

Submission to IP Australia
Consultation on an objects clause and
an exclusion from patentability
(consultation paper)

Pirate Party Australia

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Note

This PDF has been compiled from the submission originally made in September 2013. Formatting (including the formatting of citations) has been modified but apart from this notice no body text has been changed.

1 Introduction

Patents are based on the development of new inventions or innovations and as such cannot be owned in a way similar to how natural property can be owned. Patent law was originally created to encourage innovation by granting a monopoly on the use of a new technology for a time to provide incentives to research new technologies. As society continues to develop, technologies that once took years to spread are now able to reach a global market almost immediately. Due to the rapid spread of technologies, Pirate Party Australia believes that reducing the overall length of patent terms and reducing the scope of what can be patented should be considered.

Reform of the patent system is an issue at the core of Pirate Party Australia's existence. Through a variety of methods, patents have become a hinderance to the development of new technologies. Some companies exist solely to speculatively buy up patents and use them to sue businesses which are often unknowingly using parts of these patents. These organisations, colloquially and pejoratively known as 'patent trolls',¹ have no intention of ever putting their patents to use and instead use them as a means to extort and fleece companies that are driving technology forward through the creation of new products. Often these purchased patents are excessively broad and the links to the aforementioned business ideas are tenuous, but rely on the targeted companies settling out of court since they may not have the resources to combat the claims of the patent troll.² Others use patents to attempt to lock up biological processes.³

¹See eg Wikipedia, *Patent troll* <http://en.wikipedia.org/wiki/Patent_troll>.

²Colleen Chien, *Patent Assertion and Startup Innovation* (September 2013) New America Foundation <http://oti.newamerica.net/publications/policy/patent_assertion_and_startup_innovation>.

³Erika Check Hayden, "Patent trolls' target biotechnology firms' (2011) 477 *Nature* 521 <<http://www.nature.com/news/2011/110928/full/477521a.html>>.

2 Answers to specific questions

1. *Do you have a preference for either of the two options proposed for the Objects Clause?*
 - *If so, please explain the reasons for your preference.*
 - *If you disagree with the wording of both of these options, please explain which elements you disagree with and why.*

Pirate Party Australia believes that both Option 1 and Option 2 could be misconstrued in future decision making. The concern is that this wording could be construed as lining up both 'patent applicants and/or patent holders' on one side of the equation against 'the users of technology and Australian society as a whole.' From the perspective of the sequence of stakeholders in the statements the Party fears that some interpretations of the statement could shift the balance towards the patent industry. The protection of both society and technology users need to factor more strongly in patent law and any implication of extra negotiating power being weighted to patent industries must be resisted.

An alternative wording could be:

The purpose of the patent system is to provide an environment that encourages invention and enhances the well-being of Australians by providing a commercial monopoly as an incentive for the development of inventions that will benefit Australian society and industry as a whole.

2. *Do you agree with the wording proposed by ACIP for the patentability exclusion?*
 - *If you disagree with the wording, please explain which elements you disagree with and why.*

Pirate Party Australia does not support the addition of the exclusion as stated in the discussion paper: 'exclusion for an invention the commercial exploitation which would be wholly offensive to the ordinary reasonable and fully informed member of the Australian public.'

While it would keep the application of the law open to include exceptions for new developments that are not acceptable to a reasonable and fully informed member of the public, it may introduce questions of ethics and morality which Pirate Party Australia feels is inappropriate

in a patent system. The Pirate Party favours wording that would introduce specific exemptions for 'living things' (such as genetic material and organisms, but not the processes used to create or isolate them) as well as other areas (such as public health), and/or an exemption framed as a 'public interest test.'

There is concern that the removal of section 50 of the *Patent Act 1990* (Cth) in its entirety weakens protections for foods and medicines. Instead Pirate Party Australia suggests the amendment of section 50 to the extent necessary to conform with the intent of TRIPS and to further amend section 50 to include ACIP's proposed wording.

3. Do you agree with amending the Patents Act to explicitly provide the Commissioner of Patents with powers to seek advice on ethical matters?

- If you disagree with the wording, please explain which elements you disagree with and why.*

It is reasonable for the Patent Commissioner to seek advice on ethical matters relating to patentable materials. Pirate Party Australia believes that advice given by the Patent Commissioner should be available and easily obtainable by the public, to ensure adequate transparency and confidence in the process.