

# TRADE PRACTICES LAW JOURNAL

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## EDITORIAL

**The long and (not so) short of it** ..... 81

## ARTICLES

**The allure of exclusive rights: Insights from the C7 litigation** – *Kon Stellios* and *James Arnott*

How should competition law approach the acquisition by a firm of exclusive rights to a scarce resource, particularly if that acquisition sends a competitor in the market out of business? This article addresses this question, with particular reference to the broadcast industry, by examining recent Australian jurisprudence on the topic, including the judgment in the C7 litigation. It argues that where exclusive rights are sold in a competitive tender process, a number of firms have a real chance of acquiring the rights when they next become available, and the rights are not sold for an unnecessarily lengthy period, it is very unlikely that the transaction will have the effect, or likely effect, of substantially lessening competition. .... 82

**Crime does not pay but hard-core cartel conduct may: Why it should be criminalised** – *Dr Adrian Hoel*

It is over five years since the Dawson Committee recommended that criminal sanctions for hard-core cartel conduct be introduced into the *Trade Practices Act 1974* (Cth) to run alongside the existing civil penalties. Over four years ago, the Howard Government agreed, in principle, to introduce these changes. Since the 2004 federal election until 2007, the Howard Government had a majority in both Houses of Parliament, as well as bipartisan support for this legislation, and over three years ago, it decided how hard-core conduct should be defined. Despite all this, it did not introduce a Bill, or actually pass any such legislation. In October 2007, a number of senior executives, as well as the owner of the Visy group of companies, Richard Pratt, agreed to admit to what was the biggest known example of cartel conduct in Australian history. There has been a great deal of public debate, involving politicians and the media about the proceedings and the people caught up in them. This article will discuss the proposed amendments and their background. It will also revisit the major rationales which were held by the Dawson Committee to justify their introduction, as well discussing the nature of white-collar crime in general. The Visy proceedings and the public debate surrounding them will be used as backdrop for this discussion. Lastly, the article will discuss what justifications there may have been for the Howard Government's failure to implement criminal sanctions despite having publicly declared its willingness to do so, and the likelihood of the Rudd Government doing so in the future. .... 102

**Competition v intellectual property: Uneasy allies or natural adversaries?**  
– *Dr Mitchell Landrigan*

The purpose of this article is to examine the relationship between competition and intellectual property (IP) in an Australian context. First, the background to competition policy and IP law reforms in Australia is briefly described. Then the different forms and nature of IP rights (as compared with real property rights) is examined, and possible tensions between the goals of IP laws and competition policy are considered. This is followed by an examination of some High Court cases dealing with rights or IP rights (and one United States Supreme Court case), as well as arguments and counterarguments about whether IP rights should be presumed to give rise to a finding of substantial market power. In the last section of the article, some of the findings of the Intellectual Property Competition Review Committee are considered and the treatment of IP rights in the two primary access regimes in Australia's competition law legislation, the national access regime and the telecommunications specific access regime are looked at, as well as s 51(3) of the *Trade Practices Act 1974* (Cth). ..... 116

**Promoting ethical business conduct: The case for reforming section 51AC** – *Frank Zumbo*

The operation of s 51AC of the *Trade Practices Act 1974* (Cth) has long been the subject of much debate. From the earliest days where the section's enactment was welcomed by those seeking a new legislative framework for the promotion of ethical business conduct until more recent years when such hopes have well and truly faded, discussion about the nature and scope of s 51AC has been ongoing and, at times, controversial. With s 51AC now approaching its 10th anniversary, it is timely to review recent amendments to the section and to consider possible reforms and alternatives to the section to ensure that Australia has an effective and well understood legislative framework for promoting ethical business conduct. .... 132

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