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ARTICLES

An Empirical Analysis of 15 Years of Australian Domain Name Disputes – *Andrew F Christie, James Gloster and Sarah Goddard*

The .au Dispute Resolution Policy (auDRP) creates an online mandatory administrative procedure for resolving disputes about .au domain names that contain another's trade mark. This study is the first – and, to date, the only – detailed quantitative analysis of every one of the 470 determinations made in the procedure's first 15 years of operation. By identifying the characteristics of each case and its decision-maker, and by analysing which of those are associated with particular outcomes, we provide previously unknown information about the factors that contribute to a case's success, and about the procedure's integrity. We find that the rate at which cases succeed has not changed over time and does not differ between the two service providers or between the most prolific panelists. When there is a statistically significant difference in the success rate, it is associated with a difference in the characteristics of the individual case – namely, that the complaint is based solely on a trade mark rather than on a name alone or together with a trade mark, or on a registered rather than an unregistered trade mark, or that the complaint is not defended by the respondent. Importantly, these findings support the conclusion that, contrary to some commonly expressed opinions, the auDRP produces outcomes that are consistent and fair. 4

Protecting Profits Post-Patent Expiry: ACCC v Pfizer, Patents and Competition Law – *Arlen Duke and Rhonda L Smith*

In the lead up to patent expiry, pharmaceutical companies often engage in strategies designed to delay the production of generic medicines. This article considers whether such conduct is likely to be caught by competition law prohibitions. The article focuses on the recent Full Federal Court decision in Australian Competition and Consumer Commission v Pfizer Australia Pty Ltd. The court's analysis of the conduct engaged in by Pfizer Australia is interesting in its own right. Further, the judgment provides guidance as to whether or not a firm will be viewed as possessing market power in the period leading up to patent expiry. The judgment also indicates that a firm may escape liability on the basis that it acted to protect profits, not substantially lessen competition. The article concludes by identifying other strategies employed by pharmaceutical companies and, drawing on the Pfizer decision, considers the legality of such practices. 26

Mitey Marks and Expressive Uses of Culturally Significant Trade Marks in Australia – *Genevieve Wilkinson*

Trade marks are important and valuable because they can benefit the interests of owners, consumers and the public. However, they can also impermissibly restrict the human right to freedom of expression. One example of freedom of expression restriction occurs when

individuals seek to make expressive use of well-known marks on blogs. This article uses the example of expressive use of the well-known Vegemite mark on an opinion blog entitled Straylemite to consider how Australian trade mark legislation deals with expressive uses of well-known marks and whether those restrictions are permissible restrictions on freedom of expression. It compares the limited legislative protection for freedom of expression in Australia to American and European jurisdictions that have fundamental protection of freedom of expression for individuals as well as broader protection regimes available for well-known marks. Approaches to addressing freedom of expression concerns raised by trade mark protection in these jurisdictions are considered. To reduce the restrictions for freedom of expression posed in the blog example, a statutory fair expressive use defence to infringement is proposed to balance the competing interests engaged by trade mark protection. 46