection of the special leave application in the *RPL Central* case, which held that computer implemented business methods are not patentable in Australia. The Commission believes that a 'wait and see' approach allows flexibility when considering patent-worthiness and allows for the protection of unanticipated inventions.
3. **Redesign extensions of term for pharmaceutical patents** - the Commission reaffirms that EoTs have done little to encourage R&D, with their benefits being "*largely illusory*". It recommends that EoTs should be limited to situations where regulatory actions cause an unreasonable delay (e.g. 1+ years). Such measures would reduce calculating behaviour and also the financial burden on consumers and taxpayers.
4. **Revise data protection for pharmaceutical patents** - while reaffirming that the data protection period is currently unbalanced and should be limited, the Commission recognises that firms may become protectionist if researchers are allowed access to data unilaterally. Any moves to publish the relevant data would need to be internationally coordinated.
5. **Stop evergreening** - by increasing the inventive step threshold.
6. **Stop pay-for-delay agreements** - through a transparent reporting and monitoring system conducted by the ACCC and using existing competition law to prevent anti-competitive behaviour. The 'credible threat' of a sanction would also act as a deterrent and potentially decrease the occurrence of pay-for-delay arrangements.

It will be interesting to see whether the Federal Government accepts any of these recommendations. If it does, the next stage (i.e. preparing draft legislation) will undoubtedly be long and complicated.

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