Introducing Balance into Australia’s 
*Patents Act 1990*

Response to IP Australia's August 2017 consultation papers on an objects clause and on amending the inventive step

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Introducing Balance into Australia’s Patents Act 1990

The patent privilege is a powerful exclusive right. It provides the patent owner with the right:

“to prevent third parties not having the owner’s consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product” ¹ (TRIPS Article 28).

These rights are so strong that they prevent commercial use of any closely similar but independently invented (i.e. not copied) inventions. They also prevent competitors gearing up to enter the market on day one after the patent expires thus extending the patent privilege period beyond the already lengthy 20 years. They prevent Australian companies for producing goods for export to countries where the relevant patent is not in force.

Last time the government undertook a major consultation on raising patentability standards, it implemented these in the 2012 Raising the Bar Act. In the Explanatory Memorandum to the Raising the Bar Bill (2011) the then Minister told Parliament:

"A key principle of the patent system is that protection is only given for things that are a significant advance over what was known and what was available to the public at the priority date of the patent. A granted patent can be a powerful exclusive right: as such, it is appropriate that the inventive step requirement be sufficiently stringent.²"

If the government actually implemented this principle the patent system would operate in the interests of Australia. The benefit provided to the Australian (and indeed global) public in exchange for the powerful 20-year monopoly would be useful new knowledge.

But the current patent system falls far short of this standard. In proposing improvements to the patenting standard, both the Productivity Commission and IP Australia have lost sight of this simple and important principle. This principle would, if implemented, achieve a balance in the patent system between the interests of the creators of new technology and the users of this new technology.

This principle should be the core of an objects clause in the Patents Act.

It should also be central to raising the height of the inventive step from its current abysmally low level.

The Objects Clause

In its draft report the Productivity Commission recommended an objects clause stating that the purpose of patent legislation is “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.”³

From the perspectives of the national interest, consumers, follow-on inventors and taxpayers funding the Pharmaceutical Benefits Scheme, this was an excellent proposal. It focused attention on the two key features necessary for a balanced patents system – that is, a patent system that balances the interests of the producers and users of technology. These two elements are that patents should be granted only for:

¹ And parallel rights in respect of patented processes.
² Explanatory Memorandum, Raising the Bar Bill 2011, p. 42, emphasis added.
³ Productivity Commission, Draft IP Arrangements Report, p. 32.
socially valuable innovations; and
innovations that would not otherwise have occurred

Such a standard would provide patents for genuine inventions such as new medicines and the range of inventions from Australia’s leading innovating companies (e.g. Aristocrat, Cochlear, CSL, ResMed).

Following extensive lobbying by parties with a vested interest in a patents system that allows broader, stronger and longer monopoly privileges, the Productivity Commission proposed a far less rigorous statement for the proposed objects clause:

“The purpose of the legislation is to enhance the wellbeing of Australians by promoting technological innovation and the transfer and dissemination of technology.”

(Objects clause discussion paper, option A)

Both objects clauses proposed in the IP Australia consultation paper also include wording about balance between competing interests. Such wording does no harm provided the central objective of the patent system is clearly stated.

No country is better off for granting powerful exclusive privileges for innovations which would have occurred absent patents.

Such innovations will occur without the need for a patent.

A patentable innovation must also be socially valuable – its benefit to society must exceed the costs imposed on society by the monopoly grant. If there is an important new medical discovery in the form of a genuinely new chemically active substance, then it is likely that the costs associated by the grant of a 20-25 year patent will be at least partially offset by better health outcomes. But if a 20 year patent is granted for a formulation of the already invented medicine that is simply designed to delay generic entry to the market, then there will be a high cost to society, and no benefits in terms of either health outcomes or new knowledge.

If patents are granted for “inventions” embodying no new knowledge, there will be no spillover benefits to recompense Australians for the cost of the granted monopolies. Each such patent grant is a loss to Australia.

By backing off from the proposed wording that emphasised the two essential features of a balanced patent system, the Productivity Commission has not lived up to its reputation of providing sound advice to maximise the wellbeing of Australia. It has let the Australian public and Australian inventors down.

IPAustralia has fiddled with the proposed Productivity Commission wording, offering an alternative option:

“The purpose of this Act is to provide a patent system in Australia that enhances the wellbeing of society by promoting technological innovation and the transfer and dissemination of technology.”

(Objects clause discussion paper, option B)

4 For example a patent for a particular coating for LOSEC – deemed obvious in the UK was upheld in Australia at a cost to taxpayers of $A1.1 billion over the eight years that generic market entry was delayed. The grant of a patent for the known isomer of LOSEC – marketed as NEXIUM has cost the Australian taxpayer $A1.8 billion over a 12 year period. See Moir (2016: 426).
As neither of these wordings goes to the heart of the matter – that innovations merit patent privileges only if they are induced by the patent system and offer a net benefit to society, I can support neither of them.

Patent legislation rarely touches on issues of technology dissemination. Yet it is the dissemination of new knowledge which leads to society-wide improvements in technology and therefore productivity. This is why societies grant patents.

Because those who use the Patents Act are so divorced from the issue of technology dissemination the suggested wording will do nothing to offset the current judicial approach of granting powerful monopolies for every trifling innovation, rather than focusing on the need for patented inventions to contain new knowledge which will be disseminated to the benefit of Australia.

Australia would be better off with no objects clause rather than either of the proposed versions.

My 2013 submission on the ACIP proposal on an objects clause goes into these matters in more detail and is reproduced at Attachment 2.

The inventive step

The Productivity Commission’s consideration of issues relating to the inventive step totally ignores the most important issue – just how inventive something should be before a patent is granted.

Inventiveness is a quality that ranges along a continuum from highly inventive – think Velcro, jet engines, the keel that won Australia the America’s Cup – to simply not inventive at all – putting the same medicine in a tablet rather than a capsule; changing the proportion of water in the compound, inventing the 60th low-dose oral contraceptive.

But as the decision in the patent system is binary – grant or refuse – the discussion on just how much inventiveness is required is too often ignored.

The principle enunciated in 2011 remains sound.

"A key principle of the patent system is that protection is only given for things that are a significant advance over what was known and what was available to the public at the priority date of the patent."

Yet the discussion in the Productivity Report and the IP Australia response focuses on “technical features”. All the technical features in the world do not make up for a lack of new knowledge. If there is no new knowledge embodied in the invention for which a patent is being sought, then there can be no benefit to society from the grant of a patent. This is worth repeating as it is so often ignored.

All the options proposed for amending the inventive step ignore this fundamental requirement.

They all retain what can only be described as the “uninventiveness test.” They fail to ask “is there useful new knowledge in the innovation?” Instead they twist the test around and ask whether it is “not obvious”. There are a vast number of patented innovation that are not obvious (not obvious in patent law is a very narrowly
circumscribed condition), yet no ordinary person working in the field would consider them inventive, in the ordinary meaning of the word.

The “not obvious” test in all the proposed permutations is like short-listing for a beauty contest by identifying and removing only the ugly people.

It totally fails in excluding from patent grant a vast quantity of very trivial “inventions”.

The figure in Attachment 1 demonstrates the gulf between the proportion of applications that would be granted patent monopolies if the question asked was – is there sufficient new knowledge (inventiveness) in this innovation to merit the grant of a patent monopoly?

Applicants for patents should be required to specify clearly the new knowledge in their innovation. Such a requirement would go a long way to achieve the goals sought by the Productivity Commission in suggesting that applicants should identify the “technical features”. And such a requirement would go closer to the important key principle underlying a balanced patent act.

Section 7 of the Patents Act should be re-drafted to place the onus of demonstrating novelty and inventiveness on the applicant. This would make this part of the Act compliant with Article 5.1 of the Competition Principles Agreement. The whole thrust of the Competition Principles Agreement is that it is the proponent of an intervention in the market who must clearly and unequivocally demonstrate the need for such an intervention. And given the powerful privileges granted by a patent it is vital that this principle be embodied in the way in which the patent system is administered.

Section 7(2) should read:

An invention meets the inventive step requirement if it contains knowledge which is a significant advance over what was known and what was available to the public at the priority date.

This would allow the current complex definition of existing knowledge (prior art) to be abandoned. The way in which “prior art” is defined in patent legislation eliminates much of current knowledge before testing for novelty or inventiveness.

Australia – like most of its trading partners – has a very low standard for granting a patent, and the US Trade Representative has been negotiating – for example in the Trans Pacific Partnership – to drive this standard even lower. The “inventors” who benefit from this low standard – acquiring powerful monopolies for “inventions” containing no new knowledge – are mostly overseas entities. The price is paid by consumers and taxpayers and this price can be very high. Two very low quality patents that followed from the original patent for the new medicine marketed as LOSEC (omeprazole) have cost the Australian taxpayer an estimated $A2.9 billion over a 12-year period (Moir, 2016: 426).

Moving towards the complexities of the European Patent Office’s rather convoluted definition of “technical” will do little to raise the inventiveness standard in Australia.

What is needed is to:

- abandon artificial constraints on relevant existing knowledge (i.e. throw out the whole antiquated concept of “prior art” and the body of law that radically constrains the existing knowledge that is considered when deciding whether to grant a patent); and
• base the inventiveness test on the quantum of new knowledge embodied in the innovation, with the onus being on the applicant to identify this new knowledge in plain English – which could be technical but should not be legalese.

Attachment 1: Comparing a test for new knowledge and the current “not obvious test”

The figure below shows a likely distribution of patent applications by inventiveness, where very many inventions have only a small degree of inventiveness, and only a small number are radically inventive. This allows a focus on the different outcomes achieved by asking ‘Is it obvious?’ compared to ‘Is it sufficiently inventive?’ Given the narrow and constrained approach to the patent test for obvious, many applications which pass this test will not be reach the ‘significant advance’ standard advised to Parliament in 2011.

The “is it sufficiently inventive?” test is most easily operationalised by asking two questions:
- what is the new knowledge embodied in the invention? and
- is this a sufficient quantum of new knowledge to merit a powerful monopoly?

The proposed quantum of new knowledge is that in the 2011 Ministerial statement to the Australian Parliament – “a significant advance over what was known and what was available to the public at the priority date of the patent”.

Figure: Hypothetical inventiveness continuum and determining patentability

PATENTABLE SUBJECT MATTER

Response to IP Australia's
"Consultation on an objects clause and an exclusion from patentability", July 2013

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PATENTABLE SUBJECT MATTER

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In yet another non-transparent "consultation" exercise – largely involving only those benefiting from the patent system – IP Australia has issued a consultation paper on patentable subject matter. This derives from the appallingly self-serving report by the Advisory Council on Intellectual Property (ACIP 2010). At the time that report was released, the membership of ACIP included no-one who was not a direct beneficiary of the restraints on competition that IP Australia hands out.5

The current paper raises two issues: an objectives clause for the Patents Act and a clause to specify how the _ordre public_ exception to patentability should be interpreted.

A patent objectives clause: why is it needed

The importance of inserting a clear objective into the _Patents Act 1990_ now seems to be generally recognised. The evidence from legal decisions shows that without this Australian courts regularly make decisions that reduce Australia's economic wellbeing. These include:

- **Minnesota Mining and Manufacturing v Beiersdorf** (1980) 144 CLR 253
  : overturning the synergy doctrine and effectively required written evidence of obviousness to reject an application for a new combination of known elements or processes that produced no unexpected result or result that was greater than the sum of the parts.

  : allowing a patent for software, despite bi-partisan agreement with the IPAC report that patents were not to be extended to software.

- **Ccom Pty Ltd v Jiejing Pty Ltd** [1994] FCA 1168 (22 June 1994)
  : an extraordinarily low inventive step requirement - upheld a patent for the mere computerisation of a known process (translating Chinese to English).

- **Anaesthetic Supplies Pty Ltd v Rescare Ltd** (1994) 50 FCR 1
  : determining that Senate negotiations with minor parties holding the balance of power which included passage of the Patents Bill 19906 meant that parliament had intended that all traditional exclusions from the patent system be abandoned. There is no evidence of any such intent – indeed there was bi-partisan support for the Patents Bill 1990.

5 IP Australia does not provide back records of ACIP membership on its website, so this is from memory. But at around this time advertisements for new members indicated clearly that benefitting from the privileges handed out by ACIP was an essential qualification (see Attachment). IP academics may not consider themselves as beneficiaries of the system – yet the broader the reach of the system, the larger the number of potential students.

6 Leading to the "Harradine amendment" (Sections 18 (2) and (3)).
: Granting a patent because consumer loyalty specialists were ignorant of well-known
dynamic storage technology; extending patents to business methods without any
discussion of the costs and benefits simply because a court in another country had
done this.

: emphasising the scintilla standard for inventiveness – "led directly as a matter of
course"

Obiter in Full Federal Court Grant v Commissioner of Patents [2006] FCAFC 120,
particularly 44-45
: Stating that it was not up to the court to determine balance in the patent system
(between social cost and public benefit) on the peculiar logic that the systems level
parliamentary decision to have a patent system absolved the courts from any such
scrutiny of individual patents. If each of the parts fails the test, how can the sum of
them pass?

: Ignoring the context of applying for a patent in determining that patent knowledge
was not allowable existing knowledge ("prior art").

Lockwood Security Products Pty Ltd v Doric Products Pty Ltd (No 2) [2007] HCA 21
: "led directly as a matter of course" inventiveness standard; disallowing knowledge of
one type of lock to be deemed relevant to solving problems with another type of lock.

: granting an injunction for a patent considered to be prima facie invalid without any consideration of the
cost to Australian taxpayers of preventing generic entry for this expensive drug. The estimated cost of
this decision to the Australian taxpayer is $209 million.7

Bayer Pharma Aktiengesellschaft v Generic Health Pty Ltd (No 2) [2013]FCA 279
: although alternative drug delivery forms had been well-known for many decades, this
decision upheld the combination of a specific drug and a specific delivery mechanism
as inventive (re-emphasised the "led directly as a matter of course in the expectation
of success" doctrine).

The reason why an objectives clause is needed in the Patents Act is that judges clearly need
better parliamentary direction as to the reasons behind patent policy and the limits (balance)
that needs to be achieved. This will assist in ending such economically dysfunctional
decisions.

Patent objectives clause: the proposals

The proposed objectives clauses each contain two elements: a statement of objectives and a
balancing statement.

The objective statement

It is widely understood throughout the Australian community that patents are only for
technological inventions. Even parliamentarians would probably be surprised to see how far
beyond technology judges have extended the reach (subject matter) of the patent system. No
evidence has been required to support these major policy changes.

The technology focus of patents is also clear from the TRIPS Treaty, to which Australia is a signatory. Article 7 sets out the objectives of TRIPS in wording that clearly applies directly to the patent system:

"The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." (emphasis added)

ACIP rejected the TRIPS objective as unsuitable for Australia, without providing any empirical or logical reasons to support its position. This was despite the Department of Innovation, Industry, Science and Research favouring an objectives clause based on Article 7. ACIP instead proposed a much vaguer objective – promoting Australia’s national interest and enhancing the well-being of Australians. This objective statement could be seen as applying to any social, economic or cultural policy or program. It is so motherhood that it is useless in providing guidance to the Federal and High courts about patent policy in particular.

The patent system has a direct and specific objective – to induce inventions that would not otherwise occur.

IP Australia comes closer to this in its alternative objectives clause which states that the purpose of the patent system is:

"to provide an environment that enhances the well-being of Australians by promoting innovation and the dissemination of technology."

This is still fuzzy round the edges. It avoids stating that the innovation which should be promoted is technological innovation. This is what parliament was advised in 2011. It is also important to note that a "granted patent can be a powerful exclusive right." If patents work at all to induce invention or innovation they do so through this powerful exclusive right. It operates as a direct incentive not as a factor that simply changes the environment.

The following wording is proposed for the direct objective of the patent system:

"… to encourage technology-based inventions which would not otherwise occur"

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8 Parliamentary intent in regard to patent objectives is clear from the wording of the Explanatory Memorandum to the 2011 "raising the bar" amendment bill. This stated: "[t]he 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." (p.8, emphasis added).

9 Explanatory memorandum p. 42.
**The balancing statement**

It is clearly not the objective of the Australian (or any other) government to promote invention at any cost, especially not with an incentive such as a patent – a legal right to restrict others from developing technology in the patented space. Because of this inherent contradiction – that invention and innovation can as easily be suppressed as encouraged – the issue of balance has always been central to patent policy.

But it is entirely inappropriate to specify this as:

"balancing the competing interests of patent rights holders, the users of technological knowledge, and Australian society as a whole" (Option 1).

Or

"balancing the competing interests of patent applicants and patent owners, the users of technology, and Australian society as a whole (Option 2).

The balancing of competing interests is an activity undertaken by executive governments and parliaments against the backdrop (at least in democracies) of putting the public good before any sectional interest. Where governments preference the interests of particular groups ahead of the public interest, trust in government drops sharply.

It is entirely inappropriate to put such a political statement into an act of parliament. This would be to bring our courts into the parliamentary process. Separation of powers is too important to be threatened in this way.

Further, either version of this balancing statement does little to help courts to interpret this important economic policy in a sound economic manner. Courts need to be instructed as to what issues need to be considered in ensuring balance between the goals of inducing invention and maximising competition.

Recalling that important initiative of the Howard Government, the Competition Principles Agreement, the underlying principle for legislative or regulatory intervention in markets is set out clearly. Article 5(1) states (emphasis added) that:

"The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

(a) the benefits of the restriction to the community as a whole outweigh the costs; and

(b) the objectives of the legislation can only be achieved by restricting competition."\(^{10}\)

What are the relevant benefits and costs when it comes to the patent system?

The most significant social cost of patent systems is "the restrictions they put on the right to imitate new ideas" (Penrose 1951: 99). Not only can negative impacts on subsequent innovation create direct losses, but also – because innovation is cumulative, evolutionary and path-dependent – it can change the direction of future technological development.\(^{11}\) Such negative impacts on subsequent innovation is a concern that has been raised by many (for example, David 1993; Macdonald 2004). A particular concern is the exclusion of new market

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\(^{11}\) Because of the general lack of variability between national patent systems, real world experiments and counter-factuals are rarely available to test the actual impact of patent systems. In one of the very small number of studies of differences in innovation behaviour between those resident in countries with patent systems and those resident in countries without them, Moser looked used a new dataset of close to fifteen thousand innovations at the Crystal Palace World Fair (1851) and at the Centennial Exhibition (1876) to examine the effects of patent laws on innovation. She found that the existence of patent laws changed the fields in which innovative activity occurred, but did not raise the overall level of innovation (Moser 2005).
entrants. Another is the acquisition and suppression by industry incumbents of patents for improved technologies which would disrupt existing markets. There are numerous examples of patents causing technological hold-up. Watt's steam engine patents delayed the progress of the industrial revolution by decades (Sell and May 2001). Patents impeded developments of radio and airplane stabilisation and steering in the USA (Merges and Nelson 1990). Cohen (2005) concludes that although the probability of such hold-ups might be small, the social cost if they occur can be very substantial. Policy therefore needs to be designed to avoid this risk.

When it comes to benefits the critical issue is spillovers. If new technology did not provide spillover benefits – benefits arising from the new knowledge embodied in the invention that become available to the community, including other innovative firms – there would be no economic rationale for the patent intervention. It would not matter that some invention did not take place if there were no spillover benefits. It is the spillover benefits from new knowledge that turns technological invention into an important driver of enhanced productivity and economic growth.

Thus it is these spillovers from new knowledge which provide the key to the critical balancing item in patent policy: patents should only be granted where the probable spillover benefits are likely to exceed the social cost of the grant (the restraint on competition).

Within patent policy as it currently stands, the best proxy for spillover benefits is the inventive step. While the correlation between spillover benefits and inventiveness is far from perfect, no other administrative variable in the patent system comes closer to proxying the desired benefit from the patent system.

Publication of patent specifications may possibly provide a conduit for the dissemination of the new knowledge. But if the granted patent contains no, or very little, new knowledge there will be no spillovers. No amount of publication of trivial patents will create the new knowledge that is missing from them.

The courts need to be aware that the point at which a patent system becomes dysfunctional – operates to reduce national economic wellbeing – is that where spillovers from new knowledge cease to offset the losses from the restraints on competition. Setting the fulcrum close to this level will balance the competing interests of users of technology with those of producers of technology. Users receive no quid pro quo if there is no new knowledge.

This balancing criterion can be clearly specified for an objectives clause in the Patents Act. The objective of patent policy is to encourage technology-based inventions which would not otherwise occur:

"and which provide a significant advance over what is known or used in Australia."

This choice of wording comes directly from the Explanatory Memorandum to the Intellectual Property Laws Amendment (Raising the Bar) Bill 2011. In this the then the government clearly advised parliament that:

"A key principle of the patent system is that protection is only given for things that are a significant advance over what was known and what was available to the public at the priority date of the patent. A granted patent can be a powerful exclusive right: as such, it is appropriate that the inventive step requirement be sufficiently stringent." (p. 42, emphasis added).
Patent objectives clause: conclusion:

Both option 1 and option 2 fail to achieve the desired purpose of introducing an objectives clause into the Patents Act. In both cases the goal specified is set out in such generic language that it effectively provides no guidance to courts. Further the balancing item is entirely inappropriate in an act of parliament and provides no useful guidance to judges.

A more appropriate objectives clause would be:

"the objective of the patent system is to encourage technology-based inventions which would not otherwise occur and which provide a significant advance over what is known or used in Australia."

An ordre public clause

Australian courts have been reluctant to invalidate patents on any of the grounds that attach to the definition of a patentable invention in the Patents Act.12 Yet the current statutory definition of a patentable invention was included in the major 1990 re-draft of the Patents Act and thus indicates parliamentary intent that this definition over-ride any subsequent case-based doctrine. Spelling out the kinds of things that should not be patentable on these grounds is therefore a sensible proposal.

The proposal is put forward as general rather than specific guidance as:

"an invention the commercial exploitation which would be wholly offensive to the ordinary reasonable and fully informed member of the Australian public."

It is interesting to consider how this wording would work when considering two types of inventions that would be generally offensive to ordinary Australians:

- methods of killing people, especially untargeted methods such as cluster bombs, or distance methods, such as drones; and
- methods of undermining the law, such as avoiding tax or avoiding legitimate debts.

In neither of these cases would the ordinary reasonable Australian be likely to be "fully informed", particularly if the courts interpreted "fully informed" as meaning informed about the technology. But one does not need to be fully informed about the technology to object to our government encouraging invention of either type. Both are generally antithetical to the running of a civilised and civil society.

Given the substantial experience we have had of lawyers turning patent law into a goldfield for semantics, just why is the phrase "fully informed" included as a qualifier? Does this mean that the opinions of Australians who are not "fully informed" don't count? We are not disbarred from voting if we do not know all the policies of all the candidates. We can take

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12 Section 18(1)(a) of the act defines a patentable invention as a manner of manufacture within the meaning of section 6 of the Statute of Monopolies. The Statute of Monopolies defines a patentable invention as "the sole working or making of any manner of new manufactures within this Realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grants shall not use, so as also they be not contrary to the law or mischievous to the State, by raising prices of commodities at home or hurt of trade, or generally inconvenient" (emphasis added). Despite the fact that the Patents Act was totally redrafted in 1990, courts continue to preference the 1959 High Court NRDC decision (National Research Development Corp. v. Commissioner of Patents (1959) 102 CLR. 252) over the statutory definition. Effectively the NRDC decision has been interpreted by both Federal and High Courts as: a patentable invention is anything from which you can make a dollar.
moral positions on the basis of fundamental principles, such as obey the laws of the land, including do not kill.

The "fully informed" phrase will also mean a great deal of resources will be wasted on legal argument.

Similarly the phrase "commercial exploitation" is not needed. The phrase is entirely redundant as the patent system is only about commercial exploitation. Patentees are not given any rights with respect to non-commercial exploitation. The issue is whether we agree our government should grant privileges for inventions of which we do not approve. Again this unnecessary phrase simply tips the playing field towards lawyers.

Further the phrase "wholly offensive" instead of "generally offensive" provides yet another example of the balance in patent policy being tipped towards commercial interests and away from the public interest. Either adjective will lead to substantial legal wrangling. While "generally offensive" would be an improvement on "wholly offensive" simple "offensive" would be an improvement.

I support the inclusion of greater assistance to courts to properly interpret the patent act definition of a patentable invention but it be rephrased as:

"an invention which would be offensive to the ordinary reasonable member of the Australian public."

The provisos in the definition of a patentable invention could also bear repeating in plain English and included in the list of inventions which are not patentable. These important provisos cover such things as:

- contrary to the law – which should be expanded to "could undermine the law …"
- mischievous to the State – which could include whether patenting an invention will impose substantial additional costs on taxpayers (why would we want such a policy?)
- hurt trade – which could be interpreted as having negative impacts on innovating businesses; and
- inconvenient – which does not need to be further defined – courts simply need to be encouraged to recognise that this is part of current patent law and that they should not ignore this proviso.
References


Attachment: 2009 advertisement for ACIP members

Qualifications are stated in paragraph 3 and emphasise being a beneficiary of IP systems.