

Submission on IP reform  
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## IP law fails inventors:

- Only some 3% of applications, drawn up without a Patent Attorney, are of sufficient quality on initial application to lead to a patent. This is because the evolution of patent law over the centuries mandates patents must be written in a precise legalistic way to be enforceable. Eg From “Essentials of Patent Claim Drafting” 2014 Edition by Morgan D. Rosenberg on page 17 states “...wherein said backrest is secured to the upper surface of said seat by an adhesive *or by a screw,*” this is “alternative”; i.e., we are providing alternatives or options in the claim. In other words, we are trying to claim two separate implementations or inventions in one claim and this is “indefinite” and not allowed.” In Plain English patents should be developed and/or guides on how to write in legalese should be made available. I have read two such books and still plan to seek the services of a Patent Attorney. Why does it have to be this hard?
- Patents do not ‘Protect’ IP. Patents merely confer a right to sue an infringer. Consequently the cost of patenting is only a small part of the overall cost of protecting IP. Any valuable patent will attract infringers. Currently a patent holder has to sue. How does this help an inventor? The inventor must trade away reward for inventive effort by finding investors/corporates with deep enough pockets if unable to finance the litigation him/herself. Eg CSIRO spent millions and wasted years litigating against infringers. In There should be a presumption that an injunction against an infringer can be issued for a patent holder. Refer P483 of the Draft Report which show there is a mechanism in place “to prevent the importation of goods that allegedly infringe copyright or trade marks.” but no mechanism to protect against import of products infringing patents. Please see below for response to *Information Request 18.1*.
- An inventor cannot discuss the invention with another person without having to share the patent with that person as joint inventor. The inventor cannot brainstorm. The inventor is obliged to keep all work on the invention secret. Non-disclosure agreements (NDA) are unsatisfactory as any party to the NDA breaching the NDA voids any rights the inventor has to

applying for a patent, because a disclosure places the invention in the public domain. Is there should be a way for an inventor to divulge inventions to third parties, secure in the knowledge that a patent can continue to be secured. Eg A register of parties to an invention before the invention is applied for. Such a register could provide security of invention prior to priority date of patent application.

## **In reference to Tailoring the strength of patent rights on P10 of the Draft Report**

I see no justification why duration of patents rights should be any different to duration of copyright rights, so why is duration of copyright so much longer than duration of patent? I might also ask why patent rights don't continue for 70 years after the inventors death? This is absurd, so why are copyright holders granted such a long duration?

It is surprising that such a large percentage (15%) of standard patents reach their full term given that only around 5% of patents are truly inventive. Claims that are being used for strategic purposes are likely to account for the difference. It is too easy for Corporates with deep pockets to build up a patent 'bank' and too difficult for inventors, without corporate/investor backing, to defend their invention.

In my view, the Draft Report places too much faith is placed in patent fees influencing applicant behavior. An 'inventor' backed by a corporate is much less likely to be influenced by patent fees than one who is not, and it is the corporate accruing bragging rights who is best place to pay increased fees. If anything an individual inventor is placed at a large disadvantage vis-à-vis a corporate because he/she can't seek investments before a patent application is filed. "Thinking of Applying for a patent in Australia" by Matt Lohmeyer & Philip Heuzenroeder Copyright 2012 on page 56 states "It is not uncommon for inventors to seek financial support before filing a patent application. This is a dangerous move on two counts: disclosure can put the novelty of your invention at risk... Offering the invention for sale or investment could be construed as 'commercial dealing,... Prior commercial use could be exploited as an argument to invalidate your patent down the track...". Perhaps this disadvantage could be offset by charging concessional fees to individual inventors?

It is suggested in the Draft Report on page 11 that "higher claim fees would help limit the costs of patent protection...", Properly protecting ip mandates both independent and dependent claims. The limit of three independent and twenty dependent claims seems arbitrary. Why should a patent be limited to three independent claims when for proper ip protection it may need more?

"Essentials of Patent Claim Drafting" 2014 Edition by Morgan D. Rosenberg on page 257 states "Given that twenty claims are allowed under the basic filing fee for a patent application, it is tempting to draft dependent claims that are not really necessary just to meet the twenty claim limit... then these claims are worthless, since just the broad 'seat' in the independent claim already covers all of them. It should be noted that sometimes, during prosecution, one must add a very narrow limitation in order to

distinguish over the prior art. At that point, though, it is up to the inventor as to whether he or she really wants such a narrow claim scope... the Examiner only needs to find one of those items on the list to reject the entire claim." The point being that making the full twenty claims can work against the inventor by increasing the likelihood the application won't stand up to examination or the issued patent will be more vulnerable. The fact that Figure 6.9 of the Draft Report doesn't show a dramatic falloff after 20 claims is evidence that well written patent applications are written so they will withstand litigation, rather than to maximize the number of 'free' claims.

## **In response to Information Requests**

### **Information Request 6.1**

*The Commission is seeking further information from participants on the likely costs and benefits from reforming patent filing processes. Would there be any unintended consequences from requiring applicants to construct their claims in the two-part form that applies in Europe or articulating why their invention is non-obvious? Are there better approaches available?*

The additional burden on applicants does not seem onerous as the inventor can reuse the results of their prior art investigation. Where this two part approach may be beneficial is in reducing the deluge of obvious patents from Corporates. Eg IBM patenting hexagonal ventilation holes in servers, when Sun Microsystems already had hexagonal ventilation holes in servers. Eg Google patenting human flypaper; <http://www.smh.com.au/technology/innovation/google-patents-human-flypaper-for-car-crashes-20160519-gozi64.html>.

### **Information Request 18.1**

*Would changes to the jurisdiction of the Federal Circuit Court improve access to dispute resolution by small- and medium-sized enterprises? Should additional rules be introduced, such as caps on the amount of costs claimable in a case?...*

Yes. Consider my case where I plan to license my patent to third parties. I expect the Business Plan will show that enforcement of patent rights will be a significant component of costs. A Business plan which quantifies litigation costs becomes an easier sell to investors, as it reduces their risk.