

8th March 2007

Kostas Arvenitis
ACIP Secretariat
P O Box 200
WODEN ACT 2606

Dear sirs

Comments on Post Grant Enforcement Strategies

The following comments are based on my experience in acting for Australian based start up enterprises and research institutes who develop new technologies and products for a global market. These enterprises are at the leading edge of new wealth creation in Australia.

In Australia, patent litigation can only be based on Australian patents. The majority of Australian patents are owned by overseas based corporations and these organisations are usually adequately resourced to undertake litigation in Australian courts. The majority of businesses who are significantly affected by Australian patents are also overseas based or owned. Larger Australian enterprises are also well resourced to undertake litigation. The concern that litigation may be too expensive is therefore mostly an issue for the smaller Australian businesses.

The Australian entities that I work with are all small Australian businesses. They rarely have any conflicts in Australia. Their existing and potential markets are overseas and the major proportion of current and future revenues will come from exploitation of their overseas patents.

These businesses do have regular conflict situations in overseas markets where they are either likely to infringe competitor's patents or have concerns that their patents are likely to be infringed. All of these disputes are resolved by either they or their competitors, redesigning products to avoid infringement or entering into patent licensing arrangements or simply assigning ownership. Litigation is avoided because the costs and time involved in litigation cannot justify the outcomes that litigation produces when compared to the outcomes that redesign or commercial negotiation can produce.

If the effective cost of litigation in overseas countries was lower for these businesses, litigation would in some cases be a viable alternative.

Thus my conclusion is that any changes to the patent litigation environment in Australia will be of little benefit to the most important group of Australian innovators, namely those focused on developing products for global markets.

The current efforts made by the Australian government and I P Australia in encouraging other countries to meet minimum patent law and enforcement standards is to be applauded and encouraged. At a practical level an information exchange based on real situations would help these enterprises. But the most effective assistance would be to reduce the effective cost of overseas litigation.

By having a higher tax deduction for overseas litigation may help, but some of these enterprises may have low levels of taxable income and in some cases the litigation expenses may be incurred by subsidiary companies based overseas. Payment of direct grants or subsidies may be more effective.

Thank you for granting me the opportunity to provide my comments.

Yours respectfully



Darryl Mischlewski