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Submission responding to IP Australia's Consultation Paper on ACIP's Recommendation on the Innovation Patent System

Nufarm Australia Pty Ltd (Nufarm) welcomes the opportunity to make a submission on ACIP's amended recommendations in light of IP Australia's *The Economic Impact of Innovation Patents* - being the substantial statistical analysis afforded by the IPGOD dataset.

In particular, Nufarm has considered the conclusions and inferences drawn from this analysis against the realities of the domestic and global agricultural chemicals industry.

Summary of Submission

Nufarm does not support abolishing the innovation patent system. However, Nufarm does support two of ACIP's original recommendations for improvement to the innovation patent system.

In particular, Nufarm believes the patentee should request examination on the third anniversary of lodgment. Unexamined innovation patent applications should also be described as something less than a patent.

Background

Nufarm is an Australian publicly listed company (Code NUF.AX) with more than 50 years of experience developing and supplying crop protection products to farmers here and around the world .

Nufarm and the Agrochemical industry need Innovation Patents

Nufarm disagrees with ACIP's original recommendation to prohibit method claims.

The agrochemical industry in Australia is one of incremental innovation. The development of new synergistic methods of use of known compounds on targets may fall short of the non-obviousness required of standard patents, but represents a significant component of Australian R&D investment.

Nufarm will increasingly look to protect all of its incremental innovations since the protection of these innovations impacts directly on the provision of affordable and current technologies to the Australian farmer.

Conformity with utility models / legal systems in Australia's major trading partners

Like any Australian manufacturer of regulated products, Nufarm is dependent on its ability to compete in lucrative export markets on equal terms with our overseas competitors. Critical to this is the equal footing of our researchers with their overseas counterparts. We note that critical jurisdictions in Latin America, including Argentina, Brazil and Chile, as well as Malaysia, Taiwan and France, provide similar patent systems / utility

models to the Australian innovation patent system. Abolishing the innovation patent system would cause a severe disruption to our global patenting strategies, and ultimately our R&D allocation.

Economic Analysis does not support abolishing Innovation Patent System

Nufarm believes that ACIP's final recommendation to abolish the innovation patent system is not supported by the IPGOD dataset. Nufarm would like to see the IPGOD dataset interpreted alongside other readily available data (for example, Australian SME's make up the majority of the innovation patent infringement cases decided at first instance by the Federal Court over the last five years).

Nufarm also holds a different view on the characterization of the development of policy objectives, and the conclusions drawn from the IPGOD dataset. In particular, only one – but not the only - objective of the innovation patent system is to assist SMEs and individuals. Having said that:

1. The fact that the innovation patent system is well used by larger companies does not mean that it is failing SMEs; and
2. The data cited as indicative of a *failing* in this objective is instead a measure of the extreme ease with which the system has been accessed by SMEs and individuals. Any failure to certify or renew an innovation patent is a corollary to encouraging access by SMEs and individuals without the benefit of an experienced agent or a strategy for commercial exploitation.

If anything, the innovation patent system should be improved, in line with some of ACIP's original recommendations, to ensure applicants use the system with an appropriate level of sophistication.

Furthermore, the economic analysis has assigned a nil value to uncertified innovation patents, which fails to reflect the commercial and strategic value currently enjoyed by holders of uncertified innovation patents.

No change to the Innovation Step

Nufarm considers that the legal assessment of the innovative step is adequately refined in case law and capable of application with certainty. There is no need to raise the threshold - to one of non-obviousness in light of Common General Knowledge – which would significantly increase the complexity of examination to determine which prior art is included or excluded from the Common General Knowledge.

Compulsory Examination by 3rd Anniversary

Nufarm agrees with ACIP's original recommendation that substantive examination be requested before the third anniversary of the lodgment of an innovation patent.

The IPGOD dataset supports this – with many innovation patents expiring for non-payment of the first annuity due at two years after lodgment. Clearly, many applicants will not request examination, thereby ridding the system of un-certified innovation patents. The IPGOD data already shows a correlation between non-certification and early expiry. Appropriate levying of examination fees may result in even greater numbers of non-certified patents expiring early.

Nufarm is mindful that the anniversary for requesting examination would need to be set in line with the conduct of examinations for standard patents, to avoid strategic filing practices that burden the resources of IPAustralia, and so as not to undermine the attraction of an innovation patent system.



'Patent' is a term reserved for examined and certified patents (Innovation or Standard)

Nufarm agrees with ACIP's original recommendation that the term 'patent' should be reserved, given that many people infer a legally enforceable right. Although Nufarm agrees that the term 'patent' should ideally be reserved, alternative suggestions include "uncertified innovation patent" and "pending innovation patent".

This certainty of meaning that is conveyed, along with the compulsory examination by the third anniversary, are the two recommendations that counter any inference of a significant cost burden on third parties arising from the uncertain validity of the rights claimed.

Conclusion

Nufarm thanks IPAustralia for the opportunity to make this submission.

Any questions regarding the submission can be directed to me on 03 9282 1000.

Yours sincerely

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