

Submission to the
Advisory Council on Intellectual Property
Review of the Innovation Patent System
Options Paper

Pirate Party Australia

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1 Introduction

Pirate Party Australia would like to thank the Advisory Council on Intellectual Property (ACIP) and the Australian Government for conducting this review and providing an opportunity for stakeholders and other interested parties such as Pirate Party Australia to submit on such an important issue as the Innovation Patent System. Intellectual property rights impact everyone in our modern society. Providing monopolies on inventions and innovations particularly can positively *and* negatively impact access to medicine, affect technological development (both as an incentive and a deterrent) and, by their nature, limit competition in the free market. As with any government-granted monopoly, reform should not be considered lightly: intellectual property rights such as innovation patents are a compromise to ensure that society benefits from the work of the patent holder, and that the patent holder is rewarded for their contributions.

Although other intellectual property rights such as trademarks and copyrights are far more visible in the public consciousness, the patent system has been used to protect a significant number of inventions in Australia and worldwide. In recent times patents have become more prominent as technological advances have been made in certain fields, such as information technology, pharmaceuticals and genetic modification. Innovation patents have existed in Australia for a considerably less time than standard patents. Given there has been, however, more than a decade of experience with the Innovation Patent System, and technological development is increasingly rapid, now is an appropriate time to review how the system is operating and to ensure it is working as efficiently as possible, while bringing the maximum possible benefit to Australian society — the public, businesses, inventors and innovators alike.

1.1 About Pirate Party Australia

Pirate Party Australia is a political party registered under the *Commonwealth Electoral Act 1918*. The Party was founded in late 2008, and competed its first Federal Election in 2013. The Party's main areas of concern are intellectual property rights (predominantly copyright and patents), privacy rights, increased governmental transparency, and opposition to censorship.

Pirate Party Australia is a member a worldwide movement that began in Sweden in

2006, and has since spread to more than 40 different countries. Pirate Parties have been elected to all levels government — local, state, national and supranational — with 45 state seats in Germany, three seats in the Icelandic Parliament, and two Members of the European Parliament.

2 Role and objectives of the innovation patent system

Pirate Party Australia agrees that, broadly, an optimal Innovation Patent System maximises the difference between the social value of intellectual property created and used and the social cost of its creation. Under any intellectual property regime, the nature of the rights being granted requires much diligence with regard to certainty. Although patents, like copyright, do not provide an intellectual property right over an idea, there is a fine line between an idea and an expression of an idea. In many areas it is not abnormal for an idea to be expressible in a finite number of ways, and it is where expressions manifest themselves in the form of inventions or methods in these areas that much dispute and litigation occurs.

As such, unlike copyright, patent systems worldwide have retained a registration process and a central register of patents. Naturally maintaining a register of patents requires certain criteria be met to ensure only valid patents are registered. The price of this certainty is increased administrative costs, but ultimately the benefit of the patent system is more than paid for by the public access to information and new products that are provided.

However, it should be remembered that the ultimate goal of a patent system should be to ensure that the benefits provided to society outweigh the costs resulting from the granting of the monopoly, and that administrative costs and inefficiencies are minimised as much as possible. This, Pirate Party Australia believes, should be the first consideration when making reforms.

2.1 Raising the step

The goal of the innovation patent system to stimulate innovation in Australian small and medium enterprises (SMEs) by providing monopolies on lower-level in-

ventions and reducing the compliance burden by providing rights easily, cheaply and quickly, while promising, does not seem to actually necessitate a lower level of inventiveness than standard patents. Provided the intellectual property right was easily obtainable, this might be sufficient and the innovative step could be raised to the inventive step of standard patents.

3 Use of the innovation patent system

While it has been mentioned in ACIP's Options Paper that 'a typical comment at the roundtables was "the innovation patent system is being used — therefore it is useful",¹ it is arguable that the Innovation Patent System is being underused, given that standard patent applications in 2007–2008 were 33,482 — approximately two and a half times the number of innovation patents that had been filed as at 31 December 2012.²

Regardless of this possible underuse, it is clear that the innovation patent system is being used by Australians more so than foreign applicants, although the number of foreign applicants is increasing.³ The number of Australian filings has fallen, with the deficit being made up for by foreign applicants which does seem to imply that the goal of promoting innovation by domestic SMEs is not entirely being met.

4 Modernising the innovation patent system

4.1 Duration

Pirate Party Australia advocates that the patent term for innovation patents be reduced to five years. Technology today moves at a rapid pace and lengthy patent terms unnecessarily stifle further development and competition: it no longer takes several years for an invention or innovation to spread within a domestic or even

¹Advisory Council on Intellectual Property, *Review of the Innovation Patent System* (Options Paper), August 2013, 27.

²Department of Innovation, Industry, Science and Research, *Annual Report 2007–08*, 130.

³Advisory Council on Intellectual Property, *Review of the Innovation Patent System* (Options Paper), August 2013, 16.

global market, and five years should be more than adequate for the majority of patentees to market their innovations.

Statistics provided by in the Options Paper indicate that only about one-quarter of filings from 2001 to 31 December 2012 were examined, approximately 70% of which were certified and became enforceable.⁴ Less than 20% of total filed innovation patents became enforceable ultimately.⁵ Within three years, the number of innovation patents that were not renewed exceeded 50%, and less than 24% of innovation patents were renewed on their final anniversary.⁶

Taken together, Pirate Party Australia believes these statistics support a case for reducing innovation patent terms — a very small number of patents end up certified and renewed by their seventh anniversary. This indicates that the viability of continuing the development of an innovation patent can be determined quite quickly: 12–24 months appears long enough to decided whether to continue pursuing the development of an innovation given that 54% of innovation patents are renewed after two years, and 47% after three, with only 18% of total filings ever becoming enforceable.

4.2 The innovation patent process

One of the key concerns the Option Paper raises is that due to the ease with which innovation patents can be obtained, there is no substantive examination of the patent prior to its grant beyond a formalities check. It is clear that an innovation patent might be more attractive than a standard patent purely for this alone — it is a cheap and quick process, and substantive checks would remove this appeal if it made the process more complex, more expensive, and lengthier.

The obvious problem this raises is the potential for a proliferation of self-filed applications that do not meet the sufficient requirements for an innovation patent, but nevertheless are placed on the register. Although innovation patents are not enforceable until certified after examination, there is uncertainty created merely by the fact that these patents may, or may not, be certified and if they are certified they become enforceable from the date of filing. An innovation patent that appears unenforceable may actually be certified and become enforceable, and vice

⁴Ibid.

⁵Ibid.

⁶Ibid 17.

versa. In this way it might be an incentive for some to ‘innovate’ while at the same time acting as a deterrent for others who are uncertain of the validity of a granted innovation patent.

Intellectual property systems should always aim to provide as much certainty as is practical, as the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) aimed, and potential inconsistencies between the standards and certainty between innovation patents and standard patents should be reduced to the extent possible while continuing to provide and incentive for its target users to innovate.

4.3 Uncertainty

Any intellectual property regime must pay great attention to ensure the system works with as much certainty as possible. The nature of the rights involved — a right over the intangible — makes it very easy for a system to lack certainty with regard to numerous factors, especially whether a use constitutes infringement or not.

Pirate Party Australia agrees with the suggestion that examination of innovation patents should occur not later than three years after the application is filed. As has been noted by ACIP, and discussed earlier in this submission, approximately 25% of innovation patents end up certified, and less than 50% are maintained after three years. If after three years an innovation patent holder chooses not to have their innovation patent examined and certified, then it indicates the value of the innovation patent to their business is minimal, especially if the innovation has failed to generate enough revenue to cover the cost of maintaining the innovation patent. The suggestion that ‘compulsory certification ...would increase costs and could deter applicants by removing the incentive to file an innovation patent’⁷ does not seem accurate given that there is already a low barrier to entry and the majority of those using it choose not to renew after three years. For greater than 50% of applicants, a three-year period is enough to decide if an innovation patent is worth pursuing.

The Pirate Party is in favour of any move that would improve the certainty and operation of the system on a practical level. As such, a more stringent formalities check by IP Australia would be a positive step. At the recent Sydney roundtable, a

⁷Ibid 28.

participant noted, however, that IP Australia does not exist to provide legal advice. Pirate Party Australia agrees that it would be unreasonable for IP Australia to act in a similar way to a patent attorney. The filing of innovation patents 'without any written claim'⁸ would be easy to detect and prevent, however there may be benefit in introducing some legislative guidelines for a simple formalities test.

Examination before grant would reduce uncertainty, but would seemingly defeat the purpose of the innovation patent system of being an easily obtainable, low-cost intellectual property right. As such, Pirate Party Australia is more in favour of the introduction of an improved formalities check and mandatory examination after three years.

Pirate Party Australia believes the disadvantage to third parties requesting examination outweighs the positives. It should not be the responsibility of a third party to ensure that an innovation patent is valid or not: the maintenance of an intellectual property right is dependent on the vigilance of the the holder, not third parties. Failure to have innovation patents examined shows a lack of prudence on the part of the innovation patent holder, and it would be unfair to expose a competitor's business interests to the holder simply because of the holder's own inertia, as well as creating an expense for a prospective competitor that should not logically be imposed. This is the same principle embodied in the doctrine of laches: *vigilantibus non dormientibus æquitas subvenit* ('equity assists the vigilant not the dormant'). It is the responsibility of those with who hold the right to assert, maintain and enforce it.

5 Preventing the misuse of innovation patents

Pirate Party Australia advocates for the introduction of a statutory requirement that innovation patent holders demonstrate active use of a patent as a pre-requisite for infringement litigation. Such provisions would improve the goal of the promoting innovation by Australian small and medium enterprises by ensuring those wishing to defend a patent are actually putting it to use.

The purpose of limiting the ability to seek remedies is intended to prevent 'patent trolling' — the practice of building a portfolio of patents for the sole purpose of litigating against infringers, rather than actually developing the invention or inno-

⁸Ibid 29.

vation, and marketing and releasing products to the public. This can include refusal or failure to licence patents or offering licences only for an extortionate fee. Patent trolls do not promote innovation.

Given the rates of renewal and certification are so low (less than half innovation patents are renewed on their third anniversary, and less than 25% are certified according to the Options Paper as discussed previously), the requirement to demonstrate active use would not be significantly onerous as innovation patent holders who have an enforceable right are in a minority of total applicants (less than 20% of granted innovation patents become enforceable). It is those who maintain portfolios for the full term that are of concern, and as these are in a definite minority, active use is a reasonable requirement.

Statistics provided in the Options Paper indicate that larger, certified portfolios are more likely to be in the possession of corporations and not individual inventors/innovators.⁹ This indicates that the type of entity likely to become a patent troll is in the minority of innovation patent holders to begin with.

6 Exclusions

Although TRIPS forbids exclusions from the patent system, it does not mandate that Australia must have an innovation patent or utility model system as the Options Paper notes.¹⁰ As such, TRIPS does not (or at least, *should not*) prevent Australia from excluding certain types of innovations from its innovation patent system. Even if the bar were raised to that of the inventive step found in the test for a standard patent, innovation patents would remain distinct from standard patents and TRIPS would not apply. This distinction would be even more prominent if the name of the innovation patent system were changed to something more reflective of its status as a 'lesser' intellectual property right. However, as ACIP notes, reform must be careful not to characterise the Innovation Patent System as a utility model system in order for reform to go unimpeded.¹¹

⁹Ibid 20–21.

¹⁰Ibid 35.

¹¹Ibid.

6.1 Innovation patents and software

Pirate Party Australia recognises that the area of software-related patents is controversial and in dire need of reform. Software innovation patents must reflect the uniquely dynamic nature of the industry.

Patents, innovation or otherwise, should aim:

1. To balance the first-mover cost in the marketplace, so that a business is not faced with years of research to get to market only to have a competitor take the result of this research and profit directly without that same cost, and
2. To ensure the public disclosure of works, such that they do not disappear with the business if or when it ceases to exist or operate (e.g. in the case of bankruptcy).

The challenge for patent systems in the presence of software relates primarily to the generality of software. Ordinary invention-based patents should not be too constrained with regard to the specific materials from which they are constructed, lest they be effectively circumvented by alternate constructions of essentially the same device. When it is possible to implement or simulate an invention or method in the form of software (and such inventions and methods often are), the current patent system fails to recognise that it is just another material, albeit a 'virtual' one, and not a new concept necessarily. Such patents should not be granted where the 'invention,' 'innovation' or 'method' is simply an implementation of an existing concept (prior art or an existing patent) using a new material. That is to say that a concept implemented in software should not be granted merely because it has not been implemented in software before.

Processes that are solely or partly implemented in software are incredibly uncertain, and there appears to be significant difficulty in defining the boundaries of software-related patents. Much of the software in the world is virtual recreations of concepts or inventions that already exist in physical form or as cultural constructs. Pirate Party Australia believes that such software should not qualify for patents, on the grounds that it is already patented or common knowledge.

Another specific concern is the vagueness for determining whether or not something is 'obvious to someone experienced in the field.' Pirate Party Australia believes there is a serious need to have patents that are primarily implemented in software to be reviewed by experts who are actually experienced in the field to

prevent obvious patents from being granted.

In addition, software in the form of code is covered by copyright and/or kept as confidential information. This appears to greatly reduce the need for patents on software. Incorporating existing code, in whole or in part, would, if done without permission, constitute copyright infringement. As such, there does not appear to be substantial necessity for granting software patents in many cases.

6.2 Abolishing innovation patents on genes and living organisms

The general concept that 'nature cannot be patented' is fairly well understood. Very recently, however, it has become apparent that there is strong community resistance to certain types of patents. The BRCA1 breast cancer gene is one of the more prominent examples of this.

The isolated BRCA1 gene is patented by Myriad Genetics, and in *Cancer Voices Australia v Myriad Genetics Inc* [2013] FCA 65 it was upheld that isolated genes could be patented as they do not occur naturally in their isolated state. Although technologically far more complex, this is the equivalent of separating the yolk from the white of an egg: in its natural state, the yolk and white are not separate, and separating the two creates something that is in a non-naturally occurring state. The proposition that stripping something of its natural surroundings creates something new and patentable is absurd in Pirate Party Australia's view.

Pirate Party Australia believes that patents should be granted on methods and inventions that are able to separate out genes in a way that is inventive or innovative, but that the product of the process should not be patentable. To use another analogy: a machine or method for digging a hole, if inventive or innovative, is patentable, but the product of the use of that machine or method (the hole) should not be. It is obvious to someone working in the field of genetics that an isolated gene is of immense value, but the means of doing this may not be, and if the method is inventive or innovative it should be protected.

The Party submits that genes and living organisms be excluded from the Innovation Patent System on the grounds that merely manipulating existing material does not give sufficient basis for protection unless the means of manipulating that material is genuinely inventive or innovative in which case it should be the method

and not the product that is patented.

Pirate Party Australia's proposal to exclude the *products* and instead provide patents on the methods and tools would provide adequate support to innovators while reducing the amount of natural, genetic and living material that is patented, reducing the overall burden of the Innovation Patent System.

6.3 Abolishing innovation patents on pharmaceutical drugs

Pirate Party Australia supports the abolition of innovation patents on pharmaceutical drugs *except* where the patent relates to the method of production and not the end product.

Broadly, pharmaceutical patents fall into two categories: (1) patents on processes for creating a drug, and (2) patents on the drugs themselves. Pirate Party Australia's policy is aimed at encouraging companies to seek alternative and better ways to produce a desired outcome (the pharmaceuticals) without infringing on a patent¹². This would stimulate competition and maximise the public benefit as companies would have an incentive to conduct independent research and development into more effective pharmaceuticals (including delivery methods). On the other hand, patents on the drugs themselves by their nature stifle free market competition which might otherwise drive improved techniques.

Pharmaceutical research is undoubtedly important, however the guarantee of a lengthy monopoly of even eight years in the case of innovation patents reduces the necessity to compete on either quality or price — to continue being inventive or innovative. Admittedly, this problem is less serious (currently or potentially) with regard to innovation patents compared with standard patents, but it is still an area of concern. High prices can result, and since a large number of drugs qualify for the pharmaceutical benefits scheme (PBS), the Government is ultimately forced to fund the monopolies it has created, costing billions of dollars a year.¹³

¹²Michele Boldrin and David K Levine, *Against Intellectual Monopoly* (Cambridge University Press, 2008) 244–251, 255, 257; Jörg Schaaber, 'Misguided Research' [2010] (11) *D+C Development and Cooperation* 421.

¹³Peter Drahos, 'Patents, practical ethics and scientists' (2011) 29(3) *Prometheus: Critical Studies in Innovation* 354