

TRADE PRACTICES LAW JOURNAL

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ARTICLES

The interface between intellectual property and antitrust: Some current issues in Australia – Justice Kevin Lindgren

The relationship between intellectual property and antitrust or pro-competition legislation is a tense one. In Australia, the issue raises for consideration ss 46 and 51(3) of the *Trade Practices Act 1974* (Cth). In the first part of this article seven cases are considered, four Australian, two United States and one European, and the question is asked: how would the overseas cases have been approached under Australian law? The second part of the article addresses, from the trade practices viewpoint, the position of the Australian copyright collecting societies, and, in particular, the system of declared collecting societies and “statutory licences” under the *Copyright Act 1968* (Cth). The third and final section of the article deals with a series of recent reform proposals..... 131

Ascertaining when loss is first suffered by misleading conduct: Relevance of contingencies, future predictions and concealment – Sharon Christensen and Stephen Lumb

The seminal case in the context of limitation periods under the *Trade Practices Act 1974* (Cth) is *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514. While the High Court concluded that a plaintiff should not be required to commence a claim until the existence of her or his loss is ascertained or ascertainable, the decision was limited to consideration of contingent loss under an indemnity. While it is accepted that the meaning of “ascertainable loss” in the context of a pure contingency is clear, several decisions since *Wardley* have applied the principle of ascertainable loss to losses which are not readily identifiable as “contingent”. This article critiques the concept of “ascertainable loss” with the aim of determining whether the conceptual framework for ascertaining when the relevant limitation period commences should adopt “contingent loss” as its core principle, or a broader concept based on “ascertainable loss” 149

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