

**Submission in response to National Competition Council Review
of sections 51(2) and 51(3) of the Trade Practices Act 1974, Issues
Paper June 1998**

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Review of sections 51(2) and 51(3) of the Trade Practices Act 1974

This submission in response to the June 1998 Issues Paper on the Review of sections 51(2) and 51(3) of the Trade Practices Act 1974 ("TPA") is made by the Australian Copyright Council, Australasian Performing Right Association, Australian Publishers Association, Australian Record Industry Association, Copyright Agency Limited and Screenrights. It is directed to the issues raised by section 51(3) of the TPA.

Executive summary

Copyright and other intellectual property rights play a substantial and increasingly valuable role in the Australian economy.

Copyright and other intellectual property rights do not restrict competition and are not inconsistent with competition laws, when viewed properly from a dynamic or *ex ante* viewpoint. Section 51(3) of the TPA does not exempt anti-competitive conduct from the competition law. Rather, the objective of section 51(3) is to promote competition and consumer welfare by ensuring an appropriate balance is struck between competition law and intellectual property rights. (See esp. sections 2, 3.1, 3.2 and 3.5.)

We do not believe that the alternative solutions canvassed by the Issues Paper would achieve the objectives of section 51(3) more appropriately or efficiently. On the contrary, they seem more likely to increase uncertainty, risks and other transaction costs. Nonetheless, we believe there is some scope for improving the wording of section 51(3). (See esp. sections 3.6 and 3.7.)

We question whether the risks and costs associated with any change to the legislation is warranted in any way where the Hilmer Inquiry identified no practical problems with the current provisions and at a time when the world community, through the World Trade Organisation, is undertaking preliminary studies of, amongst other things, the relationship of intellectual property rights, competition laws and trade laws.

1 Background

We note that the Issues Paper arises out of the Commonwealth Government's Legislation Review Schedule pursuant to the Competition Principles Agreement. We understand that it is intended to ensure that legislation and regulation which restricts competition should be retained only if the benefits to the community as a whole outweigh the costs, and if the objectives of the legislation (or regulation) cannot be achieved more efficiently through other means. We also note that, in respect of section 51(3) with which we are primarily concerned, recommendation 6.2 of the *Report by the Independent Committee of Inquiry on National Competition Policy* recommended that:

The provision exempting certain intellectual property matters be reviewed by relevant officials, in consultation with industry and other interested persons, to determine whether the current exemption is warranted; and if so, whether the current legislative

formula meets the intended policy objective, and whether current inconsistencies between various intellectual property rights are justified.

This recommendation arose because the Hilmer Inquiry considered ‘it was not in a position to make expert recommendations on the matter’. In its brief consideration of section 51(3), the Hilmer Inquiry also noted that ‘no submissions pointed to practical problems with the current provisions’.

Broadly, we are or represent a wide range of owners, licensors and licensees of copyright protected material. Our membership ranges from individual authors, composers and artists, small and medium sized businesses to multi-national enterprises.¹ A survey in 1994 estimated the contribution of ‘copyright industries’ generally to the Australian economy to be in the order of \$11 billion in 1992-3.² At the conclusion of the GATT Uruguay Round, the Commonwealth Government reported that:

Australian export industries involved with aspects of intellectual property contribute billions of dollars in revenue to Australia. They include a wide range of exporters of copyright material industries such as film, music and books, high value manufactures such as telecommunications, chemicals and pharmaceuticals and advanced technology, and wine makers who rely on labelling with their geographical locations as a marketing tool.³

We suggest, however, that, substantial though this contribution is, these reports do not adequately convey the importance of copyright in particular (and intellectual property more generally) and those who create it and exploit it for Australia’s future in the so-called ‘Information Age’.

2 Objectives

The Issues Paper questions whether “competition laws” and “intellectual property laws” are compatible with each other or in conflict. We submit that, properly understood and interpreted intellectual property rights and competition laws are compatible and consistent. We further submit that section 51(3) of the Trade Practices Act 1974 (“TPA”) plays an important role in facilitating that compatibility and consistency.

Competition laws and intellectual property laws are not necessarily ends in themselves, but rather means to an end. They are both policy tools designed to promote what can broadly be described as consumer welfare.⁴

¹ A brief description of each of the submitting organisations appears in the Appendix.

² Hans Hoegh Guldberg, Copyright: AN Economic Perspective, (Australian Copyright Council, 2 edn, Sydney, 1994).

³ Department of Foreign Affairs and Trade, Uruguay Round: Outcomes for Australia, (Canberra, December 1993), 38. At 39, the report referred to the dramatically changing composition of Australia’s trade.

⁴ For the TPA, see section 2.

2.1 Objectives of competition law

In this connection, we think it very important to stress that competition laws are intended to protect competition as a process for the benefit of consumers, not individual competitors.⁵ The distinction is important as failure to recognise that the object of protection is the competitive process and not individual competitors will often result in treating any restriction on conduct improperly as a restriction of competition.⁶

2.2 Objectives of intellectual property laws

The Issues Paper at page 24 cites the then Trade Practices Commission's Background Paper on the Application of the Trade Practices Act to Intellectual Property ("Background Paper") for the objectives of intellectual property regimes. More generally, we note that four broad explanations of intellectual property rights have been advanced:⁷

- (1) a contract or bargain theory: that, in return for the disclosure of the work or invention to the public, the author or inventor is granted an exclusive right of limited duration (sometimes called the 'exchange for secrets' theory);
- (2) a reward theory: that the exclusive right of limited duration is the author's or inventor's just reward;
- (3) an incentive theory: that in the absence of intellectual property rights there will be an under investment in innovation and new creation because of the risks of free-riding; and
- (4) a natural rights theory: that an author or inventor has a natural entitlement to the fruits of his or her intellectual activity just as he or she has an entitlement to the tangible results of physical activity.⁸

While some economists have questioned the need for intellectual property rights at all,⁹ the mainstream economic approach has accepted the incentive theory.¹⁰

⁵ *Queensland Wire v BHP* (1988) 167 CLR 177, 191 per Mason CJ and Wilson J, 194 per Deane J.

⁶ See e.g., Valentine Korah, *EEC Competition Law and Practice*, (Sweet & Maxwell, 5 edn, London, 1994), 269-72.

⁷ Fritz Machlup, *An Economic Review of the Patent System*, Study No 15 of the Sub-committee on Patents, Copyrights and Trademarks of the Committee on the Judiciary, United States Senate, 85th Congress, 2nd Session, (US Government Printing Office, Washington, 1958), 22-4.

⁸ In the context of copyright, this theory has been particularly important in the continental European tradition with its emphasis on the primacy of moral rights.

⁹ For example, Arnold Plant, 'Economic Theory Concerning Patents for Inventions' and 'Economic Aspects of Copyright in Books,' both reprinted in *Selected Economic Essays and Addresses*, (Routledge & Kegan Paul, London, 1974); Robert M Hurt and Robert M Schuchman, 'Economic Rationale of Copyright,' 56 *Am Econ Rev* (Supp.) 421 (1966); TD Mandeville at al., *Economic Effects of the Australian Patent System*, (AGPS, 1982); Prices Surveillance Authority, *Inquiries into the Prices of Books, Sound Recordings and Computer Software*.

¹⁰ For copyright, see e.g. William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law,' 18 *JLS* 325 (1989). For patents, see e.g., Machlup, *op. cit.*; NR Norman

In many situations, the reward theory and the incentive theory may seem similar. The reward theory has largely been rejected, however, for two reasons. First, it carries with it a notion of entitlement to some level of return when in fact (as is very often the case) the market may simply place no or little value on the results of the particular creation or innovation.¹¹ In contrast, the incentive theory as its name suggests lays a bait: it holds out the promise that the creator will be able to reap whatever value the market places on the resulting creation if he or she is willing to risk (gamble) his or her resources on successfully generating the creation or innovation. Secondly, the reward theory lends itself to limitation after the event by notions of fairness and reasonableness.

The protection of intellectual property rights, therefore, is intended to address the market failure attendant on free riding. Generally, the creation of material protected by copyright and other intellectual property rights involves large, upfront sunk costs and risks while the marginal costs of production tend to be small in comparison to the development costs and to fall with production volumes. Intellectual property rights therefore confer on the owner a power to exclude free riding and, depending on market conditions, to charge a price higher than the marginal cost of production. As a result, copyright and other intellectual property rights promote consumer welfare and technological progress by promoting investment in improvements to existing products and the development of wholly new products.

Accordingly, in economic terms, copyright and other intellectual property laws seek to achieve the same end as competition laws. They are two means to the same end, addressing different issues. Moreover, while from a static or *ex post* point of view intellectual property rights involve a possible cost, this is a very short term view. It is widely accepted that a dynamic or *ex antepoint* of view¹² is both preferred and requires a short term trade off in the interests of longer term gains and growth.¹³

'Patent Law Revision: Some Economic Considerations,' (1984) 12 ABL Rev. 226; OECD, Competition Policy and Intellectual Property Rights, (Paris, 1989). While some commentators refer to the function of trade marks as protecting the public from deception or confusion, the economic justification is still primarily the incentive theory: see e.g. Economides, 'Economics of Trade Marks,' 78 TMR 523 (1988) and William M Landes and Richard A Posner, 'Trademark law: An Economic Perspective,' 30 JLE 265 (1987).

¹¹ Consequently, intellectual property rights are truly a market-based solution since the level of returns depends entirely on the value in market place. Contrast the interventionist, regulatory solutions favoured by those opposed to intellectual property rights: see Rothnie, *Parallel Imports*, (Sweet & Maxwell, London, 1993), 549-51.

¹² That is, assessing the impact (if any) on competition at the time the decision is made to commit to the investment when the (potential) outcomes are both uncertain and (very) risky in contrast to the cherry picking, *ex post* assessment made after the risks have been undertaken and consequently focussing only on the successful outcomes: see e.g., Korah, *EEC Competition Law and Practice*, 5 edn, 274.

¹³ One influential American commentator has pungently expressed the relationship between the static and dynamic perspectives as follows:

"An antitrust policy that reduced prices by 5 percent today at the expense of reducing by 1 percent the annual rate at which innovation lowers the costs of production would be a calamity. In the long run a continuous rate of change, compounded, swamps static losses."

2.3 Objectives of section 51(3)

The High Court has clearly identified the rationale of section 51(3) as follows:

Section 51(3) determines the scope of restrictions the patentee may properly impose on the use of the patent. Conditions which seek to gain advantages collateral to the patent are not covered by s.51(3).¹⁴

We respectfully submit that this is both right and states in terms of patents the principle generally applicable to all intellectual property rights.¹⁵ It is merely a recognition that:

- competition law and intellectual property laws, while addressing slightly different issues, are directed to the same ends;
- intellectual property laws operate on a dynamic or *ex ante* view of the promotion of consumer welfare;
- the encouragement of particular dealings in intellectual property rights, particularly assignments and licensing of intellectual property rights is generally pro-competitive by encouraging the dissemination of new developments and improvements;
- there are potentially very high transaction costs in exposing dealings in intellectual property rights to 'unrestrained' application of competition law and/or costly authorisation or approval processes and, further, that those transaction costs can be highly inimical to risky investments in intellectual property.

We also wish to stress that the policy behind section 51(3) is hardly novel or unique. Statutory recognition that intellectual property rights require "exemption" from broader prohibitions on monopolies dates back to at least 1623: Section 6 of the famous *Statute of Monopolies* provided that:

"Provided also and be it declared and enacted that any declaration before mentioned shall not extend to any letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufacture within the realm, to the true and first inventor and inventors of such manufacturers which others at the time of marking such letters patent and grants shall not use, so as also they be not contrary to the law or mischievous to the state, by raising prices of commodities at home or hurt of trade, or generally inconvenient."

Frank H Easterbrook, 'Ignorance and Antitrust,' in Jorde and Teece (eds) *Antitrust, Innovation and Competitiveness*, 122-3. See also F M Scherer and David Ross, *Industrial Market Structure and Economic Performance*, (Houghton Mifflin, Boston, 3 edn, 1990), 613- 4.

¹⁴ *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83, 103 per Mason J.

¹⁵ For a similar approach (albeit not involving section 51(3) of the TPA), see *APRA v Ceridale* (1990) 19 IPR 1.

3 Particular issues raised by the issues paper

3.1 Does section 51(3) permit anti-competitive conduct?

We submit, in the strongest terms possible, that section 51(3) does not permit anti-competitive conduct which would otherwise be subject to Part IV of the TPA.

First, as discussed in section 2 above, intellectual property rights are pro-competitive; the view that they are in conflict with competition laws is wrong.

Secondly, as indicated in section 2.3 above, section 51(3) itself promotes competition and consumer welfare by encouraging the dissemination of intellectual property rights. Dissemination enables both more suppliers to obtain the benefits of the investment in creativity and innovation, and also allows satisfaction of a wider range of consumers' needs. Section 51(3) also promotes dissemination by promoting certainty and reducing other transaction costs.

Thirdly, section 51(3) is limited in application: it does not exclude the operation of section 46 and 48 of the TPA. Therefore, the competitive process is thoroughly protected since generally the holder (or licensee) of an intellectual property right will not be able to impair competition unless he or she has a substantial degree of power in a market.¹⁶

In light of this, we are far from convinced that the maintenance of section 51(3) imposes any costs on the Australian economy. Further, to the extent that there may be costs, we firmly believe that they would be far outweighed by the costs which would be imposed on the economy by the repeal of section 51(3), particularly through the increased uncertainty and very substantial transaction costs that would result from repeal.¹⁷ A statutory exemption such as section 51(3), therefore, is best suited to achieve the desired objectives including the Agreed Principles.¹⁸

3.2 Relevance today

We have already referred above to the increasing importance of intellectual property rights to the Australian economy and the world trading system. We submit, therefore, that the objectives of intellectual property laws and section 51(3) are as relevant today, if not even more so.

¹⁶ See for example *Outboard Marine v Hecar* (1982) 66 FLR 120 at 143 per Fitzgerald J; *Broderbund Software v Dataflow* (1991) 22 IPR 215, 244 per Wilcox J. We note that the exemption of section 46 of the TPA from the operation of section 51(3) is consistent with the exception from section 6 of the Statute of Monopolies for patents and privileges which are 'mischievous' to the State. Those of us which are collecting societies are also subject to the regulatory oversight of the Copyright Tribunal, which was established to address concerns about monopoly power: see eg. Lahore, *Copyright & Designs*, (Butterworths, looseleaf), para. 30,000 et seq.

¹⁷ We consider the costs and risks in more detail in sections 3.4 and 3.6.

¹⁸ Hilmer Inquiry, *National Competition Policy*, 99-100.

3.3 International obligations

In our view, Australia's international obligations are very relevant. Australia is and has for many years been party to major international conventions relating to intellectual property.¹⁹ More recently, intellectual property has also been included within the World Trade Organisation through the TRIPS Agreement.²⁰ This is particularly important as a failure to provide protection for intellectual property rights in accordance with the TRIPS Agreement exposes a member to the risk of trade sanctions through the dispute resolution process of the World Trade Organisation.²¹

Article 40 of the TRIPS Agreement deals specifically with the application of competition law to intellectual property rights. It permits competition law to override intellectual property rights only *in particular cases* where the practice or condition constitutes an abuse of intellectual property rights and has an adverse effect on competition in a relevant market. (We note that article 40 permits intervention; it does not require it.) This provision clearly recognises, therefore, the primacy of intellectual property rights generally.

Section 51(3) is clearly consistent with the requirements laid down in the TRIPS Agreement since section 51(3) does not preclude the operation of section 46 of the TPA. A requirement that the validity of licences be subject to an authorisation or notification process, however, would not appear to be consistent with the TRIPS Agreement as the prohibition would operate generally (subject to the possibility of authorisation or notification), not in particular cases.

3.4 Consequences of removal

We are extremely concerned about the consequences of repealing section 51(3).

At the most basic level, repeal of section 51(3) could only mean that Parliament had consciously chosen a new policy. The existing case law and understandings would be irrelevant. There would be a very high risk that regulators, courts and private litigators would conclude that dealings in intellectual property rights should not be judged by a dynamic, *ex ante* perspective; instead a static *ex post* view would be adopted. This would undermine, if not defeat, the objectives of the intellectual property laws; it would severely impair investment in creation, development and dissemination; it would introduce great uncertainty and expose owners, licensors and licensees to potentially large transaction costs.

3.5 Are intellectual property rights different?

We submit that the nature of intellectual property rights does warrant the retention of section 51(3). The static or *ex post* standard by which competition law seeks to assess transactions and dealings is whether or not the supplier has power

¹⁹ For example, the two principal treaties date from the 1880s: Berne Convention (for copyright), Paris Convention (for patents, trade marks, designs).

²⁰ Agreement on Trade Related Aspects of Intellectual Property.

²¹ TRIPS Agreement, article 64.

to charge a price over and above the marginal cost of supply.²² The very purpose of intellectual property rights, however, is to hold out the prospect of charging prices higher than the marginal costs of supply.²³

3.6 Other mechanisms

As the Issues Paper notes, other regimes approach the relationship between intellectual property rights and competition law in quite a wide range of ways. So far as we are aware, there is no uniform or preferred approach.²⁴

We are aware that the laws of a number of countries expressly exempt various dealings in intellectual property rights from the operation of some or all aspects of competition law: eg. Austria, Germany, Japan, Switzerland in addition to those of New Zealand.²⁵

We submit that great care would need to be exercised in seeking to import into Australia a model based on beliefs about how an overseas jurisdiction's law may work.

For example, the Issues Paper refers favourably to the Guidelines adopted by US enforcement agencies. The USA, however, has a much more active tradition of private enforcement of competition laws on which the Guidelines are neither binding nor influential. In addition, the USA has experienced far greater volumes of litigation about intellectual property rights under US antitrust laws. It is far from clear that such levels of litigation are desirable in Australia. US courts have relatively recently developed a strong balancing approach which recognises the importance of the role intellectual property rights play in providing incentives.²⁶ That has been in a context, however, where US law has never included a counterpart to section 51(3) or the authorisation and notification processes included in the TPA. It is very questionable that Australian courts would or could follow that route in the face of a repeal of section 51(3).

The Issues Paper also refers to the group of block exemptions promulgated by the European Commission. We respectfully submit that this would not be an appropriate model to follow.

²² See eg. Scherer and Ross, *Industrial Market Structure and Economic Performance*, 3 edn, chap. 2.

²³ See section 2 above.

²⁴ In this connection, we note national perspectives are so divergent that the World Trade Organisation has set up a mere "working group" to explore the interaction of intellectual property rights, competition and trade laws: Singapore Ministerial Declaration, WT MIN (96)/DEC/W, 13 December 1996 para 20. The differences of view were so great that the declaration made it clear that the Working Group was set up to "study" the issues and did not entail a commitment even to negotiations at a later date.

²⁵ An overview of some of these can be found in OECD, *Competition Policy and Intellectual Property Rights* (1989).

²⁶ Eg. *US v Studiengesellschaft Kohle mbH* 670 F 2d 1122 (DC Cir 1982); *Berkey Photo v Kodak Eastman* 603 F 2d 263 (2d Cir 1979).

- The need for the block exemptions arose out of a very wide interpretation of what constituted a restriction of competition: in effect virtually any restriction on conduct.²⁷
- The Commission's approach was developed at a time when the European Community did not have any competence over intellectual property rights and in a context where intellectual property rights (granted and confined to national territories) were being exploited to circumvent the creation of the common or internal market.
- The block exemptions have been drafted in legalistic detail in a type of pigeon-holing approach. Treatment of particular types of arrangements in different block exemptions is not necessarily consistent. It also imposes unnecessary constraints on commercial dealings.²⁸
- The Commission has never been able to deal with its work load.²⁹
- The Commission often intervenes and requires the parties to re-negotiate arrangements after the balance of negotiating power has shifted.³⁰
- The Commission itself is exploring ways to deal with these issues more appropriately and effectively.³¹

The Issues Paper also questions whether or not it will be preferable for exploitation to be subject to the authorisation or notification process. In the strongest terms possible, we submit that this would not be appropriate.

- As already noted, investment in the creation of intellectual property rights is the uncertain and risky enterprise. The certainty provided by a provision like section 51(3) removes some of that uncertainty and risk by providing a secure environment in which to invest.
- Also as already noted, the repeal of section 51(3) can only signal to regulators, courts and private litigants a deliberate change of policy which would be highly inimical to the balanced approach taken to date by the courts in adopting the dynamic, *ex ante* point of view.
- The authorisation process and to a lesser extent the notification process is expensive. Filing fees, particularly for authorisations, are high. The costs of preparing applications is far, far higher (often running into the order of \$50,000-\$100,000). This is an unwarranted burden on business in the absence of properly assessed anti-competitive effects.³²

²⁷ See eg. Korah, *EEC Competition Law and Practice*, 5 edn, 269-72.

²⁸ The Commission condemned one arrangement in part because it was not the normal way the industry dealt with the issue: see Rothnie, "Commission Re-runs same old Bill", [1990] EIPR 72.

²⁹ Korah, *op-cit*, 272-4.

³⁰ Korah, *op-cit*, 274-7.

³¹ For example, in the face of sustained criticism, the Commission has proposed adopting a much more "economic" approach in place of its formalistic approach to vertical restraints: European Commission, Green Paper on Vertical Restraints in EC Competition Policy, January 1997.

³² These transaction costs would still be present even if it were possible to maintain the current approach to defining markets since parties would be forced to obtain expert and expensive advice on whether or not the arrangements would potentially result in a substantial lessening

- The authorisation and notification process also increases other transaction costs. For example, they present the regulator with opportunities to force the parties to re-negotiate arrangements, often after the balance in bargaining power has shifted.³³
- We note that the then TPC has published the Background Paper. This is in some respects similar to the Guidelines published by US regulatory agencies. While we do not necessarily agree with all the details of that Background Paper, we believe it sets out a generally reasonable approach to its subject matter. Nonetheless, it is a document of an administrative agency only. It is not binding on the courts or private litigants and consequently it is unable to provide the necessary degree of certainty.
- Moreover, administrative agencies may also change their views simply as a result of changes in personnel. In this respect, while administrative guidelines can be useful, they clearly fail to satisfy at least the first three Agreed Principles reported by the Hilmer Inquiry.³⁴

3.7 Is section 51(3) expressed sufficiently precisely?

Meaning of “relates to”

We note the concerns expressed about the meaning of the words “relates to”. The expression is used in many other contexts and has been the subject of judicial consideration in those contexts. The courts have repeatedly recognised the very broad scope of the meaning. In our view, therefore, it is highly likely that Parliament was both aware of that judicial interpretation and adopted the expression advisedly. As this is consistent with the objectives of both intellectual property rights and competition law, we submit that the term should be maintained.

Should section 51(3) apply to other types of intellectual property?

The Issues Paper suggests that section 51(3) applies only to the first embodiment of a work or other subject matter. We think that is a most surprising conclusion and wrong. Section 51(3) should be amended, however, to make this clear.

The Issues Paper raises questions about the treatment of registered trade marks. As will be apparent from section 2 above, the inclusion of registered trade marks in section 51(3) is consistent with the rationale of protecting trade marks.

Insofar as relevant to the present context, the Trade Marks Act 1995 makes three changes of substance over the Trade Marks Act 1955. The concept of registered user was not continued. It has been replaced, however, by authorised use (ie. licensed use). This is not a substantive change in terms of the relationship with competition law since both concepts are just licensed use. Registered use was

of competition. Moreover, these assessments often fall to be made under pressure, when both urgency and certainty are at a premium.

³³ While perhaps not reaching the levels achieved by the European Commission, this is clearly an issue with the ACCC.

³⁴ At pages 99-100.

introduced into the legislation at a time when it was thought the common law did not permit licensing of trade marks. It was not until the *Pioneer* case in 1977 (ie. after the enactment of section 51(3)) that an Australian court authoritatively recognised that registered trade marks could be licensed without registering the user.³⁵ Secondly, Parts C and D of the Register were abolished and the concepts of collective trade marks, certified trade marks and defensive trade marks were introduced. Thirdly, the 1995 Act formally recognises rights to assign applications for registration.

Accordingly, we submit that at least:

(a) section 51(3)(a)(i) and (ii) should be amended to include references to a registered trade mark, a certification trade mark, a collective trade mark, a defensive trade mark *and* a person who has applied to register such trade marks or, in the case of section 51(3)(a)(ii), a right to apply to register such trade marks;

(b) add a new section 51(3)(a)(vii):

“the use of (as the case may be) the trade mark, certification trade mark, collective trade mark or defensive trade or the goods or services in respect of which the trade mark may be used.”

The Issues Paper raises the treatment of “unregistered” trade marks and confidential information. It may be that these subject matters are not specifically addressed in section 51(3) because, unlike those rights which are addressed, they are not created by statute. To some extent, of course, these rights are addressed under section 51(2). We also understand that there is some uncertainty about the legality of “licensing” an “unregistered” trade mark. Consistently with the objectives and principles we have referred to above, however, we see no reason in principle why section 51(3) could not be expressed to cover dealings in these rights.

20 August 1998

Australasian Performing Right Association Limited
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³⁵ 137 CLR 670.

Appendix: information about submitting organisations

Australasian Performing Right Association

The Australasian Performing Right Association (APRA) is a copyright collecting society whose members are composers and music publishers. APRA licenses the broadcast, public performance and cable transmission of live and recorded musical works and accompanying lyrics.

Australian Copyright Council

The Australian Copyright Council is a non-profit company limited by guarantee, partly funded by the Australia Council, the Commonwealth Government's arts funding and advisory body. The Council's roles include making submissions in the interests of creators and other copyright owners. The Council also provides information and advice about copyright, through publications, information sheets, a web site, seminars, and a free legal advice service. There are 24 organisations affiliated with the Council, which include the five other organisations making this submission.

Australian Publishers Association

The Australian Publishers Association is the peak industry body representing book publishers in Australia. The APA membership currently embraces about 88% of publishing in Australia. The Association is concerned with the interests and problems of all Australian publishers, large or small; commercial or non-profit; academic, specialist or popular; locally or overseas-owned. Size, nationality of form or types of works published are not important criteria for membership of the Association, but members must be engaged in publishing in Australia as a bona fide and ongoing activity.

Australian Record Industry Association

The Australian Record Industry Association (ARIA) is an industry organisation whose members are Australian record companies. It has over 80 members.

Copyright Agency Limited

Copyright Agency Limited (CAL) is a copyright collecting society whose members include most of Australia's authors and publishers and journalist members of the Media Entertainment and Arts Alliance. CAL licenses the reproduction of the works of its members and of members of affiliated reproduction rights organisations overseas. CAL has been declared by the Commonwealth Attorney-General as the approved collecting society for copying of works by educational institutions under the statutory licence in Part VB of the Copyright Act. CAL also licenses copying by governments, corporations, legal and accounting firms, not for

profit organisations, churches, libraries providing commercial document delivery services and media monitors.

Screenrights

Screenrights is a copyright collecting society for film producers, distributors, script writers and other rights owners in film. Screenrights administers rights in film and television programs on behalf of these copyright owners, collecting fees for the exercise of these rights and distributes this income to the relevant rights holders. Screenrights has been declared by the Commonwealth Attorney-General as the approved collecting society for copying of broadcasts by educational institutions under the statutory licence in Part VA of the Copyright Act. The Society does not replace individual licensing of rights in traditional markets; rather, it administers rights that are impossible or difficult for rights holders to exercise on an individual basis.

Screenrights is a private, non profit organisation. Membership is free. All money collected by Screenrights is distributed to producers, distributors, scriptwriters and music copyright owners after deduction of administrative overheads only. For the 1996-97 financial year, these overheads were approximately 11%.