



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S40 of 2022

BETWEEN: **ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY LTD**
ACN 001 660 715
Applicant

and

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COMMISSIONER OF PATENTS
Respondent

IPTA'S SUBMISSIONS

Part I:

- 20 1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. The Institute of Patent and Trade Mark Attorneys of Australia (**IPTA**) seeks leave to make the following submissions, and to be heard, as *amicus curiae* on the Applicant's (**Aristocrat's**) appeal from the judgment of the Full Court of the Federal Court of Australia delivered on 6 December 2021 ([2021] FCAFC 202).

Part III:

3. IPTA wishes to make submissions in support of Aristocrat's appeal, dealing with relevant matters of law and of fact not dealt with by either party,¹ including the following:

¹ An *amicus* may be heard if it is willing to offer the Court a submission of relevant law or fact which will assist the Court in a way it would not otherwise have been assisted: *Levy v Victoria* (1997) 189 CLR 579 at 604-605; also, for example, APRA and Communications Alliance were given leave to be heard as *amici curiae* in *Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 54 at [6] (orders 3 and 5).

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- (a) The application of the Full Court’s test for manner of manufacture, regardless of the field of technology. IPTA would make submissions concerning the impact on research and industry in Australia of excluding from patentability² computer-implemented inventions that do not constitute an advance in computer technology;
 - (b) The illogical distinction the Full Court makes between an advance in computer technology and an advance in the use of computer technology;
 - (c) How the present test for whether a computer-implemented invention constitutes a manner of manufacture puts Australia at odds with its international obligation to make patents available without discrimination as to the field of technology involved, and has no justification in the *Patents Act*; and
 - (d) How the Full Court’s (and Commissioner’s) approach to construing a patent claim for the purposes of determining whether the claimed invention is a manner of manufacture is having a deleterious effect on the prosecution and grant of patents in Australia.
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4. Finally, IPTA submits that the Court should, rather than applying the two-step test posed by the majority of the Full Court, ask, “*Is the invention, considering the subject-matter of the claim as a whole, no more than a mere scheme, method of doing business or abstract idea?*”
5. IPTA represents the interests of patent attorneys in Australia, who act on behalf of clients in research and industry in Australia and overseas in the prosecution of patent applications through the Australian Patent Office. The members of IPTA represent the manufacturers and developers of many different inventions that are implemented on computers, well beyond the gaming industry.

² In these submissions the references to patentability, patentable subject matter or manner of manufacture of an invention refer to whether an invention is a manner of manufacture as required by section 18(1)(a) of the *Patents Act 1990* (Cth). This is a separate question to whether an invention is novel over the prior art or involves an inventive step over common general knowledge as required by section 18(1)(b) of the *Patents Act*.

6. In 2019, computer technology ranked as the fifth most-filed class for standard patent applications in Australia.³ In 2021, computer technology patent applications in Australia grew by 27 per cent.⁴
7. IPTA's experience is that a significant proportion of other patent applications, which might not be classed as "computer technology" *per se*, involve computer implementation, in particular in mechanical and electrical engineering; chemical and civil engineering; mining; medical technology; and biotechnology.⁵
8. Accordingly, the decision of the majority of the Full Court in relation to the patentable subject matter of computer-implemented inventions and their approach to construing claims in order to test whether they involve a manner of manufacture is of importance to those involved in conducting research and innovation in a broad range of industries beyond that in which Aristocrat is specifically interested. If that decision were to remain undisturbed, it will also significantly affect IPTA's members who draft and prosecute patent applications in Australia and overseas.

Part IV:

9. IPTA submits that the appeal should be allowed.

The new test for patentability of computer-implemented inventions extends well beyond the gaming industry

10. At FCJ [26]-[27] of the joint judgment of Middleton and Perram JJ, their Honours formulated a new two-step test to determine the patentability of a claim that includes a physical object that contains or may itself be a computer, asking:
 - (a) Is the invention claimed a computer-implemented invention?
 - (b) If so, can the invention claimed broadly be described as an advance in computer technology?

³ *Australian Intellectual Property Report 2022* as published by IP Australia on 22 May 2020: [https://www.ipaustralia.gov.au/files/ip-report-2022\(IP Australia Report\)](https://www.ipaustralia.gov.au/files/ip-report-2022(IP%20Australia%20Report)), Chapter 2, page 9 (Table P1).

⁴ IP Australia Report, Chapter 2, pages 9ff.

⁵ Affidavit of Philip Walter Gehrige sworn on 4 May 2022 (**Gehrige**) at [15].

11. The new test excludes from patentability inventions that are not mere business schemes or abstract ideas, and would otherwise be patentable, merely because they are computer-implemented.
12. Aristocrat has addressed the effect of this test in its own industry. However, because of the number of fields of endeavour in which computers are now used, a test that excludes from patentable subject matter any invention implemented in a computer that is not an advance in computer technology represents a seismic shift in patent law. It renders unpatentable swathes of inventions that would previously have been patentable subject matter, and that have been found as such.
- 10 13. For example, the new test excludes from patentability medical imaging and diagnostic machines, speed detection camera systems, green energy solutions, and biotechnology inventions such as COVID-19 diagnosis systems, where those inventions include features (as is often the case) implemented by way of software running on known computer processors.⁶
14. If there is no patent protection for computer-implemented inventions that do not constitute an advance in computer technology *per se*, research and investment into such inventions (being inventions in most fields of endeavour) will be significantly stifled, which will reduce the availability of products and methods of utility to society.⁷
- 20 15. From the Commissioner's submissions on the special leave application,⁸ IPTA understands that she contends that the Full Court's new test for manner of manufacture and reasoning at FCJ [26]-[27] should be understood as limited to computer implementation of abstract ideas. However, first, that is not what the patents in suit claim; and secondly, that is not what the Full Court says at FCJ [26]-[27]. Those paragraphs are not so limited, for the reasons that follow.
16. The majority introduced the test thus: "*In cases such as the present we would therefore respectfully favour the posing of these two questions in lieu of those*

⁶ Gehrig at [16].

⁷ Gehrig at [19].

⁸ Respondent's submissions on the application for special leave dated 7 January 2022 (**RSLS**) at [24].

advanced by the primary judge". The majority's reference in FCJ [26] to "*cases such as the present*" is a reference to the cases described in the previous paragraph: namely, cases "*where the claim includes a physical object which contains or may itself be a computer and where there is a question as to whether what is claimed is in substance a computer-implemented invention or something else*" (emphasis added). Those words do not, as IPTA understands the Commissioner asserts,⁹ limit the new test at FCJ [26]-[27] to cases where the invention is an otherwise unpatentable mere scheme or abstract idea. On the contrary, those words make it clear that the new test applies to any process or apparatus which, in addition to other physical features, includes a computer configured to perform certain functions or operations.

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17. Furthermore, the two-step test promulgated by the majority is, on its face, not limited simply to the kind of invention the subject of this case. In fact, other parts of the majority's reasons indicate that the majority *did* mean to exclude from patentability inventions in other fields that include computer implementation. At FCJ [87], the majority said that there are aspects of EGMs relating to human interaction that may be inventive, and that if those aspects *also* constitute an advance in computer technology, they will be patentable subject-matter. That is, on the present test, it is not sufficient for patentability for an invention to be an advance in the field of human interaction, if the invention is implemented in a computer. Similarly, at FCJ [65], the majority accepted that two aspects of the claimed invention – changes in the reel structure and configurable symbols – "*may constitute advances in gaming technology*". However, because they were not advances in computer technology, the claimed invention was held not to be patentable.

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The majority erred in holding that advances in the use of computer technology are not patentable whereas an advance in computer technology is

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18. The majority also draws a distinction at FCJ [63] between an advance in computer technology, and an advance in the use of computer technology, implying that the former is patentable, but the latter is not. A similar statement is at FCJ [93], where

⁹ RSLs [25].

the majority says, “[t]he encouragement of novel uses of computers is not the point of this area of patent law. Its purpose is the encouragement of novel uses of computers to advance computer technology.”¹⁰ This distinction has not been addressed by Aristocrat in its submissions.

19. The majority does not cite any authority for this principle. It is inconsistent with the Full Federal Court’s statement in *Commissioner of Patents v RPL Central Pty Ltd* (2015) 238 FCR 27 at [104], citing *Research Affiliates LLC v Commissioner of Patents* (2014) 227 FCR 378, that a business method implemented on a computer can be patentable where there is “some ingenuity in the way in which the computer is utilised” (at [104]), even assuming that test is correct (as to which IPTA adopts the submissions of Aristocrat). It is also inconsistent with *obiter* of this Court stating that claims to computer programs having “the effect of controlling computers to operate in a particular way” are patentable subject-matter.¹¹
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20. Indeed, the practical consequence of the majority’s statement is that their new test for manner of manufacture as it relates to computer-implemented inventions now requires an advance over pre-existing computer technology. The same approach, applied in the field of pharmaceuticals, would eliminate inventions that are new uses of a known substance.¹² At FCJ [93], the majority acknowledged that their approach “is likely to overlap with the question of novelty”. With respect, that is an understatement. This requirement impermissibly¹³ conflates manner of manufacture with at least novelty. Manner of manufacture is purely a test of eligible subject matter, not whether what is claimed is new, advantageous or inventive.¹⁴
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¹⁰ The phrase “of this area of patent law” does not fix the problem. It is not a material limitation on the statement, because the two questions the majority applied would now bring into “this area of patent law” a swathe of inventions in various fields of endeavour.

¹¹ *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 202 CLR 1 at [20], citing *CCOM*.

¹² Cf, for example, *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284 at [291] per Crennan and Kiefel JJ.

¹³ *D’Arcy v Myriad Genetics Inc* (2015) 258 CLR 354 (*Myriad*) at [130]; *Research Affiliates LLC v Commissioner of Patents* (2014) 227 FCR 378 (*Research Affiliates*) at [111], citing *CCOM* at 291.

¹⁴ The Explanatory Memorandum for the *Patents Bill 1990* said of the proposed definition of “invention”: “The requirement in paragraph 18(a) that an invention, in order to be patentable, must be a “manner of manufacture” invokes a long line of UK and Australian court decisions. It

21. The accepted objects of patent law are to encourage inventive ingenuity and disclosure to the public of a new and useful article or process.¹⁵ There is no reason why patent law should not encourage novel uses of computers that would otherwise constitute patentable inventions that result in an artificially created state of affairs that has economic significance or utility.¹⁶ For example, if a novel use of computers were to lead to a field without weeds, that should properly be patentable, consistently with *National Research Development Corporation v Commissioner of Patents* [1959] HCA 67; (1959) 102 CLR 252 (*NRDC*), where the novel use of a known chemical to treat land in a manner which killed weeds was held patentable.

10 ***The majority's new test puts Australia at odds with its international obligations and the statute***

22. The new test establishes a different threshold of patent eligibility for computer-implemented inventions as compared with other inventions, which is inconsistent with Australia's international obligations and is not justified by the *Patents Act*. Aristocrat has not addressed these obligations in its submissions.

20 23. Under the TRIPS Agreement,¹⁷ patents must be available without discrimination as to the field of technology. Following its ratification of the Marrakesh Agreement (which included the TRIPS Agreement), Australia amended the *Patents Act* to introduce amendments consistent with the TRIPS Agreement,¹⁸ and so it may be taken that Parliament considered section 18 of the *Patents Act* to be compliant with Australia's obligations under TRIPS.

24. Then, in 2004, the Commonwealth Parliament enacted the *US Free Trade Agreement Implementation Act 2004* (Cth), which implemented into domestic law the Australia-United States Free Trade Agreement (**AUSFTA**). Article 17.9 of the

means little more than that an invention must belong to the useful arts rather than the fine arts." See *Apotex* at [16].

¹⁵ *Attorney-General (Cth) v Adelaide Steamship Co Ltd* [1913] AC 781 at 793.

¹⁶ *Anaesthetic Supplies Pty Ltd v Rescare Ltd* (1994) 50 FCR 1 per Lockhart J at 19, endorsed by Crennan and Kiefel JJ in *Apotex* (2013) 253 CLR 284 at 372 [241], cited with approval by the majority in *Myriad* at [20]; and see also *Myriad* at [28].

¹⁷ *Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement (TRIPS Agreement)*, Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*, Article 27(1).

¹⁸ *Patents (World Trade Organisation) Act 1995* (Cth) (**TRIPS Amendments**).

AUSFTA says, “*Each Party shall make patents available for any invention, whether product or process, in all fields of technology, provided that the invention is new, involves an inventive step, and is capable of industrial application. The Parties confirm that patents shall be available for any uses or methods of using a known product*” (emphasis added).

25. Accordingly, in light of Australia’s obligations at least under TRIPS and AUSFTA and the technology-neutral treatment of patentability in the *Patents Act*, the starting point in Australia must be that the test for what is a patentable invention should be consistent across technologies. While the law on manner of manufacture is judge-made law, it nevertheless needs to be created on a principled basis and consistently with the *Patents Act* and Australia’s international obligations.
26. Consistently with its international obligations, other than to exclude “*human beings, and the biological processes for their generation*” from patentability for standard patents (*Patents Act* s 18(2)), the requirements for patentability in section 18 of the *Patents Act* and section 6 of the *Statute of Monopolies* do not distinguish between different technologies, and certainly do not provide for different tests for patentability based on different technologies. Parliament certainly did not suggest otherwise when it recently inserted the object of the *Patents Act* (s 2A) to “*provide a patent system in Australia that promotes economic wellbeing through technological innovation and the transfer and dissemination of technology*”. Parliament did not there seek to exclude technological innovation involving any computer implementation where there was no advance in computer technology.
27. Aristocrat correctly submits (in its submissions (AS) at [37]-[41]) that the law on manner of manufacture in Australia is not the same as the law in the US and the UK. IPTA recognises, of course, that those nations are also signatories to TRIPS and, in the case of the US, AUSFTA. However, what makes the law of those countries different from Australia’s is the terms of their domestic patents legislation (as submitted at AS [54]). That does not mean the Australian legislature did not intend to comply with Australia’s obligations under these treaties, and the Court could not assume otherwise in the absence of express words to the contrary.

28. According to the majority of the Full Court, what was inventive about the claim in this case was the feature game claimed in integers 1.10 to 1.12 (FCJ [54]). The Full Court acknowledged at FCJ [16] that, if that game had been implemented in a mechanical poker machine, the claim would have been patentable. But because the invention was implemented in an electronic or computerised poker machine, the patentee was denied protection. That inconsistency in approach troubled the primary judge, who said at [102]:¹⁹

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Secondly, as the Commissioner accepts, were the EGM of claim 1 to have been implemented mechanically, the old-fashioned way, without using software but instead using cogs, physical reels and motors to create the gameplay, there is no doubt that it would be a manner of manufacture. There would be no occasion to disaggregate the game features from the combination of physical parts. It is difficult to see why the development of an implementation of an EGM that utilises the efficiencies of electronics technology would be disqualified from patent eligibility, when the old-fashioned mechanical technology was not. Such an approach would be antithetical to the encouragement of invention and innovation. To adapt the analogy used in CCOM, a ball point pen that used computerised components to enable it to function more efficiently would be no less a manner of manufacture now than the original ball point pen was when it was first invented. Whether or not it is novel or involves an inventive step is, of course, for separate enquiry.

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29. The majority in the Full Court sought to dismiss the primary judge’s concern by describing it as “a reflection of the different way abstract ideas have been approached where questions of computer implementation are involved” (at [88]). With respect, that is no more than saying “it is so because it is so”. Specifically, the majority says that computers are different because, as opposed to other physical apparatus (see FCJ [88]), “[their] only purpose is to give effect to the abstract ideas embodied in the code which [they execute]” (at FCJ [89]). Again, with respect, that does not distinguish computers from other physical apparatus. For example, the only purpose of a mechanical poker machine is to give effect to the abstract idea for the game being played on the machine. But mechanical poker machines are accepted as patentable subject matter (see FCJ [88]). There is no other type of technology that has been pulled out from the pack and given its own

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¹⁹ *Aristocrat Technologies Australia Pty Limited v Commissioner of Patents* [2020] FCA 778; (2020) 382 ALR 400.

standards for patentability in this manner, and to do so is inconsistent with the *Patents Act*, TRIPS and AUSFTA.

The majority's approach to characterising the invention for the purposes of considering manner of manufacture is having a deleterious effect on the prosecution and grant of patents in Australia

- 10 30. The majority also erred in characterising the invention in suit when determining whether it constituted a manner of manufacture (FCJ [50]-[62]). In seeking to identify the substance of the invention, the majority impermissibly disregarded several of the claimed features of the invention, and thereby erroneously abstracted the claimed subject-matter to the point that it was incorrectly characterised as a mere scheme or abstract idea. Aristocrat has made submissions about the correctness of this approach. IPTA's submissions below address the effects of this approach on the grant of patents in Australia generally.
- 20 31. The claim in this case (see FCJ [6]) defined a physical device, namely an EGM having a display; a credit input mechanism including at least one of a coin input chute, a bill collector, a card reader and a ticket reader; and meters configured for monitoring credits established via the credit input mechanism. Despite acknowledging that elements of the claim should not be prematurely discounted, with respect, the majority did exactly that, disregarding the parts of the claim that defined a physical device and holding that the invention was no more than the feature game implemented on a computer (at FCJ [56]).
32. This impermissible approach of the majority echos the approach that IPTA has observed is being taken by patent examiners at the Australian Patent Office. It has become common practice in recent years for patent examiners to, in the course of assessing the "substance" of the invention, disregard or exclude essential features of a claimed invention. Specifically, examiners commonly now disregard computer hardware integers, unless the examiner considers those integers themselves to be novel or inventive. This has the result that subject matter that would likely have been found to be a manner of manufacture by the Commissioner in the past, so that

patents were granted, is no longer being considered to be a manner of manufacture, and patents are being refused.²⁰

33. The Full Court’s approach in this case is very different from how the Court construes claims for the purpose of infringement or novelty. For infringement and novelty, a patentee is required to establish that every essential feature of the claim has been taken by the infringer or disclosed in the prior art. In contrast, the approach of the majority in this case means that, for at least the threshold test of manner of manufacture, some of those features can be disregarded in the exercise of determining the substance of the claim. That disparity is unfair to patentees. Rather, for both infringement and validity, claims must be construed as a whole without disregarding any essential features.
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34. A similar, impermissible, approach was taken by the Full Court in *Research Affiliates* at [118]. While the Full Court correctly observed that identifying the essential integers of a claim was of “*particular importance in the assessment of, for example, novelty and infringement*”, their Honours held that, when “*examining whether a claimed invention is properly the subject of letters patent, it is necessary to look not only at the integers of that claimed invention but also at the substance of that invention*”. The Full Court went on to disregard the computer implementation of the claimed invention in that case, although implementation was accepted to be an essential integer. With respect, the “substance” of an invention which involves a combination of essential integers cannot disregard any such integer.
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The correct test

35. IPTA submits that the correct approach for computer-implemented inventions is the same as the approach for all other inventions.
36. In place of the two-step test posed by the majority in this case, the Court should ask: “*Is the invention, considering the subject-matter of the claim as a whole, no more than a mere scheme, method of doing business or abstract idea?*” or, for that

²⁰ Affidavit of Philip Walter Gehrig made 5 May 2022 at [20].

matter, any other accepted non-patentable subject matter.²¹ In considering that question, the Court should not ignore essential features of the claimed invention.

37. Aristocrat at AS [13] is correct to distinguish between a mere scheme, and a scheme that “involves something more” that renders it a manner of manufacture. AS at [47] goes on to say that the Full Court in *RPL*²² should have first considered whether the invention was a mere scheme and then, if so, asked, “*whether, either in its implementation or otherwise, there was something that rendered the claimed invention patentable.*” There need not be two steps. In determining whether an invention is a mere scheme, the Court should consider the claim as a whole, without distinguishing between the idea of the invention and its implementation. If it is the way a claim is implemented that makes it more than a “mere scheme”, then it will be patentable if it meets the ordinary requirements for patentability (as enunciated, for example, in *Myriad* at [20] and [28]).
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Part IV:

38. IPTA estimates that it would require 20 minutes for the presentation of its oral argument.

²¹ This is broadly consistent with the questions posed by Gordon J in *Myriad* at [278].

²² *Commissioner of Patents v RPL Central Pty Ltd* (2015) 238 FCR 27.

Dated: 4 May 2022



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ANNEXURE

RELEVANT STATUTORY PROVISIONS

PATENTS ACT 1990 (Cth) (as at 5 May 2022)

2A Object of this Act

10 The object of this Act is to provide a patent system in Australia that promotes economic wellbeing through technological innovation and the transfer and dissemination of technology. In doing so, the patent system balances over time the interests of producers, owners and users of technology and the public.

18 Patentable inventions

Patentable inventions for the purposes of a standard patent

- 20 (1) Subject to subsection (2), an invention is a patentable invention for the purposes of a standard patent if the invention, so far as claimed in any claim:
- (a) is a manner of manufacture within the meaning of section 6 of the Statute of Monopolies; and
 - (b) when compared with the prior art base as it existed before the priority date of that claim:
 - (i) is novel; and
 - (ii) involves an inventive step; and
 - (c) is useful; and
 - (d) was not secretly used in the patent area before the priority date of that claim by, or on behalf of, or with the authority of, the patentee or nominated person or the patentee's or nominated person's predecessor in title to the invention.

Patentable inventions for the purposes of an innovation patent

- 30 (1A) Subject to subsections (2) and (3), an invention is a patentable invention for the purposes of an innovation patent if the invention, so far as claimed in any claim:
- (a) is a manner of manufacture within the meaning of section 6 of the Statute of Monopolies; and
 - (b) when compared with the prior art base as it existed before the priority date of that claim:
 - (i) is novel; and
 - (ii) involves an innovative step; and
 - (c) is useful; and
 - (d) was not secretly used in the patent area before the priority date of that claim by, or on behalf of, or with the authority of, the patentee or nominated person or the patentee's or nominated person's predecessor in title to the invention.
- 40 (2) Human beings, and the biological processes for their generation, are not patentable inventions.

Certain inventions not patentable inventions for the purposes of an innovation patent

- (3) For the purposes of an innovation patent, plants and animals, and the biological processes for the generation of plants and animals, are not patentable inventions.
- (4) Subsection (3) does not apply if the invention is a microbiological process or a product of such a process.

[Note: see also sections 7 and 9.]

Patents (World Trade Organization Amendments) Act 1994 (Cth) (as at 5 May 2022)

10 **Long title**

An Act to amend the law with respect to patents to enable Australia to accept the Agreement Establishing the World Trade Organization

Statute of Monopolies 1623 (UK) (as made) (as at 5 May 2022)

VI Proviso for future Patents for 14 Years or less, for new Inventions.

- 20 Provided alsoe That any Declaracion before mencioned shall not extend to any tres Patents and Graunt of Privilege for the tearme of fowerteene yeares or under, hereafter to be made of the sole working or makinge of any manner of new Manufactures within this Realme, to the true and first Inventor and Inventors of such Manufactures, which others at the tyme of makinge such tres Patents and Graunts shall not use, soe as alsoe they be not contrary to the Lawe nor mischievous to the State, by raisinge prices of Commodities at home, or hurt of Trade, or generallie inconvenient; the said fourteene yeares to be accomplished from the date of the first tres Patents or Grant of such priviledge hereafter to be made, but that the same shall be of such force as they should be if this Act had never byn made, and of none other.

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US Free Trade Agreement Implementation Act 2004 (Cth) (as at 5 May 2022)

Long title

An Act to implement the Australia-United States Free Trade Agreement, and for other purposes

- 40 ***Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed on 15 April 1994 (as at 5 May 2022)***

Article 27

Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

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