The Productivity Commission’s first scalps: Australia’s Government introduces draft legislation to abolish innovation patents and amend pharmaceutical data requirements

Kluwer Patent Blog
November 15, 2017

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Please refer to this post as: John Collins and Sumer Dayal, Francesca Teng, ‘The Productivity Commission’s first scalps: Australia’s Government introduces draft legislation to abolish innovation patents and amend pharmaceutical data requirements’, Kluwer Patent Blog, November 15 2017, http://patentblog.kluweriplaw.com/2017/11/15/productivity-commissions-first-scalps-australias-government-introduces-draft-legislation-abolish-innovation-patents-amend-pharmaceutical-data-requirements/

On 23 October 2017, IP Australia released the draft *Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill 2017* for public comment. The purpose of the Bill is to implement the Government’s response to the Productivity Commission’s recommendations on Australia’s IP Arrangements (our coverage of the Government’s response can be found here).
Taking into account that the Government’s response to the Productivity Commission was given only three months ago, the move to prepare and implement these amendments has been unusually swift.

For patents, the Bill’s most notable amendments include the following:

Abolition of the innovation patent system

The Productivity Commission recommended that Australia abolish the innovation patents regime, the principal reasons being that such patents have a lower inventive step than that of a standard patent and inhibited rather than assisted innovation from small business enterprises. The Government has agreed with this conclusion, noting that neither small business enterprises nor the Australian community at large benefited from it.

Part 4 of the draft Bill contains amendments to commence the abolition of the innovation patent system by preventing the filing of new applications, subject to certain exceptions. For example, existing rights before the commencement of the abolishing Act will remain unaffected, including the right to file divisional applications and convert standard patent applications to innovation patent applications where the patent date and priority date for each claim are before the abolishing Act’s commencement date.

Repeal of certain data requirements relating to pharmaceutical patents that have their term extended

Section 76A of the Patents Act currently requires patent holders that receive an extension of term for a particular patent to provide the Department of Health with specified information about the costs of research and development, including any Commonwealth funding. The objective was to provide the Government with data to determine whether extensions of term for pharmaceutical patents served their purpose in incentivising local R&D in Australia. However, the provision of such data was “inconsistent”, as there were no penalties for failing to do so.

The Government has decided that the provision is no longer required as alternative sources of data are available that provide the same type of information (for example the business register, R&D tax credit, clinical trial data from the Therapeutic Goods Administration and expenditure listed in the Portfolio Budget Statements).

IP Australia has expressed an invitation for written submissions in response to the Exposure Drafts by 4 December 2017. At this rate, the Bill is progressing quickly and could be tabled in Parliament in the next few months. Given their impending demise, it will be interesting to see what spike (if any) is about to be generated for innovation patent applications.

Further amendments will be introduced in due course to deal with other recommendations of the Productivity Commission including (in relation to the *Patents Act 1990)*:

- the introduction of an objects clause;
- varying the compulsory licensing provisions; and
- varying the Crown Use provisions.