

# **Filing and Settlement of Patent Disputes in the Federal Court, 1995-2005**

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**Intellectual Property Research Institute of Australia**

**Working Paper No. 17.06**

ISSN 1447-2317

November 2006

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**ABSTRACT**

Patent litigation is a subject which attracts constant discussion and debate. Until recently, Australian courts were perceived as 'anti patent'. Now there seems to be some concern that Australian patent litigation is slower, and more expensive, than other analogous jurisdictions. However, in general, few statistics on patent litigation have been available and most previous work on the topic has focused on the small proportion of cases which proceed to trial. Using data obtained from Federal Court records, this article presents a set of descriptive statistics relating to the filing and settlement of patent disputes in the Federal Court from 1995 to 2005. Our analysis indicates that, as in other countries, settlement rates in Australia are high, yet the average time to settlement, and judgment, is longer in Australia. However, there is some evidence that parties are in part responsible for the length of patent proceedings by requesting long delays between court events.

## INTRODUCTION

Patent litigation – disputes over patents and how they are resolved – is an ongoing topic of controversy particularly in developed countries. In the US, commentators have noted ‘an alarming growth in legal wrangling over patents’, while the ‘risk of being sued, and demands by patent holders for royalty payments to avoid being sued, are seen increasingly as major costs of bringing new products and processes to market’.<sup>1</sup> But how is the Australian system travelling? While policymakers have called for hard data on the operation of the system for litigating patent (and other IP) disputes, in general few statistics have been available.<sup>2</sup>

This article presents a set of descriptive statistics relating to the filing and settlement of patent disputes in the Federal Court over the last eleven years from 1995 to 2005. The intention is to provide a ‘snapshot’, which describes how much, and what kind of patent litigation is occurring in Australia, and the broad pattern, using data collected by the Federal Court of Australia on first instance filings in that court.<sup>3</sup> We do not aim to provide the definitive view on patent litigation and its settlement: that would be impossible using purely descriptive statistics. Behind each of the proceedings, and each termination, is a story with real parties and real lawyers, whose interactions may lead to settlement for all kinds of reasons.<sup>4</sup> However, while anecdotes, literature and discussion are also very significant, data obtained from court records provides an instant insight into the realities of patent dispute processes and mechanisms.<sup>5</sup>

## BACKGROUND

### Patent litigation in Australia

At least until relatively recently, there has been a perception that Australian courts were ‘anti-patent’. This has traversed the legal literature,<sup>6</sup> IP community gatherings,<sup>7</sup> and government reviews of the Australian IP enforcement system.<sup>8</sup> This impression appears to have shifted more recently, with one commentator going so far as to call Australia a ‘patentee’s paradise’.<sup>9</sup> In a paper published in 2005, one of the authors of this piece showed that the success rate of patentees was higher, at least between 1997-2003, than had been reported in previous periods.<sup>10</sup> The outcomes of cases litigated through to judgment, however, are only part of the picture. The overwhelming majority of cases that are filed will never be heard by a court, because they settle or

otherwise terminate prior to hearing.<sup>11</sup> More recently, there appears to be some concern that Australian patent litigation is slower, and more expensive, than other comparable jurisdictions.

Most previous work on patent litigation has focused on the small proportion of cases which go to trial.<sup>12</sup> However, analysis of the filing and settlement of patent disputes is also important, as it widens the analysis beyond what is happening in the courtrooms. How many patent cases are being filed in Australia? What is the most common type of issued proceeding? What proportion of cases settle, and when? These are important questions. The enforcement of patent rights and, the threat of enforcement, are of significance to patent holders as well as inventors. Filing and settling a patent dispute can have a variety of consequences, ranging from the costs involved to affecting a patent's value and impacting upon the innovation process itself.<sup>13</sup> In this article, we analyse the patent proceedings filed from 1995 to 2005 and look at which cases settled, rather than focusing only on those that proceed to trial. By examining the entire range of proceedings issued, we are able to provide a more complete picture of the patent litigation process. We compare our data regarding filing and settlement to analogous US studies, to see how well Australia is placed regarding patent adjudication. Unfortunately, similar data is not available for the United Kingdom.

This is not the first time the question of the rate of patent litigation has been asked. An ACIP report in 1999 provided some figures, noting that from 1993 to 1996, between 20 and 39 proceedings under the *Patents Act* were filed each year in the Federal Court.<sup>14</sup> However, these figures seem likely to overstate the number of patent *disputes*, as they appear to include all cases filed under the *Patents Act* - including not only infringement actions but also appeals from decisions of the Patent Commissioner, for example contesting decisions regarding grant or extension of patent terms. A small survey of selected patent attorney and legal firms was also conducted for the same report. Estimates as to the proportion of disputes which proceed to litigation ranged between 5 and 40 percent. Attorneys' approximations of the proportion of cases which in their experience settled ranged between 30 and 95 percent. It should also be noted that these results served as one small part of an extended review of industrial rights generally (trade mark, patent and designs), rather than patents exclusively. In

short, there is a gap in the Australian data. Readier availability of court databases online in Australia makes it possible to begin to fill this gap.

### **Comparative US studies on patent litigation**

In the US, there have been a variety of studies on patent litigation. Questions about the effect of the specialised appeal courts, and the availability of sophisticated litigation and patent databases has seen a burgeoning collection of literature and discussion on the filing and settlement of patent disputes. US studies have provided insights into the filing of patent cases, their settlement, and characteristics of the disputed proceedings and patents.

In the US, there has been, what Bessen and Meurer call, a ‘patent litigation explosion’.<sup>15</sup> In their 2005 working paper, they claim that the annual number of patent lawsuits filed in the US doubled during the 1990s, from just under 800 per year in 1989 to nearly 1600 in 1999. The patent litigation upsurge is not a common occurrence for *all* litigation in the US. The trial rate of patent litigation is double the average of federal civil litigation,<sup>16</sup> and filing of antitrust and contract suits declined over the 1990s.<sup>17</sup> Further, Prakash-Canjels<sup>18</sup> analyses the trend in patent cases as reported in data provided by the United States Administrative Office of the District Courts, and finds in the period 1991-2000, the number of cases filed each year increased by 111%. Somaya,<sup>19</sup> using the same data as Prakash-Canjels, examines patent litigation from 1970 to 2000, and shows that the number of patent cases was ‘virtually stagnant’ until the mid 1980s and has been increasing at a growing rate since.

In relation to settlement, according to an oft-quoted study by Lanjouw and Schankerman,<sup>20</sup> only 5% of all US patent cases conclude with a trial, meaning that 95% of patent cases settle. They find that 85% of these settlements occur quickly, before any pre-trial hearing. However, Kesan and Ball,<sup>21</sup> examine patent cases litigated in 1995 and 1997 to conclude that approximately 70% of all patent cases settle. The authors also observe that about 15% of patent cases – 13% of the cases in 1995 and 16% of the cases in 1997 – terminated with a court decision, ie, terminated though some sort of court ruling on the merits. Kesan and Ball claim that the 95% settlement rate applies only to cases which terminated without a trial, whereas in fact

successful summary judgement motions appear equally important.<sup>22</sup> Kesan and Ball confirm Lanjouw and Schankerman's finding that settlements occur quickly, as most of the patent cases they examined settled about 12-15 months after filing the complaint. While there are a small number of cases with exceedingly long durations, in both 1995 and 1997, 50% of cases were resolved in 10 months.

There have also been various studies examining *which* patents are being litigated in the US. According to Lerner,<sup>23</sup> examining patents suits filed from January 1990 to June 1994, the newer the technology, the greater the probability that a patent will be involved in a case. Lanjouw and Schankerman,<sup>24</sup> looking at litigated patents reported to the US Patent and Trademark Office between 1975 and 1991, find that the greater the overall value of the patent (when measured by citations, or the patent's age) the greater possibility of its being litigated. Further, Allison et al,<sup>25</sup> analysing patent cases that terminated during 1999-2000 combined with patents issued between 1963 and 1999, find that patents are more likely to be involved in litigation if they are young (i.e. litigated soon after they are obtained), are issued to individuals or small, domestic companies, have a larger number of claims, citations or prior art, and spend longer in prosecution than ordinary patents. The authors also find that litigated patents come disproportionately from certain industries. Patents in the mechanical, computer and medical device industries are significantly more likely to be litigated than patents in the chemical and semiconductor industries.

### **STUDYING PATENT LITIGATION IN AUSTRALIA: METHODOLOGY**

While an examination of US patent settlement and filing data provides a valuable insight into patent litigation, we cannot assume the picture is the same in Australia. The patterns of patenting, economies, and levels of litigious activity are likely to be very different in Australia and the US. Hence, there is no guarantee that the picture emerging from studies of patent litigation will be the same, or even similar, between the two jurisdictions.

In order to fill the gap in data on Australian patent litigation, we sourced information from the Federal Court's online case management systems, the previous FEDCAMs system, and Casetrack which replaced it in 2004.<sup>26</sup> To determine all cases filed in the relevant period, we used a report, generated by FEDCAMs of all proceedings filed

under the *Patents Act* from 1995 to the end of 2003. We supplemented this information using Casetrack to identify cases filed in 2004 and 2005 where the application type was stated to be Intellectual Property and where the case was a patent case.<sup>27</sup> Information regarding judgements was obtained by examining the court orders and looking at Federal Court decisions on the Australasian Legal Information Institute (AustLII) website.<sup>28</sup>

From FEDCAMs and Casetrack, we obtained three types of information:

1. Proceedings data: basic information about the case, including the case file number, the names of the respondent, the applicant, and the judge hearing the case;
2. Important dates, such as the issue date and end date, which enabled us to determine how long a case took to settle or terminate;
3. The type of case. Historically, FEDCAMs recorded the section of the *Patents Act 1990* (Cth) under which proceedings were issued. Using this information, and matching it to the *Act*, we were able to determine the type of proceedings (for example, infringement, unjustified threats, opposition) in most cases. Casetrack does not list the section of the *Patents Act 1990* (Cth) under which proceedings are filed. The only cases Casetrack identifies are infringement proceedings however, this is only done sporadically. Hence, for 2004 and 2005, we have a larger number of ‘unknown’ proceedings.

In this analysis, a ‘settled’ case is defined as a proceeding that did not end with a court judgement on the merits. Either a proceeding was withdrawn unilaterally, was withdrawn due to negotiations between the parties, or otherwise terminated following an interlocutory or summary judgement. The data we were able to source does not enable us to differentiate these.<sup>29</sup> We expect that only a handful of cases are unilaterally withdrawn, as this is more likely to occur prior to the issue of proceedings. Instead, we assume that more settlements occur once proceedings are issued and there is agreement to withdraw prior to the commencement of a hearing.<sup>30</sup> Hence, the extent to any over-inclusion in our analysis of settled cases where proceedings have been withdrawn is likely to be small.

Proceedings that terminate following an interlocutory or summary judgement have also been classified as settled. If an interlocutory judgement was rendered and proceedings then terminated, the case is classified as a settlement. If a summary judgement was given and a case terminated immediately, the case is classed as settled. If a summary judgement was a partial summary judgement, or was followed by meetings between the parties (which we could only determine by interviewing the parties), and proceedings were then terminated, the case is classified as settled. These cases have been classed as settled as a final judgement on the merits has not been reached. It is probable that the pre-trial rulings provided information about each party's likelihood of winning at trial and helped negotiations move along to settlement.

There are limitations inherent in the methodology we have used. We cannot guarantee that every patent proceeding has been captured. We depend, for identification of the cases, on correct entry of the relevant legislation into the Federal Court database at the time of filing. Further, as this system of identification did not continue with the implementation of Casetrack, the data on casetype is incomplete for proceedings issued in 2004 and 2005. Also, there are quirks in the structure of the database, and its history, that mean some proceedings will not have been collected, although we think it is likely the proportion is very small.<sup>31</sup>

Another limitation is in the information we could obtain. Unlike in the US, the courts do not record the patent number in any given filed case.<sup>32</sup> Therefore, the information we obtained for this investigation does not include the technology class or type of invention that is the subject of the patent(s) being litigated. This can only be achieved by looking at documents in the proceedings, such as the Statement of Claim, for each individual patent case. As this information is not readily available, our analysis cannot be aligned to US studies where litigated patents can be categorised on a technology or industry basis,<sup>33</sup> or where a large database of filed cases can be statistically analysed to determine factors effecting settlement.<sup>34</sup> Also, the amount of Australian patent cases is much smaller, making broad statistical analysis that takes into account a range of different factors and variables, more difficult. Our analysis cannot be compared to US studies where litigated patents are able to be analysed across technology types, technology fields and other factors such as the size of the patent owner.<sup>35</sup> Hence, the results presented in this report must be interpreted and discussed with care.

## **ANALYSIS OF AUSTRALIAN PATENT LITIGATION ACTIVITY FROM 1995 TO 2005**

Based on our methodology as explained above, we are able to provide a broad, descriptive picture of:

- the amount of patent litigation occurring in Australia from 1995 to 2005,
- the types of proceedings filed,
- settlement rates (how many proceedings terminate without a judgment),
- which kinds of proceedings more often settled, and
- when settlement occurred.

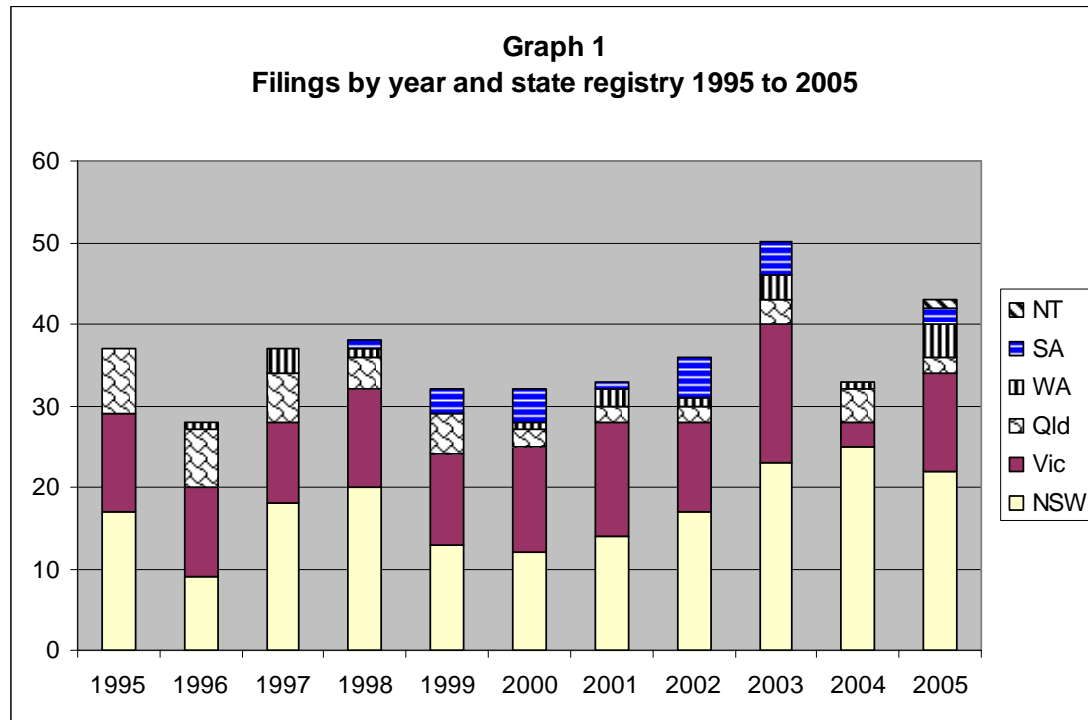
### **How many patent cases were filed from 1995 to 2005?**

The first question to ask is how much patent litigation activity is occurring in Australia. While US patent studies by Lanjouw and Schankerman,<sup>36</sup> Alison et al<sup>37</sup> look at the rate of litigation per patent, and Landes and Posner,<sup>38</sup> Merz and Pace<sup>39</sup> observe aggregate patent litigation rates, we analyse Australian patent litigation and settlement rates per year.<sup>40</sup>

Graph 1 shows the issued patent proceedings in the Federal Court by year and state, from 1995 to 2005. For the number of issued proceedings per year, broadly speaking, there is no particular pattern and no particular rise. There are slight ebbs and flows, but overall, a fairly constant rate. From 1995 to 2005, between 28 and 50 patent cases were filed each year in the Federal Court. The year 2003 had the most issued proceedings (50), while 1996 had the least (28). The average number of issued proceedings over the period was 36 (36.27) per year.<sup>41</sup> In a context where there are close to 100,000 patents in force,<sup>42</sup> this is a tiny number.

The breakdown by state illustrated in Graph 1 follows the pattern that would be expected, given the respective populations of those states.<sup>43</sup> New South Wales has the

most filed proceedings (190), followed by Victoria (126). The other states are quite a way behind, in order of Queensland (45), South Australia (20), West Australia (17), and Northern Territory (1).

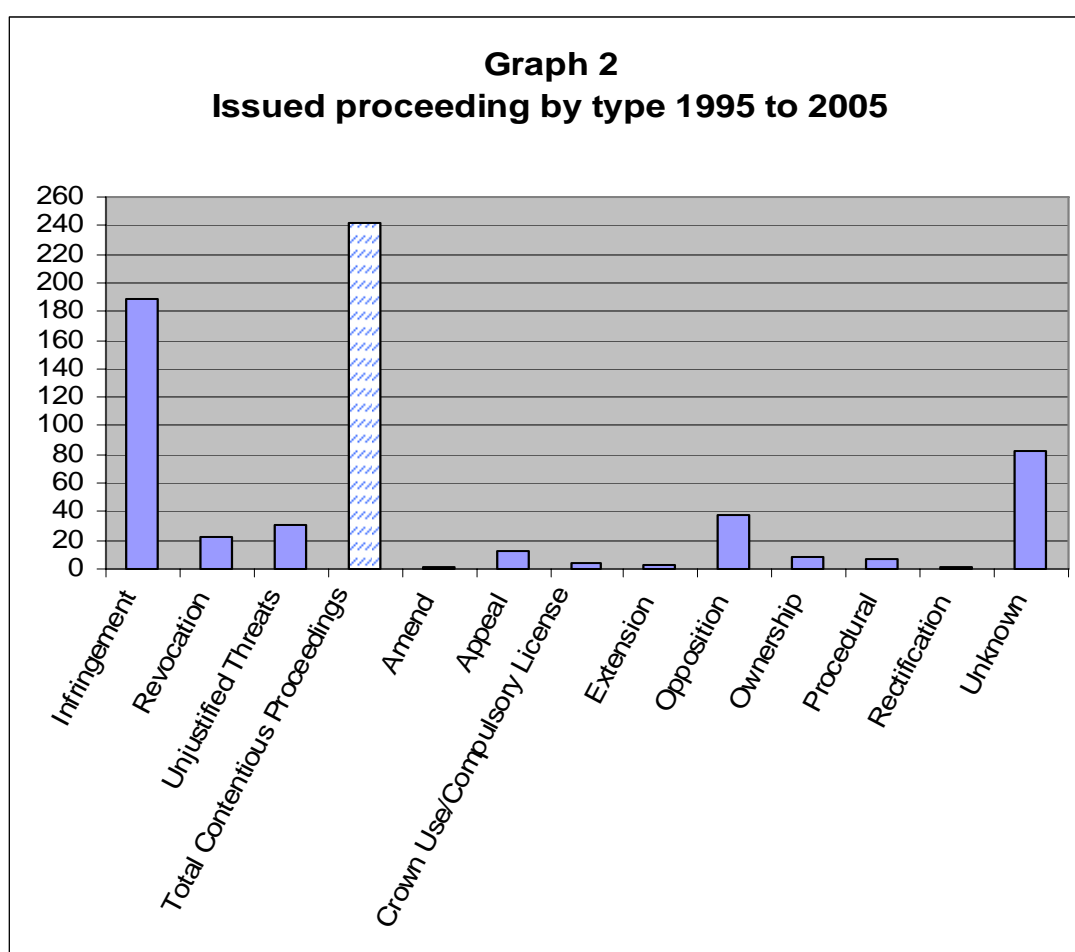


### What types of patent proceedings were filed from 1995 to 2005?

Analysing the number of proceedings issued is only a starting point for understanding patent litigation. Ideally, we would prefer to know the types of patents being litigated, and the areas of technology to which those patents related. Unfortunately, the Federal Court does not record the patent number in its internal databases, so we are unable to provide that information. We are, however, able to provide some data on the *kinds* of proceedings being brought before the Australian courts.<sup>44</sup>

As shown in Graph 2, the majority of filed proceedings from 1995 to 2005 were infringement cases.<sup>45</sup> Out of a total of 399 filed proceedings, 189 of these (47%) were infringement cases. The nearest type are unknown cases<sup>46</sup> (82 out of 399 – 21% of the total), followed by opposition cases<sup>47</sup> (38- 10%), unjustified threats cases<sup>48</sup> (31 – 8%), and appeal cases<sup>49</sup> (12-3%). The least amount of filed proceedings in the relevant period were rectification cases<sup>50</sup> (1 out of 399– 0.3%).

Graph 2 also shows that the overwhelming majority of filed cases in this period are 'contentious proceedings'. We define total 'contentious proceedings' to mean the sum of infringement, revocation and unjustified threats cases. The type of case it is may depend on who files proceedings first. If these are added together, of the total 399 proceedings filed in the period, 242, or just over 3/5 are directly contentious cases of that kind.



## ANALYSIS OF SETTLED PATENT CASES

### What proportion of patent cases filed from 1995 to 2002 settle?

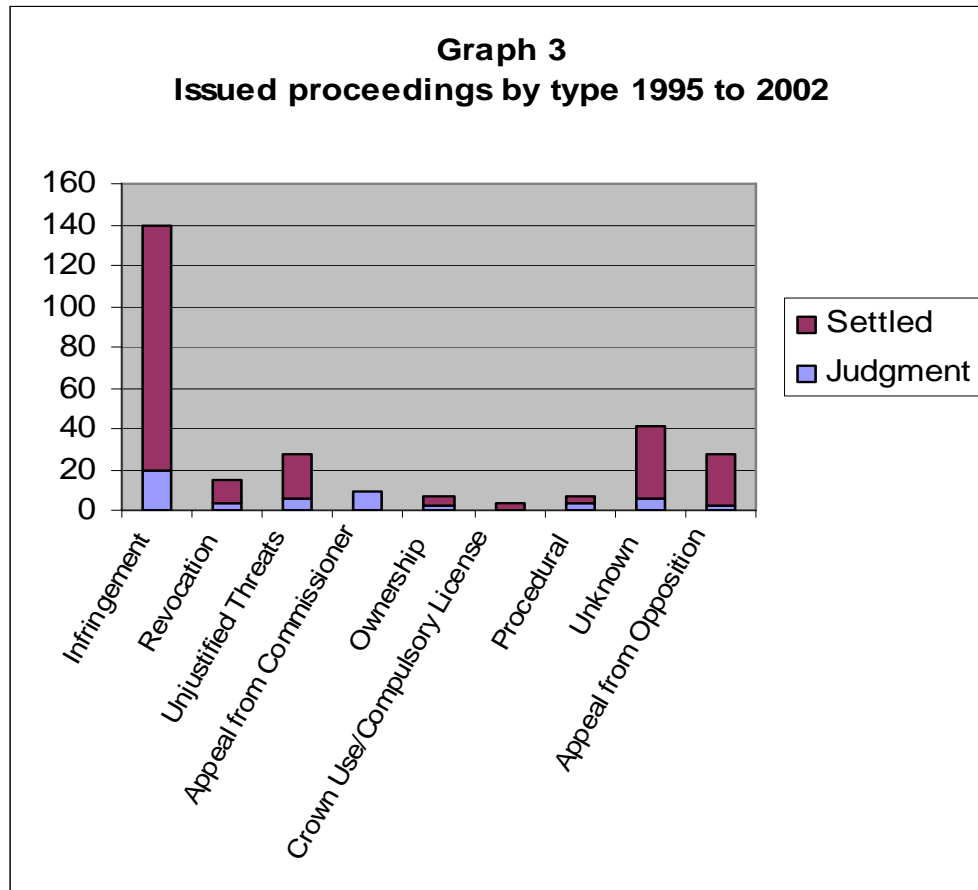
We now move to consider settlement of patent cases. Here we need to consider a different time period. The selected period is 1995 to 2002. This was chosen as it is

still unknown how many of the 2005 cases, or even the 2004 cases, will settle. Previous studies have shown that the mean number of days elapsed from commencement of proceedings to decision for first instance cases in the Federal Court is 1000 (2.7 years).<sup>51</sup> Therefore, we have built in a time lag of 3 years.

From 1995 to 2002, approximately 15% (42 of 277) proceedings ended with a judgement on the merits. Unfortunately, the Federal Court does not produce statistics on how many cases settle across its jurisdictions, so a direct comparison between Australian states cannot be provided. But this figure puts Australia broadly in the same range as the US, where Kesan and Ball found that about 15% of all cases in 1995 and 1997 terminated through some sort of court ruling on the merits.<sup>52</sup>

It should be noted that our findings are based on FEDCAMs and Casetrack designations, which are not unequivocally reliable. In Casetrack, for example, there is a code for “Application Dismissed”. It is applied to cases where there has been a judgment dismissing the application, and where the dismissal is with consent – that is, after settlement. Also, there are some cases where there is both judgment and settlement: like *Novartis v Bausch & Lomb (Australia) Pty Ltd.*<sup>53</sup> This case was listed for judgment, but then the parties settled in international settlement negotiations and sought orders dismissing the claim and cross-claim, and granting amendments sought by Novartis. Then the judge gave a judgment on the amendment – and refused some. In the Federal Court database, it is listed as a matter in which Terms of Settlement were filed – ie a settled case. According to our criteria, this is a judged case.

Interestingly, the rate of settlement does vary according to the type of proceedings, illustrated in Graph 3.<sup>54</sup> Our results show that there is a high settlement rate for opposition proceedings. There is no one indicator to explain this, it may be that in such matters there is more opportunity to collaborate and confer, for example, to negotiate the scope of the patent. Also striking is that the majority of infringement cases settle. It may be that these cases also allow the parties room to move to reach a deal or give consent to any undertakings or injunctions regarding the infringed patent.



#### **When do patent proceedings filed from 1995 to 2002 settle?**

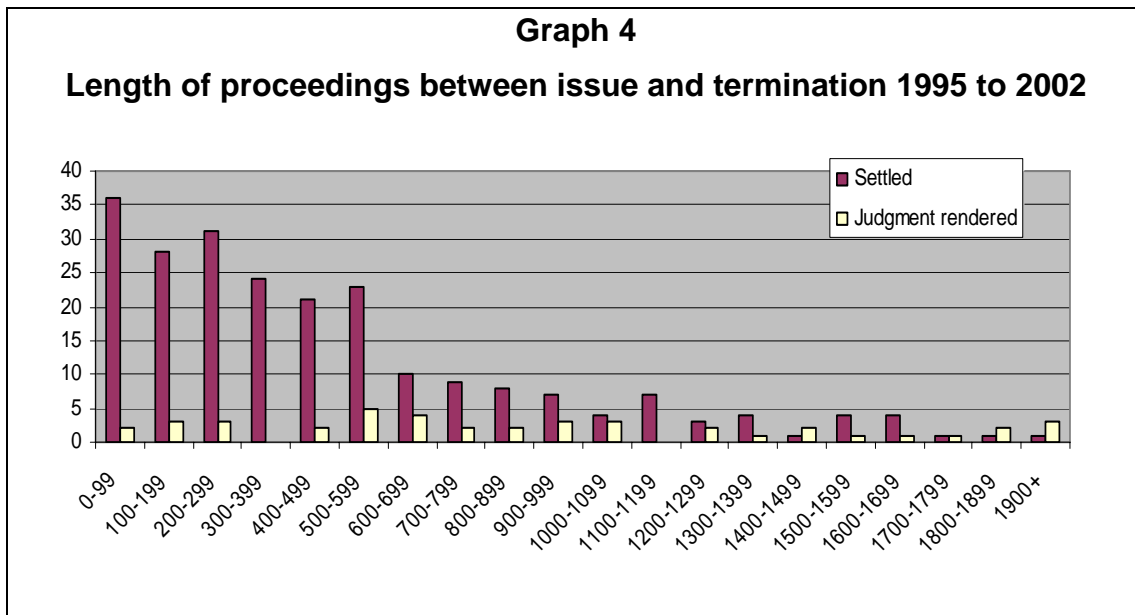
The question of when proceedings settle is an important issue for disputing parties. Patent litigation can be time-consuming and expensive. Little wonder it has been called ‘the sport of kings’.<sup>55</sup> Lengthy periods of litigation may discourage people from taking enforcement action, and could discourage them from using the patent system. Further, prolonged enforcement procedures can greatly encumber society, tying up the courts and other resources in what can be a largely unproductive activity.

Graph 4 shows the number of court days and the number of cases that settled or had a judgement rendered in each band of days.<sup>56</sup> Our results demonstrate that the peak settlement time for Australian patent litigation is in the first 100 days, then again between 200 to 300 days. This suggests there are a cluster of cases that settle quickly. We assume what is occurring is that certain cases ‘drop off’ very quickly: small cases, and perhaps cases in which the issue of proceedings is a strategy used by a party to indicate their seriousness or to move negotiations forward. Bigger or more serious cases stand a chance of settling after about 8 months: perhaps a stage when expert or

discovered evidence is available, and thus parties have more information on which to base an assessment of their case and reach settlement. After that, the settlement rate decreases. The average time to settlement is 511 days. This is actually longer than in the US, where the average number of days to settlement was 422 in 1995 and 439 in 1997.<sup>57</sup>

While the time to settlement is longer than in the US, a recent study by Dent and Weatherall<sup>58</sup> shows that the majority of Australian patent cases settle early. Based on a survey sent to lawyers regarding Australian patent dispute settlements, they find that the bulk of settlements (72%) occur after the start of proceedings but before the commencement of the hearing. This period is broken up into the following periods: between commencement of proceedings and first directions hearing (3% of all settlements); between first directions hearing and discovery (19%); at court-ordered or court-proposed mediation (20%); and otherwise before commencement of the hearing (30%).

The number of cases with judgement rendered is quite small in comparison to the cases settled. The most striking observation here is that there are a number of cases being determined through judgement rather early – within 100 days (about 3 to 4 months) of proceedings issued. Many of these would be procedural – for example, appeals from decisions of the Commissioner. However, some substantive matters are dealt with quickly. For example, there is *Impro Limited and Arjo Limited v Nesbit Evans Group Australia Limited*,<sup>59</sup> an infringement case concerning alleged infringement of a patent on an invalid lifting hoist. Heard by Beaumont J, the case lasted less than a year (257 days). There is also *Aktiebolaget Hässle v Alphapharm Pty Ltd*,<sup>60</sup> a complex litigation concerning the stomach ulcer treatment Losec. Judgment was rendered by Lehane J within 14 months (411 days), and there were two hearings within that time. However, many cases take longer; the average number of days to judgement is 879. This is longer than in the US. The average number of days to termination for cases with a final court ruling was 680 in 1995 and 855 in 1997.<sup>61</sup>



#### **To what extent are delays in the Australian process a matter of party choice?**

One fact which emerges from the discussion thus far is that Australian patent litigation processes take a long time – longer than equivalent processes in the United States, whether we are talking about cases which settle, or those which proceed all the way through to judgment. At 2.7 years (average) to judgment, the time taken for patent cases is also considerably more than the Federal Court target of disposal of all cases (except native title) within 18 months.

However, one question which arises is the extent to which the court has control over the length of proceedings. After all, it may be neither possible, nor desirable, for a judge to refuse a request, made by both parties in an early directions hearing, for a delay of 6 months to find and brief experts beyond Australian shores. In this respect, patent cases are different from other forms of litigation where highly specialised expert and scientific evidence is not required. A court may be able to dictate how long parties in general commercial litigation have to prepare affidavits and inspect documents. It is less able to dictate how long it will take to locate an available specialist in a limited field.

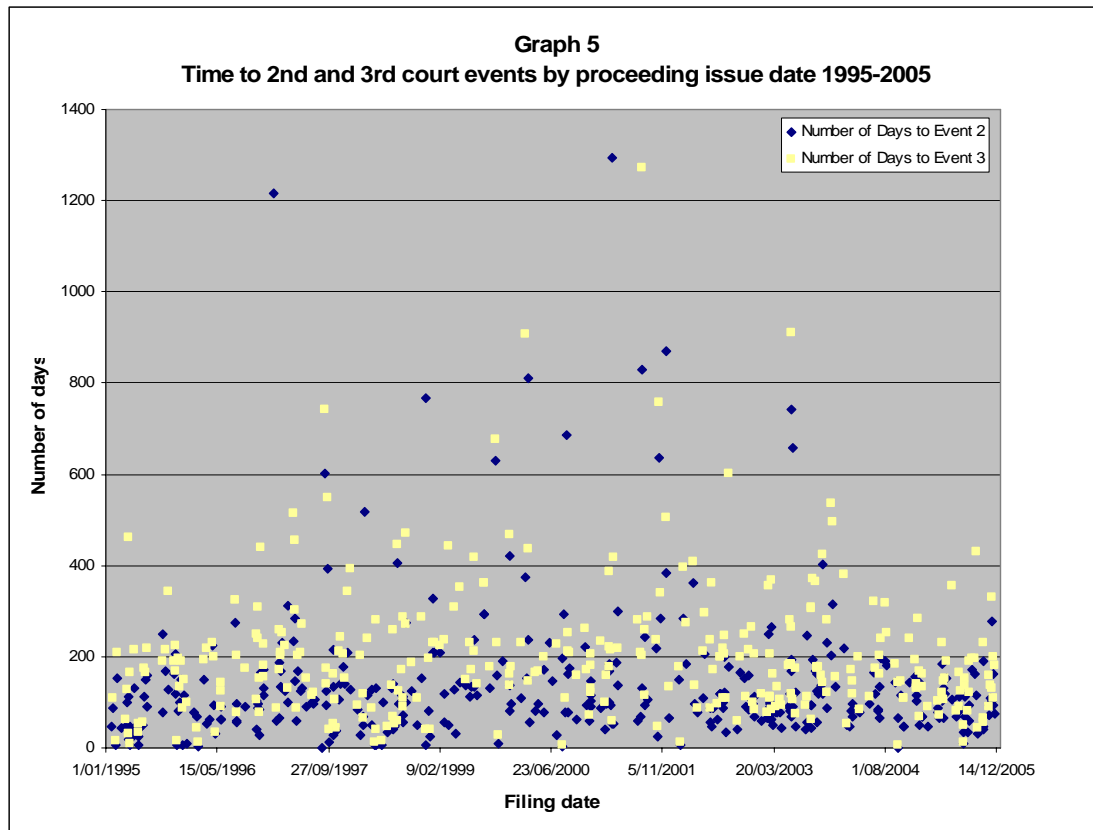
It is difficult, statistically, to explore how often this occurs: court databases do not record which delays are at parties' request, nor the reasons given in hearings for any extended periods of time between court events.<sup>62</sup> However, one way we can get at

least some idea is to look at the number of days which pass between the issue date of proceedings, and early events before the court. If we observe particularly long delays between the first time the matter is before the court, and, say, the second and third times, it seems reasonable to infer that we have cases where long delays are being requested by the parties and thus parties are to some extent ‘to blame’ for such delays. While the first time a matter is in court will generally be set by the court registry, the next dates (the second and third events) will be set by the court, guided to some extent by what the parties request. Moreover, it seems unlikely that ‘blame’ for long delays will attach to one party alone: it seems highly unlikely that any court would often send the parties away for 6 months or more at the request of only one party.

We have therefore analysed two pieces of data, extracted from the Federal Court CaseTrack database:

- The number of days between the issue date of proceedings, and the second time the matter is listed; and
- The number of days between the issue date and the *third* time the matter is listed.

This analysis is presented in Graph 5, below. Each dot (in statistical terms, each ‘observation’) represents a court file. There are two dots for each file: one for the time to the second event, one for the time to the third event). The vertical axis represents the number of days between the issue date and the second or third event. The horizontal axis is the issue date of the proceedings: that is, the dots on the left are older case files (1995-1996), the ones at the far right the most recent measured (2005). Obviously, the decision to analyse only the second and third events is somewhat arbitrary, of course: delays initiated by the parties may occur at any point in proceedings, and many proceedings also have early interlocutory matters dealt with by the court. These two events have been chosen because (a) some cut off is necessary for purely practical reasons (more dots would make the graphs unreadable!), and (b) it seems likely that any significant delays observed occur with the consent of both parties. Once we move past the second or third event, however, it may be more likely that one party requires time for some particular purpose. At the very least, the picture becomes more complicated as time goes on.



Note that the bottom-most line – at 200 days – is over 6 months. An appreciable proportion of the darker diamonds – representing the second event in court – fall above this line, indicating proceedings which, following the first directions of appearance before the judge, take another 5-6 months before coming into a courtroom again. Even more notable of course is the number of darker diamonds falling beyond 400 days. Those observations represent files in which, after well over a year, the judge has seen the parties in his or her courtroom only twice.

This graph suggests – although it cannot conclusively prove, given the enormous variety between files – that parties bear some responsibility for the length of patent proceedings in Australia, and that in an appreciable proportion of cases, parties consent to, or request, long delays to prepare evidence and/or negotiate. It may not be possible to reduce patent proceedings to the desired 18 month disposal time without changing this behaviour or practice significantly.

### CONCLUDING REMARKS

In summary then, in Australia, the rate of patent litigation remained stable in the period 1995-2005. Settlement rates are high, as we see in other countries, but it is fair to say that the average time to settlement, and judgment, is longer in Australia. However there is some evidence that, if blame is to be apportioned for delays, it falls to some extent on parties requesting early, long gaps between court events.

There are many limitations of attempting to look at litigation in a purely statistical way. The numbers are only part of the overall picture. So, for example, while we observe that the number of patent cases filed in the Federal Court has remained fairly constant, this does not conclusively prove that the rate of infringement is stable. There could, for example, be more infringement which is occurring undetected. Alternatively, even where infringement is detected, a patent owner may not have the inclination, time, or resources to pursue patent litigation. A patent owner may simply decide, either before or after consulting a lawyer, to negotiate with an opposing party regarding a patent dispute.

In fact, the figures do not even prove that the number of patent disputes is stable. For example, there could be an increase in patent dispute activity occurring earlier, in opposition proceedings. At this stage we do not have the relevant data, although informal discussions with IP Australia do not suggest any significant rise. Alternatively, there could be an increase in activity prior to issuing patent proceedings, for example, more letters of demand being sent,<sup>63</sup> or greater instances of negotiation between lawyers of opposing parties.<sup>64</sup> There could also be an increase in alternative patent dispute resolution mechanisms, such as mediation, conciliation, facilitation or arbitration. Indeed, patent owners may be increasingly focusing on these methods in an effort to limit the significant costs and pressures of patent litigation. Alternatively, there could be a rise in the number of filed cases in other spheres of IP, such as copyright, trade mark, or designs. We do not have data for those areas of the law at present, although certainly the number of cases, and judgements, are higher in each than for patents. Nevertheless, while the picture is complex, we can at least have some assurance that the patent litigation explosion seen in the US has so far passed Australia by – for better or worse.

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<sup>1</sup> Adam B. Jaffe and Josh Lerner, *Innovation and Its Discontents: How our Broken Patent System is Endangering Innovation and what to do about it* (2004, Princeton UP), 2.

<sup>2</sup> See, for example, National Research Council Committee on Intellectual Property Rights in the Knowledge-Based Economy (US), *A Patent System for the 21<sup>st</sup> Century* (2004) 1-2. In Australia, a similar desire has been expressed: see Working Group on Managing Intellectual Property, 'Framework Paper' (National Innovation Summit, 1999).

<sup>3</sup> The Federal Court does not have exclusive jurisdiction, however it receives the majority of patent cases filed in Australia. The Federal Court of Australia has jurisdiction to hear patent enforcement cases at first instance: *Patents Act 1990* (Cth) s 120(1). All appeals under the *Patents Act 1990* (Cth) are heard by the full Federal Court: *Patents Act 1990* (Cth) s 158.

<sup>4</sup> For an examination of the factors considered by lawyers when advising their clients on Australian patent dispute settlements, see Chris Dent and Kimberlee Weatherall, 'Lawyer's Decisions In Australian Patent Dispute Settlements: An Empirical Perspective' (2006) 17 *Australian Intellectual Property Journal* 255.

<sup>5</sup> For an empirical review on patent enforcement outcomes in Australian courts during the period 1997 to 2003, see Kimberlee G. Weatherall and Paul H. Jensen, 'An Empirical Investigation into Patent Enforcement in Australian Courts' (2005) 33 *Federal Law Review* 239.

<sup>6</sup> Miranda Dugan and Michael Dowling, 'Threshold Manner of Manufacture in Australia – What Next?' (1999) 110 *Patent World* 26; Justice Douglas Drummond, 'Are the Courts Down Under Properly Handling Patent Disputes?' (2000) 42 *Intellectual Property Forum* 10; Dimitri Eliades, 'Intellectual Property – What Went Wrong?' (2001) 14 *Australian Intellectual Property Law Bulletin* 49; Weatherall and Jensen, above n 5.

<sup>7</sup> Adrienne Clark, 'Commercialisation of Science and Technology' (Paper presented at the Supreme and Federal Court Judges' Conference, Canberra, January 2000).

<sup>8</sup> See the Advisory Council on Industrial Property (hereinafter ACIP) now renamed the Advisory Council on Intellectual Property, *Review of Enforcement of Industrial Property Rights* (1999).

<sup>9</sup> K. O'Connell, 'Australia: A Patentee's Paradise' (2003) 25 *European Intellectual Property Review* 481

<sup>10</sup> Weatherall and Jensen, above n 5.

<sup>11</sup> *Ibid* 248-251.

<sup>12</sup> See, for example, Jean O. Lanjouw and Mark Schankerman, 'Characteristics of Patent Litigation: A Window on Competition' (2001) 32 (1) *Rand Journal of Economics* 129; Kimberley A. Moore, 'Forum Shopping in Patent Cases: Does Geographical Choice Affect Innovation?' (2001) 79 *North Carolina Law Review* 889; Jean O. Lanjouw and Josh Lerner, 'The Enforcement of Intellectual Property Rights: A Survey of the Empirical Literature' (1997) NBER Working Paper 6296.

<sup>13</sup> Lanjouw and Lerner find that filing a patent suit can affect the value of patent protection. Lanjouw and Lerner, above n 12. Lerner finds that the threat of litigation deters biotech firms from innovating in some technology fields. Josh Lerner, 'Patenting in the Shadow of Competitors' (1995) 38(2) *Journal of Law and Economics* 463.

<sup>14</sup> ACIP, above n 8.

<sup>15</sup> James Bessen and Michael J. Meurer, 'The Patent Litigation Explosion' (2005) Working Paper No 05-18, Boston University School of Law.

<sup>16</sup> James Bessen and Michael J. Meurer, 'Lessons for Patent Policy from Empirical Research on Patent Litigation' (2005) 9 *Lewis & Clark Law Review* 1, 3.

<sup>17</sup> Kevin M. Clermont and Theodore Eisenberg, 'Judicial Statistical Inquiry Form'

<http://teddy.law.cornell.edu:8090/questata.htm>; Marc Galanter, 'Contract in Court or Almost Everything You May or May Not Want to Know About Contract Litigation' (2001) *Wisconsin Law Review* 577, 590.

<sup>18</sup> Gauri Prakash-Canjels, 'Trends in Patent Cases: 1990-2000' (2001) 41 *IDEA: The Journal of Law and Technology* 238.

<sup>19</sup> Deepak Somaya, 'Patent Litigation in the United States (1970-2000)' (2002)

[emertech.wharton.upenn.edu/WhartonMiniConfPapers/SomayaPatentLitig2002c.pdf](http://emertech.wharton.upenn.edu/WhartonMiniConfPapers/SomayaPatentLitig2002c.pdf).

<sup>20</sup> Lanjouw and Schankerman, above n 12.

<sup>21</sup> Jay P. Kesan and Gwendolyn G. Ball, 'How are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes' (September 2005) Illinois Law and Economics Working Paper No. LE05-027.

<sup>22</sup> According to Kesan and Ball, 8-9% of US patent cases filed in 1995 and 1997 terminated through final rulings granting a motion for summary judgment. Kesan and Ball, above n 21, Part IIIC.

<sup>23</sup> Josh Lerner, 'The Importance of Trade Secrecy: Evidence from Civil Litigation' (1995) unpublished working paper, Harvard University quoted in Lanjouw and Lerner, above n 12, 8-9.

<sup>24</sup> Lanjouw and Schankerman, above n 12.

<sup>25</sup> John R. Allison, Mark A. Lemley, Kimberly A. Moore and R. Derek Trunkey, 'Valuable Patents' (2004) 92(3) *Georgetown Law Journal* 435.

<sup>26</sup> See Federal Court of Australia, *Annual Report 2004-2005*, 13. The website of Casetrack is [http://research.fedcourt.gov.au/Esearch?p=general\\_enquiry](http://research.fedcourt.gov.au/Esearch?p=general_enquiry).

<sup>27</sup> There were 20 proceedings issued in 2004 and 2005 where the application type was stated by Casetrack to be Intellectual Property and we were unable to determine (by looking at the orders issued, judgements rendered and parties involved) if the proceedings were patent cases.

<sup>28</sup> See the AustLII website, <http://www.austlii.edu.au/>.

<sup>29</sup> Typically, the terms of a settlement will not be recorded in any orders of the court that terminate proceedings.

<sup>30</sup> This presumption is reflected in a recent study by Dent and Weatherall, where a survey sent by the authors to Australian patent lawyers indicated that the bulk of settlements in patent disputes (72%) occurred after the start of proceedings but before the commencement of the hearing: see Dent and Weatherall, above n 4.

<sup>31</sup> Under the FEDCAMS system (which operated prior to 2004), up to three pieces of legislation under which a case was filed were noted in the database. However, statistical reports could only be generated for the *first* Act. Thus, if a proceeding alleged, for example, both *Trade Practices Act* violations and *Patents Act* violations, we would capture the case if the *Patents Act* was the first Act noted in the database, but not if the *Trade Practices Act* was noted first. We believe that it is more likely that the *Patents Act* would be recorded first in the vast majority of cases: patent infringement, for example and in any event, relatively few cases involve violations.

<sup>32</sup> A recommendation was made by the Australian Law Reform Commission in 2004 that as soon as practicable, IP Australia should update and regularly a searchable online database containing information about Australian patents, including details of court proceedings: see Australian Law Reform Commission (2004) Report 99 *Genes and Ingenuity: Gene Patenting and Human Health*, Recommendation 9.

<sup>33</sup> See, for example, Alison et al, who find that that the probability of a patent being litigated varies substantially across industries. Allison, Lemley, Moore and Trunkey, above n 25.

<sup>34</sup> See, for example, Lanjouw and Schankerman, who analyse patent litigation relating large databases of patent cases filed to other available databases of company data. Jean O. Lanjouw and Mark Schankerman, 'Protecting Intellectual Property Rights: Are Small Firms Handicapped?' (2004) 47 *Journal of Law and Economics* 45.

<sup>35</sup> See, for example, Jean O. Lanjouw and Mark Schankerman, 'Enforcing Intellectual Property Rights' (2001) Working Paper No 8656, National Bureau of Economic Research.

<sup>36</sup> Lanjouw and Schankerman, above n 34.

<sup>37</sup> Alison, Lemley, Moore and Trunkey, above n 25.

<sup>38</sup> William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (2003), Cambridge, MA, Bellknap Press of Harvard University Press, Chapter 12.

<sup>39</sup> J.F. Merz and N.M. Pace, 'Trends in Patent Litigation: The Apparent Influence of Strengthened Patents Attributed to the Court of Appeals for the Federal Circuit' (1994) 76(8) *Journal of the Patent and Trademark Office Society*, 579-590.

<sup>40</sup> An alternative approach is that used by Moore, who identifies the sample of litigated patent disputes by year of termination and examines the method of termination or time to termination. See Moore, above n 12. See also Kimberly A. Moore, 'Judges, Juries, and Patent Cases – An Empirical Peak inside the Black Box' (2000) 99 *Michigan Law Review* 365.

<sup>41</sup> According to ACIP, the amount of proceedings issued per year, from 1993 to 1996, was 29.3 per year. We do not have data for the years 1993 and 1994, but found that for 1995 and 1996, 37 and 28 patent proceedings were filed respectively. These findings are less than the amount reported in the 1999 ACIP report, which states that 39 proceedings were issued in 1995 and 29 in 1996. This

discrepancy gives further strength to the argument that the 1999 ACIP Report overstates the number of patent litigation disputes: see n 14 and accompanying text.

<sup>42</sup> In Australia in 2004, there were 96673 patents in force, according to WIPO Statistics: WIPO, *WIPO Patent Report: Statistics on Worldwide Patent Activity* (2006 Edition), available at [http://www.wipo.int/ipstats/en/statistics/patents/patent\\_report\\_2006.html](http://www.wipo.int/ipstats/en/statistics/patents/patent_report_2006.html).

<sup>43</sup> It should be noted that we do not have any data for proceedings issued at the South Australian Federal Court registry for the years 1995, 1996, 1997 and 2004.

<sup>44</sup> How these categorisations were obtained, and weaknesses with the data, are discussed above at nn 26-35 and accompanying text.

<sup>45</sup> ‘Infringement’ cases include straight infringement actions, *plus* infringement actions with revocation claims, *plus* infringement, infringement supply actions, *plus* infringement actions with invalidity claims, *plus* straight infringement supply actions.

<sup>46</sup> ‘Unknown’ cases are those where we were unable to determine the type of patent proceeding issued. See ‘methodology’ section 4 above.

<sup>47</sup> ‘Opposition’ cases refer to appeals from oppositions to the grant of a standard patent: see *Patents Act 1990* (Cth) Ch.5; oppositions to the grant of the extension of the term of a standard patent: see *Patents Act* (Cth) s 75; and oppositions to an innovation patent that has been certified: see *Patents Act 1990* (Cth) Ch. 9A Part 3.

<sup>48</sup> ‘Unjustified threats’ cases include straight unjustified threats actions, *plus* unjustified threats actions with revocation claims. The *Patents Act*, like most Australian IP legislation, includes provisions which prohibit unjustifiable threats of infringement proceedings: *Patents Act 1990* (Cth), Ch. 11 Part 3 (ss 128 and following). A threat is *prima facie* unjustifiable: it is only justifiable if a person threatening infringement proceedings establishes that the relevant conduct infringes, or would infringe a valid claim of a standard patent: *U & I Global Trading (Australia) Pty Ltd v Tasman-Warajay Pty Ltd* (1995) 32 IPR 494 at 501; see Bucknell, Beattie, Goatcher and Rofe, *Australian Patent Law* (2004), 200-201.

<sup>49</sup> ‘Appeal’ cases refer to appeals from decisions of the Commissioner of Patents.

<sup>50</sup> ‘Rectification’ cases refer to actions for an order to rectify of the Register of Patents under section 192 of the *Patents Act 1990* (Cth).

<sup>51</sup> Weatherall and Jensen, above n 5, Table 2, 262.

<sup>52</sup> Kesan and Ball, above n 21, 29.

<sup>53</sup> *Novartis v Bausch & Lomb (Australia) Pty Ltd* [2004] FCA 835.

<sup>54</sup> In Graph 3, ‘Appeal from Commissioner’ includes two cases filed within the relevant period concerning a patent’s extension of term under sections 68 and 70 of the *Patents Act 1990* (Cth). Also, ‘Procedural’ includes one case filed within the relevant period concerning rectification of the Register of Patents under section 192 of the *Patents Act 1990* (Cth).

<sup>55</sup> Douglas J. Kline, ‘Patent Litigation: The Sport of Kings’ (2004) [http://www.technologyreview.com/BizTech/wtr\\_13562.311.p2.html](http://www.technologyreview.com/BizTech/wtr_13562.311.p2.html).

<sup>56</sup> Not every patent proceeding issued in the Federal Court from 1995-2002 has been resolved. As at 30 June 2006, there are 5 patent proceedings that are ongoing (1 proceeding was issued in 2000, 1 was issued in 2001, and 3 were issued in 2002).

<sup>57</sup> Kesan and Ball, above n 21, 40.

<sup>58</sup> Dent and Weatherall, above n 4.

<sup>59</sup> *Impro Limited and Arjo Limited v Nesbit Evans Group Australia Limited* [1996] FCA 1127

<sup>60</sup> *Aktiebolaget Hässle v Alphapharm Pty Ltd* [1999] FCA 1390

<sup>61</sup> Kesan and Ball, above n 21, 40.

<sup>62</sup> Furthermore, sometimes a delay between court dates simply means that both parties are experienced litigators who are ‘getting on with’ the preparation of the case.

<sup>63</sup> According to Dent and Weatherall, in a recent survey the authors sent to Australian lawyers regarding patent dispute settlements, over half the respondents indicated that a letter of demand would be issued in at least 60% of cases: see Dent and Weatherall, above n 4.

<sup>64</sup> According to 78% of lawyers who responded to Dent and Weatherall’s survey, only between 0 and 20% of patent disputes in which they had been involved in the last five years had settled before a statement of claim was filed. This figure may suggest that filing of patent litigation proceedings is seen as, in effect, a stage of negotiations (with settlement occurring thereafter): see Dent and Weatherall, above n 4.

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