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INTRODUCTION: AUSTRALIAN INTELLECTUAL PROPERTY LAW IN THE GLOBAL MARKETPLACE

INTRODUCTION

Over the past 30 years intellectual property (IP) has evolved from being an intellectual curiosity seldom seen in undergraduate law school curricula to becoming a front-rank and popular legal subject. An understanding of IP laws is central to the sciences, manufacturing and the arts, and increasingly important to mainstream legal practice. IP has also become a more controversial and politicised area of study in light of its emergence as a specialisation within international trade law, and the fast-paced development of the information economy. IP laws impact on our daily lives in much more obvious ways than in the past, and affect the way we access or engage with technology, medicine, nature, education and entertainment.

There have been statutes and regulations that we now recognise as IP laws dating from the seventeenth century, and specific international agreements since the late nineteenth: the *Paris Convention for the Protection of Industrial Property* (1883) and the *Berne Convention for the Protection of Literary and Artistic Works* (1886). These instruments, developed to address ‘international piracy’ between dominant political powers, arranged IP into two related but distinct fields: manufacturing and the arts. The term ‘industrial property’ covered patents over inventions, design rights and trade marks. ‘Literary and artistic works’ were defined broadly to encompass written texts, drawings, paintings, architecture, sculptures, engravings, lithography and sheet music. The conventions marked out certain standards for the protection and treatment of such subject matter, but the protection conferred depended upon the technicalities of the respective domestic laws of the signatories to these conventions.

This separation of art and science still underpins commonsense intuitions about IP laws today. Regulation of the culture industries and education is perceived as requiring essentially different considerations from that of industry and manufacturing, and perhaps also as requiring different kinds of legal skills. Notwithstanding that, it is still also common to find the terms ‘copyright’, ‘patent’ and ‘trade mark’ being used colloquially and in the media as imprecise and often confusing catch-all phrases in relation to debates about what intangible subject matter ‘should’ or ‘should not’ be protected.

It is important for law students to appreciate that despite the way IP laws might commonly come to be discussed in the broader community, as a subject of legal knowledge, IP is a problematic term.

Considered as an overarching concept, the idea of a unified IP system, or IP regime, leads to the conflation of vastly different subject matters and divergent approaches to regulation itself.

IP is an artificial construct and, as a matter of law, it is made up of a number of distinctive categories, most with underlying statutes that define the particulars of the property and limits to the rights. Each area of IP has its own history, rationales and technicalities. These 'knowledge laws' only fit together in a very loose and rather uncoordinated way. Accordingly, the categories need to be studied and understood as discrete legal and political constructs.

IP LEGISLATION

Australian IP laws today include:

- *Copyright Act 1968* (Cth), *Copyright Regulations 1969* (Cth) and *Copyright (International Protection) Regulations 1969* (Cth);
- *Designs Act 2003* (Cth) and *Designs Regulations 2004* (Cth);
- *Patents Act 1990* (Cth) and *Patents Regulations 1991* (Cth);
- *Trade Marks Act 1995* (Cth) and *Trade Marks Regulations 1995* (Cth);
- *Competition and Consumer Act 2010* (Cth), Sch 2 (the 'Australian Consumer Law');
- *Resale Royal Right for Visual Artists Act 2009* (Cth);
- *Circuit Layouts Act 1989* (Cth);
- *Plant Breeder's Rights Act 1994* (Cth);
- *Australian Grape and Wine Authority Act 2013* (Cth);
- the common law tort of passing off;
- the equitable action to prevent the breach of confidence (used to regulate trade secrets); and
- cultural protocols for the protection of Indigenous cultural and intellectual property.

A broad survey approach to the main categories of law allows students to grasp the nature and scope of the relevant legislation and administration applicable in each area. This book is designed as an introduction to:

- equip law students with legal knowledge appropriate for entry-level legal practice in IP;
- develop basic rights and commercialisation awareness for scientists, creators and managers of IP rights and their administration; and
- provide a foundation to enable students to progress to more specialised postgraduate study of IP law.

In relation to each main area of Australian IP law this book covers:

- a policy overview of the legal category, its history and emerging trends;
- an explanation of the structure of the legislation and associated rights; and
- leading case extracts to elucidate key legal principles and tensions.

METHODOLOGY

Our methodology, which we developed in the first edition of this text, utilises a new approach to the selection of cases. Where material and space permits, and especially in relation to difficult or

controversial concepts, we provide different types of case materials and indicate their nature with tabs in the margin:

- A precedent chosen to give context to an enduring authority or to highlight a contrast with the reasoning in current law is marked with the tab PRECEDENT.
- A current leading authority is marked with the tab CURRENT LAW.
- A counterpoint (comparative perspective) precedent is marked with the tab COMPARATIVE LAW.

Case books perform an important role in organising legal knowledge. There are, however, limits to their usefulness as stand-alone texts. On the one hand, if case selection is too narrow (which may occur in an effort to present the law in tidy, easily digested snippets), the impression given may be misleading. The question of selection is especially problematic in IP, as principal legislation is complex and often confusingly drafted, with key concepts sometimes not defined in relevant legislation (instead requiring reference to regulations or ‘practice and procedure’ manuals). Also, there are very few legal principles that do not require significant qualification or analytical work so that they can be applied to new situations. On the other hand, the inclusion of too many cases in a text makes it unwieldy and unsuitable as an introduction because there is too much information to be appreciated and not enough opportunity for it to be synthesised, particularly by readers who are new to the area.

Our case selection provides students with tools to move away from both a simplistic and an overly dense treatment of the law, and recognises the fluidity of the law and related policy changes. This provides a mechanism for covering the basics while keeping policy challenges and international perspectives at the fore. This approach does not compromise the traditional role of the case book in exposing students to the field and its key principles, but it does allow for a more critical and engaged discussion of those principles. While the primary focus is Australian law, an awareness of comparative law—especially US law and UK law (the latter increasingly influenced by EU developments)—is vitally important in legal practice today.

AUSTRALIAN IP POLICY MANAGEMENT IN A GLOBAL CONTEXT

A number of agencies have an international agenda-setting role in IP policy, and four key agencies are considered below. The claim that IP rights are central to economic development has been much scrutinised of late, with considerable debate revolving around the politics of world trade, development, economics, and biological and cultural diversity.¹

INTERNATIONAL ORGANISATIONS

WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

WIPO is an intergovernmental organisation established in 1967 as a specialised agency of the United Nations (UN). It is the successor to the *United International Bureaux for the Protection of Intellectual Property* (BIRPI), established in 1893 to administer the *Paris Convention for the*

¹ Some of these issues are explored further in K Bowrey, M Handler and D Nicol, eds, *Emerging Challenges in Intellectual Property*, Oxford University Press, Melbourne, 2011.

Protection of Industrial Property (1883) and the *Berne Convention for the Protection of Literary and Artistic Works* (1886). As set out in the *Convention Establishing the World Intellectual Property Organization* (1967), WIPO has two main objectives:

- to promote the protection of IP worldwide; and
- to ensure administrative cooperation among the intellectual property unions established by the treaties that WIPO administers.

WIPO now administers over 25 treaties. It also engages in policy development and offers a range of education and dispute resolution services. WIPO's principal sources of income are fees paid by private users of the international registration services and contributions paid by the governments of member states.²

WORLD TRADE ORGANIZATION (WTO)

The WTO administers the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the 'TRIPS Agreement') (1994).³ The TRIPS Agreement was negotiated in the 1986–94 Uruguay Round of the General Agreement on Tariffs and Trade, and is Annex 1C to the *Agreement Establishing the World Trade Organization* (1994). It introduced IP rules into the multilateral trading system for the first time by setting minimum levels of protection that each WTO member must provide across most fields of IP, as well as requiring adherence to most of the substantive provisions of the Paris Convention and the Berne Convention. Developed countries were given until 1995 to ensure that their laws and practices conformed with the TRIPS Agreement. Developing countries and transition economies were given until 2000 (with a further five years to implement product patent protection). Least-developed countries initially had until 2006, since extended to 2021, to implement their TRIPS obligations. As well as setting minimum standards of protection in many areas, the TRIPS Agreement also established general principles applicable to all intellectual property enforcement. Disputes between WTO members about adherence to the TRIPS obligations are subject to WTO dispute settlement procedures. As TRIPS is a minimum-standards agreement, members may provide more extensive protection and determine the appropriate method of implementing the provisions of the Agreement within their own legal systems. TRIPS led to the reform of many provisions of Australian IP law and continues to affect Australian law in contentious areas such as access to pharmaceuticals and rights to genetic material.

UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO)

UNESCO was founded on 16 November 1945. It facilitates universal access to information and knowledge, and its primary role in IP relates to setting ethical standards that encourage global information sharing, including providing information about the advantages and disadvantages of using free and open source or proprietary software.

² See www.wipo.int.

³ See www.wto.org/english/tratop_c/trips_c/trips_e.htm.

CONVENTION ON BIOLOGICAL DIVERSITY (CBD), CONFERENCE OF PARTIES (COP)

The CBD, signed at the 1992 Rio Earth Summit, is dedicated to promoting sustainable development. Australia ratified the Convention in 1993. The Convention's governing body is the COP, consisting of all 193 governments and regional economic integration organisations that have ratified the Convention (but not the USA). The CBD impacts on IP rights by raising issues surrounding ownership and control over plant genetic resources, bioprospecting and Indigenous rights to equitable benefits derived from the utilisation of IP.⁴

AUSTRALIAN ORGANISATIONS

Domestically, IP policy development is fragmented among a number of federal departments. To observers, little coordination of these efforts is apparent. This is partly a historical problem dating from our colonial heritage and a longstanding bureaucratic separation of responsibility for the arts, education and the sciences. It is also a consequence of contemporary politics, where different government departments react to IP reform agendas emanating from Europe or the USA. It is also quite difficult to identify any distinctively Australian element in our contemporary IP policy (even though highly distinctive approaches to particular IP issues are taken in Australian IP legislation, which further increases the complexity of this area of law).

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE (DFAT)

DFAT supports the development of strong IP rights and the harmonisation of rights with major trading partners, arguing that internationally consistent IP regimes allow Australian producers and manufacturers to take advantage of global supply chains by protecting important IP in foreign markets when parts of their business operations are offshore. DFAT has a role in managing TRIPS-related matters (e.g. in bringing disputes against allegedly non-compliant parties, or defending such actions). It also has the central role in negotiating preferential trade agreements with key trading partners, which include IP chapters. The most important of these is the *Australia–US Free Trade Agreement* (AUSFTA) (2004), with more recent agreements negotiated with Korea and Japan.⁵ At the time of writing, DFAT is also involved in negotiations for a regional trade agreement known as the *Trans-Pacific Partnership Agreement* (TPP) with Japan, the USA, Singapore, New Zealand, Malaysia, Brunei, Canada, Chile, Mexico, Peru and Vietnam. The IP negotiations in the TPP have proved to be particularly contentious. It is apparent that countries like the USA and Japan are seeking high levels of IP protection, especially in relation to pharmaceutical patents and related rights; while developing countries and countries like Australia and New Zealand—which provide subsidised access to pharmaceuticals—are concerned about the potential impact on the cost of, and access to, medicines. Detailed provisions on the enforcement of IP rights are also proving to be controversial.

DFAT's relatively recent role in developing Australian IP policy has been considered contentious in some circles, with concern that the international trade agenda has advanced protection of IP rights

4 See www.cbd.int/convention.

5 See www.dfat.gov.au/trade/topics/intellectual-property/

without due regard to the impact these reforms will have on the Australian public, our cultural and educational rights, and our public health policy.⁶

COMMONWEALTH ATTORNEY-GENERAL'S DEPARTMENT

The Attorney-General's Department has a key role in developing policy on a miscellaneous range of copyright and related issues. At the time of writing, it is looking into such issues as online copyright infringement, the role of 'safe harbours' for carriage service providers, and the domestic implementation of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* (2013).⁷ Formerly, the *Copyright Law Review Committee* (CLRC) was part of the Attorney-General's Department: this was a part-time committee appointed to consider and report on specific copyright matters referred to it. The CLRC published a number of significant reports from 1959 (the Spicer Report,⁸ which formed the foundation of the *Copyright Act 1968* (Cth)) to 2005, when it was abolished. The Attorney-General also makes occasional requests to the independent Australian Law Reform Commission (ALRC) to inquire into particular areas of the law. In 2012 the then Attorney-General made a reference to the ALRC to consider reform of Australian copyright exceptions, which led to Report No 122, *Copyright in the Digital Economy* (2013).

COMMONWEALTH DEPARTMENT OF INDUSTRY

The Department of Industry develops policies to support a national innovation system with the goal of driving knowledge creation, cutting-edge science and research, international competitiveness and greater productivity. The Department also releases Annual Innovation System Reports, which assess the performance of the Australian innovation system by comparing it to that of other OECD countries, looking at issues such as patent filing figures and trade in IP-protected goods and services.

IP AUSTRALIA

IP Australia is an independent government agency under the Department of Industry. It administers the grant of patents, designs, trade marks and plant breeder's rights (PBR), and provides policy advice to government. Since 2012 IP Australia has had an office of the Chief Economist, which conducts and commissions IP research and policy analysis. IP Australia is self-funding, with revenue (mainly from fees paid by applicants for registration and renewal of registration) of over \$178 million for the 2013–14 financial year. IP Australia also promotes IP awareness and basic

6 See R Burrell and K Weatherall, 'Exporting Controversy? Reactions to the Copyright Provisions of the US–Australia Free Trade Agreement: Lessons for US Trade Policy' [2008] *University of Illinois Journal of Law, Technology & Policy* 259; K Weatherall, 'Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms' (2007) 31 *Melbourne University Law Review* 967; P Drahos et al, 'Pharmaceuticals, Intellectual Property and Free Trade: The Case of the US–Australia Free Trade Agreement' (2004) 22 *Prometheus* 243; K Weatherall, 'The Australia–US Free Trade Agreement's Impact on Australia's Copyright Trade Policy' (2015) *Australian Journal of International Affairs* (forthcoming).

7 See www.ag.gov.au/RightsAndProtections/IntellectualProperty/Pages/default.aspx.

8 Copyright Law Review Committee (the 'Spicer Committee'), *Report of the Committee appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth* (1959).

IP education to business and the public. IP Australia’s searchable databases of patents, designs and trade marks are an important free public resource providing access to a wide array of technical information. The agency also publishes practice and procedure manuals that are used as reference tools for examiners within their patents, designs, trade marks and PBR sections. These guides set out procedural and legal matters relevant to the examination of applications under each of the relevant Acts and are helpful for those seeking a practical understanding of the operation of the relevant law.⁹

IP Australia also provides secretariat services to the Advisory Council on Intellectual Property (ACIP). ACIP is an independent body appointed by the government to advise on IP matters and the strategic administration of IP Australia. ACIP recently completed reviews into the innovation patent system, and collaborations between the public and private sectors involving IP.¹⁰ It has been announced that ACIP will be disbanded on completion of its current review into the operation of the designs system.

LEGAL FOUNDATIONS: THE CONSTITUTION

Section 51 of the *Commonwealth of Australia Constitution Act 1900* (Imp), which is headed ‘Legislative powers of the Parliament’, provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- ...
- (v) postal, telegraphic, telephonic, and other like services;
- ...
- (xviii) copyrights, patents of inventions and designs, and trade marks;
- ...
- (xxix) external affairs.

The Australian Constitution offers little indication of the nature or purpose of our IP laws. The specificity of s 51(xviii) once supported a conservative approach to the federal power to make new laws that might expand on the subject matter originally covered. This interpretation sat oddly with an area of law which might, by its nature, be expected to be forward-looking and innovative in ambition. Following the *Union Label* case (*Attorney-General for New South Wales v Brewery Employees’ Union of New South Wales* (1908) 6 CLR 469, extracted first below) it was subsequently questioned whether the constitutional provision could support reforms relating to performers’ rights, moral rights for authors, circuit layouts protection, plant variety rights and trade marks for services. However, in addition to adopting a more generous interpretative approach to s 51(xviii), there was potential to enact some IP legislation by relying upon the postal and telegraphic power in s 51(v) and the external affairs power in s 51(xxix).

The uncertainties over the scope of s 51(xviii), and the extent to which it could be used to support the enactment of laws covering novel forms of IP, remained unresolved until a

⁹ See www.ipaustralia.gov.au.

¹⁰ See <http://acip.gov.au>.

challenge to the constitutionality of the *Plant Variety Rights Act 1987* (Cth) and the subsequent *Plant Breeder's Rights Act 1994* (Cth) in *Grain Pool of Western Australia v Commonwealth* [2000] HCA 14; (2000) 202 CLR 479, extracted second below. This decision has somewhat settled the scope of s 51(xviii) today.

It has been recommended that the Constitution should be amended to simply permit laws with respect to 'intellectual property'—a term more current now than it was at Federation. Alternatively, Australia could consider the value of a US-style provision that provides a foundation for constitutional challenges with reference to the overriding public purpose of IP laws. In *Grain Pool* the High Court noted the comparative breadth of the Australian IP power compared with that of the USA. However, while the US Constitution creates a 'system' of copyright and patent laws that promotes the 'Progress of Science and useful Arts', in a constitutional challenge in 2003 the US Supreme Court determined that it is generally the role of Congress—and not for the courts—to decide how best to pursue that objective and achieve the delicate balance of interests to be served (see *Eldred v Ashcroft* 537 US 186 (2003), extracted third below).

The Australian approach to the constitutional power places few limits on the freedom of Parliament to make laws about 'intellectual effort'. It encourages an IP jurisprudence that is particularly attentive to the detail of particular provisions without necessarily requiring much analysis of the politics of IP as a system of law supportive of innovation overall.¹¹

CASE EXTRACT: PRECEDENT

Attorney-General for New South Wales v Brewery Employees' Union of New South Wales (the 'Union Label case')

(1908) 6 CLR 469
High Court of Australia

[The *Trade Marks Act 1905* (Cth) provided for registration of 'workers' trade marks' which indicated that the goods were made by an individual Australian worker or members of a trade union. The marks were politically controversial,¹² and two years after their introduction the Part of the Act dealing with workers' trade marks was challenged as not being supported by s 51(xviii) of the Constitution.]

Griffith CJ (at 500–518): The plaintiffs contend that the 'workers' trade mark' authorized by Part VII to be registered by an association of workers is not a trade mark at all in the sense in which that word is used in the Constitution. The defendants answer that the mark in question is a mark; that it is to be used in connection with trade, which includes manufacture and production; and that this is sufficient to bring the Act within the power. Now, while there is no doubt that within the ambit of its powers the Parliament is supreme, it has no authority whatever beyond that ambit. It is necessary, therefore, to consider the nature of the authority conferred by s 51(xviii) ...

- ¹¹ For a rare case where the High Court took into account the politics surrounding IP reform, see *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; (2005) 224 CLR 193.
- ¹² See S Ricketson, 'The Union Label Case: An Early Australian IP Story' in A Kenyon, M Richardson and S Ricketson, eds, *Landmarks in Australian Intellectual Property Law*, Cambridge University Press, Melbourne, 2009.

The meaning of the terms used in that instrument must be ascertained by their signification in 1900. The Parliament cannot enlarge its powers by calling a matter with which it is not competent to deal by the name of something else which is within its competence. On the other hand, it must be remembered that with advancing civilization new developments, now unthought of, may arise with respect to many subject matters. So long as those new developments relate to the same subject matter the powers of the Parliament will continue to extend to them. For instance, I cannot doubt that the powers of the legislature as to posts and telegraphs extend to wireless telegraphy and to any future discoveries of a like kind, although in detail they may be very different from posts and telegraphs and telephones as known in the nineteenth century ...

We have then to choose between these two conflicting lines of reasoning, and to say whether the term 'trade marks' used as defining a subject matter of legislation is to be taken in the wider or more limited sense. Apart from any light thrown on the question by the history of the use of the word in legislation or otherwise, it might be contended with much force that the term means 'a mark used in connection with trade,' the term 'trade' being, perhaps, limited to the exchange of vendible articles by way of commerce. If this view is accepted, the Parliament has absolute authority to prescribe:

- (1) whether any marks may be so used at all;
- (2) what marks may be so used;
- (3) whether certain marks must be so used;
- (4) by whom any marks may be so used;
- (5) by whom any marks must be so used;
- (6) the signification to be given to any particular mark;
- (7) the conditions of the particular trade upon which the right or obligation to use the mark shall depend.

Such authority would undoubtedly involve a very large power of interference with the conditions of domestic trade, but that is no objection if the authority is given.

If, on the other hand, the term 'trade mark' is interpreted strictly according to the definitions which had been given in English Courts before the year 1900, the result would be that, although new kinds of marks and new purposes to which marks of the old kind may be applied may be, and indeed have been, devised since that time, the authority of Parliament is limited to dealing with the particular kind of trade mark then known, and to the use of trade marks for the particular purposes then recognized, with the result that all new developments of the subject matter would fall within the domain of State legislation.

... In my opinion it follows, from a consideration both of the Statute law of England and the Australian Colonies up to 1900 and of the authoritative expositions of the law with respect to trade marks in British Courts of Justice, that, whether the term 'trade mark' as used in s 51 (xviii) of the Constitution is to be regarded as a term of art or as a word used in popular language, it did not in that year denote every kind of mark which might be used in trade or in connection with articles of trade and commerce, but meant a mark which is the visible symbol of a particular kind of incorporeal or industrial property consisting in the right of a person engaged in trade to distinguish by a special mark goods in which he deals, or with which he has dealt, from the goods of other persons.

This concept includes in my opinion five distinct elements:

- (1) A right which is in the nature of property;
- (2) The owner of the right must be a person, natural or artificial, engaged in trade;
- (3) The right is appurtenant or incident to the dealing with goods in the course of his trade;
- (4) The owner has such an independent dominion over the goods to which the mark is to be affixed as to entitle him to affix it to them; (It is not material whether this right is incident to his possession of the goods or arises under an agreement with the owner of them.)
- (5) The mark distinguishes the goods as having been dealt with by some particular person or persons engaged in trade; (I use the word 'particular' not as meaning that the person in question is indicated *nominatim*, but as indicating that he is a person who has an independent individual right with respect to the goods in question, and who is capable of ascertainment upon inquiry).

With regard to this species of property the power of the Parliament is absolute. They can prescribe the conditions on which it may be acquired, retained, or enjoyed; they may possibly even prohibit its enjoyment altogether; but they cannot, by calling something else by the name of 'trade mark,' create a new and different kind of industrial property.

...

In my opinion, therefore, the workers' trade mark does not conform in any respect to the concept of a trade mark as used in the Constitution.

Higgins J (dissenting) (at 600–614): The case as put for the plaintiffs is short and simple. They say that, though the Federal Parliament has power to legislate about 'trade marks' a 'workers' trade mark' was not a 'trade mark' within the accepted definition in 1900, the date of the Constitution, and that therefore the Parliament has no power to make any law as to 'workers' trade marks.' It is said that, though the mark is to be used by or with the consent of a trader, for the purposes of pushing trade, it is not a trade mark.

If the argument for the plaintiffs is right—if the powers of the Commonwealth Parliament are so rigidly and narrowly circumscribed as is contended—there will be some curious results, not merely as to trade marks, but as to most, if not all, of the subjects of legislation in s 51. No matter how circumstances may change, no matter what may be the developments of science, of the arts, of business enterprise, and of society to the end of time, the Parliament is confined for ever (unless there be an alteration in the Constitution) to such trade marks as the Court enforced in the year 1900. Even since that year the class of trade marks which the Court will enforce has been extended in Great Britain and Ireland so as to include marks such as the plaintiffs deny to be 'trade marks' (English *Trade Marks Act 1905*, ss 3, 62); and s 62 has been incorporated in our *Trade Marks Act 1905* (s 22). But though the British legislation is, of course, valid, the Commonwealth legislation, to the same effect, for Australia, is to be treated as invalid. The Commonwealth is to be tied down to the practice in 1900. According to the plaintiffs' argument, the Federal Parliament having covered all the ground for trade marks as enforced by the law in 1900, the State Parliaments may, each for its own State, make such laws as they think fit, varying in character and in machinery, as to any marks to be used for purposes of trade, excepting only such trade marks as the Courts enforced in 1900. The several State Parliaments