

AUSTRALIAN BUSINESS LAW REVIEW

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EDITORIAL 5

ARTICLES

Patent privileges and the National Competition Policy – patent scope and allocation? – *Charles Lawson*

This article suggests that the modern Australian policy for strengthened patent privileges has failed to adequately address the requirement to demonstrate that the benefits of the restriction on competition outweigh the costs and that the objectives of patent privileges can only be achieved by restricting competition. These requirements are the principle articulated in the Independent Committee of Inquiry into Competition Policy in Australia (Hilmer Committee) and its subsequent codification in the Competition Principles Agreement (CPA) as part of the National Competition Policy. The article concludes that applying the requirements of the CPA to patent privileges and assessing the broader debates about the appropriate patent scope and allocation is more likely to deliver a more rational patent policy that is more likely to be suited to the Australian community. 7

Potential anticompetitive effects of bundling – *Joshua S Gans and Stephen P King*

There has been a recent surge of antitrust interest in the bundling behaviour of firms with market power. In this light, this article reviews the economic arguments that raise concerns about the potential anticompetitive effects of bundling; distinguishing when it is and is not likely to be of concern to competition authorities. 30

Separation of powers and the Australian Competition Tribunal – *Michael Borsky*

This article raises the possibility that the Australian Competition Tribunal (the ACT) may contravene a fundamental basis of democratic government – the doctrine of separation of powers. On the basis of its powers, functions and composition, it is argued that the ACT exercises non-judicial power. The article notes that the exercise of non-judicial power by a presidential member of the ACT (necessarily a judge of a Federal Court) appears to violate the principle of separation of judicial powers. The persona designata exception is explored but may be inapplicable by reason of incompatibility. It is submitted that presidential members of the ACT, in evaluating public benefits and the public interest, are required to exercise discretion on political grounds not confined by factors prescribed by law. On the basis of the tests laid down by the High Court in *Grollo* and *Wilson*, therefore, incompatibility appears to arise. Accordingly, the article suggests that the ACT may breach separation of powers and lack constitutional validity. 36

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5. Austin, n 4, p 56.

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7. Sheehy et al, n 6 at 221.

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