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Australia

Jane Owen



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1 Patent Enforcement

1.1 Before what tribunals can a patent be enforced against an infringer? Is there a choice between tribunals and what would influence a claimant's choice?

The Federal Court of Australia (**Federal Court**) and the state and territory Supreme Courts have jurisdiction to hear patent infringement matters.

Infringement proceedings are typically brought in the Federal Court because this Court has numerous judges with extensive patent expertise who are appointed to the patent list and allocated to hear these matters.

1.2 What has to be done to commence proceedings, what court fees have to be paid and how long does it generally take for proceedings to reach trial from commencement?

To commence proceedings in the Federal Court, a party must file an originating application, statement of claim, and genuine steps statement in accordance with the *Federal Court Rules 2011* (Cth) (**FCRs**).

The fees to file an originating application are prescribed in schedule 1 of the *Federal Court and Federal Circuit Court Regulation 2012*. As at June 2017, the fee for filing an originating application for a corporation is AUD 3,745.

The period of time that elapses between the filing of the originating application and the final trial depends on the complexity of the proceedings – for example, whether the applicant seeks to amend the patent(s), the number of patents asserted, whether experiments need to be carried out, how long evidence preparation takes. Generally, parties should allow anywhere between 12 and 18 months before the final trial on infringement.

1.3 Can a party be compelled to disclose relevant documents or materials to its adversary either before or after commencing proceedings, and if so, how?

The FCRs provide several mechanisms for disclosure of documents both before and after the commencement of proceedings.

Before commencement

A party that believes they have the right to obtain relief against a party, but does not have sufficient information to decide whether to

start a proceeding, can seek an order for “preliminary discovery” of documents by that party.

After commencement

The FCRs also provides mechanisms to obtain “standard” and “non-standard” discovery of documents after the commencement of a proceeding.

Orders for discovery after commencement are not made as a matter of course and a party must only seek discovery (whether “standard” or “non-standard”) if it will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.

Other mechanisms

A party to a proceeding can use Notices to Produce served on a party requiring the party to produce any document or thing within the party's control at the trial.

1.4 What are the steps each party must take pre-trial? Is any technical evidence produced, and if so, how?

There are numerous steps a party must take in the lead up to the trial. A new practice note in the Federal Court, IP1, provides some examples of special steps which may be ordered to be undertaken in patent matters (e.g. the court may also order that the parties file a technical primer to assist the court).

The first step is the pleading of each party's case (a statement of claim, a defence and any cross-claim, defence to cross-claim and replies).

After the close of pleadings, evidence will be led by both parties.

Evidence relied on for both infringement and revocation will invariably include expert technical evidence.

In the immediate lead up to the trial, a case management conference will occur before the judge. At the case management conference, the judge will set a timetable for the filing of submissions, court book preparation and other requirements the judge may have in preparation for the trial. This may also include orders regarding evidence to be taken concurrently and a timetable for competing experts to confer prior to the trial and the taking of the concurrent evidence.

1.5 How are arguments and evidence presented at the trial? Can a party change its pleaded arguments before and/or at trial?

At the trial, any affidavit evidence upon which a party intends to rely will be formally “read” by the party relying on the evidence and admitted into evidence. A person that has given evidence in

affidavit form may also be called to be cross-examined by the other party on that evidence.

The parties' arguments are submitted by both written and oral submissions.

In terms of seeking amendments to a pleaded case, the court is generally receptive to applications for amendment. The FCRs provide:

- a party must seek leave from the Court to amend its originating application both before and at trial; and
- a party may amend a pleading once without leave of the Court at any time before pleadings close. After pleadings close (and including during the trial), any amendment is only by leave of the Court or with the consent of the opposing party.

1.6 How long does the trial generally last and how long is it before a judgment is made available?

The length of a trial will depend on the complexity of the issues before the Court. On average, trials concerning one patent can run anywhere between five and 15 days.

Judgment can be anticipated some three to six months after the end of the trial.

1.7 Are judgments made available to the public? If not as a matter of course, can third parties request copies of the judgment?

Judgments are publicly available in Australia, typically within 24 hours of being handed down by the judge.

1.8 Are there specialist judges or hearing officers, and if so, do they have a technical background?

There are presently 17 judges in the Federal Court's Intellectual Property National Practice Area – Patents & Associated Statutes that can be assigned to patent cases.

There is no requirement that these judges have a technical background, though some of them do.

1.9 What interest must a party have to bring (i) infringement, (ii) revocation, and (iii) declaratory proceedings?

Infringement

The patentee and the exclusive licensee can bring infringement proceedings.

The exclusive licensee is defined in the *Patents Act 1990* (Cth) as the licensee that has the right to exploit the patented invention throughout the patent area to the exclusion of the patentee and all other persons.

Revocation

Any person has standing to bring an application to either the Federal Court or state and territory Courts for an order revoking the patent.

A defendant in any infringement proceedings may also cross-claim for revocation.

Declaratory proceedings

A person can apply to the Federal Court for a declaration that an act does not or would not infringe a patent, whether or not the patentee has made an assertion that the doing of the act would infringe a claim.

The person cannot apply to the Federal Court for a declaration unless the patentee has refused or failed to make a written admission of non-infringement.

The person must have given the patentee full written particulars of the act, and asked the patentee in writing for a written admission that the doing of the act does not or would not infringe the patent. The person must also undertake to pay the patentee's reasonable costs of obtaining advice as to whether the act has or would infringe the claim. The patentee must be joined as a respondent in the proceeding.

1.10 If declarations are available, can they address (i) non-infringement, and/or (ii) claim coverage over a technical standard or hypothetical activity?

Non-infringement declarations can be sought in relation to technical standards and hypothetical activity.

1.11 Can a party be liable for infringement as a secondary (as opposed to primary) infringer? Can a party infringe by supplying part of, but not all of, the infringing product or process?

A party can be liable for "indirect" or "contributory" infringement of a patent in Australia.

The Patents Act (section 117) provides that if the use of the product by a person would infringe a patent, then the supply of that product by one person to another is an infringement of the patent by the supplier, unless the supplier is the patentee or licensee.

1.12 Can a party be liable for infringement of a process patent by importing the product when the process is carried on outside the jurisdiction?

A person can be liable for infringement of a process patent by importing a product into Australia made by the process outside the jurisdiction.

In *Apotex Pty Ltd v Warner-Lambert Company LLC (No 2)* [2016] FCA 1238, the Federal Court found that the importation and sale in Australia of a product that was made overseas using a method or process the subject of an Australian patent infringed claims of the Australian patent because the acts of importation and sale occur within Australia.

1.13 Does the scope of protection of a patent claim extend to non-literal equivalents?

Australia has no doctrine of non-literal or mechanical equivalents.

1.14 Can a defence of patent invalidity be raised, and if so, how? Are there restrictions on such a defence e.g. where there is a pending opposition?

A respondent can assert in the infringement proceedings in response to any allegation of patent infringement that it has not infringed the patent because the patent is invalid and should be revoked.

In this regard, in any proceedings for infringement, the alleged infringer can counter-claim for revocation of the patent, including on the basis that the patent is not a patentable invention.

1.15 Other than lack of novelty and inventive step, what are the grounds for invalidity of a patent?

In the Federal Court, other than lack of novelty and inventive step, the validity of a patent may be challenged on the grounds that:

- the patentee is not entitled to the patent;
- it is not a manner of manufacture;
- it is not useful;
- the patent was obtained by fraud, false suggestion or misrepresentation; and
- the specification does not comply with section 40(2) and (3) of the *Patents Act 1990* (Cth), being best method and clarity requirements.

1.16 Are infringement proceedings stayed pending resolution of validity in another court or the Patent Office?

The Court proceedings are the superior proceedings and so no procedure can take place in the Patent Office if there are pending court proceedings.

If two separate proceedings concerning the patent were on foot, a party may seek to have the matters listed together but there is no rule that a revocation claim be determined before a parallel infringement proceeding.

1.17 What other grounds of defence can be raised in addition to non-infringement or invalidity?

Australian patent law includes these specific exemptions to infringement:

- immediately before the priority date of the claim, the person was already exploiting, or had taken definitive steps (contractually or otherwise) to exploit the product, method or process in Australia;
- use of a patented invention occurred on board or in a foreign vessel, and the vessel came into Australian territory only temporarily or accidentally;
- use of a patented invention occurred in the construction or working of a foreign aircraft or land vehicle if the aircraft or land vehicle into Australian territory only temporarily or accidentally;
- exploitation was connected with obtaining regulatory approval in Australia; and
- an act was done for experimental purposes relating to the subject matter of the invention.

1.18 Are (i) preliminary, and (ii) final injunctions available, and if so, on what basis in each case? Is there a requirement for a bond?

Preliminary injunctions

The Federal Court will grant a preliminary injunction against an alleged infringer in circumstances where it is satisfied that:

- the patentee has a *prima facie* case (that there is a probability that the patentee will succeed at final trial); and
- the balance of convenience favours the granting of the injunction (this involves the consideration of factors such as whether the payment of damages will adequately compensate the patentee if there is a finding of infringement).

There is no requirement for a bond. Rather, before the Federal Court will make this order, the patentee will have to give the “usual

undertaking as to damages”, to compensate the restrained party if the patentee does not ultimately win.

If the person in whose favour the preliminary injunction is granted is resident overseas and has no assets in Australia, or is otherwise unlikely to be able to satisfy a call on the undertaking as to damages, the Court may require that person to provide security for the undertaking as to damages.

Final injunctions

Relief that a court may grant for infringement of a patent includes an injunction, subject to such terms that the court thinks fit.

1.19 On what basis are damages or an account of profits assessed?

Damages are compensatory in nature and so the assessment is made on the basis of the actual loss suffered by the patentee. The analysis will require the Court to determine what proportion of the infringer’s sales would have been sales of the patentee or the exclusive licensee and then determine the profit that would have been made by reason of the sales.

Additional (punitive) damages can be awarded, but this provision has only been applied once in Australia and resulted in an award of a modest sum.

An award of additional damages may be appropriate having regard to:

- the flagrancy of the infringement;
- the need to deter similar infringements;
- the conduct of the infringing party, including after it was informed that it had allegedly infringed;
- any benefit accrued to the infringer because of the infringement; and
- any other relevant matters.

Profits are assessed by calculation of the profit earned by the infringer by reason of the conduct. This is a forensic accounting exercise.

1.20 How are orders of the court enforced (whether they be for an injunction, an award of damages or for any other relief)?

A breach of injunctive orders is enforced by an application for contempt of court (which can result in fines being levied or imprisonment).

Enforcement of a judgment debt for payment of compensation is enforced by way of usual methods of execution of judgment – seizure of assets, winding up of a company or bankruptcy of an individual.

1.21 What other form of relief can be obtained for patent infringement? Would the tribunal consider granting cross-border relief?

Other relief which a court may grant for infringement of a patent includes declarations of infringement. Cross-border relief will not be ordered.

1.22 How common is settlement of infringement proceedings prior to trial?

Settlement pre trial is common – estimated to occur in 50% of cases.

1.23 After what period is a claim for patent infringement time-barred?

Infringement proceedings cannot be brought unless started within:

- (a) three years from the day on which the relevant patent is granted; or
- (b) six years from the day on which the infringing act was done.

1.24 Is there a right of appeal from a first instance judgment, and if so, is it a right to contest all aspects of the judgment?

A party can appeal judgment of a single judge of the Federal Court to the Full Federal Court of Australia. Appeal is as of right in respect of any aspects of the judgment but will only succeed if the appeal court finds that the judge at first instance made an error of law.

1.25 What are the typical costs of proceedings to first instance judgment on (i) infringement, and (ii) validity? How much of such costs are recoverable from the losing party?

The range of expected costs in running/defending an infringement case or running/defending a combined infringement and revocation case ranges between AUD 500,000 and AUD 1.5 million.

The successful party would anticipate recovering between 70% and 75% of its costs from the unsuccessful party.

1.26 For jurisdictions within the European Union: What steps are being taken in your jurisdiction towards ratifying the Agreement on a Unified Patent Court, implementing the Unitary Patent Regulation (EU Regulation No. 1257/2012) and preparing for the unitary patent package? For jurisdictions outside of the European Union: Are there any mutual recognition of judgments arrangements relating to patents, whether formal or informal, that apply in your jurisdiction?

This is not applicable in Australia.

2 Patent Amendment

2.1 Can a patent be amended *ex parte* after grant, and if so, how?

A patentee may seek the leave of the Commissioner of Patents to amend a patent after grant (section 104).

2.2 Can a patent be amended in *inter partes* revocation/invalidity proceedings?

A patentee may make an application to a court during any relevant proceedings for an order that the patent be amended (section 105).

2.3 Are there any constraints upon the amendments that may be made?

An amendment must meet the requirements in section 102 – an amendment is not allowable if the amended specification claims or discloses matter extending beyond the complete specification as filed.

If the application to amend is made to the Court during proceedings, then the Court must also be satisfied that there is no matter that should dissuade the Court from exercising its discretion to allow the amendment (e.g. delay by the patentee in seeking amendment after knowing that it should so amend; covetous claiming).

3 Licensing

3.1 Are there any laws which limit the terms upon which parties may agree a patent licence?

Pursuant to section 144, a term of a patent licence may be void in certain circumstances, including where the effect of the term is to:

- prohibit or restrict the use of a product or process (whether patented or not) supplied or owned by a person other than the lessor or licensor; or
- require the acquisition of a product not protected by the patent by the lessor or licensor.

3.2 Can a patent be the subject of a compulsory licence, and if so, how are the terms settled and how common is this type of licence?

After a period of three years from grant has elapsed, a person may apply to the Federal Court for an order requiring the patentee to grant the applicant a licence to work the patented invention (section 133). If the fee is not agreed, the court sets the fee.

Very few, if any, compulsory licences have been ordered.

4 Patent Term Extension

4.1 Can the term of a patent be extended, and if so, (i) on what grounds, and (ii) for how long?

The term of a patent relating to pharmaceutical substances can be extended if regulatory approval was not obtained until at least five years after the date of the patent.

The extension period is the difference of the time period from the filing date of the patent to the first regulatory approval date less five years.

5 Patent Prosecution and Opposition

5.1 Are all types of subject matter patentable, and if not, what types are excluded?

Human beings and processes for their biological generation are not patentable (section 18(3)). Pure business processes are not patentable subject matter, even if computer-implemented (*Commissioner of Patents v RPL Central Pty Ltd* [2015] FCAFC 177).

5.2 Is there a duty to the Patent Office to disclose prejudicial prior disclosures or documents? If so, what are the consequences of failure to comply with the duty?

There is no such duty.

5.3 May the grant of a patent by the Patent Office be opposed by a third party, and if so, when can this be done?

The grant of a patent may be opposed by a third party within three months after the patent application has been advertised as accepted.

5.4 Is there a right of appeal from a decision of the Patent Office, and if so, to whom?

There is a right of appeal from a decision of the Patent Office to the Federal Court, from a refusal to grant a patent (section 100A), an opposition decision (section 60), a decision to revoke after re-examination (section 101), refusal or grant of, or direction to make an amendment (sections 104 and 109).

5.5 How are disputes over entitlement to priority and ownership of the invention resolved?

Disputes over ownership can be resolved in the Patents Office (section 32), or by the grant of the patent after an opposition in the Patents Office (section 33) or by application to the Court.

5.6 Is there a “grace period” in your jurisdiction, and if so, how long is it?

There is a grace period of 12 months.

5.7 What is the term of a patent?

A standard patent has a maximum term of 20 years and an innovation patent has a term of up to eight years.

6 Border Control Measures

6.1 Is there any mechanism for seizing or preventing the importation of infringing products, and if so, how quickly are such measures resolved?

No, there is not.

7 Antitrust Law and Inequitable Conduct

7.1 Can antitrust law be deployed to prevent relief for patent infringement being granted?

There is some prospect of the *Competition & Consumer Act 2010* (Cth) (CCA) being deployed against a patentee, but there has been no court decision in which this has occurred.

7.2 What limitations are put on patent licensing due to antitrust law?

Section 51(3) of the CCA provides an exemption from certain provisions of Part IV of the CCA (other than sections 46 and 46A (misuse of market power) and section 48 (resale price maintenance)),

for the imposing, or giving effect to, a condition of a licence granted by the owner or licensee of a patent, registered design, copyright, or circuit layout right or by an applicant for registration of a patent or design; or an assignment of any of these rights.

If the licence is outside section 51(3), then these provisions may give rise to a contravention of the CCA:

- (a) the prohibition on the making or giving effect to agreements, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market (section 45 of the CCA);
- (b) the prohibition on exclusive dealing in section 47 of the CCA; and
- (c) the prohibition on the making and giving effect to provisions of agreements between competitors by which one or more is restricted, prevented or limited from supplying goods or services to, or acquiring goods or services from particular persons or classes of person (a primary boycott) which is also prohibited (sections 4D and 45 of the CCA).

8 Current Developments

8.1 What have been the significant developments in relation to patents in the last year?

There have been some significant findings in cases in the last year:

- the decision that taking steps to have a pharmaceutical product listed on the Pharmaceutical Benefits Scheme (PBS) is not patent infringement – *Warner-Lambert Company LLC v Apotex Pty Limited* [2017] FCAFC 58;
- the decision that importation of a product made by a patented process overseas is an infringement – *Apotex Pty Ltd v Warner-Lambert Company LLC (No 2)* [2016] FCA 1238; and
- the expression by the Court that novelty cannot be conferred in drafting a patent claim by addition of mere new information so as to distinguish a claim for prior art – *Otsuka Pharmaceutical Co., Ltd v Generic Health Pty Ltd (No 2)* [2016] FCAFC 111.

8.2 Are there any significant developments expected in the next year?

On 20 December 2016, the Australian Productivity Commission released its report on its Inquiry into Intellectual Property Arrangements in Australia. The report recommended that “Commercial transactions involving IP rights should be subject to competition law. The current exemption under the CCA is based on outdated views and should be repealed”.

At the time of writing, draft legislation to amend the CCA has not included repealing section 51(3) of the CCA and, accordingly, it remains to be seen whether this important recommendation will be implemented.

8.3 Are there any general practice or enforcement trends that have become apparent in your jurisdiction over the last year or so?

Yes – there is the new Intellectual Property Practice Note (IP-1) in the Federal Court which applies to patent litigation.

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Specialising in contentious IP, Jane focuses on patent litigation, particularly in the life sciences sector. Her experience ranges across complex patent infringement/revocation, trademark and passing off, design infringement, disputes on ownership of IP and appeals from decisions of the Commissioner of Patents and the Registrar of Trade Marks. Jane's litigation experience also allows her to advise clients in IP driven commercial transactions enabling them to minimise the risk of later disputes.

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Bird & Bird

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