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Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD 1288 of 2025

On appeal from the Federal Court of Australia

CPC Patent Technologies Pty Ltd (ACN 615 736 028)
Appellant

Apple Pty Limited (ACN 002 510 054) and another
Respondents

CPC'S OUTLINE OF SUBMISSIONS IN ANSWER

9 February 2026

Filed on behalf of (name & role of party) CPC Patent Technologies Pty Ltd, the Appellant
Prepared by (name of person/lawyer) Michael Williams
Law firm (if applicable) Gilbert + Tobin
Tel (02) 9263 4000 Fax (02) 9263 4111
Email mwilliams@gtlaw.com.au
Address for service (include state and postcode) Level 35 Tower Two, International Towers Sydney, 200 Barangaroo Avenue Barangaroo NSW 2000

A. INTRODUCTION

1. These submissions respond to Apple's submissions in chief on its cross-appeal (**ASC**). They are to be read together with CPC's submissions in chief (**CSC**). Defined terms are adopted herein.

2. Contrary to Apple's contentions, the primary judge correctly found that: **(a)** the series feature, construed in the manner contended for by CPC, is not disclosed in Mathiassen, Scott, Hamid and Wuidart (J [616], [559], [588], [645]); **(b)** Hamid does not disclose a secure access signal (J [586], [174]-[176]); and **(c)** the claims of the Patents are fairly based (J [661]-[662]).

3. The Full Court should otherwise reject Apple's cross-appeal. Apple impermissibly seeks to re-agitate, and ask the Full Court to remit back to the primary judge for determination, grounds that it expressly abandoned, or did not press and therefore did not ask the primary judge to consider in the circumstances that arose. As discussed further below, this should not be permitted.

B. IMPERMISSIBLE ASPECTS OF THE CROSS-APPEAL

4. As the primary judge recorded at J [468], during the course of and after closing submissions, principally by email after the completion of the hearing, Apple advised the primary judge that it no longer pressed a number of grounds advanced in its cross-claim. Relevantly, Apple informed the Court that it: **(a)** no longer pressed its lack of inventive step case based on s 7(3) of the Act at all; **(b)** did not press its CGK inventive step case if the primary judge construed accessibility attribute such that it was not embodied in the Apple Devices; and **(c)** did not press its novelty case based on the iPAQ Reference Guide if the primary judge construed accessibility attribute, or TSS and RSS, in a manner not embodied in the Apple Devices. The primary judge also observed at J [469] that Apple indicated in its closing written submissions that it did not press its case based on lack of manner of manufacture if his Honour rejected CPC's construction of accessibility attribute, TSS and RSS.

5. In taking these steps, Apple invited the primary judge not to make findings on substantial parts of its cross-claim, despite Apple having advanced those grounds to the final post. Contrary to ASC [1], Apple only sought to confine its cross-claim based on CPC's construction at the time of, or after, closing submissions. This was a strategic decision made by Apple resulting from the exceptionally broad cross-claim that it had advanced (as raised by the primary judge): T1316.26-.1317-13 (Pt C Tab 96, AB-3930-3931), T1443.4-13 (Pt C Tab 97, AB-4057). The grounds Apple elected not to press were, on any view, the most vulnerable to rejection. Regardless of Apple's motives, the result is that the judgment does not contain findings on a number of grounds which Apple had originally pleaded, but which it ultimately elected not to press.

6. Notwithstanding that election, Apple now contends at ASC [30] that, if the appeal is successful, the matter should be remitted to the primary judge for determination of the grounds in paragraphs 1 to 4(a) of its notice of cross-appeal. That course should be rejected.

7. **Ground 1 (inventive step)**: So far as Apple's s 7(3) inventive step case is concerned, the position is very straightforward. That ground was unconditionally abandoned at the end of the trial. Apple cannot now seek to revive it on appeal, whether directly or via remittal. It is "*fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial*": *Coulton v Holcombe* (1986) 162 CLR 1 at 7 per Gibbs CJ, Wilson, Brennan and Dawson JJ; and "*the public interest in the finality of litigation is an important consideration, especially in a case where, at trial, counsel has explicitly disclaimed reliance on grounds upon which, subsequently, an appeal is sought to be based*": *CA Henschke & Co v Rosemount Estates Pty Ltd* (2000) 52 IPR 42 at [34]. Moreover, as Mason P (with whom Gleeson CJ and Priestley JA agreed) stated in *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631 at 645:

> …A party does not have a right to insist that a new point be decided on appeal simply because all of the facts have been established beyond controversy or the point is one of construction or of law, even constitutional law. This is because it remains a question of whether the appellate court "may find it expedient and in the interests of justice to entertain the point" … The rule is not an absolute one … However:
>
> > '… it is a sound general principle, leading not only to the maintenance of fair play, but also to the repression of unnecessary litigation, that parties must be bound by the course they deliberately adopted at the trial': Rowe v Australian United Steam Navigation Co Ltd (1909) 9 CLR 1 at 24 per Isaacs J.

8. **Grounds 1, 2 and 4(a) (inventive step, manner of manufacture, novelty**): Similar considerations also apply to these grounds, which Apple elected not to press conditionally, as recorded at J [468]-[469]. Whilst these grounds were not abandoned using the same unqualified language as the s 7(3) case, they were not left undecided through inadvertence or judicial oversight. They were left undecided because Apple deliberately invited the primary judge not to determine them if his Honour rejected CPC's construction of particular integers of the claims, and thereby avoided the risk of adverse findings on complex factual and technical issues, and the forensic consequences that would have flowed from such findings. This also had the practical effect of avoiding potentially adverse findings on these matters. It should also be noted that, so far as the manner of manufacture ground is concerned, Apple has elected not to make any submissions to the Full Court on this ground, despite paragraph 2(a) of its notice of cross-appeal expressly contemplating that the Full Court should determine the ground.

9. In those circumstances, the Full Court should decline to exercise its discretion to remit the matter for determination of these grounds. Remittal is not a mechanism by which a party may obtain a second opportunity to litigate issues it chose not to pursue at trial, particularly where doing so would occasion significant delay, cost and procedural inefficiency. It is well established that, where possible, all issues be the subject of adjudication by a trial judge (and intermediate appellate courts). Whilst this practice is grounded in practical considerations, there was no reason (other than Apple's election) why these issues could not have been the subject of adjudication by the primary judge: *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at [113] per French CJ, Kiefel, Bell, Keane and Nettle JJ; *Kuru v New South Wales* (2008) 236 CLR 1 at [12]; *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1 at [34] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ; *Bruce v Baju Henley Square Pty Ltd* [2016] SASCFC 149 at [212].

10. That conclusion is reinforced by the overarching purpose in sections 37M and 37N of the *Federal Court of Australia Act 1976* (Cth). It has been almost a year since the primary judge delivered judgment, and approximately two years since the close of evidence and submissions, in a proceeding involving complex technical and factual issues. Remittal would require the primary judge to revisit those matters after a substantial lapse of time, with the real prospect of further appeal thereafter. That course would be antithetical to the just, quick and inexpensive resolution of the proceeding, and to the principle of finality in litigation; and the Full Court should be slow to endorse a procedural course which fragments the resolution of a single controversy across multiple hearings and appeals, where that fragmentation is the product of a party's own forensic choices.

11. Apple made a forensic choice as to how it conducted its cross-claim at trial. It obtained the benefit of that choice. It should also bear its consequences.

12. **Ground 3 (s 40 issues)**: Additionally, in relation to ground 3 of the notice of cross-appeal, which raises certain section 40 issues, Apple has elected not to make any submissions to the Full Court on this ground, despite paragraph 3 of the notice of cross-appeal expressly contemplating that the Full Court should determine the ground. In the circumstances, the Full Court should also decline to remit the matter for determination of this ground.

13. For completeness, it is noted that, whilst Apple did not press its case that the asserted claims of the 293 Patent lacked novelty at all if the primary judge construed the series feature in a way that did not embody the Apple Devices, the primary judge nevertheless considered whether Mathiassen, Scott, Hamid and Wuidart disclosed the series feature on CPC's construction and correctly found that they did not. In those circumstances, CPC does not oppose Apple advancing this ground in its cross-appeal, which is addressed further below.

14. **Conclusion in relation to grounds 1, 2, 3 and 4(a)**: For the reasons outlined above, CPC submits that the Full Court should decline to entertain grounds 1, 2, 3 and 4(a), having regard to the forensic course Apple voluntarily adopted at trial and the consequences which flowed from that course.

C. GROUND 4(B) - NOVELTY: SERIES FEATURE

15. CPC's construction of the series feature is addressed at CSC [24]-[27]. For the avoidance of doubt, where it is stated at CSC [26(b)] that the series feature involves a means for mapping said series into an instruction – "ie a means for taking the series (one or more scans) and mapping it into an instruction (such as an instruction to save the samples as individual templates as the signature of a particular user in the database)" – CPC contends (as is recorded at J [196]) that the "mapping series into an instruction" requires that the scans or images are mapped into a *single mathematical representation*, which is then saved in the database as a biometric signature according to the mathematical representation. This is the natural consequence of the language "mapping said series into an instruction". The primary judge was correct to find that the series feature was not disclosed in Mathiassen, Scott, Hamid and Wuidart on that construction (J [616], [559], [588], [645]).

16. **In relation to Mathiassen**: ***First***, contrary to ACS [34]-[35], the primary judge correctly confined his attention to paragraph [164] of Mathiassen, and did not "overlook" paragraph [130]. Paragraph [130] concerns a different system (the medicine cabinet, rather than the vehicle), and it is not permissible to combine the disclosures about two different systems for the purposes of assessing novelty: *Re ICI Chemicals & Polymers Ltd and Lubrizol Corp Inc* (1999) 45 IPR 577 at [57] citing *Minnesota Mining & Manufacturing Co v Beiersdorf (Aust) Ltd* (1980) 144 CLR 253 at 292-3. Notably, Apple does not contend as part of its cross-appeal that the disclosure in Mathiassen relating to the medicine cabinet system anticipates any of the asserted claims (cf J [620]). ***Secondly,*** Mathiassen at [164] does not describe "the same process in relation to the vehicle embodiment" (cf ACS [35]). In contrast to paragraph [130], paragraph [164] of Mathiassen makes no reference to the need for an acceptable quality of the minutiae fingerprint representations, "sufficient" minutiae tables, or rejecting the captures if they are of inferior quality. Those omissions are deliberate and material, such that there is no clear and unmistakeable direction to key aspects of the series feature. ***Thirdly,*** in any event, in the case of both paragraphs [130] and [164] there is no disclosure that the series of entries are mapped into a *single* mathematical representation, which is then saved in the database according to an instruction. Rather, Mathiassen discloses that the tables are reduced to a master *minutiae* (plural) table - ie the three images are mapped into separate representations and stored as multiple signatures. Dr Dunstone agreed that Mathiassen does not mention anything about mapping the

representations into a single template: T969.13-19 (Pt C Tab 92, AB-3583). Accordingly, carrying out the directions in Mathiassen in relation to the vehicle embodiment (or any of the other embodiments) will not "inevitably result in something being made or done which… would constitute infringement of the patentee's claim": *General Tire & Rubber Co v Firestone Tyre and Rubber Co Ltd* [1972] RPC 457 at 485-6, (1971) 1A IPR 121 at 138.

17. **In relation to Scott, Hamid and Wuidart**: Apple accepts at ASC [36]-[39] that the series feature is not explicitly disclosed on the face of these pieces of prior art. Rather, Apple resorts to contending that there is an "implicit" disclosure simply because they disclosed a system that included enrolment of a biometric signature. This does not suffice for the high bar required for an implicit disclosure for lack of novelty in accordance with the authorities set out in J [526]-[527]. In particular, as noted in CSC [25], it was CGK that, during enrolment, it was common to get more than one impression or sample (typically three or more) and those samples could then be dealt with in a number of ways, including but not limited to (most commonly) taking individual biometric sample and saving them as individual templates. In contrast, the series feature specifically requires the multiple samples to be mapped into a single mathematical representation. Contrary to ASC [37], the CGK Summary at [115] (Pt C Tab 70, AB-1974) says nothing about producing "a template or mathematical representation" from scans, and the questioning at T901.17-25 (Pt C Tab 91, AB-3515) makes clear that one would not necessarily use data from all of the scans - ie it was not inevitable that multiple samples would be used to map a single mathematical representation. It follows that following these disclosures would not inevitably result in an enrolment system having the series feature. Notably, Dr Dunstone agreed that the series feature was not disclosed in Scott and Hamid: CB Tab 40.8, integers 1.6-1.8 at CB-2192-3 (Pt C Tab 45, AB-1539-1540); T916.15-20 (Pt C Tab 91, AB-3530). There is no basis for a contrary finding in Wuidart.

18. Apple's position on the disclosure of the series feature in Scott, Hamid and Wuidart is also at odds with the judge's findings on deferred priority: see CSC [34].

D. GROUND 4(C) - NOVELTY: HAMID/SECURE ACCESS SIGNAL

19. Contrary to ASC [40]-[42], there is no disclosure in Hamid of a secure access signal, and the primary judge was correct to find as such at J [586]. Apple's reliance on the "authorization code" referred to in paragraph [0018] of Hamid (Pt C Tab 30, AB-1117), which the primary judge discusses at J [581], is misconceived. The "authorisation" in that context is referring to the fact that a positive match has occurred and the user is therefore "authorised" to enter - it is not in any way suggesting that the "authorization code" being sent is secure in the sense of having been transmitted from an authenticated source, or otherwise.

20. Further, the primary judge ought to have found that Hamid does not disclose a secure access signal because it discloses sending multiple separate signals to multiple separate receivers at different locations / "plurality of portals", each of which is "exclusively operable": see, in particular, Figure 4 and [0017], [0018], [0065] (Pt C Tab 30, AB-1113, AB-1117, AB-1120). Accordingly, Hamid does not disclose "a" signal, as required by the claims. This is coupled to why Hamid does not disclose the output or provision of an accessibility attribute - it is merely a binary "grant access" code sent to different receivers.

E. GROUND 5 - FAIR BASIS: TSS AND RSS

21. Ground 5 of Apple's cross-appeal is premised on a construction that Apple has not yet properly articulated, which it says (at ASC [6] and [43]) will be further addressed in relation to the notice of contention. This is unsatisfactory, given that Apple bears the onus on its cross-appeal and CPC is required to respond in these submissions. CPC will endeavour respond to this ground once it is articulated fully. Nevertheless, CPC makes the following observations.

22. ***First***, Section B of ASC seeks to draw the Full Court into error by impermissibly construing the asserted claims based on disclosures in the Provisional (Pt C Tab 27). That is not a permissible approach to construction. The claims are to be construed, in light of the CGK, based on their plain ordinary language in light of the specification as a whole: *Jupiters Ltd v Neurizon Pty Ltd* (2005) 65 IPR 86 at [67]. The Provisional has no role to play. Once that is accepted, critical pillars of Apple's construction arguments fall away. Indeed, numerous aspects of Section B of ASC are disputed by CPC. As these matters relate to construction, they will be addressed as part of CPC's submissions in reply.

23. ***Secondly,*** the primary judge was plainly correct not to "go further" and determine that the TSS and RSS refer to separate and distinct items of *hardware:* cf ASC [5]. As the primary judge correctly observed, the TSS and RSS are defined by functionality, not hardware components; the specification explicitly envisages the TSS and RSS being within a computer; and it is useful to have hardware and software components that overlap in function: see CSC [15]-[20]. In those circumstances, there is no basis for construing the TSS and RSS as being limited to separate and distinct items of *hardware*; nor is there any basis for suggesting that such claims travel beyond the disclosures of the specification. As Prof. Boztas deposed in the passage referenced at ASC footnote 33, there is nothing in the specification that rules out the TSS and RSS being the same piece of hardware: cf ASC [43], second last sentence.

24. Apple's contention at ASC [45]-[46] that the primary judge failed to recognise that, when the specification describes the provision of logical access to a PC, it is describing access from another item of hardware, such as a fob or a remote computer, should not be accepted. Nothing in the specification limits the implementation of the invention in computers and the provision of

logical access in such a way. Both experts accepted that the reference to the personal computer on page 12 lines 18 to 20 of the specification stood independently of the reference to the remote fob: T499.3-23 (Pt C Tab 88, AB-3113). Indeed, Dr Dunstone had never seen a remote fob for access to a personal computer before the priority date: T499.25-36 (Pt C Tab 88, AB-3113). The rationale of Apple's position seems to be that, because the two subsystems are separated by a wired or wireless medium, they remain distinct pieces of hardware: ASC [21]. This is fundamentally misconceived - a single piece of hardware can have electronic components within it that communicate with one another, such as a printed circuit board. Further, the mere fact that multiple pieces of hardware are discussed in the context of Figure 10 is not determinative - it is a description of one embodiment, which are expressly said not to limit the scope of the invention: p 28 lines 14-20 (Pt C Tab 28, AB-1032).

25. *Thirdly,* contrary to ASC [44], the law of fair basis does not require the specification to disclose "how one might embody a TSS and a RSS of the invention on a single item of hardware". The well-established test for fair basis is as set out in *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* (2004) 217 CLR 274 at [68], [69], and [99] (**Lockwood No 1**). As summarised in *Merck Sharp & Dohme Corporation v Wyeth LLC (No 3)* (2020) 155 IPR 1 at [496]:

> Fair basis involves a comparison between the claims made in the patent and what is disclosed in the specification in order to determine whether there is a real and reasonably clear disclosure of the invention claimed, or whether the invention claimed travels beyond the invention described: *Bitech* at [39]. The enquiry as to the disclosure of the body of the specification is whether broadly, in a general sense, it describes the invention as claimed: *Lockwood (No 1)* at [69]. This involves consideration of what the specification discloses as a matter of substance.

26. Apple's fair basis case is fundamentally misconstrued. There is nothing in the specification to support the overly narrow construction of TSS and RSS that it advances. In those circumstances, it cannot be said that the claims are not fairly based.

F. CONCLUSION

27. For the reasons outlined in these submissions, which will be expanded upon at the hearing, CPC's appeal ought to be allowed; resulting in a finding that the asserted claims in each of the Apple Devices have infringed the asserted claims in each of the Patents in suit.

AJL Bannon, C Dimitriadis, M Evetts
Counsel for CPC
20 February 2026

Gilbert + Tobin
Solicitors for CPC