

Kluwer Patent Blog

Australia's Federal Government has its say on the Productivity Commission's Report on IP Arrangements

John Collins, Sumer Dayal (Clayton Utz) · Monday, September 4th, 2017

The Productivity Commission released its [final report](#) into Australia's IP arrangements in December 2016 (covered in our post earlier this year, '[IP Rights vs IP Wrongs](#)'). Now, the Australian Government has [weighed in](#) on the Commission's recommendations, supporting some and 'noting' others.

With respect to patent law, the Government supports the following recommendations:

1. **Add an objects clause to the Patents Act** – the Government says that it will seek amendments to the Patents Act to implement the recommendation. The Government will consider the exact wording of the objects clause and highlights that the implementing legislation will be the subject of further public consultation.
2. **Reform the inventive step threshold** – the Government accepts that the threshold should be raised beyond a 'scintilla' of invention or the current obviousness test (i.e. the invention is obvious if the person would be directly led to the proposed invention as a matter of course). Specifically, the Government intends to make amendments that will be consistent with the European Patent Office. The wording of the legislative change and explanatory memorandum will also be the subject of further public consultation.
3. **Improve the evidence base for granting patents** – the Government agrees that IP Australia should require applicants to identify the technical features of an invention in the set of claims.
4. **Abolish innovation patents** – the Government notes that the innovation patent system was established with the objective of stimulating innovation in Australian small-to-medium enterprises (SMEs). However, neither the intended beneficiaries nor the Australian community at large have obtained value from it. The Government considers that more targeted assistance would better achieve the objective of assisting SMEs. It therefore intends to seek legislative amendments to abolish the innovation patent system while maintaining existing rights.
5. **(supports in principle) Addressing pay for delay arrangements** – the Government agrees that pay for delay agreements have the potential to "*seriously harm competition and innovation in relation to pharmaceuticals*". However, it also notes stakeholder concerns that there is presently no evidence suggesting that such activity takes place in Australia. In the Government's view, this might confirm the difficulty in detecting such arrangements. It therefore considers that the introduction of a reporting and monitoring regime for potentially anticompetitive conduct between pharmaceutical patent owners and generic pharmaceutical manufacturers might assist the ACCC's investigations and improve transparency. The Government intends to further consider the options for this recommendation.

The Government notes (rather than supports) the following recommendations:

1. **Tactically utilise patent fees to promote IP policy objectives over costs recovery** – the recommendation was concerned with increasing patent fees later in life, reducing the initial threshold for claim fees and increasing claim fees for applications with a large number of claims. The Government's view is that these changes are unnecessary. IP Australia's fees are set to balance both innovation and cost recovery policy objectives that, in the Government's view, achieve the policy outcomes of the recommendation. However, the Government will keep the recommendation in mind when considering renewal fees and claim fees in the future.
2. **Redesign extensions of term for pharmaceutical patents** – the Government has no plans to proceed with this recommendation. It notes the significant cost and time taken to bring a new pharmaceutical product to market and concludes that any consideration of changes to the extensions of term regime must strike a balance between (a) ensuring that new pharmaceutical products are developed and that they are safe and effective, but (b) they are accessible and affordable. It appears the Commission's recommendation did not strike this balance.

Based on the above, it appears that significant reforms to the Patents Act are forthcoming. However, most of these changes will involve public consultation and extensive delay until implementation. With the 2013 Raising the Bar amendments only just being felt in Australia's patent market, it may some time until the market starts to experience the effect of further reforms.

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