RESPONSE TO IP AUSTRALIA’S CONSULTATION ON DRAFT IP BILL

EXPOSURE DRAFT:
Intellectual Property Laws Amendment
(Productivity Commission Response
Part 2 and Other Measures) Bill 2018
No. , 2018

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When the government emphasises innovation and evidence-based policy, it is a shame that proposals for amending the Patents Act 1990 fail to live up to these standards. The proposed amendments do nothing to support the goal of enhancing innovation among Australian companies. They ignore important evidence about the economic impact of patent systems and the cost to Australian of its abysmally low inventiveness standard.

The Productivity Commission’s proposals for improving the Patents Act in its draft report were watered down by lobbying from vested interests. The rather poor recommendations in the final report are watered down further in the proposed legislative amendments.

The proposed Explanatory Memorandum starts with the unexceptional statement that:
“‘The objective of the intellectual property (IP) rights system is to support innovation by encouraging investment in research and technology in Australia, and by helping Australian businesses benefit from their good ideas. The Australian Government proposes improvements to Australia’s IP rights legislation to better meet these objectives.”

But it fails to go on and note that 90% of Australian patents are granted to foreigners. Because Australia’s patent system is so dominated by foreign use, great care needs to be taken in setting standards that achieve the desired objectives for Australian businesses and inventors.

Australian companies produce world-class inventions. They do not need a very low standard of inventiveness for patents. Indeed it does companies a dis-service if they are granted a patent for something that no-one but a Patent Office would recognise as an invention. And, of course, if the product reaches the market, then Australian consumers pay unnecessarily higher prices.

So having sub-optimal goals/objectives for the patent system and an appalling low standard for inventiveness mainly acts to increase the number of patents granted to non-resident entities. The only consequence of this is higher costs for Australian consumers and taxpayers. There are no innovation benefits to Australian society or the Australian economy.

The patent privilege as defined in the Trade Related Intellectual Property Rights (TRIPS) Agreement is very strong – far stronger than needed and far stronger than any other monopoly in any other area of economic life. Because of this, and the difficulty of getting the TRIPS Agreement amended, great care needs to be taken in handing out such monopolies. For example, the TRIPS privilege, reflected in Australian patent law:

• prevents generic companies gearing up to enter the market the day after a patent on a medicine expires; and
• prevents companies manufacturing for export to countries where there is no patent, if there is a patent in Australia.

It is hard therefore to understand why Australia seems so wedded to retaining an almost non-existent inventiveness criterion for grant of a patent. Unless, that is, our public patent policy is entirely driven by vested interests – those making a living off the patent system and foreign companies who are able to extract considerable undeserved revenue from Australia because of very low quality patents.1

1 See, for example, my article in the December 2016 issue of the Australian Economic Review where I trace the costs of granting very low quality patents for pharmaceuticals – in the case of the two uninventive patents related to the medicine LOSEC, the cost to Australia was some $A2.9 million over 12 years (Moir, 2016: 425-6).
Raising the inventiveness standard:

In its final report the Productivity Commission argued that *at a minimum* the standard of the inventive step should be raised to “the highest threshold set by any country with which Australia conducts substantial technology trade” (Productivity Commission, 2016: 225-6). The government supported the Commission’s recommendations to raise the height of the inventive step.

**The proposed amendments do not do this.**

Australia has very detailed specifications in its patent statute narrowing the extent to which existing knowledge can be used as the base against which inventiveness is tested. The Productivity Commission noted that Australia was unique in this regard.

The proposed amendments simply move the detailed provisions narrowing the existing knowledge (“art”) which is used as the base for inventiveness from Section 7 of the Act to a Schedule. They do nothing to attain the simple standard used by the European Patent Office: “the state of the art comprises everything made available to the public by means of a written or oral description, by use, or in any other way before the date of filing of the European patent application.” (draft Explanatory Memorandum: 12)

As Summerfield (2017) points out:

“Every single step and hurdle of the current provisions is still present in this proposal. ... Essentially, every significant word that has caused problems in the existing legislation is still present, but in a different order. The phrase ‘rearranging the deck chairs’ comes to mind! One might almost think that the purpose of the proposed legislation is to give the appearance of change, without actually changing anything very much.”

The Australian national innovation system will be the looser from this complete unwillingness to implement the higher standards proposed by the Productivity Commission and endorsed by the government. It is not often that one sees so blatant an undermining of a government decision. These amendments as proposed should not go forward, and if they do, they should be strongly resisted by parliament.

**Objects clause:**

The proposed objects clause in the Productivity Commission’s draft report lived up to the Commission’s reputation of defending Australia’s overall economic wellbeing. It stated:

“The objects clause should describe the purposes of the legislation as being to enhance the wellbeing of Australians by providing patent protection to socially valuable innovations that would not have otherwise occurred and by promoting the dissemination of technology. In doing so, the patent system should balance the interests of patent applicants and patent owners, the users of technology — including follow–on innovators and researchers — and Australian society as a whole.” (Productivity Commission, 2015: 32)

The most important phrase in this objects clause is that patents should only be provided for “socially valuable innovations that would not have otherwise occurred”. Any patent system which dis-regards this important qualifier will be far less likely to return positive benefits to a nation. Strong monopolies should not be granted unless there is at least some chance they will return a social benefit. If the innovation is not socially valuable and/or would have occurred anyway, then granting a patent creates only a negative outcome.
Unfortunately the Commission was persuaded – presumably by the beneficiaries of the current low quality system – to remove this essential proviso. So the objects clause proposed in the final report was a very watered down version. Summerfield notes that the objects clause proposed in the draft legislation is further watered down, not only from the Commission’s final report, but also from IPAustralia’s initial consultation on the objects clause.

Without a clear statement of how to run a patent system that is both efficient and effective, there is no point in having an objects clause. The essence of an effective objects statement is that patents should be provided only for socially valuable innovations that would not have otherwise occurred.

The current objects clause should not be implemented – it is too far from providing correct guidance to ensure Australia’s patent system encourages investment in research and technology in Australia, and by helps Australian businesses benefit from their good ideas.

References

