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Welcome to this latest issue of our occasional guide to important aspects of intellectual property in Australia, particularly highlighting some of the differences between the practice of IP in Australia and China. The current issue focuses on matters relating to Registered Designs and design practice in Australia, with special emphasis on details of the filing and registration process for designs. The points discussed below are largely based on enquiries that we have received from our colleagues in firms and companies in China, so please contact us if there are any matters of particular concern to you.

欢迎来到我们有关澳大利亚知识产权指南栏目。在该栏目中，您可以了解到一些重要的有关中国和澳大利亚在实施知识产权保护方面的区别。本期主要涉及澳大利亚注册外观设计及其专利权的实施，尤其是有关外观设计申请和注册方面的问题。这些讨论主要基于来自我们中国同行以及中国企业的咨询，欢迎大家就感兴趣的问题与我们作进一步的探讨。

questions and answers – registered designs 问题与解答—注册外观设计

introduction 简介

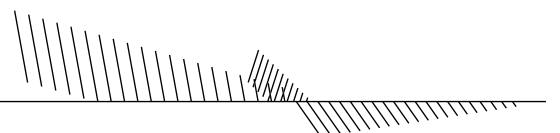
Q1. What is a Registered Design?

什么是注册外观设计？

A1. A Registered Design in Australia is similar to a Design Patent in China or in the United States of America. It is a registered right that protects the visual appearance of a product, ie the features of shape or configuration and pattern or ornamentation of a new product, as judged by the eye. A Registered Design does not protect how a product is made, what it is made from or how it functions.

The law that governs Registered Designs is the Australian Designs Act 2003 (the ***Designs Act***).

Compared with obtaining a granted patent, a Registered Design provides a speedy and very cost-effective way of protecting new products.



澳大利亚注册外观设计与中国或美国的外观设计专利相似。这是一种注册的权利，用来保护一件产品的可视性外观，也就是保护眼睛可看到的一个新产品的形状或构造以及图案或修饰的特征。一件注册的外观设计并不保护产品制作、制作材料或者产品的功能。

规定注册外观设计的法律称为澳大利亚外观设计法2003（“外观设计法”）。

与获得一个专利授权相比较，注册外观设计为保护新产品提供了一个快速、价格低廉的途径。

Q2. What sort of designs can be protected?

什么样的外观设计可以得到保护？

A2. Designs of both three-dimensional articles (shape and configuration) and two-dimensional articles (pattern or ornamentation) can be registered, so long as the overall appearance of the design is new and distinctive. The Designs Act specifies that certain designs cannot be registered, such as designs for medals, scandalous designs, and designs including the Australian flag.

产品的三维（形状和构造）和二维（样式或装饰）的外观设计可以注册，只要整个的外观设计是新颖和独特的。外观设计法专门规定某些外观设计不能注册，比如奖牌的设计、恶意诽谤的设计以及澳大利亚国旗的设计都不能被注册。

filing and registration 申请和注册

Q3. What are the filing requirements for an Australian design application?

申请澳大利亚外观设计有什么要求？

A3. In Australia, no power of attorney or authorisation of agent form is required.

The following information is required to file a design application in Australia:

- the applicant's full name and address;
- the full names of the author or authors of the design (ie the designer or designers);
- representations of the design as applied to a product that adequately show the features sought to be protected. Ideally, these will be good-quality photographs or line drawings showing top, bottom, left side, right side, front, back and perspective views;
- the name of the product to which the design is applied;
- an indication of any parts of the design representations that are not to be taken into account when comparing the design with others (eg when considering whether the design is new and distinctive); and
- details of any convention priority claim (which must not be more than six months prior to the application date in Australia).

在澳大利亚不需要委托书或授权书。

但是需要如下文件：

- 申请人姓名和地址；
- 外观设计的作者或多名作者的姓名（即设计人或多名设计人的姓名）；
- 用于某件物品的外观设计图，其能充分体现需要保护的特征。最好是高质量的照片或者是画线图，可以显示上方、下方、左侧、右侧、前方、后方和立体方位；
- 需要申请注册外观设计的产品名称；
- 并要注明在与其它外观设计进行比较时（比如在评估该外观设计是否新颖和独特时），不需要进行考虑的外观设计图上的任何一部分；以及
- 要求优先权的详情（不能超过在澳大利亚申请日之前的6个月）。

Q4. Can a single application contain multiple designs?

一件单一申请可以包含多重外观设计吗？

A4. Under the Designs Act, multiple designs can be included in a single application. However, the government fee is calculated on the basis of the number of designs, and each design has to be renewed separately. There is therefore little advantage in filing a multiple design application, and we usually recommend that each design is filed as a separate application.

Where we file multiple applications simultaneously for a client, Allens provides a substantial discount to our usual service charge.

根据外观设计法，多重外观设计可以包含在一项单一的申请里。但是，官费是按外观设计的件数来收取，并且每一件外观设计需分别续展。所以申请多重外观设计并没有多少优越性，我们一般建议对每一项外观设计分别进行申请。

如果Allens为客户同时申请多重外观设计，会在代理费上进行优惠。

Q5. Should I conduct any searches for a design?

需要对外观设计进行检索吗？

A5. A design registration is only valid if the design is new and distinctive compared with the prior art base at the filing or priority date. The prior art base consists of designs that were published anywhere in the world or used in Australia before the filing date. To assess this, it is often advisable to carry out searches of the prior art before making an application, including searching the Australian Register of Designs (a record of all the registered designs in Australia). Allens can assist you with planning and carrying out such a search.

只有在与申请日或优先权日之前的现有技术相比具有新颖性和独特性，那么一项外观设计才可能有效。现有技术包含在申请日之前已经在世界各地发表和在澳大利亚使用过的外观设计。要进行评估，通常建议在提出申请之前对现有技术进行检索，包括检索澳大利亚外观设计注册簿（所有在澳大利亚已经注册的外观设计记录册）。Allens会协助您安排和进行检索。

Q6. Is an examination conducted in the process of getting a design registered?

在申请外观设计注册过程中，需要进行实审吗？

A6. An application for a Registered Design undergoes a formalities examination to check whether it meets the formal requirements of the Designs Act, but substantive examination to compare the design with prior designs and assess the newness and distinctiveness of the design is an optional process that does not take place until after the design has been registered (see below).

申请注册外观设计需要进行形式审查，检查该项申请是否符合外观设计法对形式上的要求。而将该申请与现有技术进行对比来评估新颖性和独特性的实质审查具有选择性，这项步骤一直要到该项外观设计已经注册之后进行（请参考如下）。

Q7. How long does it take a design to be registered?

进行外观设计注册需要多长时间？

A7. Once you have filed your application, it undergoes a formalities check, and then proceeds to either registration or publication, depending on the particular procedure you have selected. This usually occurs within about four to six weeks of filing the application. A design passes to registration without substantive examination (see below).

在申请递交之后要通过形式审查，然后根据申请人所选定的程序决定注册还是公布。这个过程从递交申请算起大约需要四到六个星期。一项外观专利可以不经实质审查获得注册（请参考如下）。

Q8. How long does a Registered Design last?

外观注册保护年限是多久？

A8. An Australian Registered Design has a maximum term of 10 years from the date of application; this period cannot be extended.

从申请之日算起，一项澳大利亚注册的外观设计最长保护期限是10年，并且这个期限不能继续延续下去。

examination 实质审查

Q9. How and when is a Registered Design examined?

如何并且什么时候对一项外观设计进行实审？

A9. Examination of the newness and distinctiveness of the design is optional; however, a Registered Design must be examined and a Certificate of Examination issued before the owner can enforce it against third parties. Examination may be requested by the owner or a third party at any time during the 10-year term of the registered design. After examining the design and comparing it with the prior art and other legal requirements, the Designs Office will either issue a Certificate of Examination (if the design is valid) or revoke the registration (if it is not valid). The examination process generally takes around four-six weeks to complete. A revocation decision can be appealed to an Australian court.

虽然对新颖性和独特性进行实质审查是可以选择的，但是一项外观设计必须在实审通过之后才可以获得审查证书，然后所有人才可以对第三方采取维权行动。在外观设计注册之后10年期限的任何时候，所有人或者第三方都可以对该外观设计提出实审请求。在检查该外观设计、将之与现有技术进行比较及对其它法律要求进行审核之后，外观设计局将颁发审查证书（如果该外观设计有效）或者是撤销注册（如果该外观设计无效）。实审过程一般需要4-6个星期完成。可以将撤销决定上诉到澳大利亚法院。

Q10. How are the newness and distinctiveness of a design assessed?

如何评估一项外观设计的新颖性和独特性？

A10. A design is new if it is not identical to a design publicly used in Australia or published in a document anywhere in the world.

A design is distinctive if it is not substantially similar in overall impression to another design publicly used in Australia or published in a document anywhere in the world. When making a judgement on the question of distinctiveness (eg in examination in the Designs Office, or in court), more weight should be given to similarities between the designs than to differences between them. This test for distinctiveness is the same as the test for infringement of the design once it is registered.

如果一项外观设计与另一项已经在澳大利亚公开使用的外观设计不同，或者还未在世界各地公开，那么该项外观设计即具有新颖性。

如果一项外观设计相对于另一项已在澳大利亚公开使用或者在世界各地已经公开的外观设计具有总体上的差异，那么该项外观设计即具有独特性。在判断独特性的时候（例如，在外观设计局进行实审，或者在法院），重心会放在比较外观设计之间的相同之处而不是不同之处。对独特性的这种检视与对外观设计（注册之后）进行的侵权检视是相同的。

renewals, and general issues 续展及其它事项

Q11. What are the maintenance costs after the design is registered?

外观设计注册后，如何缴纳续展费？

A11. The initial period of registration is five years from the date of application. You then need to pay an extension fee to extend the registration for an additional five years (to take the design to the full 10-year term).

从申请之日算起第一个注册期为五年。在您缴纳续展费后，可以延续第二个五年的注册期（使该项外观注册达到10年期满）。

Q12. Can I apply to revoke another person's Registered Design?

我可以申请撤销他人已注册的外观设计吗？

A12. Yes, but the process to follow depends on whether the Registered Design is Certified or not. If it has not yet been Certified, a third party may request examination of a Registered Design and forward documentation to the Australian Designs Office that it believes is relevant to the newness and distinctiveness of the design. The Designs Office will consider this material during examination and will revoke the registration if the design is not new and distinctive.

Once a Registered Design has been examined and Certified, no further action can be taken in the Australian Designs Office. From that point onwards, the design can only be revoked through an action brought in court, usually in the Federal Court of Australia.

可以，但是所采取的程序要视注册外观设计是否有审查证书而定。如果没有证书，那么第三方可以请求对已注册的外观设计进行实审，并将文件送交澳大利亚外观设计局，而该局认为该请求涉及评估外观设计的新颖性和独特性。外观设计局在实审期间会研究申请文件，如果该项外观设计不具有新颖性和独特性的话，将会撤销该外观设计的注册。

如果一项注册外观设计已经通过实审并且有审查证书，那么外观设计局不可能对其采取任何措施。致此，该项外观设计只能通过法院行为被撤销，通常在澳大利亚联邦法院进行。

Q13. What if someone copies my Registered Design?

如果有人复制我已注册的外观设计该怎么办？

A13. As noted above, a Registered Design that has been Certified is an enforceable legal right. If you detect possible infringement of your design registration by a competing product, you should contact a legal practitioner or patent attorney immediately. Infringement depends on whether the competing product is identical to or substantially similar in overall impression to your Registered Design.

Since the Designs Act includes prohibitions against making unwarranted threats of legal action, it is important you take advice before approaching the possible infringer. Allens can advise you whether your Registered Design is infringed and suggest appropriate next steps, including court action.

如之前所述，一项已注册的外观设计如果持有审查证书，表明可以实施维权。如果发现一个具有竞争力的产品可能对您的注册外观设计侵权，您必须立即与律师或专利代理人取得联系。侵权是指该竞争产品与您已注册外观设计相同或总体上相似。

由于外观设计法还包括禁止采取没有根据的维权恐吓，所以在接近可能的侵权人之前，最好先做咨询。Allens会帮助您分析您的注册外观设计是否遭到侵权，并且会提供应该采取的措施，包括法院行为。

Q14. Can functional features of a design be protected in Australia?

在澳大利亚，外观设计的功能性特征能够得到保护吗？

A14. Yes. Unlike in many countries, in Australia Registered Designs can be used to protect functional features of a product (ie features whose shape or pattern is dictated by the function they perform in use). This means that they can be used to protect articles such as mechanical components, which may normally be hidden from view.

可以。与很多国家不同，澳大利亚注册外观设计可以用来保护一件产品的功能性特征（即在使用时，功能由形状或样式的特征来体现）。也就是说，它们可以被用来保护如机械元件这种产品，有时从外侧看不到。

Q15. Can a product be protected in Australia by both a Registered Design and a patent?

在澳大利亚，一件产品可以同时被注册外观设计和专利保护吗？

A15. Yes. Design protection is given only in respect of the appearance of an article, whereas the product itself or its functionality may be protected by a patent. For many new products, it is possible – and can be very advantageous – to seek both design and patent protection.

可以。外观设计保护仅是涉及一个产品的外观，而产品本身或者其功能则可以通过专利来获得保护。对于很多新产品来说，同时获得外观设计和专利保护是可能的，也是具有优越性的。

Q16. Can a product be protected in Australia by both a Registered Design and copyright?

在澳大利亚，一件产品可以同时被注册外观设计和版权保护吗？

A16. Generally, a three-dimensional product cannot enjoy dual protection under Registered Design and copyright. Under Australian law, if a product is made to a design that could be (or was) protected by Registered Design, then copyright in the design cannot be enforced once the design has been published or used. In other words, in most situations, Australian law forbids ‘copyright-design overlap’ for industrial products.

There are some exceptions, such as designs that are considered ‘works of artistic craftsmanship’ (such as sculptures), and designs that could not have been protected by registration.

It is therefore essential for all new industrial products to file an application for design registration, and this must be done before any publication or use of the design occurs.

For two-dimensional designs, such as fabric prints or wallpaper, on the other hand, you do not lose copyright protection after publication and sale of the product. Such designs can therefore enjoy dual protection.

一般来说，一件三维产品不能同时获得注册外观设计和版权的保护。按照澳大利亚法律，如果一项产品被制作成能够（或已经）获得注册外观设计法保护的外观设计，那么该外观设计的版权不能进行维权，一旦该外观设计已经公开或使用了的话。换句话说，在多数情形下，澳大利亚法律禁止工业产品“版权-外观设计重叠”。

但是被认为是“艺术技能作品”的外观设计（如雕塑），以及不能被注册法保护的外观设计，是例外。

所以在公开或使用之前对所有新工业产品申请外观设计注册，非常必要。

针对二维外观设计，从另一方面来说，如织物图案或壁纸，在公开和出售这些产品之后并不会失去版权保护。这种外观设计可以获得双重保护。

Q17. Can a product be protected in Australia by both a Registered Design and a Registered Trade Mark?

在澳大利亚，一件产品可以同时被注册外观设计和注册商标保护吗？

Q17. Yes. Some designs may be registered as trade marks. It is necessary to prove that the appearance of the product has the function of indicating the trade source of the product, rather than just being a property of the product itself. Examples of designs that have been registered as Australian trade marks include a distinctively shaped chocolate bar and the famous Coca-Cola bottle.

可以。某些外观设计也可以注册为商标。但是需要证明产品的外观具有表明产品商业来源的功能，而不是产品自身的特性。将形状注册为澳大利亚商标的先例包括形状独特的巧克力棒和著名的可口可乐瓶。

Q18. How can a company use Australian Registered Designs to protect against the right of repair or the sale of spare parts?

企业如何使用澳大利亚的注册外观设计权防御修理权或零件销售？

A18. When considering a product for the purpose of design registration, a component part of a complex product can be considered to be a product in its own right.

For designs registered since 2004, the Designs Act includes a 'right of repair' provision, allowing spare parts to be used for certain repairs without infringing a Registered Design right. It is a defence to infringement of a Registered Design if the product registered is a component part of a complex product and the use is for the purpose of the repair of the complex product so as to restore its overall appearance. This means that it can prove difficult for an automotive designer (for example) to use a Registered Design of a car body panel to prevent competitors making and selling similar body panels.

在考虑对一件产品进行外观设计注册时，复杂产品的配件可以作为拥有独有权利的一件产品。

对于在2004年之后注册的外观设计，外观设计法有一项“修理权”规定，允许将配件用于某种修理用途而不涉及对外观设计侵权。这是对注册外观设计侵权的一种防御，如果所注册的产品是复杂产品的一个配件，并且使用该配件修理该复杂产品，从而使其恢复原貌的话。这就意味着比如汽车外观设计者，将很难利用已进行外观设计注册的汽车覆盖件来阻止竞争者制造和销售相似的车体覆盖件。

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