

EXECUTIVE OFFICE



**Australian  
Competition &  
Consumer  
Commission**

Our Ref: C2009/913  
Contact Officer: Lisa Anne Ayres  
Contact Phone: 02 6243 1189

GPO Box 3131  
Canberra ACT 2601  
23 Marcus Clarke Street  
Canberra ACT 2601  
tel: (02) 6243 1111  
fax: (02) 6243 1199  
www.accc.gov.au

16 October 2009

Senator Rachel Siewert  
Senate Standing Committee on Community Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600

*Sent electronically to: [community.affairs.sen@aph.gov.au](mailto:community.affairs.sen@aph.gov.au)*

Dear Senator

### **Inquiry into Gene Patents**

Thank you for your letter dated 15 September 2009 inviting the Australian Competition and Consumer Commission (ACCC) to provide written comments in order to assist the inquiry. The ACCC offers the following comments in response to the issues raised in your letter.

#### *Competition law*

As you are aware, the ACCC is the statutory body responsible for administering the *Trade Practices Act 1974* (TPA). The objective of the TPA is to enhance the welfare of Australians by promoting competition, fair trading and protecting consumers' interests. Among other things, and in general terms, the competition provisions prohibit:

- agreements that substantially lessen competition
- cartel arrangements between competitors
- exclusive dealing arrangements that substantially lessen competition
- resale price maintenance; and
- the misuse of market power.

I would be pleased to provide further background to these provisions as required.

#### *Exceptions from the TPA*

Section 51(3) of the TPA exempts intellectual property licence or assignment conditions that relate to the subject matter of the intellectual property from most of the competition provisions of the TPA. The exception applies to licences or assignments of patents, registered designs, copyrights, circuit layouts and registered trade marks. It only applies in respect of the subject matter of existing or pending intellectual property rights.

The section does not exempt conditions from either section 46 (misuse of market power) or section 48 (resale price maintenance) of the TPA. The consumer protection and unconscionable conduct provisions of the TPA also continue to apply.

Section 46 of the TPA prohibits a business that has a substantial degree of power in a market from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor
- preventing the entry of a person into a market; or
- deterring or preventing a person from engaging in competitive conduct in a market.

The High Court has said that intellectual property rights may constitute a source of market power,<sup>1</sup> however, the mere possession of a substantial degree of power in a market does not of itself constitute a breach of section 46.

Concerns may be raised when a holder of intellectual property rights refuses to licence others to use their intellectual property. The TPA does not require an intellectual property holder to licence intellectual property and, generally speaking, refusing to licence intellectual property does not of itself raise TPA concerns. However, if the intellectual property holder has substantial market power and refuses to licence the intellectual property for an anti-competitive purpose, then this refusal to licence may raise concerns under section 46 of the TPA.

Each circumstance must be considered on a case by case basis.

#### *Genetic Technologies Ltd's patent rights over BRCA1&2 testing*

The Committee has sought specific comment in relation to its consideration of the conduct of Genetic Technologies Ltd (GTG).

Concerns were raised with the ACCC when, in 2008, GTG indicated that it would be enforcing its patent rights over the BRCA1&2 testing. These concerns regarded the manner in which GTG attempted to withdraw access to its intellectual property rights and whether this raised concerns under section 46 of the TPA.

The issues that the ACCC considered were as follows:

- whether GTG had market power in a market concerning the provision of testing services for susceptibility for breast cancer by way of its exclusive licence over the patents
- whether GTG took advantage of any market power or had taken advantage of its exclusive licences; and
- if GTG had taken advantage of its market power, whether it was for the purpose of eliminating, or substantially damaging, its competitors.

On 2 December 2008 and in the course of the ACCC's consideration, GTG advised the ASX that it had reviewed its position on enforcing its BRCA testing rights and going forward it would not seek to enforce compliance with its request regarding its intellectual property rights to the licences. As GTG decided not to enforce its exclusive licence to use the susceptibility

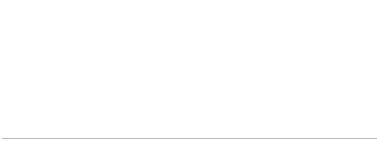
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<sup>1</sup> *NT Power and Water Generation Pty Ltd v Power and Water Authority* [2004] HCA 48 at [125].

testing patent in Australia, the ACCC was not required to form a view as to whether GTG may have breached section 46 or any other provisions of the TPA.

If you have any queries in relation to the information provided, or would like the ACCC to provide further information on any aspect, we would be pleased to assist. In this regard, please feel free to contact the ACCC's Group General Manager of Enforcement Operations, Mr Scott Gregson on (02) 6243 1350.

Yours sincerely

  
Brian Cassidy  
Chief Executive Officer