

The Australian Experimental Use Exemption: A Current Overview

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Australian patent law contains no express exemption from infringement for any experimental use of patented inventions. A variety of international and local events became catalysts for two extensive reviews in Australia of the existence of and need for some form of exemption from infringement for experimental and research use of patented inventions. One was conducted as part of a larger investigation by the Australian Law Reform Commission (ALRC): *Genes and Ingenuity: Gene Patenting and Human Health*. The second was a specific investigation into patents and experimental use by the Advisory Council on Intellectual Property (ACIP). Its final report *Patents and Experimental Use* was published in 2005. Both reports recommended that the Commonwealth government should amend the Patents Act 1990 to establish an exemption (ALRC) or exception (ACIP) from patent infringement for certain acts involving experimental use of patents. However, while the former Howard liberal government chose to accept the ACIP recommendation in 2007, the new Rudd labour government has not introduced any amendment to date. This article provides a brief overview of the recommendations of those reviews and evaluates the current position in Australia in both the light of the reviews and of subsequent international developments.

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Australian patent law does not contain an express provision that lists all the acts that infringe a patent. Instead, infringement is determined with reference to the exclusive rights of the patentee, namely “to exploit the invention and to authorize another person to exploit the invention” in the patent area.¹ The term “exploit” in relation to an invention is defined in schedule 1 of the Patents Act 1990 (Cth) (1990 Act) to include:

- where the invention is a product—make, hire, sell or otherwise dispose of the product, offer to make, sell, hire or otherwise dispose of it, use or import it, or keep it for the purpose of doing any of those things; or
- where the invention is a method or process—use the method or process or do any act mentioned in paragraph (a) in respect of a product resulting from such use.²

There are two ways in which acts might be found not to infringe a patent. The first is through judicial interpretation of the exclusive rights in a way that limits their scope. A specific type of experimental, research or private use, for example, may be construed to be non-infringing because it is outside the meaning of the definition of