



# **Patents Amendment (Innovation Patents) Act 2000**

**No. 140, 2000**



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**An Act to amend the *Patents Act 1990* by repealing  
the petty patent scheme and providing for  
innovation patents and other minor amendments,  
and for related purposes**

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**An Act to amend the *Patents Act 1990* by repealing  
the petty patent scheme and providing for  
innovation patents and other minor amendments,  
and for related purposes**

[Assented to 24 November 2000]

The Parliament of Australia enacts:

## **1 Short title**

This Act may be cited as the *Patents Amendment (Innovation  
Patents) Act 2000*.

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## **2 Commencement**

- (1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.
- (2) If this Act does not commence under subsection (1) within the period of 6 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

## **3 Schedule(s)**

Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Amendment of the Patents Act 1990**

### **1 Section 3 (index of expressions)**

Insert the following entries in their appropriate alphabetical positions, determined on a letter by letter basis:

certified  
formalities check  
innovation patent

### **2 Section 3 (index of expressions)**

Omit:

divisional application  
petty patent

### **3 Section 4**

Repeal the section, substitute:

### **4 What are the typical steps in getting and maintaining a standard patent?**

The following diagram shows most of the typical steps involved in getting and maintaining a standard patent. The diagram is intended for use only as a general introductory illustration and is not intended to have any other effect. If there is an inconsistency between any matter contained in the diagram and a provision of this Act or the regulations, the provision prevails.

### **4 Section 4 (Table 2)**

Repeal the table.

### **5 At the end of section 7**

Add:

*Innovative step*

- (4) For the purposes of this Act, an invention is to be taken to involve an innovative step when compared with the prior art base unless

the invention would, to a person skilled in the relevant art, in the light of the common general knowledge as it existed in the patent area before the priority date of the relevant claim, only vary from the kinds of information set out in subsection (5) in ways that make no substantial contribution to the working of the invention.

- (5) For the purposes of subsection (4), the information is of the following kinds:
- (a) prior art information made publicly available in a single document or through doing a single act;
  - (b) prior art information made publicly available in 2 or more related documents, or through doing 2 or more related acts, if the relationship between the documents or acts is such that a person skilled in the relevant art in the patent area would treat them as a single source of that information.
- (6) For the purposes of subsection (4), each kind of information set out in subsection (5) must be considered separately.

Note 1: The following heading to subsection 7(1) is inserted “*Novelty*”.

Note 2: The following heading to subsection 7(2) is inserted “*Inventive step*”.

## 6 Subsection 18(1)

Omit “a patentable invention is an invention that”, substitute “an invention is a patentable invention for the purposes of a standard patent if the invention”.

Note: The following heading to subsection 18(1) is inserted “*Patentable inventions for the purposes of a standard patent*”.

## 7 After subsection 18(1)

Insert:

*Patentable inventions for the purposes of an innovation patent*

- (1A) Subject to subsections (2) and (3), an invention is a patentable invention for the purposes of an innovation patent if the invention, so far as claimed in any claim:
- (a) is a manner of manufacture within the meaning of section 6 of the Statute of Monopolies; and
  - (b) when compared with the prior art base as it existed before the priority date of that claim:
    - (i) is novel; and

- (ii) involves an innovative step; and
- (c) is useful; and
- (d) was not secretly used in the patent area before the priority date of that claim by, or on behalf of, or with the authority of, the patentee or nominated person or the patentee's or nominated person's predecessor in title to the invention.

## **8 At the end of section 18**

Add:

*Certain inventions not patentable inventions for the purposes of an innovation patent*

- (3) For the purposes of an innovation patent, plants and animals, and the biological processes for the generation of plants and animals, are not patentable inventions.
- (4) Subsection (3) does not apply if the invention is a microbiological process or a product of such a process.

## **9 Subsections 24(1) and (2)**

Omit "inventive step", substitute "inventive step or an innovative step".

## **10 Section 28**

Repeal the section, substitute:

## **28 Notice of matters affecting validity of innovation patents**

*Person may give notice of invalidity of an innovation patent*

- (1) A person may notify the Commissioner that the person asserts, for reasons stated in the notice, that an innovation patent is invalid because the invention concerned does not comply with paragraph 18(1A)(b).

*When notice may be given*

- (2) A notice may only be given to the Commissioner under subsection (1) in respect of an innovation patent within the prescribed period after an innovation patent has been granted.

*How notice must be given*

- (3) Notice must be given in accordance with the regulations.

*Commissioner must inform patentee of notice given*

- (4) If the Commissioner receives a notice in respect of an innovation patent, the Commissioner must inform the patentee, in writing, of any matter of which the Commissioner is notified and send the patentee a copy of any document accompanying the notice.

*Commissioner to deal with notice in accordance with regulations*

- (5) The Commissioner must otherwise consider and deal with a notice in accordance with the regulations.

## **11 Sections 33 and 34**

Repeal the sections, substitute:

## **33 Applications by opponents etc.**

*Opposition to standard patent if a person other than nominated person eligible for grant of patent*

- (1) If:
- (a) an application has been made for a standard patent; and
  - (b) the grant of the standard patent is opposed under section 59 by one or more persons; and
  - (c) the Commissioner decides, under section 60, that:
    - (i) one or more opponents are eligible persons in relation to the invention, so far as claimed in any claim of the opposed patent application (the *original claim*); and
    - (ii) the nominated person in respect of the application is not an eligible person in relation to the invention; and
    - (iii) there is no other reason that a patent should not be granted; and
  - (d) a complete application is made under section 29 by one or more of the eligible persons for a patent in relation to the invention;
- the Commissioner may grant those eligible persons a patent jointly for the invention, so far as so claimed.

*Opposition to standard patent if nominated person eligible for grant of patent with other persons*

- (2) If:
- (a) an application has been made for a standard patent; and
  - (b) the grant of the patent is opposed under section 59 by one or more persons; and
  - (c) the Commissioner decides, under section 60:
    - (i) that both the nominated person and one or more of the opponents are eligible persons in relation to the invention, so far as claimed in any claim of the opposed patent application (the ***original claim***); and
    - (ii) that there is no other reason that a patent should not be granted; and
  - (d) a complete application is made by one or more of the eligible persons under section 29 for a patent in relation to the invention;

the Commissioner may grant a patent for the invention, so far as so claimed, to those eligible persons jointly.

*Opposition to innovation patent if patentee not entitled to grant of patent but another person is*

- (3) If:
- (a) an innovation patent is opposed under section 101M by one or more persons;
  - (b) the Commissioner decides, under section 101N, that the patentee is not entitled to the grant of the patent; and
  - (c) the Commissioner decides that one or more of the opponents are eligible persons in relation to the invention the subject of the patent, so far as claimed in any claim of the patent (the ***original claim***); and
  - (d) a complete application is made by one or more of the eligible persons under section 29 for a patent in relation to the invention;

the Commissioner may grant an innovation patent for the invention, so far as so claimed, to those eligible persons.

*Opposition to innovation patent if patentee entitled to grant of patent with other person*

- (4) If:
- (a) an innovation patent is opposed under section 101M by one or more persons; and
  - (b) the Commissioner decides that one or more of the opponents and the original patentee are eligible persons in relation to the invention the subject of the patent, so far as claimed in any claim of the patent (the **original claim**); and
  - (c) a complete application is made by one or more of the eligible persons under section 29 for a patent in relation to the invention;
- the Commissioner may grant an innovation patent for the invention, so far as so claimed, to those eligible persons jointly.
- (5) If the Commissioner grants a patent under subsection (1), (2), (3) or (4), the claims of that patent granted have the same priority date as that of the original claim referred to in the respective subsection.

**34 Applications by eligible persons arising out of Court proceedings**

- (1) If, in any proceedings in a court relating to a patent (the **first patent**), the court is satisfied either:
- (a) that one or more persons are eligible persons in relation to an invention so far as claimed in any claim of the patent (the **original claim**) but that the patentee is not an eligible person; or
  - (b) that the patentee and another person or persons are eligible persons in relation to an invention so far as claimed in any claim of the first patent (the **original claim**);
- the court, in addition to any other order it may make in the proceedings, may, by order, declare that the persons who it is satisfied are eligible persons are eligible persons in relation to that invention so far as so claimed.
- (2) Subject to subsection (3), if a complete application is made under section 29 by one or more declared persons, the Commissioner may grant a patent for the invention, so far as claimed in the original claim, to those declared persons jointly.

- (3) If the Commissioner grants a patent under subsection (2), the claims of that patent have the same priority date as that of the original claim.

## **12 Subsection 35(1)**

Repeal the subsection, substitute:

- (1) If the Commissioner:
- (a) revokes a patent under section 137; and
  - (b) is satisfied:
    - (i) on application made by one or more persons in accordance with the regulations, that the persons are eligible persons in relation to the invention concerned, so far as so claimed in any claim of the revoked patent (the *original claim*) and that the former patentee is not such an eligible person; or
    - (ii) on application made by one or more persons in accordance with the regulations, that the persons and the former patentee are eligible persons in relation to the invention concerned, so far as is claimed in any claim of the revoked patent (the *original claim*);
- the Commissioner may declare in writing that the eligible persons are such eligible persons.
- (1A) If a complete application is made under section 29 by one or more of the declared persons, the Commissioner may grant a patent for the invention, so far as so claimed, to those declared persons jointly.
- (1B) If the Commissioner grants a patent under subsection (1A), the claims of that patent have the same priority date as that of the original claim as referred to in subsection (1).

## **13 Section 36**

Repeal the section, substitute:

### **36 Other applications by eligible persons**

- (1) If:

- (a) a patent application has been made and, in the case of a complete application, the patent request and complete specification have not been accepted; and
  - (b) an application for a declaration by the Commissioner is made by one or more persons (the *section 36 applicants*) in accordance with the regulations; and
  - (c) the Commissioner is satisfied, in relation to an invention disclosed in the specification filed in relation to the application for the patent:
    - (i) that the nominated person is not an eligible person, but that the section 36 applicants are eligible persons; or
    - (ii) that the nominated person is an eligible person, but that the section 36 applicants are also eligible persons;the Commissioner may declare in writing that the persons who the Commissioner is satisfied are eligible persons are eligible persons in relation to the invention as so disclosed.
- (2) The Commissioner may make a declaration under subsection (1) whether or not the patent application lapses or is withdrawn.
- (3) The Commissioner must not make a declaration under subsection (1) without first giving the nominated person a reasonable opportunity to be heard.
- (4) If a complete application is made under section 29 by one or more of the declared persons, the priority date of the claims of a patent for the invention granted to the person, or persons, as the case may be, must be determined under the regulations.
- (5) An appeal lies to the Federal Court against a decision by the Commissioner under this section.

#### **14 Section 39**

Repeal the section.

#### **15 Paragraph 40(2)(c)**

Repeal the paragraph, substitute:

- (c) where it relates to an application for an innovation patent—  
end with at least one and no more than 5 claims.

#### **16 At the end of section 43**

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Add:

*Priority date if claim arises from further application for an innovation patent provided for in section 79C*

(5) If:

- (a) an innovation patent has been granted following an application provided for in section 79C; and
- (b) a request for the examination of the patent has been made within the period prescribed in the regulations;

the priority date of each claim in the specification is the date determined under the regulations.

(6) If:

- (a) an innovation patent has been granted following an application provided for in section 79C; and
- (b) a request for the examination of the patent has not been made within the period prescribed in the regulations;

the priority date of each claim in the specification must not be a date earlier than the date of filing of the application provided for in section 79C.

## **17 Part 2 of Chapter 3 (heading)**

Repeal the heading, substitute:

## **Part 2—Examination of standard patent requests and specifications**

### **18 Subsection 45(1)**

Repeal the subsection, substitute:

- (1) Where an applicant asks for an examination of a patent request and complete specification relating to an application for a standard patent, the Commissioner must examine the request and specification and report on:
  - (a) whether the specification complies with section 40; and
  - (b) whether, to the best of his or her knowledge, the invention, so far as claimed, satisfies the criterion mentioned in paragraph 18(1)(a); and

(c) whether, to the best of his or her knowledge, the invention, so far as claimed in any claim and when compared with the prior art base as it existed before the priority date of that claim:

- (i) is novel; and
- (ii) involves an inventive step; and
- (d) such other matters (if any) as are prescribed.

(1A) For the purposes of paragraph (1)(c), the prior art base is to be taken not to include information made publicly available only through the doing of an act anywhere in the patent area.

### **19 Subsection 48(1)**

Repeal the subsection, substitute:

(1) When an applicant asks for a modified examination of a patent request and complete specification relating to an application for a standard patent, the Commissioner must examine the request and specification and report on:

- (a) whether, to the best of his or her knowledge, the invention, so far as claimed, satisfies the criterion mentioned in paragraph 18(1)(a); and
- (b) whether, to the best of his or her knowledge, the invention, so far as claimed in any claim and when compared with the prior art base as it existed before the priority date of that claim:
  - (i) is novel; and
  - (ii) involves an inventive step; and
- (c) such other matters (if any) as are prescribed.

(1A) For the purposes of paragraph (1)(c), the prior art base is to be taken not to include information made publicly available only through the doing of an act anywhere in the patent area.

### **20 After Part 3 of Chapter 3 (heading)**

Insert:

## **Division 1—Acceptance of standard patents**

### **21 Subsection 49(1)**

Omit “section 51”, substitute “section 50”.

## **22 Sections 50, 51 and 52**

Repeal the sections, substitute:

### **50 Application or grant may be refused in certain cases**

- (1) The Commissioner may refuse to accept a request and specification relating to a standard patent, or to grant a standard patent:
  - (a) for an invention the use of which would be contrary to law;  
or
  - (b) on the ground that the specification claims as an invention:
    - (i) a substance that is capable of being used as food or medicine (whether for human beings or animals and whether for internal or external use) and is a mere mixture of known ingredients; or
    - (ii) a process producing such a substance by mere admixture.
- (2) The Commissioner may refuse to accept a specification relating to a standard patent containing a claim that includes the name of a person as the name, or part of the name, of the invention so far as claimed in that claim.

### **51 Appeal**

An appeal lies to the Federal Court against a decision of the Commissioner under this Division.

## **Division 2—Acceptance of innovation patents**

### **52 Formalities check and acceptance of innovation patents**

- (1) If a complete application for an innovation patent is made, the Commissioner must undertake a formalities check in respect of the application.
- (2) If satisfied that the application passes the formalities check, the Commissioner must accept the patent request and complete specification.

### **23 Subsection 54(1)**

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Omit “for a patent”, substitute “for a standard patent”.

**24 Paragraph 54(4)(a)**

After “divisional application”, insert “for a standard patent provided for in section 79B”.

**25 Subsection 54(5)**

After “divisional application”, insert “for a standard patent provided for in section 79B”.

**26 Paragraph 54(6)(a)**

After “divisional application”, insert “for a standard patent provided for in section 79B”.

**26A Subsection 55(1)**

After “under section 54”, insert “or under subsection 62(3)”.

**27 Subsection 55(2)**

Omit “a petty”, substitute “an innovation”.

**28 Subsection 57(2)**

Repeal the subsection.

**29 Subsection 57(3)**

Omit “Neither subsection (1) nor (2) gives”, substitute “Subsection (1) does not give”.

**30 Subsection 57(4)**

Repeal the subsection, substitute:

- (4) It is a defence to proceedings under subsection (1) in respect of an act done:
  - (a) after the complete specification became open to public inspection; and
  - (b) before the patent request was accepted:  
if the defendant proves that a patent could not validly have been granted to the applicant in respect of the claims (as framed when the act was done) that are alleged to have been infringed by the doing of the act.

**31 Chapter 5 (heading)**

Repeal the heading, substitute:

**Chapter 5—Opposition to grant of standard patent**

**32 Paragraph 59(a)**

Repeal the paragraph, substitute:

- (a) that the nominated person is either:
  - (i) not entitled to a grant of a patent for the invention; or
  - (ii) entitled to a grant of a patent for the invention but only in conjunction with some other person;

**33 At the end of section 59**

Add:

- ; (d) that the invention is not a patentable invention under subsection 18(2).

**34 Section 62**

Repeal the section, substitute:

**62 Grant and publication of innovation patent**

- (1) If:
  - (a) the Commissioner accepts a patent request and complete specification filed in respect of an application for an innovation patent; and
  - (b) a prohibition order is not in force under subsection 152(3) or 173(1) in relation to the application;the Commissioner must grant the innovation patent by sealing an innovation patent in the approved form.
- (2) If an innovation patent is granted, the Commissioner must publish a notice in the *Official Journal* stating that:
  - (a) the innovation patent has been granted; and
  - (b) the patent request and complete specification are open to public inspection.
- (3) If:

- (a) a divisional application provided for in section 79B is made for an innovation patent; and
- (b) a notice is published in the *Official Journal* that the complete specification filed in respect of the divisional application is open to public inspection;

the Commissioner must also publish in the *Official Journal* a notice that the complete specification filed in respect of the original application on which the divisional application is based is open to public inspection.

**35 Paragraph 64(2)(a)**

Omit “a patent application”, substitute “an application for a standard patent”.

**36 Subsection 64(2)**

Omit “patent cannot”, substitute “standard patent cannot”.

**37 At the end of section 66**

Add:

(2) If:

- (a) the Commissioner is satisfied that particulars on a patent are incorrect because of an error or omission by the Commissioner; and
- (b) the patent is returned to the Commissioner;  
the Commissioner may seal a duplicate of the patent.

**38 Section 68**

Repeal the section, substitute:

**68 Term of innovation patent**

The term of an innovation patent is 8 years from the date of the patent.

**39 Part 3 of Chapter 6 (heading)**

Repeal the heading, substitute:

## **Part 3—Extension of term of standard patents relating to pharmaceutical substances**

### **40 Division 1 of Part 3 of Chapter 6**

Repeal the Division.

### **41 Division 2 of Part 3 of Chapter 6 (heading)**

Repeal the heading.

### **42 After Chapter 6**

Insert:

## **Chapter 6A—Divisional applications**

### **79B Divisional applications prior to grant of patent**

- (1) If a complete patent application for a patent is made (but has not lapsed or been refused or withdrawn), the applicant may, in accordance with the regulations, make a further complete application for a patent for an invention:
  - (a) disclosed in the specification filed in respect of the first-mentioned application; and
  - (b) where the first-mentioned application is for a standard patent and at least 3 months have elapsed since the publication of a notice of acceptance of the relevant patent request and specification in the *Official Journal*—falling within the scope of the claims of the accepted specification.
- (1A) The reference to a complete patent application first-mentioned in subsection (1) does not include a reference to a divisional application for an innovation patent provided for in section 79C.
- (2) In this section:

***applicant*** has the same meaning as in section 38.

**79C Divisional applications for innovation patents may be made after grant of an innovation patent**

*Applications may be made*

- (1) A patentee of an innovation patent (the *first patent*) may make a complete application for another innovation patent for a further invention disclosed in the first patent if the invention was disclosed in the complete specification filed in respect of the application on which the first patent was sealed.

*When further applications must be made*

- (2) The patentee may only make the further complete application during the period that commences on the day an examination of the first patent begins and ends at the end of a period prescribed in the regulations.

*When does an examination begin?*

- (3) For the purposes of subsection (2), an examination of the patent begins:
  - (a) if the examination has been requested under paragraph 101A(b)—on the day the request was made; or
  - (b) if the Commissioner decided to examine the patent under paragraph 101A(a)—on the day the Commissioner made that decision.

**43 Section 80**

Repeal the section, substitute:

**80 Chapter does not apply to innovation patents**

This Chapter does not apply in relation to innovation patents.

**44 Subsection 88(2)**

Repeal the subsection.

**45 Subsection 89(1)**

After “applications”, insert “for standard patents”.

**46 Chapter 9 (heading)**

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Repeal the heading, substitute:

## **Chapter 9—Re-examination of standard patents**

### **47 Before section 97 in Chapter 9**

Insert:

### **96A Chapter does not apply to innovation patents**

This Chapter does not apply in relation to innovation patents.

### **48 Subsection 98(1)**

Omit “immediately”.

### **49 Subsection 98(2)**

After “available”, insert “only”.

### **50 At the end of subsection 99(2)**

Add “or 107”.

### **51 After Chapter 9**

Insert:

## **Chapter 9A—Examination, re-examination and opposition-innovation patents**

### **Part 1—Examination of innovation patents**

#### **101A Examination may be requested or Commissioner may decide to examine**

After the grant of an innovation patent, the Commissioner:

- (a) may, if the Commissioner decides to do so; and
- (b) must, if asked to do so, in writing, by the patentee or any other person;

examine the complete specification relating to an innovation patent.

## 101B Examination of an innovation patent

### *What the Commissioner must do in examining a patent*

- (1) If the Commissioner examines an innovation patent under section 101A, the Commissioner must:
  - (a) examine the complete specification relating to the patent to determine if the patent is invalid and should be revoked because a ground set out in subsection (2), (4), (5), (6) or (7) is made out; and
  - (b) report on the grounds set out in those subsections.These are the only grounds for revocation under this section.

### *Grounds for revocation relating to validity*

- (2) The grounds for revocation under subsection (1) include the following:
  - (a) that the specification does not comply with section 40;
  - (b) that the invention, so far as claimed, does not comply with paragraph 18(1A)(a) or (b);
  - (c) that the invention is not a patentable invention under subsection 18(2) or (3);
  - (d) that the use of the invention would be contrary to law.
- (3) For the purposes of working out whether the invention does not comply with paragraph 18A(1)(b), the prior art base (referred to in that paragraph) is to be taken not to include information made publicly available only through the doing of an act anywhere in the patent area.

### *Revocation on ground that invention claims a substance capable of being used as food or medicine etc.*

- (4) A further ground for revocation is that the patent claims as an invention:
  - (a) a substance that is capable of being used as food or medicine (whether for human beings or animals and whether for internal or external use) and is a mere mixture of known ingredients; or
  - (b) a process producing such a substance by mere admixture.

*Revocation on ground that patent includes a name*

- (5) A further ground for revocation is that the patent contains a claim that includes the name of a person as the name, or part of the name, of the invention so far as it is claimed in that claim.

*Revocation on grounds of multiple patents for one invention*

- (6) A further ground for revocation is that:
- (a) the innovation patent claims an invention that is the same as an invention that is the subject of a patent and is made by the same inventor; and
  - (b) the relevant claim or claims in respect of each patent have the same priority date or dates.

*Revocation for grounds set out in the regulations*

- (7) A further ground for revocation is that the complete specification does not comply with such other matters (if any) as are prescribed.

**101C How and when examination to be carried out**

The examination under section 101B must be carried out:

- (a) in accordance with the regulations; and
- (b) within the period prescribed.

**101D Commissioner may get information on searches**

The Commissioner may, from time to time, by notice in writing, direct the patentee to inform the Commissioner of the results of the searches specified in the notice, being searches carried out in a foreign country by a specified patent office or organisation in respect of a corresponding application filed outside Australia.

**101E Certificate of examination**

If:

- (a) the Commissioner decides in writing that, after examining a patent under section 101B, a ground for the revocation of a patent has not been made out, or that any such ground has been removed; and
- (b) the patent has not ceased under section 143A;

the Commissioner must:

- (c) notify the patentee and the person who requested the examination (if that person is not the patentee) that the patent has been examined and that a certificate of examination is to be issued; and
- (d) publish a notice of the examination having occurred in the *Official Journal*; and
- (e) issue a certificate of examination to the patentee in the form approved by the Commissioner; and
- (f) register the issue of the certificate.

**101F Revocation of innovation patents following examination under section 101B**

- (1) If:
  - (a) the Commissioner considers that, after examining a patent under section 101B, a ground for the revocation of a patent has been made out and that the ground has not been removed; and
  - (b) the patent has not ceased under section 143A;the Commissioner must revoke the patent.
- (2) If the Commissioner revokes the patent:
  - (a) the Commissioner must notify the patentee and the person who requested the examination (if that person is not the patentee) of the revocation; and
  - (b) register the revocation of the patent.
- (3) The Commissioner must not revoke a patent under this section unless the Commissioner:
  - (a) has given the patentee a reasonable opportunity to be heard; and
  - (b) has, if appropriate, given the patentee a reasonable opportunity to amend the relevant specification for the purposes of removing a ground for the revocation of the patent and the patentee has failed to do so.
- (4) An appeal lies to the Federal Court against a decision of the Commissioner revoking a patent.

## **Part 2—Re-examination of innovation patents**

### **101G Re-examination of complete specifications of innovation patents**

- (1) Subject to subsections 101K(2) and (3) and the regulations, after an innovation patent has been certified, the Commissioner:
  - (a) may, if the Commissioner decides to do so; and
  - (b) must, if asked to do so, in writing, by the patentee or any other person;re-examine the complete specification relating to the patent.
- (2) If the Commissioner re-examines an innovation patent under subsection (1):
  - (a) the Commissioner must re-examine the complete specification relating to the patent to determine if the patent is invalid and should be revoked because a ground set out in subsection (3) is made out; and
  - (b) the Commissioner must report on the grounds set out in subsection (3).
- (3) The grounds for the revocation of the patent under subsection (2) are whether the invention, so far as claimed in any claim and when compared with the prior art base as it existed before the priority date of that claim:
  - (a) is not novel; and
  - (b) does not involve an innovative step.
- (4) There are no other grounds for the revocation of a patent under subsection (2).
- (5) For the purposes of subsection (3), the prior art base is to be taken not to include information made publicly available only through the doing of an act anywhere in the patent area.

### **101H Patentee statements**

- (1) If the Commissioner reports that, after re-examining a patent under section 101G, a ground for the revocation of the patent has been made out, the patentee may, within the prescribed period, file a

statement, in accordance with the regulations, disputing the whole or any part of the report.

- (2) The patentee may file a statement whether or not the patentee takes steps to amend the complete specification, or files a statement of amendments in accordance with a direction under section 106.

### **101J Revocation of innovation patent following re-examination**

- (1) If the Commissioner makes an adverse report on a re-examination under section 101G, the Commissioner may, by notice in writing, revoke the patent, either wholly or so far as it relates to a particular claim, as the case requires.
- (2) If the Commissioner revokes the patent:
  - (a) the Commissioner must notify the patentee and the person who requested the examination (if that person is not the patentee) of the revocation; and
  - (b) register the revocation of the patent.
- (3) The Commissioner must not revoke a patent under this section unless:
  - (a) the Commissioner has given the patentee a reasonable opportunity to be heard; and
  - (b) the Commissioner has considered the statement made by the patentee under section 101H (if any); and
  - (c) the Commissioner has, if appropriate, given the patentee a reasonable opportunity to amend the relevant specification for the purpose of removing any ground for revocation and the patentee has failed to do so.
- (4) The Commissioner must not revoke a patent under this section while relevant proceedings in relation to that patent are pending.
- (5) The patentee may appeal to the Federal Court against a decision of the Commissioner under this section.

### **101K Relevant proceedings and re-examination**

- (1) If the validity of an innovation patent is disputed in any proceedings before a prescribed court under this Act, the court may direct the Commissioner to re-examine the complete specification

relating to the patent. If so directed, the Commissioner must re-examine the specification accordingly.

- (2) If relevant proceedings in relation to an innovation patent are pending, the Commissioner must not re-examine the complete specification relating to the patent.
- (3) If:
  - (a) the Commissioner has started to re-examine a complete specification relating to an innovation patent; and
  - (b) relevant proceedings in relation to the patent are started;the Commissioner must not continue the re-examination.

### **101L Copies of report to be given to court**

A copy of a report under paragraph 101G(2)(b), and of any statement filed under section 101H in relation to the report, must, if the re-examination was directed under subsection 101K(1), be given to the court that gave the direction.

## **Part 3—Opposition to innovation patents**

### **101M Opposition to innovation patent**

The Minister, or any other person, may, in accordance with the regulations, oppose an innovation patent that has been certified and seek the revocation of it, on one or more of the following grounds of invalidity, but on no other:

- (a) that the patentee is either:
  - (i) not entitled to the patent; or
  - (ii) entitled to the patent but only in conjunction with some other person;
- (b) that the invention is not a patentable invention because it does not comply with paragraph 18(1A)(a) or (b);
- (c) that the invention is not a patentable invention under subsection 18(2) or (3);
- (d) that the complete specification does not comply with subsection 40(2) or (3).

**101N Hearing and decision by the Commissioner**

- (1) If an innovation patent has been opposed under section 101M, the Commissioner must decide the case in accordance with the regulations.
- (2) The Commissioner must give the opponent and the patentee a reasonable opportunity to be heard before deciding the case.
- (3) The Commissioner may, in deciding whether to revoke the patent, take into account any ground on which the grant of an innovation patent may be opposed, whether relied upon by the opponent or not.
- (4) Subject to subsection (6), if the Commissioner is satisfied that a ground exists for the revocation of an innovation patent, the Commissioner may revoke the patent in writing either wholly or so far as it relates to a particular claim.
- (5) If the Commissioner revokes the patent:
  - (a) the Commissioner must notify the patentee and the opponent of the revocation; and
  - (b) register the revocation of the patent.
- (6) The Commissioner must not revoke a patent under this section unless the Commissioner has, where appropriate, given the patentee a reasonable opportunity to amend the relevant specification for the purpose of removing any ground for revocation and the patentee has failed to do so.
- (7) The patentee, and any opponent, may appeal to the Federal Court against a decision of the Commissioner under this section.

**101P Relevant proceedings and opposition**

If relevant proceedings in relation to an innovation patent are pending, the Commissioner must not make a decision under this Part in relation to the patent without the leave of the court.

**52 Subsection 102(2)**

Repeal the subsection, substitute:

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*Certain amendments of complete specification are not allowable after relevant time*

- (2) An amendment of a complete specification is not allowable after the relevant time if, as a result of the amendment:
- (a) a claim of the specification would not in substance fall within the scope of the claims of the specification before amendment; or
  - (b) the specification would not comply with subsection 40(2) or (3).
- (2A) For the purposes of subsection (2), **relevant time** means:
- (a) in relation to an amendment proposed to a complete specification relating to a standard patent—after the specification has been accepted; or
  - (b) in relation to an amendment proposed to a complete specification relating to an innovation patent—after the Commissioner has made a decision under paragraph 101E(a) in respect of the patent.

*Amendment of innovation patent request not allowable in certain circumstances*

- (2B) An amendment to a patent request relating to an innovation patent application is not allowable if:
- (a) the patent application was provided for in section 79C; and
  - (b) the effect of the proposed amendment would be to convert the application from an application for an innovation patent to an application for a standard patent.

Note: The following heading to subsection 102(1) is inserted “*Amendment of complete specification not allowable if amended specification would claim matter not in substance disclosed in the filed specification*”.

*Meaning of relevant time*

**53 Paragraph 106(1)(b)**

Repeal the paragraph, substitute:

- (b) the Commissioner is satisfied that the patent is invalid on grounds that could be removed by appropriate amendments of the specification following:

- (i) in the case of a standard patent—re-examination of the patent; or
- (ii) in the case of an innovation patent—examination of, re-examination of, or opposition to, the patent;

**54 Paragraph 107(1)(a)**

Repeal the paragraph, substitute:

- (a) a complete application for a standard patent has been made; and

Note: The heading to section 107 is altered by omitting “**patent applications**” and substituting “**applications for standard patents**”.

**55 Section 108**

Repeal the section.

**56 Section 109**

Omit “106, 107 or 108”, substitute “106 or 107”.

**57 Section 111**

Repeal the section.

**57A Subsection 114(2)**

Repeal the subsection.

**58 After section 114**

Insert:

**114A Objection cannot be taken to certain amended claims**

- (1) This section applies if:
  - (a) a complete specification (the *original specification*) has been amended; and
  - (b) after the amendment, the amended specification claims matter that was in substance disclosed as a result of the amendment; and
  - (c) after the filing date of the original specification there is a publication or use of the invention as described in the original specification.

- (2) If this section applies, objection cannot be taken to the amended specification, and a patent is not invalid, on the ground that the invention, so far as claimed in the amended specification and having regard to the publication or the use of the invention described in the original specification, does not involve:
- (a) in the case of a standard patent—an inventive step; or
  - (b) in the case of an innovation patent—an innovative step.

**59 Subsection 120(1)**

Omit “Infringement”, substitute “Subject to subsection (1A), infringement”.

**60 After subsection 120(1)**

Insert:

- (1A) Infringement proceedings in respect of an innovation patent cannot be started unless the patent has been certified.

**61 At the end of subsection 126(1)**

Add:

- ; and (c) if the patent is an innovation patent—the patent has been certified.

**62 Section 129**

Repeal the section, substitute:

**129 Court’s power to grant relief if threats related to a standard patent or standard patent application**

If an application under section 128 for relief relates to threats made in respect of a standard patent or an application for a standard patent, the court may grant the applicant the relief applied for unless the respondent satisfies the court that the acts about which the threats were made infringed, or would infringe:

- (a) a claim that is not shown by the applicant to be invalid; or
- (b) rights under section 57 in respect of a claim that is not shown by the applicant to be a claim that would be invalid if the patent had been granted.

**129A Threats related to an innovation patent application or innovation patent and court's power to grant relief**

*Certain threats of infringement proceedings are always unjustifiable*

- (1) If:
- (a) a person:
    - (i) has applied for an innovation patent, but the application has not been determined; or
    - (ii) has an innovation patent that has not been certified; and
  - (b) the person, by means of circulars, advertisements or otherwise, threatens a person with infringement proceedings or other similar proceedings in respect of the patent applied for, or the patent, as the case may be;
- then, for the purposes of an application for relief under section 128 by the person threatened, the threats are unjustifiable.

*Courts power to grant relief in respect of threats made by the applicant for an innovation patent or the patentee of an uncertified innovation patent*

- (2) If an application under section 128 for relief relates to threats made in respect of an innovation patent that has not been certified or an application for an innovation patent, the court may grant the applicant the relief applied for.

*Courts power to grant relief in respect of threats made by the patentee of a certified innovation patent*

- (3) If an application under section 128 for relief relates to threats made in respect of a certified innovation patent, the court may grant the applicant the relief applied for unless the respondent satisfies the court that the acts about which the threats were made infringed, or would infringe, a claim that is not shown by the applicant to be invalid.

**63 At the end of subsection 130(3)**

Add:

Note: Infringement proceedings cannot be commenced in respect of an innovation patent unless the patent has first been certified (see subsection 120(1A)).

**64 Subsection 130(4)**

After “proceedings”, insert “under section 138”.

**65 At the end of subsection 130(4)**

Add:

Note: Revocation proceedings under section 138 cannot be commenced in respect of an innovation patent unless the patent has first been certified (see subsection 138(1A)).

**66 Subsection 133(1)**

Omit “A”, substitute “Subject to subsection (1A), a”.

**67 After subsection 133(1)**

Insert:

(1A) A person cannot apply for an order in respect of an innovation patent unless the patent has been certified.

**68 Subsection 134(1)**

Omit “standard”.

Note: The heading to section 134 is altered by omitting “**standard**”.

**69 Subsection 138(1)**

Omit “The”, substitute “Subject to subsection (1A), the”.

**70 After subsection 138(1)**

Insert:

(1A) A person cannot apply for an order in respect of an innovation patent unless the patent has been certified.

**71 Section 141**

Repeal the section, substitute:

**141 Withdrawal of applications**

(1) A patent application may be withdrawn at any time except during a period prescribed for the purposes of this section.

- (2) A patent application is to be treated as having been withdrawn if, and only if, the applicant lodges a written notice of withdrawal signed by the applicant.

**72 Subsection 142(3)**

Omit “patent”, substitute “standard patent”.

**73 Subsection 142(4)**

Repeal the subsection.

**74 After section 143**

Insert:

**143A Ceasing of innovation patents**

An innovation patent ceases if:

- (a) the fee for filing the request and accompanying specification relating to an application for an innovation patent is not paid in accordance with the regulations; or
- (b) after an examination of the patent has been requested under paragraph 101A(b), the patentee does not pay the prescribed fee for the examination within the prescribed period; or
- (c) the Commissioner does not make a decision under paragraph 101E(a) within the period prescribed for the purposes of this paragraph; or
- (d) the patentee does not pay a renewal fee for the patent within the prescribed period; or
- (e) the patentee does not comply with a direction of the Commissioner under section 106 within the time allowed by the Commissioner under that section.

**75 After subsection 144(1)**

Insert:

- (1A) A condition in a contract relating to the sale or lease of, or a licence to exploit, an invention the subject of an innovation patent is void if the effect of the condition would be to:
- (a) prohibit the buyer, lessee or licensee from applying for examination of the patent; or

- (b) impose restrictions on the circumstances in which the buyer, lessee or licensee may apply for examination of the patent.

**76 Paragraph 151(4)(c)**

Omit “or for a petty patent”.

**77 Subsection 153(2)**

Repeal the subsection, substitute:

- (2) While an order is in force in relation to an application for an innovation patent, the application may proceed up to the acceptance of the patent request and complete specification but a patent must not be granted on the application.

**78 Subsection 169(1)**

Omit “A”, substitute “Subject to subsection (4), a”.

**79 At the end of section 169**

Add:

- (4) An application under subsection (1) in respect of an innovation patent cannot be made unless the patent has been certified.

**80 Subsection 174(3)**

Repeal the subsection, substitute:

- (3) While a prohibition order is in force in relation to an application for an innovation patent, the application may proceed up to the acceptance of the patent request and complete specification, but a patent must not be granted on the application.

**81 Paragraph 176(c)**

Omit “or for a petty patent”.

**82 After subsection 178(1)**

Insert:

- (1A) A person must not falsely represent that he or she, or another person, is the patentee of an innovation patent that has been certified.

Penalty: 60 penalty units.

**83 At the end of subsection 186(1)**

Add:

The Register is to contain 2 parts as follows:

- (a) a part dealing with standard patents; and
- (b) a part dealing with innovation patents.

**84 Section 187**

Repeal the section, substitute:

**187 Registration of particulars of patents etc.**

- (1) Particulars of standards patents in force, and other prescribed particulars relating to standard patents (if any), must be registered in that part of the Register dealing with standard patents.
- (2) Particulars of innovation patents in force, and other prescribed particulars relating to innovation patents (if any), must be registered in that part of the Register dealing with innovation patents.

**85 Section 204**

Omit “section 21”, substitute “section 15B”.

**86 Subsection 223(4)**

Repeal the subsection, substitute:

- (4) The Commissioner must advertise in the *Official Journal*:
  - (a) an application made for an extension of time for more than 3 months; or
  - (b) an application made for an extension of time for doing a prescribed relevant act in prescribed circumstances.

**87 Subsection 223(9)**

Omit “an extension of time for more than 3 months is granted for doing a relevant act,”, substitute:

the Commissioner grants:

- (a) an extension of more than 3 months for doing a relevant act;
- or

- (b) an extension of time for doing a prescribed relevant act in prescribed circumstances;

**88 Paragraph 224(1)(a)**

Omit “or 66”, substitute “, 52 or 66”.

**89 At the end of subsection 227(1)**

Add “in accordance with the regulations”.

**90 Subsections 227(3), (4), (5) and (6)**

Repeal the subsections, substitute:

- (3) The regulations may provide for the consequences (for the purposes of this Act) of failing to pay a fee in accordance with the regulations.

Note: Some provisions of this Act provide expressly or implicitly for the consequences of failing to pay a fee (for example, see subsections 89(3) and 142(2), section 143, subsection 151(4) and section 176). Regulations cannot provide for consequences inconsistent with those provisions.

- (4) In particular, the regulations may provide that, for the purposes of this Act:
  - (a) an act is not to be done, or is taken not to have been done, if the fee for doing the act is not paid in accordance with the regulations; or
  - (b) a document is not filed, or is taken not to have been filed, if the fee for filing the document is not paid in accordance with the regulations; or
  - (c) a patent application lapses, or is taken to have lapsed, if the fee for filing the request and accompanying specification is not paid in accordance with the regulations.

- (5) Subsection (4) does not limit subsection (3).

**91 Paragraph 228(2)(d)**

Repeal the paragraph.

**92 After paragraph 228(2)(h)**

Insert:

- (ha) setting out the formalities checking process for innovation patents including, in particular, the following matters:
  - (i) specifying the formalities requirements (including compliance with the requirements of subsections 18(2) and (3)) that must be met in respect of an application for an innovation patent; and
  - (ii) empowering the Commissioner to direct an applicant for an innovation patent to do such things as are necessary to ensure that the application is in accordance with the requirements of the regulations relating to the preparation of documents for filing; and
  - (iii) providing for the lapsing of the application if such a direction is not complied with within a time specified in the regulations; and
  - (iv) providing for the restoration of an application that has so lapsed; and

**93 Paragraph 228(2)(j)**

Omit “patent”, substitute “standard patent”.

**94 Schedule 1 (Dictionary)**

Insert:

*certified*, in respect of an innovation patent other than in section 19, means a certificate of examination issued by the Commissioner under paragraph 101E(e) in respect of the patent.

**95 Schedule 1 (Dictionary) (definition of *complete specification*)**

Repeal the definition, substitute:

*complete specification* means (other than in section 116) a specification filed in respect of a complete patent application or, if the specification has been amended, the complete specification as amended.

**96 Schedule 1 (Dictionary) (definition of *divisional application*)**

Repeal the definition.

**97 Schedule 1 (Dictionary) (definition of *examination*)**

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Repeal the definition, substitute:

*examination* means:

- (a) in relation to a patent request and a complete specification relating to a standard patent—an examination of the request and specification under section 45, or a modified examination of the request and specification under section 48; or
- (b) in relation to an innovation patent—an examination of the complete specification relating to the patent under section 101B.

**98 Schedule 1 (Dictionary)**

Insert:

*formalities check* means, in respect of an application for an innovation patent, the checking process undertaken under section 52 using the process set out in the regulations.

**99 Schedule 1 (Dictionary)**

Insert:

*innovation patent* means letters patent for an invention granted under section 62.

**100 Schedule 1 (Dictionary) (definition of *patent*)**

Omit “a petty”, substitute “an innovation”.

**101 Schedule 1 (Dictionary) (definition of *patent application*)**

Omit “a petty”, substitute “an innovation”.

**102 Schedule 1 (Dictionary) (definition of *petty patent*)**

Repeal the definition.

**103 Schedule 1 (Dictionary) (paragraph (a) of the definition of *prior art base*)**

Repeal the paragraph, substitute:

- (a) in relation to deciding whether an invention does or does not involve an inventive step or an innovative step:

- (i) information in a document that is publicly available, whether in or out of the patent area; and
- (ii) information made publicly available through doing an act in the patent area.

**104 Schedule 1 (Dictionary) (at the end of the definition of *prior art information*)**

Add:

- ; and (c) for the purposes of subsection 7(5)—information that is part of the prior art base in relation to deciding whether an invention does or does not involve an innovative step.

**105 Schedule 1 (Dictionary) (definition of *re-examination*)**

Repeal the definition, substitute:

*re-examination* means:

- (a) in relation to a complete specification relating to an application for a standard patent—the re-examination of the complete specification under Chapter 9; and
- (b) in relation to an innovation patent—the re-examination of the innovation patent under Part 2 of Chapter 9A.

**106 Schedule 1 (Dictionary) (definition of *standard patent*)**

Repeal the definition, substitute:

*standard patent* means letters patent for an invention granted under section 61.

**107 Schedule 1 (Dictionary) (definition of *supply*)**

Repeal the definition, substitute:

*supply* includes:

- (a) supply by way of sale, exchange, lease, hire or hire-purchase; and
- (b) offer to supply (including supply by way of sale, exchange, lease, hire or hire-purchase).

## **Schedule 2—Application, saving and transitional provisions**

### **Part 1—Application, saving and transitional provisions relating to petty patents**

#### **1 Definitions**

In this Schedule:

*commencement day* means the day this Act commences.

*new law* means the *Patents Act 1990* as amended by this Act.

*old law* means the *Patents Act 1990*, and the regulations made under it, in force immediately before this Act commences.

*petty patent* means letters patent for an invention granted under section 62 of the old law.

#### **2 Saving and application provisions relating to old law**

- (1) Despite the amendments and repeals made by this Act, the old law continues to apply, with the exceptions set out in the following subitems, to:
- (a) petty patents in force immediately before the commencement day; and
  - (b) petty patents the term of which has expired before the commencement day; and
  - (c) applications for petty patents made before the commencement day but not decided upon by the Commissioner before that day; and
  - (d) petty patents granted on or after the commencement day on applications for a patent made before the commencement day.

The old law continues to apply as if those amendments and repeals had not been made.

**Schedule 2** Application, saving and transitional provisions

**Part 1** Application, saving and transitional provisions relating to petty patents

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*Exception—fees payable in respect of petty patents after the commencement day*

- (2) The amendments made by items 88 and 89 of Schedule 1 are incorporated into the old law in relation to fees payable in respect of petty patents on or after the commencement day.

*Exception—under subsection 33(2) of the old law only innovation patents may be granted*

- (3) Despite subsection 33(2) of the old law providing that the Commissioner may grant a person who applies for a petty patent if the matters listed in paragraphs 33(2)(a), (b) and (c) are satisfied, the Commissioner, on or after the commencement day, may only grant the person an innovation patent.

*Exception—under sections 34, 35 and 36 of the old law only innovation patents or standard patents may be granted*

- (4) Despite section 34, 35 and 36 of the old law providing that the Commissioner may grant a person a patent, the Commissioner, on or after the commencement day, may only grant a person an innovation patent or a standard patent.

Note: Under the old law, *patent* means a standard patent or a petty patent. This subitem overrides that meaning for grants of patent that the Commissioner makes on or after the commencement day.

*Exception—divisional applications made after commencement day*

- (5) Despite subsection 39(1) of the old law providing that a further complete application may be made for a standard patent or a petty patent, on or after the commencement day a further complete application may only be made, as provided for in that subsection, for a standard patent or an innovation patent.
- (6) Despite subsection 39(2) of the old law providing that a patentee of a petty patent may make a further complete application for a petty patent, on or after the commencement day a further complete application may only be made as provided for in that subsection for an innovation patent.

### **3 Transitional—applications for petty patents made before the commencement day may be converted to innovation patents or standard patents**

- (1) If, before the commencement day:
  - (a) a person files a complete application in respect of a petty patent; and
  - (b) a patent has not been accepted in respect of that application;then, after that day, the person may convert the application, as provided for under subsection 104(2) of the old law.
- (2) However, despite subsection 104(2) of the old law providing that the application may be for a standard patent or a petty patent, an application may only be made for a standard patent or an innovation patent.

### **4 Transitional—Register of Patents**

Despite the continuation of section 186 of the old law by subitem 2(1):

- (a) entries on the Register of Patents immediately before the commencement day relating to petty patents are included, after that day, in the Register in the part dealing with standard patents; and
- (b) after that day, entries relating to petty patents are to be entered in the Register in the part dealing with standard patents.

Note: Section 186 of the new law provides for the Register of Patents to have 2 parts: one dealing with entries relating to standard patents and the other dealing with entries relating to innovation patents.

### **5 Continuity of Register of Patents not affected**

To avoid doubt, the continuity of the Register of Patents and the entries on it, are unaffected by the amendments made by this Act.

### **6 Other transitional matters relating to innovation patents and petty patents may be provided for in the regulations**

The Governor-General may make regulations, not inconsistent with this Act or the new law, prescribing other transitional matters, apart from transitional matters provided for in this Schedule, that are necessary or convenient for carrying out or giving effect to:

- (a) the introduction of the innovation patent scheme; and

**Schedule 2** Application, saving and transitional provisions

**Part 1** Application, saving and transitional provisions relating to petty patents

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- (b) the limited continuation of the petty patent scheme as provided for in this Schedule.

## **Part 2—Other application and saving provisions**

### **7 Application**

- (1) The amendments made by items 85, 86, 88 and 89 of Schedule 1 do not apply in relation to fees that were due and payable before the day on which this Act commences.
- (2) The amendments made by items 85, 86, 88 and 89 of Schedule 1 do not apply in relation to fees paid before the day on which this Act commences (even if they were not due until that day or a later day).

### **8 Saving of regulations for subsection 223(9)**

- (1) Regulations in force for the purposes of subsection 223(9) of the *Patents Act 1990* immediately before the day on which this Act commences continue to have effect on and after that day as if they had been made for the purposes of that subsection as amended by this Schedule.
- (2) Subitem 1 does not prevent the repeal or amendment of regulations continued by that subitem.

## Schedule 3—Consequential amendment of other Acts

### *Income Tax Assessment Act 1997*

#### **1 Section 373-35 (after table item 2)**

Insert:

2A	innovation patent	the income year of the 8th anniversary of the patent
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*[Minister's second reading speech made in—  
House of Representatives on 29 June 2000  
Senate on 7 September 2000]*

(136/00)