

IP Australia
c/o- Patent Office
PO Box 200
Woden ACT 2606
Australia

13 August 2015

Re: Alder IP submission to *IP Australia's Consultation Paper: ACIP's Recommendation on the Innovation Patent System*

Dear Sir or Madam,

Alder IP is a specialised Australian law firm focused on intellectual property protection and commercial law for innovative businesses. Alder IP is a multidisciplinary practice incorporating lawyers, patent attorneys and trade mark attorneys. We are registered and endorsed by the NSW Law Society and Professional Standards Board for Patent and Trade Mark Attorneys, and were featured in the Top 1000 IP Laws Book published by IAM in 2014 and were awarded a Client Choice Award from Lexology in 2015. Alder IP welcomes the opportunity to submit a response to *ACIP's Recommendation on the Innovation Patent System* and hopes that this submission will provide some useful insights to the innovation patent system in Australia.

Key Points of Innovation Patent System

- The innovation patent system was introduced in 2001 with the overarching policy objective of stimulating innovation of small to medium enterprises (“SMEs”);
- The innovation patent system has a lower threshold of inventiveness than the standard patent system, aimed at SMEs who refine rather than invent; and
- innovation patent system provide advantages of low cost and low compliance requirements leading to competitive advantages for SMEs (particularly Australian SMEs).

Alder IP Recommendation

We recommend no change to the current innovation patent system. Alder IP believes that the innovation patent system appropriately fosters innovation in Australia, in particular for SMEs that focus on innovation over invention.

Response to Consultation Paper: *ACIP's Recommendation on the Innovation Patent System*

Alder IP is very concerned by many of the issues raised in IP Australia's consultation paper. In particular, the information presented in ACIP's *Final Report for the Review of the Innovation Patent System* and the findings of the *Economic Analysis of the Innovation Patent System Research Paper*.

ACIP's *Final Report for the Review of the Innovation Patent System* notes that the ACIP were unable to make a recommendation on whether to abolish or retain the innovation patent system due to the lack of empirical evidence gathered on the matter.

In addition to this, we believe that at least some of the empirical evidence published within the report makes several gross misrepresentations which bias the data. Specifically, figure 3 on page 29 displays a data set of a *comparison of innovation patents certified each year* where annual data is broken up into innovation patents certified to selected groups, namely: AU companies/firms, certified to AU individuals, and certified to foreign applicants. This data shows that at the commencement of the innovation patent system, the majority of innovation patents that were certified were owned by "AU individuals". Since then, it appears that the majority of certified innovation patents are owned by companies/firms. The aim of this data set was undoubtable to highlight that companies are benefiting from the innovation patent system over individuals.

Yet, this diagram and the accompanying text fail highlight that individuals are more rapidly and more regularly incorporating at early stage in the innovation cycle. Specifically, changes in technology investment base have led to changes in the profiles of entities applying for patents. We note that there has been a significant increase in number of patents being filed in fields relating to IT over the time period as shown in the ACIP report figures. It is more likely, that the increase in the number of corporate applicants is largely due IT innovators incorporating at

an earlier stage than other technology types. We note that although there may be a decline in certified innovation patents being owned by individuals, there has been increase of certified innovation patents owned by SMEs. Hence the policy objective of stimulating innovation among SMEs is still being met.

Further comparing filing numbers of certified innovation patents is highly misleading as a majority of SMEs or individual innovators never feel the need to proceed with the certification process. The certification process is only used wherein the Applicant believes that there is a real or likely threat of infringement. Not proceeding with the certification process greatly reduces the cost for applicants and benefits SMEs or individual innovators. This is not discussed in the ACIP report.

In addition, figure 6 on page 33 illustrates *large users of the innovation patent system* and outlines the number of innovation patents filed by fourteen large companies. Although the accompanying text to this documents notes that these companies own a large portion of certified innovation patents in Australia, it fails to note that of these fourteen companies, at least six are Australian (arguably satisfying the policy objective). Further, the report does not divulge any information about the size of these companies, and whether they could be classed as SMEs. The information that is provided instead attempts to argue that “*most of these companies appear to be patenting technologies that could be protected under a standard patent*” and attempts to support this by noting which field each company specialises in. When these fields are listed, such as “*vacuum cleaners which are categorised as consumer goods and equipment*” no further explanation is given as to why in fact an invention relating to a vacuum cleaner would warrant a standard patent over an innovation patent. These types of statements in the report lack evidentiary rigor and amount to unsupported opinion.

Moreover, the *Economic Analysis of the Innovation Patent System Research Paper* found that “*the innovation patent system is failing to incentives SMEs to innovate and is imposing an overall net cost on SMEs.*” Alder IP strongly disagrees with this conclusion and the conclusion contradicts the data provided in it. Page 15 of the report notes that SMEs and individuals have filed the majority of innovations patents since their introduction in 2001. This statement highlights that the policy objective of the innovation patent system is currently being fulfilled.

Call for Continuation of Innovation Patent System for Australians

Alder IP recommends that the innovation patent system continue in Australia in its current form as it fulfils its original policy objective, and provides Australians a lower cost option for protecting their innovations.

Yours faithfully

Alder IP Pty Ltd



Anthony Alder

NSW Supreme Court Solicitor/Patent Attorney

Btech (Biotech) LLB MIP FIPTA

