

31 August 2020

By email to rulescommittee@justice.govt.nz

The Rules Committee
PO Box 60
Auckland

Attention: Sebastian Hartley

Comments on Consultation Paper “Improving Access to Civil Justice”

These submissions have been prepared by The New Zealand Institute of Patent Attorneys, Inc (NZIPA). The NZIPA, established in 1912, is an incorporated body representing most Patent Attorneys registered under the New Zealand Patents Act, who are resident and practising in New Zealand. A significant majority of our members are registered as Trans-Tasman Patent Attorneys and/or Australian Trade Mark Attorneys.

Members of NZIPA represent local and international patent, design, trade mark and copyright owners, licensees, and alleged infringers of those intellectual property (IP) rights in New Zealand and Australia.

These submissions are made in response to the Courts of New Zealand community consultation paper “Improving Access to Civil Justice”.

Overall Support

The NZIPA supports the aims of the consultation paper and its proposed reforms to the High Court Rules.

IP is becoming an increasingly significant consideration for New Zealand innovators, traders and businesses. However, costs remain a significant barrier to bringing a civil matter to court. The Disputes Tribunal specifically excludes intellectual property disputes, and the majority of IP legislation specifically defines “Court” to mean the “High Court”. As a result, there is little alternative to High Court proceedings for resolving IP disputes.

Of the four options proposed in the consultation paper, the NZIPA specifically favours Proposal One “Introducing a short trial process”, or Proposal Four “Streamlining trial processes through rule changes”. A further option, specific to IP, is discussed below.

IP Specific Proposal

The NZIPA proposes that the Rules Committee considers the approach of the Australian Federal Circuit Court and the UK Intellectual Property Enterprise Court.

In Australia, a [Productivity Commission report](#) from December 2016 recommended the Federal Circuit Court as a forum for improving the time- and cost-efficiency of IP claims. As a result, an IP list pilot was conducted in the Circuit Court's Melbourne registry from 30 June 2017, proving to be successful. As an extension of the pilot, from 1 July 2019, the Federal Circuit Court commenced the National IP list. An [Annual Report 2018-2019](#) has since been issued.

Since the implementation of the National IP list, the number and diversity of filings in IP matters in the Federal Circuit Court has increased. It remains a small, but important and growing part of the Court's work. Currently, the IP jurisdiction of the Federal Circuit Court comprises proceedings arising under copyright, design and trade marks legislation (patents still being excluded by reason of their complexity).

Some features of the National IP list include:

- IP matters filed in the Court are docketed to a single judge for case management.
- Providing consistency in case management and interlocutory processes, to identify matters requiring early hearing dates, and to encourage early identification and narrowing of issues in dispute.
- Improving convenience and obviating the costs of in-person attendance, the Court undertaking case management hearings on the papers, by telephone and by video link with multiple registries, and electronic case management.
- Where possible, case management hearings taking place within three weeks of the initiating application. The Court may give directions, order the parties to mediation, and/or fix dates for interim and substantive issues to be discussed.
- The Court encouraging the use of alternative dispute resolution for the resolution of IP litigation, including through the Court's mediator registrars (who hold dual appointments with the Federal Court).
- Practice directions including the use of concise, plain and direct statements of case (limited to five pages) instead of lengthy statements and affidavits. This encompasses pre-trial chronology of events, outline of the case, contentions of fact and law, and form of proposed orders.
- Evidence procedures being streamlined and cross-examination controlled.
- Trials set down for less than two days wherever possible (mirroring the UK's Intellectual Property Enterprise Court).
- Openings and final addresses reduced to written form where possible.
- A trial may even be conducted entirely on the papers in particular cases.
- Decisions being given, where practicable, within a month, and in urgent matters, within a week.

Regarding the UK Intellectual Property Enterprise Court, a [2017 review](#) of costs highlights some of the specific costs-savings features:

- Statements of case stand as evidence-in-chief and have core documents attached. No further witness statements or disclosure are permitted unless specifically ordered by the judge.
- Applications are generally dealt with without a hearing; and the trial lasts no more than two days.
- Cases are robustly case managed by specialist IP judges.
- A capped recoverable costs regime and overall cap (for a liability-only trial, of £50,000 plus court fees).

Even if a specific IP approach were not adopted in New Zealand, the above features and learnings of the Australian Federal Circuit Court and the UK Intellectual Property Enterprise Court could prove helpful in further refining Proposal One “Introducing a short trial process”, or Proposal Four “Streamlining trial processes through rule changes”.

The NZIPA will be happy to discuss its current feedback and provide further feedback in due course.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'T. Huthwaite', is written over a light blue circular background.

Thomas Huthwaite
NZIPA Council Member

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