

introduction to Australian intellectual property for China

向中国介绍澳大利亚的知识产权保护

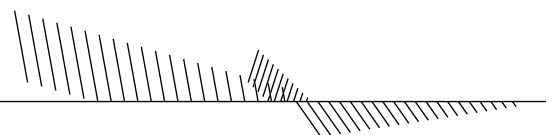
The Q&A section below provides a general introduction to Australia and to Australian IP, with the aim of helping you to develop your future Australian market. Future updates of this page will concentrate on particular key aspects of IP in Australia.

以下的问题与答复针对澳大利亚和澳大利亚知识产权保护做简要的介绍，以期为您在澳大利亚开拓市场提供帮助。今后的内容将着重探讨有关澳大利亚知识产权保护的关键事务。

Preface

Australia is a developed Western country in the Asia-Pacific region. With its unique geographic location, multicultural population, open and transparent legal system and well-developed intellectual property (**IP**) protection system, it is an ideal 'stepping stone' for United States and European companies to use to enter Chinese markets, and by which Chinese companies can establish relationships and markets in those countries. In addition to its rich natural resources, Australia's well-developed, world-class industrial base makes it a first choice for Chinese companies wishing to enter the world stage.

The dramatic development of the Chinese economy has drawn worldwide attention in the past few years. There has been an astonishing increase in the strength and enforceability of IP rights in China, and very rapid growth of substantial IP developed within Chinese companies. As one of the leading legal and IP firms in Australia, Allens Arthur Robinson (**Allens**) is very excited by these changes and is committed to significant involvement in this process.



前言

澳大利亚是位于亚太地区的西方发达资本主义国家，其独特的地理位置，多元文化的人口结构，公开、透明的法律体系和完善的知识产权保护制度，使它成为美、欧等国企业进入中国市场和中国企业进入欧、美的一个“跳板”。澳大利亚作为一个资源大国的同时，其诸多产业发展水平居世界前列，是现阶段中国企业实施“走出去”战略的热点国家之一。

中国经济的腾飞令世人瞩目，尤其是它的知识产权保护力度和实施强度的增加，以及中国企业知识产权事务的迅猛发展更让世人叹为观止。作为澳大利亚领先的法律和知识产权事务所之一，Allens Arthur Robinson (**Allens**)对这些变化尤为关注,并致力于作进一步的推进。

1. How developed is Australia, in terms of politics and economics?

Australia is an island continent (in fact, the world's largest island) with a land area of more than 7.69 million square kilometres, and a population of 22 million. It is rich in natural resources: grains, wool, mineral resources (metals) and fossil fuels (particularly, coal and natural gas). It is the third-largest economy in the Asia-Pacific region (after Japan and China), and enjoys a prosperous, Western-style market economy.

In a recent study by the Organisation for Economic Co-operation and Development (**OECD**) (OECD Economic Surveys Australia - Volume 2006 Issue 12), Australia's economy was judged as the world's most resilient for the past five years, and the country as having the world's lowest risk of political instability. The sharp rate of economic growth has exceeded that of most OECD member countries. Over the three years to 2010, Australia's projected average annual growth of 3.4 per cent is expected to be above that of the US, the UK, Germany and Japan (as estimated by *The Economist Intelligence Unit*, 2006).

Australia is one of the world's fastest growing economies, particularly reflecting strengths in information and communications technology (**ICT**) infrastructure, innovative systems and processes, the business environment and the development of human resources. In the telecommunications and IT sector, Australia ranks at number four in the Asia-Pacific region (<http://hzc.hunancom.gov.cn/hzzn/1697.htm>), while a very advanced 'e-business' economy reflects the strength of the nation's business-to-business (**B2B**) activity.

澳大利亚的政治和经济情况是什么样的？

澳大利亚是一个岛国，一个世界上最大的岛屿，国土面积为769万平方公里，拥有2千2百万人口。自然资源极为丰富，盛产粮食、羊毛、矿产资源（金属）和化石燃料（煤和天然气）。繁荣的西方式市场经营模式，使其在亚太地区位于日本和中国之后的第三大经济强国。

澳大利亚具有强大的经济背景。经合组织（OECD）的一项研究表明（OECD Economic Surveys Australia - Volume 2006 Issue 12),澳大利亚已经连续五年被列为全球最富活力的经济的国家，以及世界上政治不稳定风险最小的国家。它强劲的经济增长速度超过了经合组织（OECD）的大多数主要成员国，其中包括美国、英国、德国和日本。经济学人智库（EIU 2006）预测2007年至2010年的年均增长为4%，高于上述国家。

作为世界上经济发展最快最成功的国家之一，澳大利亚尤其在信息和通信技术（ICT）领域的设施、富有创造性的设备和工艺、商业环境和发展人力资源方面，表现出色。它在电信和 IT市场规模居亚太地区第四位 (<http://hzc.hunancom.gov.cn/hzzn/1697.htm>),而发达的电子商务经济反映出商对商（B2B）的强劲势头。

2. What is the level of adoption and development of new technology in Australia?

Australia is a nation of sophisticated technology users, particularly so in the ICT area. The country enjoys a high level of consumption, and new products and technologies are eagerly embraced and rapidly adopted. Since 2004, the level of computer use in Australia (as measured per head of population) is second only to the United States.

Among global industrialised countries, Australia ranks sixth for investment in basic research: second only to Japan in the Asia-Pacific region. The Australian Government continues to strongly support a first-rate innovative culture, currently implementing an AU\$8.3 billion strategy to stimulate innovation.

Twelve Australians have received the Nobel Prize, and 11 of these awards have been in areas of science and technology.

Australian investment in communications infrastructure, research and development facilities, and advanced skills and training have helped create world-class technology sectors. The investment in ICT as a percentage of gross domestic product (**GDP**) is reported to be the third highest of the OECD countries. Along with China and Singapore, Australia has been ranked in the top three of the most suitable countries in the world in which to develop new IT and telecommunications technologies.

Besides ICT, Australia is also the region's largest research base for biotechnology. In Melbourne alone, there are 22 non-profit medical research institutes, 19 agricultural research institutes, seven major teaching hospitals and nine universities, and the ratio of PhD graduates to total population exceeds that of the US, Japan and the UK. Particularly important research fields in medicine include oncology, immunology, cardiovascular disease, stem cells, diabetes and reproductive technologies (<http://melbourne.mofcom.gov.cn/aarticle/ztdy>).

Being a sophisticated market, Australia is seen by companies around the world as an ideal test market for newly developed technologies, before rolling those technologies out on a global scale.

澳大利亚对新技术的接受和开发水平如何？

澳洲对新科技接受迅速,尤其体现在ICT领域。由于高的消费水准,新产品和新技术都能被澳洲消费者迅速拥有。自从2004年以来,澳洲人均拥有的电脑数和使用网络的人数仅次于美国,占世界第二位。

在全球工业化国家中,澳大利亚在投资基础研究,保证长期经济发展方面位居第六位,在亚太地区仅次于日本。澳大利亚政府坚定不移地支持世界一流的创新文化气氛,并大力扶持研发基础设施的建设,目前正在实施一项83亿澳元的创新策略。

澳大利亚共有12位诺贝尔奖获得者,其中11个奖项与科技相关。

澳大利亚在通信设施、研发以及技术培训上的投资巨大,使该领域的技术具有世界一流水平。据统计,澳大利亚在ICT的投资占国内生产总值的比例在经合组织成员国中名列前三名。澳大利亚与中国和新加坡同被看作是世界上最适于开展新的IT和通信技术的三个国家。

除了ICT之外,澳大利亚还是该地区最大的生物技术公司基地。以墨尔本为例,在这里汇集了22家非营利性医学研究所,19家农业研究所,7家主要教学医院,9所大学,所培养的博士生占总人口的比例超过了美国、日本和英国。在医学研究方面优势突出表现在肿瘤学、免疫学、心血管疾病、神经科学、干细胞、糖尿病和生殖技术等领域(<http://melbourne.mofcom.gov.cn/aarticle/ztdy>)。

作为一个成熟的市场,澳大利亚早已被世界各地的企业看好,它们在将新技术投放到全球范围之前都会把澳大利亚看成一个理想的测试市场。

3. What is the level and potential for trade between Australia and China?

With its stable government policies, high GDP, high level of consumption and rapid adoption of new technologies, Australia has also become an ideal test market for exportation by Chinese companies.

Australia is a country largely built on immigration over the past 200 years, including migration from China. At present, after English, Chinese languages are the most widely spoken – by around 500,000 people. The close cultural relationship, coupled with the relative geographical proximity (the time difference between Beijing and Melbourne/Sydney is only two hours in Australian Eastern Standard time) and the business friendly environment, have led to significant investment by Chinese nationals and Chinese companies into Australia.

With the increasing consolidation of the bilateral relationship between Australia and China, China has recently replaced Japan as Australia's most significant trading partner. A free trade agreement is under negotiation between Australia and China.

如何看待澳中两国之间的贸易前景？

澳大利亚稳定的政府制度、国民生产总值高、西方社会的高消费水准，加上素来对新科技的迅速接纳，也是中国企业理想的出口探试市场。

澳大利亚是在过去的200年中建立起来的移民国家，包括中国移民。除了英语之外，中文在澳大利亚已成为最广泛使用的语言-大约有50万人讲中文。紧密的文化亲和力、相对接近的地理位置（北京与墨尔本/悉尼的时差为2小时）和有利的商业环境，构成许多中国个人和企业选择在澳大利亚投资的重要因素。

随着两国双边关系的日益巩固，近来中国已经取代日本成为澳大利亚第一大贸易伙伴。目前，两国双边自由贸易协定正在签署当中。

4. Are Chinese companies active in the Australian market?

Large numbers of Chinese companies have invested in Australia over recent years, including many leading companies such as Baosteel, Sinosteel Corporation, CITIC Group, China National Offshore Oil Corporation and Huaneng Power International Inc. Many well-known Chinese technology companies have set up subsidiaries in Australia, including Huawei Technologies, ZTE, TCL, Haier Group, Hisense, Sichuan Changhong and Tianjin Pharmaceutical, and the number is increasing rapidly. Many of these companies are well on their way to becoming household names in Australia.

中国企业在澳大利亚市场上活跃吗？

澳大利亚是海外华侨比较集中的国家之一，目前已有众多中国企业选择在澳大利亚投资，其中包括许多业界领袖如宝钢、中国中钢集团公司、中国中信集团公司、中国海洋石油总公司、华能电力等。知名的科技公司包括华为、中兴、TCL、海尔、海信、四川长虹、天津药业集团等。可以肯定地说，这个数字还在迅速增加。很多中国企业的品牌将在澳大利亚变得家喻户晓。

5. The Australian market is smaller than many other markets. Why does Australia appear to be such a popular country for patent applications by well-known international companies?

The patent and trademark systems of Australia have been in place for more than 100 years, and the quality of Australian IP rights is considered among the world's best. Compared to many major jurisdictions, the process of obtaining patent registration in Australia is relatively rapid and relatively inexpensive, yet the quality of examination and the quality of enforcement in the courts are very high.

As a result of these and other factors, Australian patents are very much sought after by companies around the world, much more than the size of the market would necessarily suggest. In a relatively short time and at relatively low cost, an applicant can secure an English-language patent grant from a patent office with good examination and in a court jurisdiction that is very 'patent-positive'.

澳大利亚市场要比其它的市场相对小一些，为什么仍旧是国际知名企业专利申请的热点国家呢？

澳大利亚有着公开、高效的法制环境，其专利和商标制度稳定可靠，实行已有100多年。由于高效的现代化知识产权保护体系，澳大利亚知识产权保护制度更是被国际公认能够提供最好保护的制度。与很多国家的司法相比，在澳大利亚获专利权的程序相对要快、费用相对要低，而且法院审查和诉讼的质量非常高。

基于这些原因以及前面的论述，澳大利亚专利被国际上很多企业看好，远比对澳大利亚市场规模本身的看重。在相对短的时间内，以较低的费用，申请人就能获取一项经过澳大利亚专利局严格审查的英文的专利权，而且能在对有利于专利的法院进行诉讼。

6. What is the basis of the legal system in Australia?

Originally based on English law, Australian law is a 'common law' system. This means that the law is developed primarily through decisions of courts and similar tribunals, rather than through legislative statutes or executive action. Where there is no authoritative statement of the law on a particular issue in question, judges have the authority and duty to make law by creating new decisions, known as 'precedents'. The body of precedent is called 'common law' and it binds future decisions.

In some areas of Australian law – such as contracts and confidential information – there are no governing statutes, and principles applied by courts are all found in the case precedents. However, the most important areas of IP (including patents, trade marks, designs and copyright) are governed by statutory frameworks (such as the Australian Patents Act 1990 (Cth) and the Australian Trade Marks Act 1995 (Cth)), although case precedents remain very important in refining the principles set out in these statutes.

澳大利亚法制体系的基础是什么？

澳大利亚的法律体系基于英国的普通法系。就是说，法律主要是通过法院和相似的特别法庭的裁决而不是通过立法法规或行政行为而产生。当一件案件没有权威性的法律论述的时候，法官有权利和义务产生新的裁决制定法律，即所谓的“判例”。该判例体系称为“普通法系”，对未来的裁决具有约束力。

澳大利亚法律的某些领域，如合同和保密信息，没有法规，都是利用判例来裁决。但是，知识产权最重要的领域诸如专利、商标、外观设计和版权都有相应的法规（如澳大利亚专利法1990(Cth)、澳大利亚商标法1995(Cth)等等），虽然判例在斟酌这些法规的条例方面仍然很重要。

7. How does Australia rank in world patent filings?

With a very well-developed and mature patent system, patents are regarded as a key aspect of business by those with business or market interests in Australia.

Australia is ranked at number 12 in world patent filing applications and even higher in certain key technology fields. Further, Australia ranks fifth in the number of resident patent applications per million population (China is placed at number 28, WIPO 2007 report).

在国际专利申请中，澳大利亚的地位是怎样的？

在发展完善和成熟的专利制度中，对那些在澳大利亚进行商业活动和对澳大利亚市场感兴趣的人来说，专利显得尤为重要。

在所申请的外国专利的国家排名中，澳大利亚列第12位，在某些关键技术领域排名更靠前。另外，在统计的国民每百万人均专利申请量中，澳大利亚排名第5位（中国第28位，2007年WIPO报告）。

8. Is Australia part of the global IP system?

Australia is very much part of the worldwide IP system, being a member of all major international treaties that govern IP matters, including:

- For patents: the Patent Cooperation Treaty;
- For trade marks: the Madrid System for the International Registration of Marks (Madrid Protocol); and the Trademark Law Treaty;
- For plant breeders rights: International Union for the Protection of New Varieties of Plants;
- For copyright: the Berne Convention; and
- General: World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights; and the Paris Convention.

In addition, Australia is party to many bilateral agreements with other countries in areas that concern IP, including free trade agreements, as well as agreements between IP Australia and other national and regional patent offices relating to the examination of patent applications, etc.

An Australian, Dr Francis Gurry, was appointed Director General of the World Intellectual Property Organization in October 2008, for a six-year term. Dr Gurry started his career as an IP lawyer in the Melbourne office of Allens Arthur Robinson.

澳大利亚是国际知识产权体系的成员之一吗？

澳大利亚在国际知识产权领域非常活跃，也是所有重要国际条约成员之一，包括：

专利方面：专利合作条约

商标方面：商标国际注册马德里议定书；商标法条约

植物育种者权：植物新品种保护国际联盟

版权：保护文学艺术作品的伯尔尼公约；以及

其它：世界贸易组织架构下的“与贸易有关的知识产权协定”；保护工业产权巴黎公约

另外，澳大利亚还是很多与知识产权有关的双边协议的签约方，如自由贸易协定，以及澳大利亚知识产权局与其它国家和地区专利局针对专利申请审查的协定，等等。

澳大利亚公民Francis Gurry（加利）博士，于2008年9月22日当选为世界知识产权组织的总干事，于2008年10月1日正式上任，为期六年。他的知识产权律师职业生涯即始于我们Allens事务所墨尔本办公室。

9. Who is responsible for the registration of IP rights in Australia?

The administration of patents, designs, trade marks and plant breeder's rights in Australia are managed by a government office called 'IP Australia', which comprises the *Australian Patent Office*, the *Australian Trade Marks Registry*, the *Australian Designs Registry*, and the *Australian Plant Breeder's Rights Registry*.

IP Australia receives and processes applications, conducts hearings, and decides on disputed matters relating to the granting or denial of Australian IP rights.

IP Australia also maintains the Registers of Patents, Designs, Trade Marks, Plant Breeder's Rights and Olympic Designs, and provides public facilities for searching and accessing information on existing IP rights.

Australia is a member of the Patent Cooperation Treaty, and thus IP Australia acts as a Receiving, Search and Preliminary Examination Office for PCT applications filed in Australia. In addition, IP Australia is an International Search and Examination Authority for 18 countries, including the US, Korea, New Zealand, Singapore, India and Malaysia.

在澳大利亚谁来负责知识产权的管理？

在澳大利亚的专利、外观设计、商标和植物育种者权的运作和管理由政府机构来执行，即“澳大利亚知识产权局”。它包括澳大利亚专利局、澳大利亚商标登记处、澳大利亚外观设计登记处、澳大利亚植物育种者权登记处。

澳大利亚知识产权局接收和处理各类申请、进行口审，和对授予或拒绝授予澳大利亚知识产权有争议的案件作出裁决。

澳大利亚知识产权局还设有专利、外观设计、商标、植物育种者权和奥林匹克标识设计登记簿，并提供检索和对现有知识产权专利信息评估的公共设施。

因为澳大利亚是专利合作条约的成员国，所以澳大利亚知识产权局可以作为在澳大利亚进行PCT申请的接收、检索和初审局。同时，澳大利亚知识产权局也是18个国家国际检索和审查的权威机构，这些国家包括美国、韩国、新西兰、新加坡、印度和马来西亚。

10. How are IP disputes dealt with in Australia?

Most IP matters fall within the jurisdiction of the Australian Federal Court system, rather than the separate court systems of the different states of Australia. Within the Federal Court there are a number of judges who are very experienced in IP matters.

Matters of infringement and validity of IP rights (such as Australian patents and trade marks), as well as appeals from decisions of IP Australia, are heard in the Federal Court.

Like many common law jurisdictions, the courts in Australia follow the adversarial system, rather than the inquisitorial system favoured in some European countries.

When the court hands down its decision, both parties have the right to appeal the decision of the trial judge to the Federal Court of Appeal, where the matter is heard by a ‘full court’ (a number of specialist IP judges).

As a final recourse, in respect of matters of law (not matters of fact), litigants may seek special leave to appeal from the Appeal Court to the High Court, which is the highest court in Australia. On average, the Australian High Court hears about two IP cases every year. IP litigation can be very complex, particularly in patent matters, where intricate issues of technology are involved, and it is necessary to involve expert witnesses in very specialised technical fields.

在澳大利亚如何处理知识产权纠纷？

大多数的知识产权案都属于澳大利亚联邦法院系统的管辖范围，而不是在各个州各自的法院系统进行处理。联邦法院的很多法官在处理知识产权案方面经验相当丰富。

知识产权的侵权和无效案（如澳大利亚的专利和商标案）以及对澳大利亚知识产权局的决定进行上诉的案件，均在联邦法院听审。

和实施普通法的许多国家一样，澳大利亚法院遵循抗辩制，而不是像一些欧洲国家采用的纠问制。

当法院作出裁决之后，双方当事人有权将该裁决上诉到联邦上诉法院，在此，相关案件将“全庭”（有很多技术专家级知识产权法官参加）出席听审。

作为针对法律本身（而不是事实本身）的最终诉求，诉讼当事人可以寻求特许将上诉法院上诉到高级法院，也是澳大利亚的最高级法院。这种知识产权案在澳大利亚的高级法院听审平均每年有两起。知识产权诉讼可以很复杂，尤其是专利案，涉及复杂的技术内容。因此，邀请专家对专门技术领域进行作证尤为必要。

For further information, please contact 详情请联系:

Chris Bird (柯鹏先生)

Partner, Allens Arthur Robinson Patent & Trade Marks Attorneys, Melbourne

Tel +61 3 9613 8259

Chris.Bird@aar.com.au

If you would like further information on Allens Arthur Robinson Patent & Trademarks Attorneys, please visit our Patent & Trade Marks Attorneys pages.

如需了解更多有关Allens专利与商标事务所的情况, 请浏览我们的网页: <http://www.aar.com.au/patentattorneys/>

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