

Intellectual property rights & competition law

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Overview

Relationship between competition and IP laws

Proposed changes to treatment of IP in Trade Practices Act 1974

Implications of these reforms

IPRs and competition – generally

IPRs are rights to exclude

- Prevent supply of perfect substitutes
- Reflects view that creators must be able to appropriate some social gain of creation to invest in creative effort

IPRs reflect balancing between social benefit and exclusive right

Incentive provided by IPRs provides stimulus to *dynamic competition, i.e.*, competition through innovation

Right to exclude may also distort competition

- Competition policy should respond to these instances

IPRs and competition – Australia

Section 51(3) of Trade Practices Act 1974

- Exempts conditions of licenses and assignments from certain provisions of TPA, to extent those conditions relate to IPR subject matter

Areas of exemption:

- S. 45: collusive conduct
- S. 45A: contracts, arrangements, or understandings regarding price
- S. 47: exclusive dealing
- S. 50: acquisitions resulting in substantial lessening of competition
- S. 50A: acquisition outside Australia of controlling interest in a corporation, which would lead to substantial lessening of competition

Not exempted: s. 46 (abuse of market power), s. 48 (retail price maintenance)

Ambiguity as to scope of s. 51(3) and lack of case law

Recent reviews and proposals

Section 51(3) TPA reviewed by

- National Competition Council: recommended that s. 51(3) be retained but substantially narrowed
- Intellectual Property and Competition Review Committee:
 - Essential that firms able to enter into efficient contracts regarding IPRs
 - But IPRs should not be capable of being used to *exceed* market power directly conferred
 - Recommended that s. 51(3) be re-framed
 - Conditions regarding IPRs in license and contract arrangements should be subject to ‘substantial lessening of competition’ test
 - Government response: accepted addition of competition test

Implications of reform

Section 51(3) TPA reforms require considering whether conditions relating to IPRs have (likely) effect of substantially lessening competition

Areas affected:

- Horizontal agreements; mergers and acquisitions
- Vertical agreements
- Resale price maintenance
- Assessment of competitive effects of conditions relating to IPRs

Under Australian competition laws, competitive impacts considered separately from wider effects on efficiency

Authorisation: provides mechanism for parties to seek permission for conduct otherwise in breach of TPA

Presumption that competition is socially desirable

Conclusions

Mere fact that conduct involves imposing conditions in relation to IPRs, should *not* exempt conduct from competition laws, when (likely) effect is to substantially lessen competition

What might otherwise be anti-competitive conduct may *increase* efficiency and rivalry with respect to IPRs

Important to ensure that competition laws do not deter potentially beneficial conduct

The logo for onecng features a stylized lowercase 'o' on the left, which is a dark grey circle with a lighter grey ring inside, creating a 3D effect. To the right of the 'o' is the lowercase text 'necng' in a bold, black, serif font.

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