

FOREWORD

PROFESSOR JILL MCKEOUGH*

It is a great pleasure to introduce this special Forum issue of the *University of New South Wales Law Journal* which comprises articles on a spectrum of intellectual property law topics written by young and emerging scholars in the field of Australian intellectual property law. This Forum contributes insights into the trends and tensions that exist in an increasingly globalised world where no physical boundaries impede the distribution of information, focussing on the Australian response to these influences.

Intellectual property continues to expand in importance as an area of legal practice and as an increasingly key aspect of the asset base of most businesses and cultural and social activities. It is estimated that 70 per cent of Australia's assets are held in the form of intellectual property, and this is true despite our enormous mineral and resources wealth.

The International Legal Service Advisory Council ('LSAC') points to the continued expansion of Australia's legal and related services market internationally to the point where provision of legal services rivals education as an export commodity. Legal exports and international activity in the 2008–09 financial year was \$709.1 million, an increase of \$34 million or five per cent since the last biennial survey in 2006–07. The survey is available on: www.ilsac.gov.au/thirdsurvey. Not only that, legal services involving intellectual property law are the preeminent area for international transactions and therefore main 'export' of Australian legal services is intellectual property.

Quite apart from the economic and trade implications of the ever-expanding role of intellectual property law, it has always been a tool for supplying information, entertainment and new technology to grateful consumers. However, despite and perhaps because of its importance, intellectual property law continues to become ever more complex, with the *Copyright Act 1968* (Cth) now weighing in at over 700 pages, as Catherine Bond discusses in her article on the complexity of copyright law and the 'muddle' surrounding law reform in Australia. Drastic overhaul has been recommended in the past but not acted on, although as Sam Ricketson has pointed out, being middle-aged and overweight does not necessarily prevent one performing one's job¹ and the *Copyright Act*

* Dean, Faculty of Law, University of Technology, Sydney.

¹ Sam Ricketson, 'Simplifying Copyright Law: Proposals from Down Under' (1999) 21 *European Intellectual Property Review* 537, 537.

1968 (Cth) has proven remarkably adaptable, as Catherine's article demonstrates, albeit perhaps losing sight of important underlying principles at times – perhaps it is time to update our understanding of a fundamental principle?

Copyright reform remains on the political agenda with 'Cleaning Up Copyright' being part of the arts policy released by the Greens before the last election, and in October 2011 the Attorney General, the Hon. Robert McClelland MP, announced that he intends the Australian Law Reform Commission ('ALRC') to examine whether *the exceptions in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment*. The announcement of the new reference underscores the importance of the fair dealing provisions and exceptions to infringement provisions of the *Copyright Act 1968 (Cth)*. These are highly contentious issues, shaping the nature of copyright as a property right and Anna Spies examines the 2006 amendments to the *Copyright Act 1968 (Cth)* relating to fair dealing for parody and satire in the context of international shifts in approach to these matters.

Despite the complexities of copyright law, it is not necessarily the most controversial of intellectual property rights nor is it the only one where 'exceptions' are part of a major policy debate. Uncertainty surrounding the operation of and relationship between the exclusive rights granted to plant breeder's rights owners is also a major problem, as Jay Sanderson's article discusses in the context of an overview of the scope of 'cascading rights' for plant breeders, which extend protection to protected harvest material and possibly products derived from such material. Plant varieties legislation is seen as an important part of economic stability, and a specialised area. Indeed, plant variety rights were excluded from the review of intellectual property legislation under the Competition Principles Agreement as they were seen to be subject to different considerations than other IP rights.²

Another article discussing a paradox of intellectual property is Sarah Lux's discussion of famous brands and trade mark dilution. The concept of trade mark 'dilution' is to some extent inherently opposed to the requirement for 'distinctiveness' and the introduction and place of such US doctrines as dilution (which deals not with confusion as to source but rather protecting the value of a 'famous' mark so that it does not become diluted as an identifier of the source) and 'blurring' (undermining distinctiveness) or 'tarnishment' (negative use of the mark that creates inferior or degrading associations) are relatively new to Australian trade mark law. These doctrines potentially create difficulties for those wishing to wander about on the 'that great open common'³ of our everyday language.

Addressing another aspect of the modern concept of 'the commons' (in a copyright rather than trade mark context) is Judith Bannister's article focusing on the possibilities of open content licensing to enhance the publication of

2 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (Commonwealth, 2000).

3 *Re Dunn's Trade Marks* (1888) 41 Ch D 439, 455.

government information while still allowing retention of copyright by the author. The irony of using a property right to ensure access to government material is of course that this weakens the incentive to abolish or restrain Crown ownership of material. Judith poses the question ‘what exactly is being opened up?’ and reviews the significant policy tensions that lie behind principles of democratic accountability and good decision making. Questions we all ask ourselves in a ‘wikileaks world’.

This Forum provides thoughtful and fresh perspectives on aspects of an area of law which is a key foundation of our economic, cultural and social lives.