



Intellectual Property Laws Amendment (Productivity Commission Response Part 2 and Other Measures) Bill 2019

Senate Standing Committees on Economics, August 15,
2019

Key Recommendations

- That Schedule 1 of the Bill does not proceed at this stage.
- That the Government maintain and amend the innovation patent through the addition of mandatory examination and increasing the inventive step threshold, but to a lower level than the current inventive step threshold of the standard patent system.
- The Government should consider implementing concurrent measures to pursue the primary objectives of the innovation patent system, in particular the objective aimed to encourage and support SMEs to innovate and commercialise novel ideas.
- Abolishing the innovation patent system without first implementing necessary improvements to it, risks sending the wrong market signal and will further risk the commercial value of existing innovation patents.
- The addition of the term 'technological innovation' in the object clause should be abandoned as it will add confusion, costs and may act to exclude certain types of inventions. Contestation of patents is best left to the judicial system rather than through an object clause that may limit the number and quality of inventions.
- The patent system should not be made harder to apply for, maintain and defend a patent.

Introduction

The Australian Chamber welcomes the opportunity to make a submission to the Senate Standing Committee on Economics regarding the Intellectual Property Laws Amendment Bill 2019.

Intellectual property laws play a fundamental role in our ability to translate novel ideas into commercialised products, services, methods and processes. Intellectual property laws have a fundamental role to play in creating a more competitive economy that can benefit both businesses and consumers by promoting innovation, productivity and access to new markets. Finding the right balance between strong and mild protection is important. Business must be kept in a position to innovate and prevent others from free-riding without contributing costs, and without stifling innovation and preventing valuable ideas from being fully exploited.

A key objective of the innovation patent system is to stimulate innovation in Australian small and medium enterprises (SMEs). While evidence from the Productivity Commission suggests the innovation patent system has failed to meet this objective, it remains important to continue to pursue

this objective by amending the existing innovation patent or some alternate pathway such as providing greater assistance in application, enforcement and defence of property rights for SMEs.

SMEs make up 98 per cent of all businesses in Australia, yet their innovation and patent activity significantly lags comparator economies. This is creating a problem for productivity growth and our ability to translate novel ideas to commercial success. SMEs require greater support and encouragement through greater support services, less burdensome and complex application and wait times, reduced fees and better guidance and education.

The 'objective' of the innovation patent remains important

The innovation patent is predominantly used by Australian SMEs. However, it is also used by larger organisations with the appetite and resources to commercialise inventions. The innovation patent is able to provide affordable and rapid protection of commercially significant incremental innovations. Evidence provided by the Productivity Commission that the innovation patent system has been underutilised and is not meeting its objects may be addressed through two primary amendments including mandatory examination and increasing the inventive step threshold, but to a lower level than the current inventive step threshold of the standard patent system.

Application for a standard patent takes significantly more time, effort, and expense than what is currently required under the patent system and often requires the assistance of third parties including IP legal professionals. Without a second-tier system, applicants will need to exhaust significantly more resources in applying for, maintaining and defending their intellectual property rights. As an example, if a business owner makes a commercially significant improvement to an existing product, in the absence of a second-tier innovation patent system this invention will likely not be commercialised. For small business owners and individuals, the innovation patent provides an important first step to protecting novel ideas and innovations. For larger organisations, it means they are able to move much more rapidly in commercialising their inventions.

While we respect the findings of the Productivity Commission's review, we are concerned that with the abolition of the innovation patent, its objectives will go unaddressed at a time when innovation and competitive markets play an increasingly important role to Australia's success in an international market place. Securing patent rights through a national patent system allows businesses to commercialise their ideas in Australia, rather than taking those ideas elsewhere. For larger businesses this means offshoring R&D activity in the event that it becomes too burdensome to apply for and maintain a patent. This is a problematic scenario as business investment in R&D has declined significantly over the past two decades. The abolition of the innovation patent may further exacerbate this issue.

Over 50 countries possess a second-tier patent system and Australia has had such a system since the late 1970s. While there have been obvious issues with the Innovation Patent system, it has not been given a chance to succeed as there have not been any constructive changes since its introduction in 2001. Recommendations made by IPTA and the Productivity Commission to include mandatory examination and the inventive step may address this issue. Government should not rush to abandon the innovation patent and its objectives without greater consideration of alternatives, particularly where other countries such as Germany appear to have a well-functioning second tier system.

In the absence of appetite for alternative second-tier patent systems, the abolition of the innovation patent should only proceed if it is complemented with measures to assist small and medium enterprises (SMEs) in particular, with their pursuit of applying for, enforcing and defending their intellectual property rights.

Australia typically lags international counterparts in its ability to translate quality research and novelty into commercial success. This is a very real issue affecting productivity and competitiveness. The objectives of the innovation patent should remain the focus for government and greater consideration should be given on 'how' the Government can improve the appetite of SMEs for innovation through better education tools and support services following patent application. IP Australia has a fundamental role to play in assisting SMEs through the journey of successful patent application and support mechanisms for defence of intellectual property rights. For example, applications for standard patents can take between 6 months to several years – this is far too long for small businesses to create and capitalise on innovation products, methods and services that could be typically be commercialised in a matter of months under the innovation patent system.

Unnecessary addition to object clause will add to confusion

In relation to the objects clause, the amendment proposes the addition of the following to the Patents Act,

“The object of this Act is to provide a patent system in Australia that promotes economic wellbeing through technological innovation and the transfer and dissemination of technology. In doing so, the patent system balances over time the interests of producers, owners and users of technology and the public”.

The addition of this object clause is unnecessary and has the potential to cause significant confusion. The lack of preciseness regarding the term 'technological innovation' has the potential to impose greater costs for all parties during litigation hearings and has potential to restrict patent eligible subject matter in Australia.

The potential for certain 'types' of innovations and subject matter to remain excluded from patent protection, such as isolated products of nature that can be used in pharmaceutical compositions, methods of medical treatment including diagnostics, therapeutics and surgical methods of treatment and inventions where R&D cost are low requires further investigation. This is particularly problematic because a large percentage of total patents that are innovation patents are in the areas of IT methods for management¹ and they may be at risk of becoming excluded from the patent system moving forward. Patent applications should not be limited to impact judicial decisions in relation to patentable subject matter and inventive step and/or significantly disadvantage the patentee where a problem arises.

Summary

The Australian Chamber respects the Productivity Commission's finding but expresses caution on the abolition of the innovation patent system without exploring amendments to the innovation patent system as recommended by the Productivity Commission and Advisory Council on Intellectual property, in particular introducing mandatory examination and increasing the inventive step threshold.

In relation to the Bill, the Government should not proceed with the abolishment of the innovation patent system without further consideration of substitute measures to pursue the 'objectives' of the innovation patent system, that is, the need to provide greater support to SMEs applying for, maintaining, and commercialising novel ideas and innovations. SMEs make up 98 per cent of all businesses, yet they are underrepresented as patent owners. The Government should provide

¹ Productivity Commission, Inquiry report on intellectual property arrangements September 2016, Figure 8.2, p 244

greater support to SMEs applying for and protecting their patent rights through better support services, less burdensome and complex application and wait times, reduced fees and better guidance and education.

Furthermore, the addition of 'technological innovation' in the objects clause should be abandoned as it will add confusion, costs and may act to exclude certain types of inventions.



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About the Australian Chamber

The Australian Chamber of Commerce and Industry is a not-for-profit organisation that represents the interests of businesses in Australia.