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Innovation policy in Australia - **relying on mines or minds?**



Innovation is essential to both the future success of Australian business and the continued prosperity of Australia in the global economy. We know it. You more than likely know it too. But do our politicians know it, let alone understand it? A federal election has just been held: Australia has voted and the decision has been made.

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We are honoured to be listed in the Janders Dean Lexis Nexis Legal Innovation Index 2013. Watermark was selected for its innovative approach to intellectual asset management and patent mapping. The Legal Innovation Index recognises firms who provide truly innovative services and deliver superior value in a competitive market.



Karen Sinclair and Peter Hallett, along with our guest presenter Dr Tim Moore of PolyNovo Biomaterials, delivered an engaging session on 'Investment Ready IP - keeping in step with global trends in Tech Transfer & IP'.

CCH Update

CCH has updated its Australian Industrial & Intellectual Property service, in light of the Raising the Bar reforms with Watermark's Mark Summerfield as the new patents author.

For a free trial visit: www.cch.com.au/iptrial

Smart tactics - the rise of Chinese brands in Australia.

Given the rapidly increasing economic importance of China, it is unsurprising that more and more Chinese brands appear regularly in the international marketplace.

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Smart tactics - the rise of Chinese brands in Australia.

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Global service operatives such as Chinese banks (the Bank of China and the Agricultural Bank of China), and airlines including Air China, China Eastern and China Southern have progressively gained an international presence. Consumer brands such as Haier and Lenovo are also increasingly well known outside China.

Australia has also seen an increase in Chinese-branded products and services, and smart positioning is helping new brands break into the market all the time.

Because China has a reputation for producing cheap products, quality as a selling point remains an issue for Australian consumers. In order to grow international sales and stature, Chinese companies are therefore adopting sophisticated branding strategies to build positive brand awareness. The key message of these strategies is one of tremendous value - good quality at affordable prices. But underlying this message is also clever positioning of the brands alongside Australian icons.

One such success is from the car manufacturer, Great Wall. This company started selling cars in Australia only in 2009. It used a cheeky marketing strategy to promote its main product: a focus on a familiar Australian icon – the low cost utility truck known colloquially as a 'ute'. The advertising strategy used humour to emphasise the significantly lower price of the Great Wall ute compared to that of competitors. And the Chinese origin of the vehicle was not hidden, the advertising often using the phrase 'the Great Ute of China'. The success of the campaign has resulted in sales that exceed those of better established brands such as Renault, Land Rover and Volvo. The brand acceptance of Great Wall in Australia can be gauged by the fact that while it took the Korean car manufacturer Hyundai five years to sell more than 25,000 cars in Australia, it has only taken three years for Great Wall to meet the same sales levels.

Another entrant to the Australian market has used less direct means to introduce its brand, albeit one again associated with an Australian icon: sport.

Hisense is a manufacturer of electronic consumer products that launched in Australia in 2006. In 2008, it signed a multi-million dollar deal to secure the naming rights of a sports and entertainment venue in Melbourne, now known as Hisense Arena. This strategy enabled the Hisense brand to be widely broadcast to the Australian public in the context of the Australian Tennis Open, dancesports events, netball, basketball and the concerts of international music stars. This strategy does not overtly push the Chinese origin of the brand as does that of Great Wall. The success of the strategy can be measured by the fact that Hisense received a Canstar Blue Most Satisfied Customers award for their LCD televisions in 2010, only two years after obtaining the naming rights for the venue. Canstar Blue rates customer satisfaction levels for brands in the Australian market.

Another company that has relied on the Australian passion for sport to promote its brand is Huawei, a telecommunications company that signed a sponsorship deal with National Rugby League team the Canberra Raiders. It has recently re-signed as the team's major sponsor for the 2014 season. As a result of this sponsorship, the Huawei brand has been seen in television broadcasts, prominently displayed in many places including on the jersey of each player.

The increasing sophistication of marketing strategies used by Chinese companies in Australia will ensure that Chinese brands become more widespread and better regarded in Australia. Concerted and clever efforts at overcoming past perceptions of cheap, low quality products by the consistent use of the brands to promote the 'Aussie-ness' of the brands will build acceptance that Chinese products offer good quality at affordable prices. There is a lesson here for all trade mark owners – good branding strategy and compliance with the rules of proper trade mark use can turn around past perceptions. The jury is in – Chinese brands are a case in point.

Michael Chin Quan

Design protection for computer icons and animations in Australia.

The Australian Designs Act 2003 does not explicitly exclude computer icons and animations from being protected as Registered Designs. However, there are serious obstacles in the Act and the law which impede any robust rights from being granted for this increasingly common distinguishing feature of PDAs, hand-helds, tablets and other mobile devices.

Computer Icons

An Australian design application must be identified in connection with a 'product'. This would appear to encompass computer icons and animations that are nominally applied to electronic devices such as a mobile phone or a computer screen.

However, the Australian Law Reform Commission's Report, which made recommendations on which the present Designs Act is based, and the Australian Designs Manual of Practice and Procedure, state that a 'product' must be a product at rest i.e. one which is not relying on a power supply. In the Altoweb case an application for a design displayed on a computer screen was rejected because the software creating the design was considered to be independent of the screen as manufactured or sold. The current Australian designs regime is therefore 'set' against protection for computer icons and animations.

Nevertheless, a design application does not require an applicant to identify whether a product is at rest or relying on a power source when filing a design application, and so it is possible to achieve a presence on the Australian Designs Register without complying with the intent or the specific requirements of the Designs Act. This is

because an Australian design application does not undergo substantive examination before becoming registered. The Designs Register reflects the anomaly by its inclusion of a number of unexamined Australian registered designs for computer icons. Many of these are titled 'Electronic Device'. The validity of these design registrations for computer icons is questionable. A registered design must pass a substantive examination process and be 'certified' for the registration to be enforceable.

Assuming a design registration for a computer icon is certified, a further complication potentially arises were it to be the basis of an infringement action. Specifically, it is not defined in the Designs Act whether an infringing product need be at rest. Consequently, the enforceability of a registered design for computer icons must also be doubtful.

Although it is possible to obtain a design registration for a computer icon applied to an electronic device, the validity and enforceability of such design registration remains uncertain. The only real value of such a design registration is that it could act as a potential deterrent to persons who review the Australian Designs Register before copying a computer icon which is the subject of a registered design.

Animations

In protecting animations under the Australian designs regime an additional problem is encountered.

Since a design is the overall appearance of a product resulting from the product's visual



features, each 'frame' of an animation is likely to be considered as a separate design. If an application includes more than one design, the applicant is required to pay a separate fee in relation to each design. This adds a significant cost burden to 'proper' protection of an animation

Several design registrations, each covering a single frame of an animation would not properly substitute for the completeness of the animation. In other words, the animation is unlikely to be considered a sequence of static frames together creating an illusion of movement.

Although attempts have clearly been made to date, for all practical purposes it seems highly unlikely that either computer icons or animations are easily protected or enforced under the Australian designs regime.

Other avenues such as trade marks or copyrights may be more suitable for protecting computer icons and animations in Australia.

Shriraj Takle



Innovation policy in Australia - relying on mines or minds?

From page 1

Amid all the electioneering, the topic of innovation barely rated a mention amongst chatter about carbon pricing and mining taxes, the NBN and boats. And now, the first moves of the new federal government have been to bury responsibility in cabinet for science and innovation somewhere in the chasm between the education and industry portfolios, abolish the Clean Energy Fund, and sack the incumbent head of the Department of Innovation, Industry, Science and Research. Does technology and innovation feature in the new political paradigm at all?

In 2008, the Australian government commissioned a review of the national innovation system¹. The report identified that Australia was falling behind in encouraging and leveraging innovation, and that policy needed to reflect a long term view and respond with sound investments in innovation strategy. We have seen some of the recommendations of the report come to fruition in the IP context relatively recently:

- the inventive step requirement in patent law has been considerably raised to align more closely with international trading partners,
- a specific infringement exclusion now exists for experimental use of an invention,
- inventions must now be well defined in a patent application so as to disclose the best method of working the invention at the time of filing.

All of this serves to provide a patent right that is internationally more robust, as well as reducing uncertainty for subsequent innovators. Further upgrades to innovation policy have been manifested in the R&D tax incentive program which has been changed from a concession that was largely inaccessible to those who needed it most, to a much more usable and functional system². These are but some of the positives that have been driven by government innovation policy over the past few years.

However, debate in Australian politics and economics has in the recent past been coloured by the fact that Australia has been riding the economic

high of a resources boom. There is little doubt that this boom has provided Australia with one of the largest income boosts in its short history and has helped the country weather the Global Financial Crisis comparatively well. It has become clear that the boom is coming to an end though, and the outlook is gloomy unless Australia can in future depend on renewed growth in other sectors of the economy. Whether you believe this or not, in an election year, it's reasonable to query whether Australian policy makers have adequately prepared the nation for the downturn and if they have policies to help the nation transition away from heavy reliance on mining.

Both sides of politics agree that in the past, Australia has had 'too many of its eggs in one basket'. Despite this, innovation policy has not featured heavily in debate, or in published policy documents³. Where it has featured, announcements have been tempered by the expectation that funding for existing innovation programs will be largely scrapped or at least reduced. This expectation is being fulfilled already.

If Australia is in a transition from a position of economic strength to one of less certainty, relying less on mining and primary resources, then fostering real innovation will be critical. Changes in IP policy are good, but if there is no considered government policy around science and innovation, then these upgrades in the IP system are meaningless and will only serve technology importers rather than Australian scientific and innovative corporate institutions. Australia's reliance on importation of technology seems set to increase. This can't be a good thing. The future for thoughtful government driven innovation policy is, unfortunately, less than certain.

Carol Kane

¹ Venturous Australia: Review of the National Innovation System (2008) accessed at <http://www.innovation.gov.au/innovation/policy/Pages/ReviewoftheNationalInnovationSystem.aspx>

² For more information on how you can use the R&D tax incentive program to benefit your business, contact Watermark Advisory Services

³ e.g. 'Our Plan: Real Solutions for all Australians' and 'The Coalition's policy to boost manufacturing' (Liberal Party Policies and Discussion Papers) accessed at www.liberal.org.au/our-policies

	\$ Billion
Iron ore & concentrates	64.1
Coal	46.8
Gold ^(b)	16.0
Education-related travel services	15.1
Personal travel (excl education) services	11.8
Crude petroleum	11.5
Natural gas	11.1
Wheat	6.1
Aluminium ores & concentrates (incl alumina)	5.4
Copper ores & concentrates	5.4
Beef	4.7
Aluminium	4.7
Copper	3.9
Business travel services	3.6
Technical & other business services	3.4
Medicaments (incl veterinary)	3.3
Professional services	3.2
Refined petroleum	2.9
Wool & other animal hair (incl tops)	2.8
Passenger transport services ^(c)	2.6
Total exports ^(b)	313.3

(a) Goods trade is on a recorded trade basis. Services trade is on a balance of payments basis.
 (b) Balance of payments basis.
 (c) Includes related agency fees and commissions.
 Based on ABS trade data on DFAT STARS database and ABS catalogue 5302.0
 Source: <http://www.dfat.gov.au/publications/trade/trade-at-a-glance-2012.html>

Innovation Patents – soon to be extinct?

Following on from its August 2011 Issues Paper, the Advisory Council on Intellectual Property has released an Options Paper outlining possible reforms of the innovation patent system.

Australia's innovation patent system provides a 'second-tier' patent right sharing many similarities with utility model rights that apply in many other countries around the world. Innovation patents have a maximum term of eight years and, once certified, a maximum of five claims.

At a broad level the three options presented by ACIP are not startling: no change, abolition, or reform.

While the recent Raising the Bar legislation introduced some refinements of the laws surrounding innovation patents, there remain a number of issues that are highlighted for possible future reform.

The test of innovative step

The general theme of the proposed reforms deals with concerns that innovation patents are too easy to obtain or – conversely – too difficult to invalidate.

Accordingly, the test of 'innovative step' has been put under the spotlight for particular consideration. The test is perceived as too favourable to innovation patent owners.

An 'innovative step' requires only a novel feature which makes a material difference, or 'substantial contribution', to the operation of the claimed product. This a significantly less onerous requirement than that of an 'inventive step' required for Australian standard patents.

Discussion in the Options Paper proposes incrementally raising the level of innovation required for certification of an innovation patent while underscoring the difficulty in actually formulating such a test.

Given that the question of what represents an inventive step has occupied the courts for centuries, without a bright-line conclusion, formulating a similar but subtly different test is (obviously) a challenge.

It has been suggested that the level of innovation required should be raised to that of inventive step. It is indisputable that this is an untenable position as it would effectively render the innovation patent system an irrelevant curiosity.

Limiting the scope of the monopoly granted or the remedies available

A second theme of the Options Paper is that the rewards offered by the innovation patent system are not commensurate with the ease of obtaining innovation patents. More particularly: that the rewards are overly generous to innovation patent owners, and liable to strategic abuse.

The lightning rod here is the legislative availability of injunctive relief for alleged infringement of innovation patents set against the lower threshold for patentability that applies.

The various options for tweaking the availability of injunctive relief – such as limiting the availability of injunctions to patentees with corresponding products in the marketplace – require careful consideration. Changing the rules may simply create different problems, such as perverse incentives for innovation patent owners working within the new rules.

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The politics of climate change in Australia.

They say a week is a long time in politics. But it seems even a day is a long time in climate change policy. Australian citizens voted in a federal election on Saturday 7 September 2013 and as a result have a new federal government with new views on the reality of climate change, and new policies on climate change management.

'Climate change is the great moral challenge of our generation'. Kevin Rudd, former Prime Minister of Australia, 31 March 2007

Climate change policy has prompted numerous leadership spills in both major political parties and, ultimately, a change of government. Amid all of this political brawling, public support for action on climate change has diminished. It would seem that Australians have become disengaged. Is this because they see such ineptitude in our political leaders, with constant battles both within and between our major political parties, or is it that they have lost interest? Maybe, in these challenging economic times, they simply have more immediate issues of concern.

The good news is that both major political parties share similar targets for reducing carbon emissions. Both parties pledge to cut carbon emissions by 5% (below year 2000 levels) by 2020. They also agree on the mandatory renewable energy target (MRET) which aims to ensure that at least 20% of Australia's electricity comes from renewables by 2020. But the parties have totally different policies on how to achieve it.

What is Australia's new climate change management policy?

The former Labor government initially proposed to introduce an emission trading scheme (ETS) but instead compromised on a carbon tax - a fixed carbon price gradually increasing over three years before transitioning to an ETS. More recently, faced with increasing public concern that Australia's carbon price (presently set at about A\$24 per tonne) far exceeds that of other countries, the Labor government announced that the carbon tax would be scrapped as of July 2014 in favour of an early move to an ETS. The proposal was that the ETS would be linked to the European system and hence bring the price down to about A\$6 per tonne. Having lost government, this policy will not be implemented.

The alternative approach presented by the Liberal National Party conservative coalition, now to be executed, is a 'direct action' plan in which A\$3.2B has been budgeted for soil carbon programs, tree planting and other measures. Under this plan, farmers and industry will be paid to take action to reduce their emissions.

'We will abolish the carbon tax... The election will be a referendum on the carbon tax'. Tony Abbott, Prime Minister of Australia, 3 September 2013

The direct action plan is concerning in that several studies, including one commissioned by the independent think tank The Climate Institute, have found that it is unlikely to deliver the 5% reduction by 2020 within the expenditure budgeted.

What does 'direct action' mean for Australian industry?

Assuming changes to legislation to implement 'direct action' pass both houses of Parliament, the plan may deliver some certainty for Australian businesses and investors in clean energy technologies. The lack of certainty over recent years has significantly restrained clean energy investment at all stages from research to deployment of mature technologies. One measure of this is the Australian CleanTech Index¹ which monitors the performance of 70 clean technology

Innovation Patents – soon to be extinct?

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The Options Paper also floats the possibility of restricting the scope of monopoly offered by an innovation patent. This might involve a strict limitation of monopoly rights to particular embodiments disclosed, for example. This is a viable suggestion in keeping with the low hurdle currently offered by the innovative step test.

Economic value of innovation patents

A report by independent consultancy Verve Economics accompanies the Options Paper. Over 4,000 innovation patent owners were canvassed through a comprehensive survey, and over 500 responses were received.

Innovation patent owners were asked to self-assess the economic value of their innovation patent.

The majority of responses fell within the range of \$100,000 to \$1M – with a weighted average value of \$895,000.

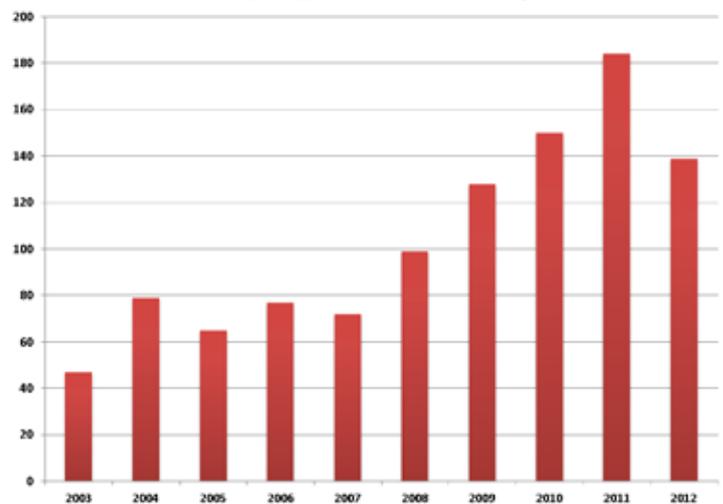
It is tempting to conclude that these self-reported

figures represent a generous 'guesstimation' rather than a cold and rigorous evaluation of economic value. Nevertheless, the figures cannot be ignored, and at the very least indicate a particularly confident perception of strong economic value bound up in innovation patent rights.

Emerging trends

Filed at the rate of one for every 20 standard patent applications, innovation patents have to date been underutilised and arguably underappreciated by foreign as well as local interests. The majority of applicants are domestic Australian applicants using the system to protect local innovation, although the gap between the number of local and foreign applicants has been closing since 2009 when the strength of innovation patents as a commercial tool became apparent from the *Dura-Post v Delnorth*¹ decision. Abolition of the system would defeat the government's intended purpose for introducing a second tier patent system in 2001 which was to encourage and reward Australian innovation. This

Australia patent applications for wind turbine technologies



stocks on the Australian Stock Exchange. The index lost 32.8% over the three years to August 2013 while the broader S&P/ASX200 gained 15.3% over the same period.

The uncertainty surrounding government policy creates risk. More established technologies are favored in a risky environment and, in this regard, the wind turbine industry has benefited most. Both sides of politics are committed to the 20% renewable energy target, and wind energy, together with gas (as a transitional fuel), are the surest way to achieve it.

Reflecting this, developers of wind turbines have sought patent protection for their technologies in Australia, at least until very recently. The accompanying chart shows the number of patent applications filed in Australia for wind turbine technologies² (including direct national applications and PCT national phase) over the past 10 years. Applications increased steadily from about 2007 to 2011 but then dropped suddenly in 2012. This drop can only partly be explained by unpublished applications³ because these would only be a very small portion of the total.

The drop in patent applications in 2012 causes us to wonder whether even international wind turbine businesses have recently become nervous about the Australian renewable energy sector. Why protect R&D in a particular jurisdiction if there is no market for a product which embodies it?

Whether or not one agrees with the 'direct action' approach, the change of government, and change of policy, should provide some certainty for the renewable energy sector in Australia. We look forward to seeing how this unfolds over the next year or so.

Ray Tettman

¹ Published by Australian CleanTech, www.auscleantech.com.au

² Class F03D of the International Patent Classification (IPC) relating to 'wind motors'

³ Patent applications are generally published 18 months after filing, so any non-convention applications would not yet be published

outcome of the Review seems highly unlikely.

As the system currently stands, many prospective innovation patent owners will remain motivated to seek innovation patent rights that are difficult for third parties to invalidate, yet offer the same suite of remedies as standard patents, albeit over a truncated term. There is a level of disquiet about this unintended outcome of the introduction of the system.

Evidence exists that international corporations (most notably Apple, Inc, and Dyson Technology Ltd) are increasingly recognising the strategic value of holding Australian innovation patents. Should this trend become broader and deeper, perceived deficiencies of the innovation patent system will inevitably become more apparent, and consequently the pressure for reform will increase.

Christian Schieber and David Perkins

¹ *Dura-Post (Australia) Pty Ltd v Delnorth Pty Ltd* [2009] FCAFC 81 (30 June 2009)

• Australian version