

Secretary
Trade Practices Act Review
C/- Department of the Treasury
Langton Crescent
PARKES ACT 2600

Dear Secretary,

Please find enclosed a submission to the Trade Practices Act Review setting out my concern that the existing competition laws are unlikely to remedy the anti-competitive conduct of the holders (and their assignees and in many instances their licensees) of broadly claimed genetic material composition and composition application patents. Effective pro-competition laws have potentially significant consequences for promoting a domestic Australian biotechnology industry dependent on access to the genetic materials and the tools of biotechnology, and the access and reduced price of patented products and processes for Australian consumers (including the public health scheme funded by taxpayers).

The submission shows that the courts and the Patent Office are reading down the pro-competition principles enshrined in the *Patents Act* as they apply to genetic materials. The result of this practice is to grant broad patents for limited contributions to innovation and restrict the potential for competitors' innovating and investing in incremental follow-on innovations. An examination of the co-existing competition scheme in the *Trade Practices Act* shows a failure to apply the *Patents Act's* competition scheme is unlikely to be ameliorated by the *Trade Practices Act*. In effect, it is the breadth of the patent claim that effectively delimits the boundary of the patentee's (and their assignees and in many instances their licensees) exclusion from competition. The consequences of a failure to apply the threshold patenting and other pro-competition measures in the *Patents Act*, and the likely inability of the *Trade Practices Act* to limit anti-competitive conduct by such patent holders, is more restricted access to, and higher prices for, the patented products and processes.

The essence of my concern is that in applying the 'taking advantage' test in s 46 of the *Trade Practices Act* there needs to be an express recognition that patents (and other intellectual

property rights) may not be necessarily 'economically efficiency'. A failure to deal with this issue will be to expand the reach of anti-competitive conduct under the *Trade Practices Act* in the guise of 'economically efficient' patent rights. The *Trade Practices Act* should apply to anti-competitive conduct within the 'purpose and scope' of a patent holder's claims and this should not be avoided by assuming patents are necessarily 'economically efficient'.

I hope this assists your deliberations.

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July 2002

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Excluding the ‘Purpose and Scope’ of the Patent Claim from the ‘Take Advantage’ Test?

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1. Introduction

Both the *Patents Act* and the *Trade Practices Act* have built in measures to allow some flexibility in their application:

- (a) The *Patents Act* was drafted to include a ‘public policy’ exception by reference to s 6 of the *Statute of Monopolies* in the threshold patenting criteria,¹ limitations on conditions in licenses and assignments² and compulsory licenses and forfeiture.³ These measures recognise that in some instances the social costs of patents are not minimal and in these circumstances a patent should not be granted; and
- (b) The prohibited anti-competitive conduct under the *Trade Practices Act* is subject to authorisation under Part VII, except for corporations with market power misusing that power,⁴ and certain conditions in licenses and assignments that are deemed to be pro-

This paper is based on materials appearing in Charles Lawson, ‘Patenting Genes and Gene Sequences and Competition: Patenting at the Expense of Competition’ (2002) 30 *Federal Law Review* 97.

¹ *Patents Act* s 18.

² *Ibid* ss 144-146.

³ *Ibid* ss 133-135.

⁴ *Trade Practices Act* s 88; Australian Competition and Consumer Commission, *Guide to Authorisations and Notifications* (1995).

competitive.⁵ The authorisation process and exemption of some licenses and assignments recognises that in some circumstances special exception from competition may be justified in the public interest.⁶

Generally, any concerns about the conflict between patents and competition law may be of minimal consequence because, '[i]n practice ... a patent holder can rarely act as a pure monopoly, because of the availability of alternative and substitute products and processes, and also because some scope for imitation almost always exists'.⁷ However, for genetic material patenting,⁸ this is unlikely to be true as very broad claims to the composition of the genetic materials⁹ and their applications,¹⁰ effectively tie up most possible commercial uses of the materials for the term of the patent.¹¹ This has potentially significant consequences for a domestic Australian biotechnology industry and the access and price of patented products and processes for consumers (including the public health scheme funded by taxpayers) in Australia.

The issue considered in the following analysis are the limits patent holders might place on restricting access to genetic material compositions subject to a patent under the *Patents Act* and whether this might be overcome by pro-competition laws in the *Trade Practices Act*. The paper finds that the courts and the Patent Office are reading down the pro-competition

⁵ Ibid s 51.

⁶ Australian Competition and Consumer Commission, above n 4, 19.

⁷ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement* (2000) 138; see also National Competition Council, *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974* (1999) 158.

⁸ For the purposes of this paper the term 'genetic material' means 'any material of plant, animal, microbial or other origin containing functional units of heredity': see *Convention on Biological Diversity* Art 2; this does not include 'biochemicals' which are 'chemicals found in diverse species of living things' that may be closely associated with and analogous to genetic resources, even though they, like genetic resources, 'contain information within its structure that human technologies can adapt or reproduce for human use' and may involve 'the use of samples that contain genetic material' (Conference of Parties to the Convention on Biological Diversity, *Access to Genetic Resources and Benefit Sharing: Legislation, Administrative and Policy Information*, UNEP/CBD/COP/2/13, 6 October 1995, para 51), although similar concerns set out in this paper apply.

⁹ See Charles Lawson, 'Patenting genetic diversity – old rules may be restricting the exploitation of a new technology' (1999) 6 *Journal of Law and Medicine* 373, 381-384.

¹⁰ See Charles Lawson and Catherine Pickering, 'Patenting genetic materials – failing to reflect the value of variation in DNA, RNA and amino acids' (2000) 11 *Australian Intellectual Property Journal* 69, 78-79.

¹¹ For an illustration of this with respect to genes and gene sequences see Charles Lawson and Catherine Pickering, 'Controlling Access to Genetic Resources under the *Environment Protection and Biodiversity Conservation Act 1999* Requires an Assessment of the Effects of the *Patents Act 1990*' (2002) 13 *Australian Intellectual Property Journal* 109; Charles Lawson and Catherine Pickering, 'Patent Laws Will Undermine Access Provisions in the *Environment Protection and Biodiversity Conservation Bill 1998* (Cth)' (1998) 15 *Environmental and Planning Law Journal* 401.

principles enshrined in the *Patents Act* as they apply to genetic materials. The result of this practice is to grant broad patents for limited contributions to innovation and restrict the potential for competitors' innovating and investing in incremental follow-on innovations. An examination of the co-existing competition scheme in the *Trade Practices Act* shows a failure to apply the *Patents Act*'s competition scheme is unlikely to be ameliorated by the *Trade Practices Act*. In effect, it is the breadth of the patent claim that effectively delimits the boundary of the patentee's (and their assignees and in many instances their licensees) exclusion from competition. The consequences of a failure to apply the threshold patenting and other pro-competition measures in the *Patents Act*, and the likely inability of the *Trade Practices Act* to limit anti-competitive conduct by such patent holders, is more restricted access to and higher prices for the patented products and processes.

2. Pro-competition measures in the *Patents Act*

(i) *Threshold patentability criteria in the Patents Act*

The *Patents Act* in Australia recognises that an element within this patent scheme is that an 'invention' should be a 'manner of new manufacture the subject of letters patent and grant of privilege within s 6 of the *Statute of Monopolies* and includes an alleged invention'.¹² Further, for the purposes of s 18 of the *Patents Act*, the 'invention' 'so far as claimed in any claim ... is a manner of manufacture within the meaning of s 6 of the *Statute of Monopolies*'.¹³ These separate tests apply threshold requirements of inherently patentable subject matter, newness (or inventiveness) and the proviso exceptions (or public policy). These requirements operate with the other legislated elements of novelty and inventive step to exclude subject matter which is not 'a mode or manner of achieving an end result which is an artificially created state of affairs of utility in the field of economic endeavor'.¹⁴ In competition terms, these threshold requirements limit a patentee's 'exclusive rights' to only those inventions likely to benefit the economy. However, the courts and the Patent Office are increasingly setting a very low standard for these legislated requirements or failing to apply them at all. The effect of these practices is to increase the number of 'inventions' benefiting from the *Patents Act* 'exclusive rights' and arguably increases the social costs of the patent scheme.

The recent review by the Intellectual Property and Competition Review Committee recommended that the 'manner of manufacture' test be retained but that 'the Patent Office

¹² Definition in the *Patents Act* Sch 1.

¹³ Ibid s 18(1)(a).

¹⁴ *CCOM Pty Ltd v Jiejing Pty Ltd* (1994) 51 FCR 260, 295.

ensure in its examination practice that the use described in the specification is specific, substantial and credible to a person skilled in the art'.¹⁵ In response the Government accepted the recommendation saying:

'These tests are already broadly included within current examination practice under the grounds of manner of manufacture and fair basis but the Government will ask IP Australia to ensure that examination covers all aspects of use being specific, substantial and credible'.¹⁶

For genetic materials composition claims there is unlikely to be much of a change in practice. Although, recent developments in the United States dealing with the 'useful invention' (or utility requirements) of 35 USC 101¹⁷ and 'written description' requirement of 35 USC 112¹⁸ suggest an alternative and productive way to restrict some overly broad composition application claims.¹⁹ For example, the utility requirement are to be applied to exclude claimed inventions with 'no assertion of specific and substantial utility', no asserted 'specific and substantial utility ... and it does not have a readily apparent well-established utility' or where the utility is 'throw-away', 'insubstantial' or 'non-specific', 'such as the use of a complex invention as landfill'.²⁰ However, there is express recognition that the 'applicant need only provide one credible assertion of specific and substantial utility for each claimed invention to satisfy the utility requirement'.²¹ The interpretation of 'credible' remains uncertain. An interpretation of 'credible' as being 'something that is not incredible' is unlikely to limit most genetic composition claims and the 'new' utility requirements may in effect maintain the existing status of broad genetic material composition and composition application claims.²²

¹⁵ Intellectual Property and Competition Review Committee, above n 7, 16.

¹⁶ IP Australia, *Government Response to the Intellectual Property and Competition Review Committee Recommendations* (2001) Response 11.

¹⁷ Department of Commerce (United States Patent and Trademark Office), 'Utility Examination Guidelines' (2001) 66 *Federal Register* 1092, 1097-1099; 35 USC 101 provides '[w]hoever patents and discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title'.

¹⁸ Department of Commerce (United States Patent and Trademark Office), 'Guidelines for Examination of Patent Applications Under the 35 USC 112 First Paragraph "Written Description" Requirement' (2001) 66 *Federal Register* 1099, 1104-1111; 35 USC 112 (1) provides '[t]he specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention'.

¹⁹ Department of Commerce, above n 17, 1097-1099.

²⁰ *Ibid* 1098.

²¹ *Ibid*.

²² See for example Nuffield Council on Bioethics, *The Ethics of Patenting DNA – A Discussion Paper* (2002) 31-32.

(ii) *Void conditions in contracts*

The *Patents Act* makes void a condition in a contract ‘relating to the sale or lease of, or a license to exploit, a patented invention’ that prohibits or restricts the buyer, lessee or licensee using or acquiring a product or process (whether patented or not).²³ This is subject to some exceptions, and allows a patent lease or license contract to be terminated by either party after the patent has ceased to be in force with three month’s notice. These provisions were intended to deal with the limited abuses where a patentee seeks a collateral advantage to the patent by restricting trade with others.²⁴ The courts have interpreted the predecessors of these provisions very narrowly giving them little practical effect.²⁵ For example, the majority of the High Court in *Transfield Pty Ltd v Arlo International Ltd*²⁶ was able to find that a ‘best endeavours’ contractual clause was not void because the condition was not an absolute prohibition on using or selling other poles.²⁷ This was a surprisingly narrow interpretation as, in the circumstances of this case, there would have been only one opportunity to make a tender for any project to the clause was in effect an absolute prohibition.²⁸

The drafting of the 1990 *Patents Act* failed to deal with this narrow interpretation or to address the pro-competitive objectives of these provisions. This was despite the Industrial Property Advisory Committee²⁹ recommendation in 1984 to repeal the equivalent provision and leave the limitations imposed on licenses and assignments to be dealt with according to the *Trade Practices Act*. The Intellectual Property and Competition Review Committee has recently made a similar recommendation that ss 144-146 be repealed ‘as these provisions are not soundly based on efficiency considerations, and as the conduct they address is better dealt with through the provisions of s 51(3) of the *Trade Practices Act*, amended in line with the Committee’s recommendations’.³⁰ The Government response to this report was to ‘largely accepted’ the Committee’s recommendation.³¹ The Committee’s recommendations about s 51(3) of the *Trade Practices Act* was essentially to replace the existing provision with a provision that allows conditions in a licence, or conditions in a contract, arrangement or understanding ‘that relate to the subject matter of that intellectual property statute [that is, the

²³ *Patents Act* ss 144-146; these sections reproduce in part the *Patents Act 1952* s 112, which in turn reproduced the *Patents and Designs Act 1907* (Imp) s 38.

²⁴ *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83, 99 (Mason J) which reviews the English authorities; note in particular *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, 669 (Lord Oaksey).

²⁵ Industrial Property Advisory Committee, *Patents, Innovation and Competition in Australia* (1984) 27.

²⁶ *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83.

²⁷ *Ibid* 92 (Barwick CJ); 95-97 (Stephen J); 102 (Mason J); 107-108 (Wilson J).

²⁸ *Ibid* 105 (Murphy J).

²⁹ Industrial Property Advisory Committee, above n 25, 27-32.

³⁰ Intellectual Property and Competition Review Committee, above n 7, 162.

patent], so long as those conditions do not result, or are not likely to result in, a substantial lessening of competition'.³² This issue is dealt with in more detail in the discussions about *Patent Act* exemptions from the *Trade Practices Act* (Part 3(i) below).

(iii) *Compulsory licences and forfeiture*

Under the existing *Patents Act*, the compulsory licensing and forfeiture provisions³³ were intended to address a concern that foreign patent owners might limit domestic prosperity by hindering domestic manufacture and industry development while at the same time extracting monopoly profits.³⁴ Promoting domestic industry and development may no longer be imperatives,³⁵ but compulsory licensing and forfeiture provide potentially useful tools to implement competition objectives where the patentee seeks to impose high prices and restrict access.

Section 133 of the *Patents Act* provides a 'person' may apply for a compulsory license to be made by a court three years after the grant of a patent³⁶ where 'the reasonable requirements of the public with respect to the patented invention have not been satisfied' and 'the patentee has given no satisfactory reason for failing to exploit the patent'. Where a compulsory license has been granted s 134 provides 'an interested person' may apply to have the patent forfeited for the same reasons. Section 135 defines the 'reasonable requirements of the public' to be unfair prejudice to an existing or potential Australian industry or demand for the patented product or process has not been met in Australia, that trade or industry in Australia is unfairly prejudiced by conditions attached by the patentee or that the patent is not being commercially worked in Australia.

Menzies J of the High Court in *Fastening Supplies Pty Ltd v Olin Mathieson Chemical Corporation*³⁷ considered a similar provision to the current s 135 of the *Patents Act* in s 110 of the *Patents Act 1952* and stated that:

'[T]he demand for the patented article has not been reasonably met if the court should be satisfied that, because of its superiority over articles already on the market, potential purchasers

³¹ IP Australia, *Government Response*, above n 16, Response 17.

³² Intellectual Property and Competition Review Committee, above n 7, 162.

³³ *Patents Act* ss 133-135.

³⁴ Industrial Property Advisory Committee, above n 25, 28.

³⁵ Intellectual Property and Competition Review Committee, above n 7, 162.

³⁶ Patents Regulations 1991 r 12.1(1).

³⁷ (1969) 119 CLR 572.

would have bought it had it been available. A market for a less efficient article indicates, other things being equal, a market for a more efficient article'.³⁸

In this case, the petitioner imported the patented improved captive bolt tool whereupon the patentee requested the petitioner cease and account for the tools already sold. The petitioner attempted to enter a licensing agreement but was refused as an exclusive licensing arrangement already existed and the licensee would not sub-license. At the time of the petition, the tool was not available to the public in Australia even though it was being manufactured overseas. Menzies J considered this was evidence that the reasonable requirements of the public had not been satisfied at the date of the petition.³⁹ However, there was other evidence that the exclusive licensee in Australia had good reasons for failing to supply the tool to the public, he had acted reasonably in attempting to develop a tool to be profitably manufactured in Australia and that this was not a belated response to the petition.⁴⁰ Menzies J also considered the petitioner would be an unsuitable company to work the invention in Australia.⁴¹ The application to grant a compulsory license was therefore refused.⁴²

The present s 135 is constructed more broadly than s 110 of the 1952 Act and might be interpreted differently, with a focus on competition principles. However, despite the apparently broad application of these provisions, and in particular the definition of the 'reasonable requirements of the public', they have not been relied on to any extent in Australia.⁴³ This might be because they are either (a) too restrictive – too difficult to prove, hedged with qualifications and discretion and too expensive to seek, or (b) very effective – inducing patentees to license in fear of a compulsory license and forfeiture.⁴⁴ Although, the Federal Court has suggested the provisions are 'cumbersome and expensive to apply'.⁴⁵

In reviewing the patent system in 1984, the Industrial Property Advisory Committee recommended additional discretionary powers for courts to order compulsory licenses as a competition law remedy where the patent related conduct breached Part IV of the *Trade*

³⁸ Ibid 575; the market was to be determined at the time of the hearing.

³⁹ Ibid 578-79.

⁴⁰ Ibid 579-82.

⁴¹ Ibid 583.

⁴² Ibid 583.

⁴³ The only reported cases are *Fastening Supplies Pty Ltd v Olin Mathieson Chemical Corporation* (1969) 119 CLR 572 and *Wissen Pty Ltd v Lown* (1987) 9 IPR 124.

⁴⁴ Industrial Property Advisory Committee, above n 25, 28; Intellectual Property and Competition Review Committee, above n 7, 162.

⁴⁵ *Bristol-Myers Squibb v FH Faulding & Co Ltd* (2000) 97 FCR 524, 568.

Practices Act.⁴⁶ This recommendation extended to including the transfer of know-how together with the patent as a reasonable license term, and that such licenses should allow importation of the patented product or process.⁴⁷ The recent Intellectual Property and Competition Review Committee recommended replacing s 135 with a series of conditions that if satisfied would require the order of a compulsory license.⁴⁸ These conditions include that access to the patented invention is required for competition in a relevant market, that there is a public interest in enhanced competition, that the reasonable requirements for access have not been met and that the order would not compromise the legitimate interests of the patent owner.⁴⁹ In applying these conditions the Australian Competition Tribunal was cited for its expertise in applying Part IIIA of the *Trade Practices Act* and perhaps suggesting the principles applied in Part IIIA might be relevant in assessing the need for a compulsory license.⁵⁰ There was no other indication of how the broad terms of the conditions might be interpreted, although the Intellectual Property and Competition Review Committee did consider the requirement for competition in a relevant market would mean there was no other option for competition in that market.⁵¹ The Government response to the Committee report is set out below in full as it provides some insight into likely future developments:

‘Compulsory licensing is one of the more contentious and politically sensitive TRIPS issues and therefore in considering this recommendation the Government has taken into account the need for consistency with international standards.

In principle, the Government supports the Committee's recommendation to make the compulsory licensing of patents subject to a competition test. However, as it stands, this recommendation would limit the grounds on which to obtain a compulsory licence to the situation where access to patented technology is required to ensure competition in the (relevant) market, rather than the broader grounds based on the “reasonable requirements of the public”. Depending on its interpretation, this could preclude situations where compulsory licensing could be argued to be valuable from a public policy perspective.

For this reason, a competition test alone is not sufficient as:

- (a) the recommended test may be more stringent in some circumstances than the existing tests and may result in the compulsory licensing provisions ceasing to act as an incentive to negotiate a voluntary licence; and

⁴⁶ Industrial Property Advisory Committee, above n 25, 27-32.

⁴⁷ Ibid 32-33.

⁴⁸ Intellectual Property and Competition Review Committee, above n 7, 163.

⁴⁹ Ibid 163.

⁵⁰ Ibid.

- (b) a competition test will not cover some situations where the non-working of the invention, or other effective denial of reasonable access to it, has some negative effect on the public interest which is not dependant on competition in the market.

Accordingly, the Government believes that the existing tests should be retained and a competition test be added as an additional ground on which a compulsory licence can be obtained.

It is inappropriate that applications for compulsory licences be considered by the Australian Competition Tribunal in the first instance because the Tribunal is essentially a review body. In addition, it is not the appropriate body to hear applications for compulsory licences under the “reasonable requirements of the public” test and, in view of the likely difficulties if applications under different grounds were to be heard by more than one body, the Government considers that all applications for compulsory licences should be considered by the Federal Court in the first instance’.⁵²

3. Relaxing competition measures in the *Trade Practices Act*

(i) Patents Act *exemptions from the Trade Practices Act*

The competition law principles in the *Trade Practices Act* Part IV sets out to promote innovation and consumer benefit by applying the legislative principles to all conduct⁵³ other than certain conditions in intellectual property licenses and assignments, which are considered to be generally pro-competitive.⁵⁴ The exemption for patents is set out in two step in s 51 of the *Trade Practices Act*. Section 51(1) provides that ‘in deciding whether a person has contravened this Part [IV], the following must be disregarded: (a) anything specified in, and specifically authorised by: (i) an Act (not including an Act relating to patents ...)’ . The only patent related exceptions are then set out in s 51(3). Section 51(3) provides that ‘the imposing of, or giving effect to, a condition’ of a patent license or assignment ‘to the extent the condition *relates to*: (iii) the invention to which the patent or application for a patent relates or articles made by the use of that invention’ are exempt from the *Trade Practices Act*, except in relation to unlawful use of market power⁵⁵ and resale price maintenance.⁵⁶

⁵¹ Ibid.

⁵² IP Australia, *Government Response*, above n 16, Response 18.

⁵³ Subject to exemption by regulation: *Trade Practices Act* s 172.

⁵⁴ National Competition Council, above n 7, 156-167.

⁵⁵ *Trade Practices Act* s 46 and s 46A.

⁵⁶ Ibid s 48.

A literal interpretation of s 51(1) suggests that the patentee's conduct must comply with the *Trade Practices Act* subject only to the s 51(3) exceptions (which apply only to Part IV conduct). Conversely though, the construction of s 51(1) does not exclude recognising the patentee's rights embodied in the *Patents Act* in applying the *Trade Practices Act* provisions.⁵⁷

There is some doubt as to the exact meaning and operation of s 51(3) as a result of the term 'relate to'. Mason J in *Transfield Pty Ltd v Arlo International Ltd*⁵⁸ supported a wide construction of the term 'relates to' recognising the provision allowed a patentee to impose conditions on the license or assignment of the patent 'to protect the patentee's legal monopoly',⁵⁹ but then said 'conditions which seek to gain advantages collateral to the patent are not covered by s 51(3)'.⁶⁰ Unfortunately this decision supports both the view that the *Trade Practices Act* exempts any condition relating to the subject matter of the patent license or assignment and the view that only those conditions which do not seek a collateral advantage to the patented product or process are exempted.⁶¹ The Trade Practices Commission took guidance from Mason J's view as to how to apply s 51(3):

'[I]f there is any doubt whether a condition relates to the subject matter of a license, the purpose and scope of the exclusive rights granted by the ... [patent] ... will be considered to determine whether a collateral advantage has been achieved by the condition'.⁶²

The breadth of the patent will delineate the purpose and scope of the exclusive rights, which will then delineate the boundaries of the license and assignment condition exemptions. For broad genetic material composition and composition application patents this is potentially a considerable exemption of a licence or assignment condition from competition.

The Trade Practices Commission guidelines would seem to have been adequate in most instances and have probably been assisted by the exemptions having a narrow scope,⁶³ the

⁵⁷ Frances Hanks and Phillip Williams, 'Implications of the Decision of the High Court in *Queensland Wire*' (1990) 17 *Melbourne University Law Review* 437, 454.

⁵⁸ (1980) 144 CLR 83.

⁵⁹ Ibid 103.

⁶⁰ Ibid 103; Barwick CJ (92) and Wilson J (108) considered the condition in question was entirely within s 51(3) and attracted the exemption but did not give detailed reasons for this conclusion; Stephen J (97) considered there was no evidence the condition, read either alone or in combination with other provisions of the license, had either the purpose or effect of substantially lessening competition (the deeming provisions of *Trade Practices Act* s 45A did not affect his conclusions); Murphy J (105) decided the matter on the basis of the *Patents Act*.

⁶¹ Trade Practices Commission, *Application of the Trade Practices Act to Intellectual Property* (1991) 13; Intellectual Property and Competition Review Committee, above n 7, 207.

⁶² Trade Practices Commission, ibid 13.

fact that generally intellectual property rights do not result in substantial market power because there are usually actual or potential substitutes,⁶⁴ and that the exemption deals only with conditions *in* licenses and assignments. The Trade Practices Commission has opined that exclusive territorial license, territorial restraints, price restrictions, quota restrictions, quality restrictions, post license termination restrictions, sub-license restrictions, license back provisions, full or third line forcing (subject to s 144 of the *Patents Act*), and leveraging which might contravene s 45 and s 47, would arguably be sufficiently connected to the patent to be within the scope of s 51(3), and therefore exempt.⁶⁵ Although, this approach would seem to be broader than just protecting the purpose and scope of the patentee's exclusive rights and includes some conduct that is theoretically advantageous in encouraging broader uses of the protected innovation.⁶⁶

Recent reviews of s 51(3) of the *Trade Practices Act* have recommended s 51(3) be amended,⁶⁷ although similar recommendations in earlier reviews have been ignored by Parliament.⁶⁸ The National Competition Council recommended a narrowing of the operation of s 51(3) so that price and quantity restrictions and horizontal arrangements (between competitors) did not benefit from the exemption.⁶⁹ The Intellectual Property and Competition Review Committee recommended s 51(3) be replaced with provisions excluding conditions in licenses and contracts, arrangements and understandings that relate to the subject matter of a patent (and other intellectual property statutes) from Part IV and s 4D (exclusionary provisions), so long as the condition does not, or is not likely to result in, a substantial lessening of competition.⁷⁰ This was considered to be narrower than the price and quantity restrictions and horizontal arrangements which the National Competition Council considered had 'significant potential' to substantially lessen competition,⁷¹ but 'an appropriate balance between the needs of the intellectual property system and the wider goals of competition

⁶³ For example, when the *Trade Practices Act* s 45 and s 47 apply, s 46 will generally also apply: National Competition Council, above n 7, 216-219, although the National Competition Council 'accepts that there is a significant amount of conduct that may breach s 45 and s 47 without breaching s 46' (217).

⁶⁴ National Competition Council, above n 7, 217; see for examples the United States Department of Justice and Federal Trade Commission, *Anti-trusts Guidelines for the Licensing of Intellectual Property* (1995) s 2.2; Organisation for Economic Co-operation and Development, *Competition Policy and Intellectual Property Rights* (1989) 15.

⁶⁵ Trade Practices Commission, above n 61, 21-30.

⁶⁶ National Competition Council, above n 7, 151 and 164-65.

⁶⁷ National Competition Council, *ibid* 152; Intellectual Property and Competition Review Committee, above n 7, 215.

⁶⁸ Industrial Property Advisory Committee, above n 25, 25.

⁶⁹ National Competition Council, above n 7, Chapter C8.

⁷⁰ Intellectual Property and Competition Review Committee, above n 7, 215.

⁷¹ National Competition Council, above n 7, 151.

policy'.⁷² The Government's response to the Committee's report appears to be to save the existing effect of the provision on licences and assignments, and applying an additional exemption for the *per se* prohibitions of exclusionary provisions,⁷³ price fixing,⁷⁴ and exclusive dealings⁷⁵ that do not substantially lessen competition.⁷⁶ Further:

'Following consultation with interested parties, the Australian Competition and Consumer Commission will issue guidelines outlining its enforcement approach to these provisions. These guidelines would outline when intellectual property licensing and assignment conditions might be exempted under s 51(3), when intellectual property licences and assignments might breach Part IV of the [*Trade Practices*] Act, and when conduct that is likely to breach Part IV of the [*Trade Practices*] Act might be authorised'.⁷⁷

License and assignment exemptions from the *Trade Practices Act* are arguably justified because they reward innovation so those innovators properly appropriate their surpluses with the associated dynamic efficiencies.⁷⁸ Another view is that intellectual property laws do not create legal or economic monopolies and so licensing and assignment exemptions simply provided greater certainty to patent licensors and assignors that reduces competition law compliance costs and encourages more licensing.⁷⁹

The Trade Practices Commission's approach,⁸⁰ and the modified approach suggested by the Intellectual Property and Competition Review Committee⁸¹ and the Government's response,⁸² will need to be applied to promote beneficial competition and avoid the likely non-tariff barriers of patent owners in increasingly globalised businesses.⁸³ Without further guidance from the Australian Competition and Consumer Commission, as recommended by the National Competition Council⁸⁴ and the Intellectual Property and Competition Review Committee,⁸⁵ and accepted by the Government,⁸⁶ the likely reach of these exemptions beyond

⁷² Intellectual Property and Competition Review Committee, above n 7, 213.

⁷³ *Trade Practices Act* s 45 and s 4D.

⁷⁴ *Ibid* s 45A.

⁷⁵ *Ibid* s 47.

⁷⁶ IP Australia, *Government Response*, above n 16, Response 26.

⁷⁷ *Ibid*.

⁷⁸ Organisation for Economic Co-operation and Development, above n 64, 6 and 11; although incentives to innovate are believed to be significantly reduced in monopolised industries (6).

⁷⁹ National Competition Council, above n 7, 150.

⁸⁰ Trade Practices Commission, above n 61, 21-31.

⁸¹ Intellectual Property and Competition Review Committee, above n 7, 215.

⁸² IP Australia, *Government Response*, above n 16, Response 26.

⁸³ Allan Fels, 'The Trade Practices Act – Past, Present and Future' (2001) 9 *Trade Practices Law Journal* 5, 14-17.

⁸⁴ National Competition Council, above n 7, 245.

⁸⁵ Intellectual Property and Competition Review Committee, above n 7, 215.

⁸⁶ IP Australia, *Government Response*, above n 16, Response 26.

the purpose and scope of the exclusive rights will remain unclear. The recommendations of the Intellectual Property and Competition Review Committee and the Government's response would seem to narrow the license and assignment condition exception by imposing the 'substantially lessening competition' threshold to some *per se* prohibitions above which the *Trade Practices Act* would apply while retaining the broad term 'relates to' in defining the scope of the intellectual property right's subject matter to which the exemption would apply. Presumably the 'relates to' requirement means the Trade Practices Commission's 'purpose and scope of the exclusive rights granted' rather than the uncertain view of the High Court in the *Transfield case*. The application of this recommendation will remain unclear until guidelines are developed dealing with the diversity of possible arrangements and how the Australian Competition and Consumer Commission proposes to view such arrangements. The Federal Trade Commission in the United States has provided a useful example of such guidance.⁸⁷ Again, the breadth of the patent will delineate the purpose and scope of the exclusive rights, which will then delineate the boundaries of the license and assignment (or contract, arrangement or understanding) condition exemptions. For broad genetic material composition and composition application patents this is potentially a considerable exemption from competition.

(ii) *Characterising rights – purpose and scope of the patent claim*

The United States Department of Justice and the Federal Trade Commission guidelines on licensing intellectual property state:

'Intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help the owners to profit from the use of their property. An intellectual property owner's rights to exclude are similar to the rights enjoyed by owners of other forms of private property. As with other forms of private property, certain types of conduct with respect to intellectual property may have anti-competitive effects against which the antitrust laws can and do protect. Intellectual property is thus neither particularly free from scrutiny under the antitrust laws, nor particularly suspect under them'.⁸⁸

Applying these principles the United States courts have sometimes hesitated, but they have never actually found a refusal to sell or license an intellectual property right as being anti-

⁸⁷ United States Department of Justice and Federal Trade Commission, *Anti-trusts Guidelines*, above n 64.

⁸⁸ *Ibid* s 2.1.

competitive,⁸⁹ and may now actually consider intellectual property rights are beyond the reach of competition laws. Thus in *Independent Service Organizations Antitrust Litigation* the Federal Circuit opined:

‘In the absence of any illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using or selling the claimed invention free from liability under the antitrust laws. We therefore will not inquire into his subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patent invention may have an anti-competitive effect, so long as that anti-competitive effect is not illegally extended beyond the statutory patent grant’.⁹⁰

This opinion has now been cited as authority ‘[b]ecause a patent owner has the legal right to refuse to license his or her patent on any terms, the existence of a predicate condition to a license agreement cannot violate the antitrust laws’.⁹¹ In contrast, recent merger decisions demonstrate that the Federal Trade Commission accepts that in some cases potential conduct relating to the purpose and scope of the exclusive rights can be anti-competitive. For example, in the *Ciba-Geigy Limited and Sandoz Limited* merger, the Commission required the merged entity to issue non-exclusive licenses for its gene therapy technology (which included the gene sequences).⁹² In the *Glaxo PLC and Wellcome Limited* merger, the Commission required the divestiture of patents and technology to allow an approved competitor to continue Wellcome’s research into a migraine treatment.⁹³ Thus the approach of the courts would appear to diverge from the Federal Trade Commission and the United States Department of Justice, with the courts excluding patents from competition laws with very few, and practically very unlikely, circumstances.

The approach of an Australian court is likely to follow the United States courts’ approach. Thus, the Federal Court in *APRA Ltd v Ceridale Pty Ltd*⁹⁴ a copyright owner of most public performance music was in dispute with a hotel owner for money owed from fees for expired licenses and further licenses were required to perform the copyright music in public. The Full Federal Court rejected the characterisation of APRA’s claim as ‘nothing more than a debt

⁸⁹ For example *Eastman Kodak Co v Image Technical Services Inc* 504 US 451 (1992) where the Supreme Court found Kodak’s refusal to supply replacement parts except to buyers of their products who used their services could have been an unlawful anti-competitive practice and remitted the matter for trial. At trial Kodak raised the issue of patent and copyright protection for its parts. This was rejected on evidence that it was a pretext: see *Image Technical Services Inc v Eastman Kodak Co* 125 F3d 1195 (1997) 1201.

⁹⁰ *Independent Service Organizations Antitrust Litigation* 203 F3d 1322 (2000) 1327-28.

⁹¹ *Townshend v Rockwell International Corporation* 2000 US Dist LEXIS 5070 [23].

⁹² *In re Ciba-Geigy Limited* 123 FTC 842 (1997).

⁹³ *In re Glaxo PLC* 119 FTC 815 (1995).

collecting exercise’ and found APRA was merely exercising its right to restrain a breach of its copyright without first obtaining a license. There was evidence that APRA’s requirement for a license application to be completed had not been properly satisfied and that APRA did not decline at any time to issue the licenses only because of the failure to pay the arrears. This was fortunate for APRA, as earlier correspondence had stated:

‘Further, we are instructed by our client [APRA] that if proceedings are instituted under the Copyright Act no subsequent application by you for the grant of a license will be considered nor a license granted unless and until all our client’s costs (being our client’s party and party costs and including its solicitor and own client costs) incurred in anticipation of, preparatory to and in relation to the said proceedings are paid by you’.⁹⁵

The Court accepted that APRA had market power as the only supplier of the copyright music and was legitimately exercising its copyright rights to ensure only those properly licensed could use the copyright works – APRA ‘was ready to grant new licenses, without any pre-condition about arrears or costs, if proper applications were lodged’.⁹⁶ Thus APRA was exercising the rights of its copyright and was not using its power for a prescribed purpose. However, the Court warned that the holders of intellectual property with market power were in a difficult position to avoid misusing that power in disputes, and had APRA’s threat to recover costs before issuing a license been acted upon, then the conduct may have been unlawful as a misuse of market power for the purposes of the *Trade Practices Act*.⁹⁷ This approach contrasted some early authority that supported the contention that relying on a statutory intellectual property right took the conduct outside the bounds of the *Trade Practices Act*.⁹⁸

Cases like *APRA Ltd v Ceridale Pty Ltd* may also be characterised as recognising the patentee’s statutory exclusive rights, but prohibiting conduct proscribed by the *Trade Practices Act* only where the exercise of that right can be said to be beyond the purpose and scope of the exclusive rights granted by the patent. So, in APRA’s case, using a patent to enforce recovery of a debt would most probably have been characterised as outside the

⁹⁴ (1990) 97 ALR 497.

⁹⁵ Ibid 500.

⁹⁶ (1990) 97 ALR 497, 511.

⁹⁷ Ibid.

⁹⁸ *Warman International v Envirotech Australia Pty Ltd* (1986) 11 FCR 478: ‘[t]o exercise in good faith an extraneous legal right, though the effect may be to lessen, or even eliminate, competition, is to take advantage of that right, not of market power’ (502); noting that this decision does not appear to have taken into account the construction of *Trade Practices Act* s 51(1) which clearly contemplates intellectual property rights being subject to the *Patents Act*.

purpose and scope of the rights conferred by the patent, and given APRA's market power, may well have been an unlawful use of market power.

In *Radio Telefis Eireann and Independent Television Publications Ltd v EC Commission*⁹⁹ the European Court of Justice held a refusal to license copyrighted television listings to an independent publisher of a comprehensive viewing guide was an unlawful use of a dominant market position (equivalent to s 46 of the *Trade Practices Act*).¹⁰⁰ This decision found the conduct was anti-competitive in a derivative market and was therefore unlawful even though the copyright owner was maintaining the exclusivity of its exclusive rights which was the very 'existence' of its intellectual property right. An alternative characterisation of *Radio Telefis Eireann and Independent Television Publications Ltd v EC Commission* might be that the court considered the conduct extended beyond the intended reach of the copyright and was therefore beyond the purpose and scope of the exclusive rights. If this characterisation is correct then the paramountcy of the 'core' intellectual property rights are maintained as outside the ambit of competition law.

That is, it would recognise that the purpose and scope of the exclusive rights of a patent may have some exposure to the *Trade Practices Act*, while being very reluctant to make such a finding unless there was very clear and extensive evidence of anti-competitive detriment (such as there was in the *Radio Telefis* case). The effect of this likely approach is to set the interface between patents and competition law according to the purpose and scope of the claims. For broad genetic material composition and composition application patents this is potentially a considerable exemption from competition.

(iii) *Refusal to supply*

Section 46 of the *Trade Practices Act* is a significant restriction on all conduct, including the exemption of certain conditions in licenses and assignments, and the reading down of the potential operation of this provision is likely to increase the scope of a patentee's broad claims. Recent decisions may signal further restrictions on the manner in which the *Trade Practices Act* deals with broad patents, in particular the license and assignment condition

⁹⁹ [1995] 4 CMLR 718.

¹⁰⁰ Reviewed in Abraham van Melle, 'Refusal to license intellectual property rights: the impact of RTE v EC Commission (Magill) on Australian and New Zealand competition law' (1997) 25 *Australian Business Law Review* 4 which argues this case has application in Australia and New Zealand.

exemption, and the likely limits of claims against a refusal to allow access to genetic material compositions covered by a patent.

Section 46 of the *Trade Practices Act* proscribes a corporation with a substantial degree of power in a market from *taking advantage* of that power for the purpose of eliminating or substantially damaging a competitor, preventing entry into a market or deterring or preventing a person from engaging in competitive conduct.¹⁰¹

The decided cases leave open the defining features of a hypothetical competitive market. It is certainly open to question whether a patent holder would ever pass the threshold for market power,¹⁰² especially as courts appear to generally favour characterising markets for intellectual property rights very broadly.¹⁰³ If this threshold is passed, the key element in any assessment of a breach of this provision by a patentee will be assessing the notion of ‘taking advantage’. Some early decisions supported the contention that relying on a statutory intellectual property right will not itself be ‘taking advantage’ of market power.¹⁰⁴ However, the more recent *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd*¹⁰⁵ suggests that ‘taking advantage’ merely means ‘using’ (without any pejorative sense to misuse) and the test is whether a firm with market power could or would adopt the disputed conduct in a

¹⁰¹ The Trade Practices Amendment Bill (No 1) 2000 proposes an amendment which will allow the onus of proof to be reversed in an action brought by the Australian Competition and Consumer Commission where a corporation has a substantial degree of market power and has taken advantage of that power. In these circumstances the corporation will be required to establish that it has not taken advantage of its power for one of the proscribed purposes set out in *Trade Practices Act* s 46(1).

¹⁰² Hanks and Williams, above n 57, 452.

¹⁰³ For example *Ah Toy Pty Ltd v Thiess Toyota Pty Ltd* (1980) 30 ALR 271 and *Broderbund Software Inc v Computermate Products (Aust) Pty Ltd* (1992) 22 IPR 215 where the market was broadly defined so that the *Trade Practices Act* had no application; Hanks and Williams, *ibid*, suggest even a pharmaceutical patent with no close substitutes might be considered in a broader range of activities of the patent owning company, such as research and marketing (452); however, the recent decision in *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* [2001] FCA 1800 suggests courts in future might be inclined to find market power even when there is a small market share.

¹⁰⁴ *Warman International v Envirotech Australia Pty Ltd* (1986) 11 FCR 478, 502.

¹⁰⁵ (1989) 167 CLR 177.

competitive market.¹⁰⁶ The recent High Court majority in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*¹⁰⁷ reviewed the *Queensland Wire* decision:

‘[T]he way to test whether BHP was taking advantage of its power was to ask how it would have been likely to behave in a competitive market. Exactly how competitive such a market might be, and the assumed structure of such a market, were open questions. The important thing was that, once it was concluded that in a competitive market BHP would have been constrained to supply QWI, and that BHP’s ability to refuse to supply resulted from the absence of such constraint, it followed that, in refusing to supply (for an anti-competitive purpose), BHP was taking advantage of its market power’.¹⁰⁸

The *Melway* majority in the High Court considered that Melway’s refusal to supply was a manifestation of its distribution system and so the ‘real question’ in issue was whether Melway, without its market power, could have maintained its distributorship system in a competitive market.¹⁰⁹ The majority accepted Heerey J’s reasoning in the Full Federal Court decision¹¹⁰ that Melway had the distributorship system in place before it attained market dominance and refusing to supply directories it was not denying Melway sales and nor would there be any assumption of lost sales in a competitive market and so there was no ‘taking advantage’ of its market power.¹¹¹

In explaining his conclusions, Heerey J pointed to analysis that ‘taking advantage’ is a test of market efficiency.¹¹² He cited other examples that supported his conclusion that ‘taking advantage’ of market power was lawful where it was use for an efficient economic objective.¹¹³ While Heerey J, and the *Melway* High Court majority, did not set out what efficiencies might justify using market power for a proscribed purpose, Heerey J provided some guidance:

¹⁰⁶ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd* (1989) 167 CLR 177; Mason CJ and Wilson J (with whom Dawson J (202) and Toohey J (216) essentially agreed): ‘If BHP lacked that market power – in other words, if it were operating in a competitive market – it is highly unlikely that it could stand by, without any effort to compete and allow the [QWI] to secure its supply of Y-bar from a competitor’ (192); Deane J adopted a different approach: ‘In refusing to supply in order to achieve that purpose [of preventing QWI from becoming a manufacturer and wholesaler of star pickets] BHP has clearly taken advantage of that substantial power in the market’ (197): for a consolidated view of the test see Lockhart J in *Dowling v Dalgety Australia Ltd* (1992) ATPR 41-165, 40,277.

¹⁰⁷ (2001) 178 ALR 253.

¹⁰⁸ *Ibid* 265; but note Kirby J (dissenting) rejects this analysis (282-284).

¹⁰⁹ *Ibid* 268.

¹¹⁰ *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128.

¹¹¹ (2001) 178 ALR 253, 268.

¹¹² (1999) 90 FCR 128, 135; Hanks and Williams, above n 57, suggested ‘taking advantage’ had to be considered in the context of efficiency and that conduct engaged in irrespective of market power was a matter of efficiency and not mere use of any market power (445).

‘Melway tendered a body of evidence as to the reasons for adopting its system. Wholesalers were dealing with customers in a market they knew as specialists. The wholesalers had a good understanding of customer requirements and an ability to sell different types of products to customers, giving supply and selling efficiencies. Major retailers like McEwans preferred “distributors of substance” who could service the product adequately. Wholesalers were given confidence to invest in marketing and customer development and especially promotion that was a critical element for Melway’s success. The wholesalers were permitted to maximise customer service and the meeting of customer needs including promotion. The wholesalers were able to service the public need for the product, including unprofitable small accounts ... All of this seems rational and not inherently improbable. And, importantly, Melway’s system worked.’¹¹⁴

Heerey J cited the Trade Practices Commission view that: ‘the Commission accepts that it is not reasonable to expect a corporation with a substantial degree of market power to supply each and every existing or new wholesale or retail outlet if it is apparent that it would not be to its commercial advantage to do so’.¹¹⁵ The Trade Practices Commission appeared to have in mind products that were technically sophisticated and required some special pre- or post-sales assistance.¹¹⁶ However, Heerey J’s conclusions go well beyond this:

‘It may be that the selling of the Melway directory (as distinct from its production) was not a high technology operation. But obviously enough the considerations which might amount to a legitimate business reason, in the present context of a book distribution system, are not limited by technology factors. Distribution involved intangible matters of fine commercial judgement, which the learned trial judge accepted as being genuinely made. The spectacular success of the Melway directory was unlikely to have been achieved without some contribution by the particular distribution system adopted. Melway was entitled to believe that, however good its particular mousetrap, the world was not going to beat a path to its door’.¹¹⁷

The High Court’s decision would therefore appear to have potentially narrowed the operation of s 46 in limiting the scope of unlawful anti-competitive conduct where economic efficiency arguments are considered relevant. Considering the economic efficiency arguments more broadly, the exclusive rights of a patent are justified to address a market failure,¹¹⁸ and are generally assumed to produce overall economic benefit by promoting beneficial innovation.¹¹⁹

¹¹³ Ibid, 135-136.

¹¹⁴ Ibid 136.

¹¹⁵ Ibid 135; Trade Practices Commission, *Misuse of Market Power* (1990) para 17.

¹¹⁶ Trade Practices Commission, *ibid*, para 17.

¹¹⁷ (1999) 90 FCR 128, 136.

¹¹⁸ Trade Practices Commission, *above n* 61, 8.

¹¹⁹ *Ibid*.

This forms the basis for an argument that the majority of patenting practices might be expected to be economically efficient. For example

‘Field-of-use, territorial, and other limitations on intellectual property licenses may serve pro-competitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialisation and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free-riding on the licensee’s investments by other licensees or by the licensor. They may also increase the licensor’s incentive to license, for example, by protecting the licensor from competition in the licensor’s own technology in a market niche that it prefers to keep to itself’.¹²⁰

It is certainly open to the courts after *Melway*, and depending on the facts of the particular case, to now consider the boundaries between patents and competition law on the grounds of economic efficiency so that a patent only becomes unlawfully anti-competitive when the conduct extends beyond the intended reach of the statutory monopoly (as in *Radio Telefis Eireann and Independent Television Publications Ltd v EC Commission*). For broad genetic material composition and composition application patents this is a significant development as a number of patenting practices, and licensing and assignment practices in particular, have theoretical economic efficiencies which in the past, when ‘take advantage’ merely meant ‘use’, may have been considered to be unlawfully anti-competitive. As Kirby J points out, corporations with market power prohibiting supply and price competition to the disadvantage of competitors, healthy competition and consumers,¹²¹ would now seem to be a real and lawful possibility, with the consequence likely to be restricted access and higher prices.

4. Conclusion

This paper traces the reading down of the threshold criteria for patenting under the *Patents Act* and the likely failure of the *Trade Practices Act* to ameliorate broad genetic material composition and composition application claims. Thus, the Trade Practices Review Committee should consider whether the ‘taking advantage’ test in s 46 of the *Trade Practices Act* needs to expressly limit patents (and other intellectual property rights) from the court’s

¹²⁰ United States Department of Justice and Federal Trade Commission, *Anti-trusts Guidelines*, above n 64, s 2.3.

¹²¹ (2001) 178 ALR 253, 274.

assessment of 'economic efficiency' recognising the special circumstances of patenting the products and process of biotechnology. The recent Intellectual Property and Competition Review Committee failed to consider the special circumstances of patenting in biotechnology where there is often very little scope for imitation or substitution. A failure to again deal with this issue is likely to mean restricted access to and higher prices for the patented products and processes of biotechnology in Australia. This has potentially significant consequences for promoting a domestic Australian biotechnology industry dependent on access to the genetic materials and the tools of biotechnology, and the access and reduced price of patented products and processes for Australian consumers (including the public health scheme funded by taxpayers).