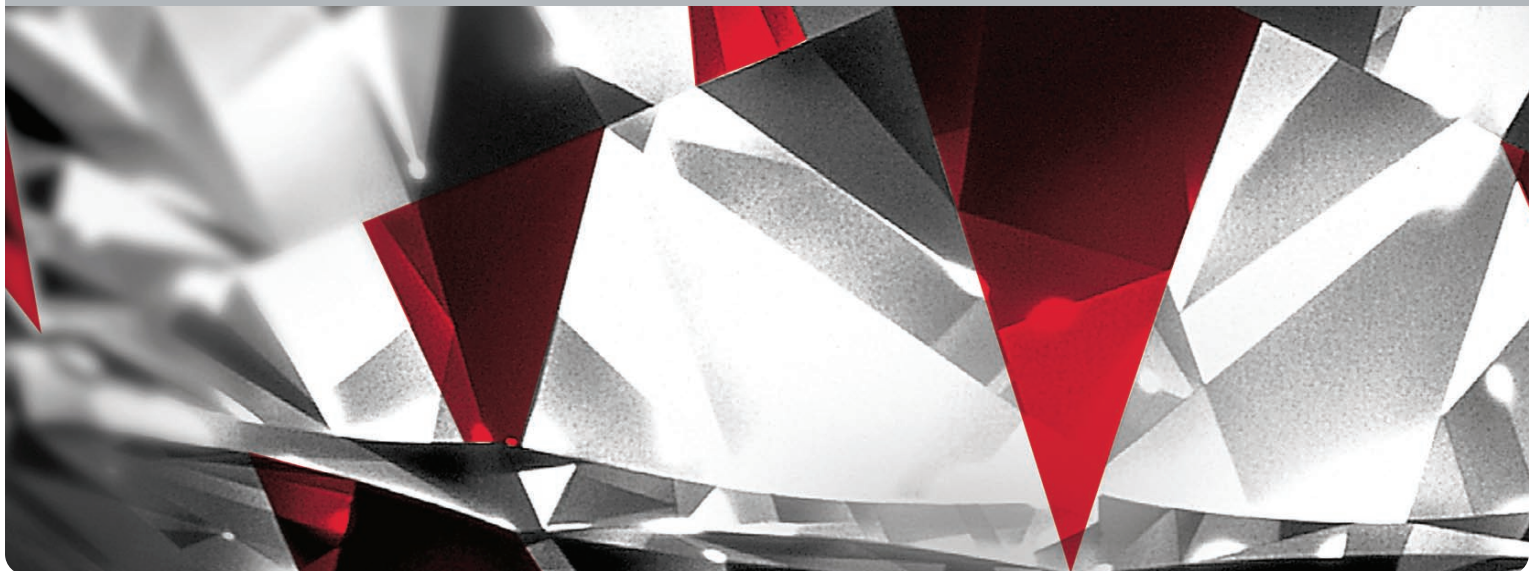


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# Intellectual Property Litigation in Australia

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Australia's strong economy makes it a significant user and creator of intellectual property ("IP") rights. It is also a significant jurisdiction in multinational IP disputes, which are becoming increasingly common in today's global economy. This article provides an overview and analysis of IP litigation in Australia.

## Overview of Australian legal system

It is useful, as a preliminary matter, to briefly outline how Australia's legal system operates,<sup>1</sup> with particular reference to IP disputes.

### Federal System

Australia is a federation comprising six states and two self governing territories. The Australian Constitution specifies a range of matters that are the responsibility of the Federal Government. The balance of legal matters remains the responsibility of the various State and Territory Governments. Relevantly, the Federal Government has the power to make and has made laws with respect to IP and in particular copyright, patents of inventions, designs, and trade marks.<sup>2</sup>

Australia's laws and legal system have their foundation in the common law of England and its practices and procedures broadly reflect those of the Anglo-American common law world.

While judgments of the House of Lords and the English Court of Appeal are of persuasive authority, they are not binding on Australian courts. More recently, in developing Australia's laws, its courts have looked to the jurisprudence of other countries, particularly the United States and Canada. This is particularly so in the case of IP laws.

Australia has both a Federal Court system and a hierarchy of courts in each of the States and Territories. Each of Australia's Federal IP statutes vests primary jurisdiction for IP litigation in the Federal Court of Australia ("Federal Court"). Concurrent jurisdiction is also vested in the various State Supreme Courts, but generally, IP litigation is commenced and prosecuted in the Federal Court and consequently it is this system that is the focus of this paper.

### Federal Court

The Federal Court operates from all capital cities in Australia, but the vast majority of IP litigation is conducted in Sydney and Melbourne, the capitals of Australia's most populous States, New South Wales and Victoria respectively.

The Federal Court is a superior court of record and a court of law and equity; however, it is not a court of general jurisdiction. Rather its jurisdiction is conferred by Federal statutes such as the IP statutes discussed here. Once seized of jurisdiction, the Federal Court is able to deal with all aspects of a dispute, even those arising under common law, equity or State statute, by reason of its accrued jurisdiction. In this way, the Federal Court is able to deal with general law actions such as breach of confidence and passing off.

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<sup>1</sup> Adapted from S. Stuart Clark and Christina Harris, *Multi-plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. OF COMPARATIVE & INT'L L. 289, 291 (2001).

<sup>2</sup> Section 51(xviii) of the Australian Constitution.

The Federal Court also has jurisdiction to hear appeals from examiner's decisions of the Trade Marks and Patents Offices. These involve a *de novo* hearing of the matter, rather than an appeal in the usual sense and the parties may lead fresh evidence.

### Federal Magistrate's Court

Some shorter and simpler IP claims can be litigated in the Federal Magistrates Court of Australia, a lower level federal court with a more limited jurisdiction that aims to provide a simpler and more accessible alternative to litigation in the superior courts. It is a relatively recent creation that conducted its first sittings in 2000. Its jurisdiction is also conferred by Federal statute and includes copyright and consumer protection. The Federal Court can also exercise its discretion to transfer other IP matters to the Federal Magistrates Court.

### Copyright Tribunal of Australia

The Copyright Tribunal was established under the *Copyright Act* to deal with inquiries and disputes arising out of royalties payable in respect of the recording of musical works, certain compulsory licences, and existing and proposed licensing schemes, amongst other things. The President of the Copyright Tribunal is a Federal Court Judge; however, the procedures adopted by the Tribunal are less formal and more flexible than those discussed below.

### Appeals

There are two-tiers of appeal within the Federal Court system, namely, the appellate jurisdiction of the Federal Court and the High Court of Australia ("High Court"). Decisions from single judges of the Federal Court or from a magistrate of the Federal Magistrates Court can, with leave, be taken on appeal to a Full Court of the Federal Court. The Full Court usually comprises three Federal Court judges drawn from different parts of the country. Consequently, Federal Court judges sit as both trial and appellate judges, albeit never in the same matter.

The ultimate appellate court in both the Federal Court and State court systems is the High Court. The High Court is also responsible for the determination of constitutional disputes, in the same way as the United States Supreme Court. Again, there is no automatic right to have an appeal heard by the High Court. Parties who wish to appeal must persuade the Court in a preliminary hearing that there are special reasons to cause the appeal to be heard, generally because a point of principle is at stake or the interests of justice in the particular case require that leave be granted.

## Source of IP laws and available relief

Australia has a comprehensive system of IP protection not only for Australian creators, but those of many other countries of which Australia has multilateral and bilateral treaty arrangements. Australia, like the U.S., is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights. On 1 January 2005 the Australia-United States Free Trade Agreement came into force. Amongst other things it sought to harmonise Australia's IP laws and practices more closely with those of the United States.

Much of Australia's IP laws are contained within specific Federal statutes. These are the Patents Act 1990, Copyright Act 1968, Trade Marks Act 1995, Designs Act 2003, Plant Breeders Rights Act 1994 and Circuit Layouts Act 1989. In addition, the Trade Practices Act 1974 contains consumer protection provisions that, amongst other things, prohibit conduct in trade or commerce that is likely to mislead or deceive consumers, and create a statutory cause of action analogous to the tort of passing off. Invariably, actions for trade mark infringement and often actions for copyright infringement are coupled with allegations of misleading and deceptive conduct, thereby putting into play the broad range of remedies available under the Trade Practices Act.

There are no relevant State IP statutes other than State and Territory *Fair Trading Acts*, which reflect the consumer protection provisions of the Federal *Trade Practices Act*.

In addition to statutory law, there are common law and equitable rights and remedies, including passing off, injurious falsehood and general law remedies for the protection of confidential information, including not only trade secrets, but also business and personal information.

Australia does not recognise the tort of unfair competition<sup>3</sup> nor does it recognise personality rights or “rights of publicity” *per se*. In relation to the latter, well known individuals have successfully protected their image from false commercial associations using the *Trade Practices Act* provisions discussed above.

The *Patents Act*, *Trade Marks Act*, *Designs Act*, and *Plant Breeders Rights Act* (but not the *Copyright Act* nor the *Circuit Layouts Act*) create registration systems administered by IP Australia, an agency of the Australian Federal government. There is no registration system for copyright in Australia - subsistence and ownership of copyright arise automatically provided the statutory criteria are met.

With respect to copyright, Australia’s entry into the Free Trade Agreement with the U.S. has resulted in specific amendments to deal with infringement in the on-line context. These provisions include “safe harbours” for what are described as “carriage service providers,” which include ISPs, in connection with the transfer of allegedly infringing copyright material across networks they control. If the ISP does comply with the relevant conditions, the court is precluded from granting relief by way of damages or an account of profits, additional damages or any other monetary relief.

However, Australia did not introduce a fair use defence analogous to that in the U.S. but rather introduced limited private and domestic use defences to supplement existing specific and quite narrow fair dealing defences.

Australia also has a unique patent system in that it recognises a lower level form of patent known as the “innovation patent”. This form of patent is aimed at small to medium enterprises and is intended to be cheaper to acquire albeit the term of the patent is short (eight years as opposed to twenty years under a standard patent) and it is limited to five claims.

The remedies and procedures available for dealing with infringements of IP rights in Australia are extensive. Australian courts have broad powers to make a range of orders including:

- Preliminary or pre-trial discovery orders (limited to documentary discovery);
- Interim injunctions (a TRO) restraining the infringing conduct. Further, interim injunctions may be ordered to prevent a defendant removing assets or documents from Australia (sometimes referred to as a *Mareva* injunction);
- Civil search and seizure orders (sometimes referred to as an *Anton Pillar* order);
- Declarations, for example, as to ownership, infringement, invalidity and non-infringement. Further, in certain circumstances the Court has power to make declarations and grant other relief in relation to unjustified threats;<sup>4</sup>
- Orders directing amendments to a patent or trade mark registration;
- Orders varying or rectifying entries in the various IP registers;<sup>5</sup>
- Orders for payment of damages or, in the alternative, an account of profits;<sup>6</sup>
- Orders for the payment of additional damages for flagrant infringement;<sup>7</sup>
- Orders for delivery up or destruction of infringing articles;<sup>8</sup>
- Orders for corrective advertising.<sup>9</sup>

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<sup>3</sup> Australia *Moorgate Tobacco Co Ltd. v. Philip Morris Ltd. (No2)* (1984) 156 CLR 414.

<sup>4</sup> See e.g., s 122 of the *Patents Act*, s 202 of the *Copyright Act*, s 85 to 89 of the *Trade Marks Act* and s 77 to 81 of the *Designs Act*.

<sup>5</sup> See e.g., s 122 of the *Patents Act*, s 85 to 89 of the *Trade Marks Act* and s 39(1) of the *Designs Act*.

<sup>6</sup> See for e.g. s 122 of the *Patents Act*, s 115 of the *Copyright Act*, s 126 of the *Trade Marks Act* and s 32B of the *Designs Act*.

<sup>7</sup> See e.g., s 122(1A) of the *Patents Act* and s 115(4) of the *Copyright Act*.

<sup>8</sup> See e.g., s 116(1) of the *Copyright Act*.

There are also procedures in place for seizure of infringing goods by customs as well as criminal sanctions.

## Litigation

Actions heard by Australian courts proceed on an adversarial basis. The practice and procedure, including rules of evidence, are similar to those in English courts.

### Trial

Civil proceedings in Australia are generally heard by a judge sitting without a jury. In particular, juries are, as a matter of practice, not available in civil proceedings in the Federal Court.

At the conclusion of the trial, the trial judge is obliged to deliver a written, reasoned judgement. As part of that process, the judge must determine all matters in issue between the parties - including technical and scientific issues - and explain how that dispute has been resolved. As a consequence both evidence and subsequent submissions and argument can become very technical.

### Case Management

The Federal Court adopts an active case management approach. Generally, a judge, referred to as the docket judge, is allocated a matter at the time it is commenced and will preside over the matter, including interlocutory disputes, until it is determined. In Sydney and Melbourne, a number of specialist judges with expertise in IP matters have dockets to deal with the IP cases as they arise. This generates an overall consistency of approach among the judges. Generally, active case management in the Federal Court results in IP disputes coming to a final hearing relatively quickly and, in most cases, within twelve to fifteen months of the start of the litigation. By way of example, Australia's equivalent of the *Grokster* online file sharing copyright litigation<sup>10</sup> took eight months from commencement by way of an application for Anton Piller orders to the completion of the final hearing.<sup>11</sup> Patent litigation generally takes longer, usually between two and three years.<sup>12</sup>

Typically, IP cases in Australia will follow the following procedural steps, some of which are discussed in more detail below:

- Initiating process (application) and pleadings;
- Discovery;
- Evidence (witness statements or affidavits);
- Trial;
- Judgment;
- Appeal(s).

These steps will be punctuated by a number of directions hearings before the docket judge, which are usually heard in open Court. To the extent interlocutory disputes arise requiring judicial determination - applications for specified orders can be made by way of Notice of Motion.

### Pleadings

The purpose of pleadings is to disclose the case which the opposing party must meet at trial. Whilst there is a growing tendency towards narrative pleadings, under the Federal Court Rules, a pleading must only contain a statement in a summary form of the material facts on which the party relies, but not the evidence by which those facts are to be proved or a statement of the issues. The pleadings define the issues for decision and

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<sup>9</sup> See s 80 of the *Trade Practices Act*.

<sup>10</sup> *Metro-Goldwyn-Mayer Studios Inc. (MGM Studios Ins.) v. Grokster Ltd.* (2005) 162 L Ed 2d 781; (2005) 125 S Ct 2764; (2005) 73 USLW 4675.

<sup>11</sup> *Universal Music Australia v. Sharman License Holding* (2005) 220 ALR 1.

<sup>12</sup> See Kimberlee Weatherall and Paul Jensen: *An Empirical Investigation into Patent Enforcement in Australian Courts*, Intellectual Property Research Institute of Australia Working Paper No. 07/05, May 2005.

consequently, the breadth of discovery and the relevance of the evidence. Technical objections raised to pleadings on the ground of alleged want of form are generally received unfavourably by Judges.

## Discovery

In Australia, discovery principally refers to documentary discovery. There is no deposition procedure in Australia and interrogatories are rarely administered.

An order for discovery requires each party to assemble, list, and disclose those documents on which the party relies; documents that adversely affect the party's own case; documents that adversely affect another party's case and documents that support another party's case. Usually, the parties will be directed to give discovery by reference to specified categories of documents rather than the much more far reaching concept of 'general discovery.'

Electronic material has long been discoverable in Australia. However, it is only recently that the Courts have issued specific practice notes dealing with eDiscovery and reforms analogous to those that took effect in December 2006 to the United States Federal Rules of Civil Procedure are only just beginning in Australia. One of the practice notes developed for the Supreme Court of New South Wales<sup>13</sup> provides a default position that discovery is to be made electronically.

## Evidence and Examination of Witnesses

Prior to the commencement of the trial, parties are required to exchange witness statements (or sworn affidavits) setting out each witnesses' evidence that they intend to rely on at trial. Expert evidence is also exchanged as part of this process.

At trial, the only oral evidence given by the witnesses comes in cross-examination and re-examination.

Expert evidence will only be admissible if, amongst other things, the expert agrees to be bound by a code of conduct that forms part of the court's rules. The primary function of this code of conduct is to create an overriding duty on the expert to assist the court, as opposed to the retaining party, and to remain impartial on matters relevant to the expert's area of expertise. In Australia, an expert witness cannot act as an advocate for a party. There is an increasing intolerance within Australian courts toward conflicting expert evidence. Judges are increasingly looking towards non-traditional procedures such as concurrent expert evidence (a.k.a. "hot tubbing") and pre-trial joint expert conferences in an attempt to narrow areas of disagreement and overcome perceptions of partisanship.

## Other Matters

Some other key aspects of Australian procedure particularly relevant to IP matters include the following:

- Summary judgment applications in IP cases are rarely successful;
- Although it is possible for separate questions to be determined, such procedures are not invoked as a matter of course. In particular, issues of claim constructions in patent proceedings will generally be dealt with at the main liability hearing and not at a separate hearing in advance. Further, in patent, trade mark, and design cases, issues of infringement and validity are usually tried together;
- An exception to the previous paragraph is that it is common in Federal Court IP matters for issues of liability to be heard separately from and before issues as to the quantum of pecuniary relief. This is often referred to as a 'split case'. This has the benefit of shortening the trial and potentially limiting costs. Often, in the event that there is a judgment in the plaintiff's favour, the parties will resolve the remaining issues as to quantum out of court. Consequently, contested hearings on the quantum of damages or account of profits are relatively rare.
- Orders for damages are generally compensatory in nature and tend to be much lower than damages awards in the U.S. courts. However, as discussed above, in certain IP matters the court does have the power to order additional damages for flagrant infringement.

## Legal Costs

In Australia, the general rule is that 'costs follow the event', that is, the loser in court proceedings pays a proportion of the legal costs of the winner. In this context 'legal costs' include both the lawyers' professional

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<sup>13</sup> Practice Note SC Eq 3.

fees and out of pocket expenses. That said, the actual amount of the legal costs recovered by the successful party will, inevitably, be less than was actually expended.

Generally, the successful party will recover something less than sixty percent of the actual costs expended. However, in some circumstances, a Court will order that the unsuccessful party pay the other sides' costs on what is known as an 'indemnity basis.' In this situation, the amount recovered will be much closer to the amount actually expended.

Both the general rule in relation to costs and the amount that is recovered can be impacted by the making of an offer of settlement. There are two types of offers of settlement, namely offers made under the Court rules, referred to as offers of compromise and more "informal" offers, usually in the form of a letter, which are commonly referred to as *Calderbank* letters. Any such offer is made on the basis that the offer does not constitute an admission and will only be seen by the Court after judgment if the case proceeds to trial when the fact that the offer was made can effect the issue of costs.

## Trends and reforms

While the general structure and operation of Australia's IP litigation system is unlikely to experience fundamental change in the short to medium term it is not a static environment. Areas where changes are occurring are:

- Strengthened rights of IP owners;
- Increasing alignment with U.S. IP laws;
- Relative increase in patent litigation and increasing activity by generic pharmaceutical companies;
- Procedural reforms to decrease the cost of litigation.

Australian IP laws are becoming more complex. The *Copyright Act* alone has nearly doubled in size over the last ten years. The most significant copyright changes have arisen out of the so-called Digital Agenda Amendments in 2000<sup>14</sup> as well as the amendments introduced by the Free Trade Agreement referred to above.

This increase in IP legislation is indicative of Australia's pro-protection stance. The trend is very much one of increasing the powers of rights holders both in terms of the ease with which they can prosecute their claims (*e.g.*, by including presumptions as to copyright ownership and subsistence) and their powers of enforcement generally. Many of these changes are occurring as a result of bilateral agreements between Australia and the U.S., which is also having the result of harmonising certain IP laws between the two countries.

One manifestation of this is the Australian Government's recent announcement that it will increase funding over the next two years to enable the Australian Federal Police and the Commonwealth Director of Public Prosecutions to more actively target trade mark and copyright crime. This is commensurate with recent amendments to the criminal provisions in the Copyright Act.

In respect of the patents, the trends are more complex. In terms of jurisprudence, the High Court has recently highlighted what it perceives to be a divergence between Australian and United Kingdom law (due to the "Europeanisation" of British law) and indicated a preference for U.S. authorities (see further below).<sup>15</sup> Commensurate with this trend has been a tightening of the law with respect to certain grounds of invalidity, such as obviousness, with Australia increasingly being seen as a pro-patent jurisdiction. Interestingly, this resulted in the following comments by Lord Justice Jacob in a decision of the England and Wales Court of Appeal:<sup>16</sup>

*I have to say that I do not discern a shift in the position in this country following the 1977 Act as the majority of the Australian High Court thought had happened. It is perhaps noteworthy that currently Australian courts seem to be taking a very pro-patent view of obviousness and that patents are being upheld there which are not*

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<sup>14</sup> Australia's equivalent of the U.S. Digital Millennium Copyright Amendments.

<sup>15</sup> See *Aktiebolaget Hassle v. Alphapharm* (2002) 212 CLR 411.

<sup>16</sup> *Angiotech Pharmaceuticals v. Conor Medsystems* [2007] EWCA Civ 5 at [43].

*upheld elsewhere. The Hässle case and the Viagra case, Pfizer v. Lilley [sic] (held by the Federal Court of Appeal non-obvious though invalid on other grounds) are perhaps examples of this. Whether, if that is so, it is good for the Australian economy is not my concern.*

This should give patentees greater confidence in litigating in this jurisdiction.

At the same time, there is increasing litigation by the generics pharmaceutical industry in Australia. Undeterred by recent High Court decisions, and emboldened by the recent lower court decisions and amendments to the patent legislation,<sup>17</sup> these parties are successfully relying on alternative grounds of invalidity that have received relatively little attention in the courts in the past, such as misrepresentation, lack of utility and lack of manner of manufacture.

An important distinction between U.S. and Australian patent law with respect to pharmaceutical patents is that the regulatory approval process for a generic pharmaceutical is not automatically stayed by the commencement of legal proceedings by the patentee. Nor will a Court enter an injunction to stay the regulatory approval process. Consequently, patentees must move quickly in seeking a preliminary injunction to restrain the marketing and distribution of the generic product pending a final trial. Such applications are by no means guaranteed of success, and in recent cases where the generic company is well advanced in the regulatory approval process or has actually commenced selling the product, an injunction against the generic company has been refused.<sup>18</sup>

Perhaps as a manifestation of the developments discussed above, patents have now overtaken copyright as the most dominant form of IP litigation in Australia. This trend is likely to continue particularly with the increasing use of innovation patents discussed above.<sup>19</sup>

One of the most dominant factors in determining whether a party commences proceedings or decides to settle is the high expected cost of litigation.<sup>20</sup> The Courts seem cognisant of this and there are now a number of alternative approaches that can be adopted such as using the Federal Magistrates Court and the “Rocket Docket” system referred to above. More and more copyright matters will be heard by the Federal Magistrates Court and, there are proposals to further expand its jurisdiction to other forms of IP.

Judges, and in particular, patent Judges, also seem more open and pro-active in terms of using non-traditional procedures to ensure that costs are kept under relative control. The Federal Court has taken steps to attempt to address what it perceives to be the high cost of litigation. It plans to adopt a Fast Track Docket scheme, already referred to by lawyers and Judges alike as the ‘Rocket Docket’ in each of its District Registries and is currently trialing the procedure in Victoria. At this stage patent litigation is not eligible but all other forms of IP disputes can be managed as part of the Fast Track Docket.<sup>21</sup>

Some of the features of the docket are:

- Informal case summaries will be used instead of pleadings;
- The trial date will be fixed between two and five months of date of the first directions hearing;

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<sup>17</sup> Recent amendments to the Australian patent legislation in relation to springboarding also favour generic manufacturers. The *Intellectual Property Laws Amendments Act 2006* extended the right of third parties to take steps to obtain regulatory approval for pharmaceuticals so that it applies at any time during the life of any pharmaceutical patent. Prior to this it only applied to pharmaceutical substances for which an extension to the patent term had been granted.

<sup>18</sup> See *Aktiebolaget Hassle v. Biochemie Australia Pty Ltd.* (2003) 57 IPR 1; *Hexal Australia Pty Ltd. v. Roche Therapeutics Inc*; *Roche Therapeutics Inc v. Alphapharm Pty Ltd.* (2005) 66 IPR 325.

<sup>19</sup> See Andrew Crowe SC: *Trends in Intellectual Property Litigation in Australia*, Intellectual Property Forum Issue 69, June 2007 for an analysis of reported intellectual property judgments.

<sup>20</sup> See, e.g., Chris Dent and Kimberlee Weatherall, *Lawyers Decisions in Australian Patent Dispute Settlements: an Empirical Perspective*, Intellectual Property Research Institute of Australia Working Paper No. 02.07, April 2007.

<sup>21</sup> However, one of the leading patent judges of the Federal Court, the Honourable Justice Bennett, has mooted separate procedural reforms, particularly with respect to discovery, to reduce the cost and delay of patent proceedings.

- Discovery will generally be limited to two categories:
  - (a) documents on which the party intends to rely; and
  - (b) documents that have ‘significant probative value adverse to a party’s case’;
- Parties will be required to undertake ‘reasonable search effort’ and ‘good-faith proportionate search’ for relevant documents (a party may be required to describe the kind of good faith proportionate search it has undertaken);
- There will be stop watch (sometimes called ‘chess clock’ style) trials. The amount of time allocated to each party will be controlled by the Judge’s associate. Time taken by the judge in questioning a witness at end of testimony is to be divided equally between the parties and deducted from the time allocation.

It is intended that judgments will be delivered within six weeks of the conclusion of the trial. It is too early to assess the merits of the Fast Track Docket and whether this compressed procedure should be adopted in a particular case will very much depend on the particular circumstances of the case and the client’s objectives.

To date, there have only been limited facilities available for the electronic filing of court documents in Australia. The Federal Court intends to extend its electronic services, which are referred to as eCourt. Amongst other things:

- The Court proposes to introduce eFiling - enables litigants or lawyers to lodge applications or other court documents electronically;
- The Court has introduced an eCourtroom and intends to extend this facility - allows parties and lawyers to participate in a virtual courtroom via a secure login. This will not only allow directions and other orders to be made online by the relevant docket judge but also enable some interlocutory motions to be dealt with electronically by way of filing U.S.-style briefs.

These initiatives are likely to affect Australia’s traditional reliance on oral advocacy and, at least with respect to interlocutory disputes, move it closer to the U.S. practice of dealing with such disputes on the papers.

## Conclusion

Given that Australia is a significant participant in the global economy, the potential for foreign organisations to become involved in Australian IP disputes remains significant. While, there have been efforts to harmonise Australia’s IP system internationally and in particular with the U.S., there will always be idiosyncrasies arising out of Australia’s legal system. These differences in laws, procedural rules, and trials will impact both on the manner in which cases are prepared, presented, and ultimately determined.

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