A change is patently needed

Tim Wilson

Patents are a private property right designed to incentivise innovation. But the incentives that patents provide for pharmaceutical innovation have been undermined at the expense of research and development investment.

Yesterday, Innovation Minister Kim Carr released the Cutler innovation review's report, *Venturous Australia*. The report identifies reforms to Australia's intellectual property (IP) regime including a review to ensure that the grounds for granting a patent are more stringent.

Tight patentability criteria are vital to ensure innovators can have confidence in the scheme. But so is the capacity for a patent's enforcement. Patents provide legal, tradeable status to an intangible asset. The right and responsibility of a patent holder is to stop others infringing on their rights, and where they do so, to take action.

Yet in 2004 the then leader of the opposition, Mark Latham, moved an amendment to the law to stop patent holders protecting their rights.

Under the amendments parliament agreed to, if a pharmaceutical patent holder enforces their rights against infringing patents they must determine whether they have "reasonable prospects of success". If the court deems the patent holder didn't think they did the court can award a penalty of up to $10 million.

Considering the subjective nature of interpreting "reasonable prospects of success" the penalty is extreme. In comparison, a mischievous patent infringer who is found to have been misleading in the same proceedings can be fined only $110,000.

The Latham amendments were not good policy at the time and are now undermining Australia's attractiveness as a centre of innovation.

But the Latham amendments are not alone. Many non-pharmaceutical inventions enjoy the full commercial potential of the patent term. But pharmaceuticals are required to demonstrate efficacy and safety of their products before they can be sold. In addition to placing huge commercial costs, doing so also eats into their patent life.

By the time they reach commercialisation, pharmaceuticals normally have only half a patent life remaining. The reduction in the patent life is so egregious that governments provide for a limited pharmaceutical patent extension period at the back-end of the patent for up to five years.

But at the front-end new regulations are regularly added, by parliament and the Therapeutic Goods Administration, that eat into the patent life.

The *2006 OECD Science, Technology and Industry Outlook* found that a mature IP system was ranked as the second most important consideration for the location of research and development in developed countries.

Carr should take the opportunity the Cutler Innovation report provides and fix the barriers to investing in an innovative Australian pharmaceuticals industry.

Tim Wilson is director of the IP and Free Trade Unit at the Institute of Public Affairs.