



## HIGH COURT OF AUSTRALIA

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File Number: S40/2022  
File Title: Aristocrat Technologies Australia Pty Ltd v. Commissioner of  
Registry: Sydney  
Document filed: Form 27A - Appellant's submissions  
Filing party: Appellant  
Date filed: 20 Apr 2022

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IN THE HIGH COURT OF AUSTRALIA  
 SYDNEY REGISTRY

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

and

**COMMISSIONER OF PATENTS**  
 Respondent

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### APPELLANT'S SUBMISSIONS

#### Part I: Suitable for publication

1. This submission is in a form suitable for publication on the internet.

#### Part II: Issues presented by the appeal

2. This Court in *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252 (*NRDC*), *Apotex Pty Limited v Sanofi-Aventis Australia Pty Limited* (2013) 253 CLR 284 and *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334 identified the general principles to be applied to determine if a claimed invention is patent eligible subject matter, that is, if it falls within the concept of a manner of manufacture (**MM**) within s 18 of the *Patents Act 1990* (Cth). This appeal raises the following issues:

- (a) Do the general principles of MM, identified in *NRDC*, *Apotex* and *Myriad*, and applied by the Full Federal Court (**FFC**) in *CCOM Pty Ltd v Jiejing Pty Ltd* (1994) 51 FCR 260 and *Grant v Commissioner of Patents* (2006) 154 FCR 62, apply to an invention implemented utilising a computer (including a machine of particular construction that includes computer components)?
- (b) Alternatively, is the patent eligibility of a "computer-implemented invention" to be determined, contrary to *NRDC*, *Apotex*, *Myriad*, *CCOM* and *Grant*, by asking

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Date of document: 20 April 2022  
 Filed by Gilbert + Tobin on behalf of the appellant

whether it involves an advance in computer, or any other, technology? Does this wrongly cause the enquiry into MM to overlap with the separate inquiries into novelty and inventive/innovative step under ss 18(1)-(1A) of the *Act*?

- (c) Does *Myriad* support an identification of the invention for the purpose of determining whether it is a MM, other than by reference to the language of the claims defining it, read in the context of the body of the specification?

### **Part III: Judiciary Act 1903 (Cth)**

3. The appellant does not consider that notice should be given under s 78B of the *Judiciary Act 1903* (Cth).

### 10 **Part IV: Citations**

4. The principal reasons of the primary judge (Burley J) are published as *Aristocrat Technologies Australia Pty Limited v Commissioner of Patents* (2020) 382 ALR 400; (2020) 153 IPR 11; [2020] FCA 778 (**PJ**). His Honour's supplementary reasons dealing with costs are published as *Aristocrat Technologies Australia Pty Limited v Commissioner of Patents (No 2)* (2020) 155 IPR 454; [2020] FCA 974.
5. The reasons of the Full Court (Middleton, Perram and Nicholas JJ) are published as *Commissioner of Patents v Aristocrat Technologies Australia Pty Ltd* (2021) 396 ALR 380; (2021) 163 IPR 231; [2021] FCAFC 202 (**FCJ**).

### **Part V: Relevant facts**

- 20 6. The innovation patents in suit have a priority date of 11 August 2014 (PJ [6]; CAB 10). They were examined and the inventions held to be novel and innovative, but not a MM. On 5 July 2018, following a hearing, the Commissioner's delegate affirmed the finding on MM, on the basis that the inventions were schemes, being game rules (*Aristocrat Technologies Australia Pty Limited* [2018] APO 45, [67]; PJ [74], [99]; CAB 27, 35).
7. In these proceedings, the parties agreed to use claim 1 of innovation patent application 2016101967 (**967 Patent**) as an exemplar, as described at PJ [8] (CAB 10). Claim 1 of the 967 Patent is set out at PJ [69] (CAB 25-6) and FCJ [6] (CAB 71), and concerns “[a] gaming machine” (**EGM**), with identified “hardware, firmware and software components” (PJ [96]; CAB 34). A copy of the 976 Patent is at AFM 4-33.
- 30 8. It was common general knowledge, at the priority date, that: “an EGM was a physical device” (PJ [30]; CAB 15); EGMs were “distinguished from each other by the way in

*which features were introduced to utilise the physical or hardware components to provide different products*” (PJ [31]; CAB 16); EGMs commonly consisted of five reels which defined the order in which symbols appeared (PJ [32], [39]; CAB 16, 17); and EGMs were highly regulated and had to comply with the ANZ Gaming Machine National Standard’s requirements regarding cash input systems, credit metering, and the proportion of money “returned to players” (PJ [45], [97]; CAB 19, 35).

9. As at 26 February 2019, the appellant (and a related entity) had obtained the grant of 611 standard patents in Australia that are similar to the 967 patent and over 950 gaming patents had been granted to the appellant’s competitors (PJ [11]; CAB 10-11).
10. On 5 June 2020, the primary judge allowed an appeal from the delegate’s decision, applied the principles identified in *NRDC* and *Myriad*, and held that claim 1 of the 967 Patent is not a mere scheme and is a MM (PJ [86], [95], [98]; CAB 31, 33, 35).
11. On 19 November 2021, Middleton and Perram JJ (**FFC majority**) allowed an appeal, held that the “*general principles of patentability*” do not apply (FCJ [26]-[27]) and held that claim 1 of the 967 Patent is not a MM because it cannot “*be described as an advance in computer technology*” (FCJ [63 and heading]-[65]; CAB 88). Nicholas J dissented, and would have remitted to the primary judge for consideration whether claim 1 makes a technical contribution to *gaming technology* (FCJ [142], [144]; CAB 111, 112).

## **Part VI: Outline of argument**

### 20 ***Summary***

12. It has long been accepted that mere schemes (plans or methods) are not patentable subject matter. The Commissioner asserted that the claimed invention is “*a scheme or set of rules*” (PJ [78]; CAB 29). Burley J was correct in considering that question first (and answering it in the negative). The FFC erred in rejecting this approach.
13. The primary judge’s second question correctly recognises that a mere scheme is not automatically ineligible to be a MM. A claimed invention may, nevertheless, constitute an artificially-created state of affairs of economic utility. However, the content of Burley J’s second question, which asks “*whether the computer-implemented method is one where **invention** lay in the computerisation of the method*” (emphasis added), reflects the  
30 extent to which previous FFCs have fallen into error in assessing whether computer-implemented inventions are a MM. The correct question is whether, notwithstanding that

an invention may involve a mere scheme (which is not this case), that invention nevertheless involves something more, perhaps in its implementation, that renders it a MM.

14. As discussed below, recent FFCs have erred in (a) construing claims by focusing upon those integers thought to be “inventive” or “novel” to the exclusion of other integers; (b) creating fetters on the patentability of computer-implemented inventions; and (c) drawing statements from EU and US cases, without the necessary caution identified by this Court given the different legislation and jurisprudence in those jurisdictions.

15. The FFC majority’s decision in this case is the culmination of a combination of these errors. It wrongly merged the two questions identified by Burley J. It treated statements in recent FFC decisions as though they are statutes and used them to create a bright line test. Nicholas J, in dissent, rejected the FFC majority’s bright line test, but erred in rejecting Burley J’s analysis, in particular by failing properly to construe the claim.

***The general principles of patent eligibility***

16. In *NRDC*, this Court explained that the enquiry into patentable subject matter involves an enquiry into “*the breadth of the concept which the law has developed*” (*NRDC* 269) and that “*a widening conception of the notion has been a characteristic of the growth of patent law*” (*NRDC* 270). This Court has eschewed any attempt to place on the concept of MM “*the fetters of an exact verbal formula*” (*NRDC* 271) and held that “[*t*]he right question is: “*is this a proper subject of letters patent according to the principles which have been developed for the application of s. 6 of the Statute of Monopolies?*”” (*NRDC* 269). This Court explained that “*the true concept*” of MM has “*two essential qualities*”, namely, there must be “*an artificially created state of affairs*” and “*the significance*” of the invention must be “*economic*” (*NRDC* 277).

17. In *Apotex*, Crennan and Kiefel JJ at:

- (a) [224], [241] emphasised that the concept of MM “*has continually widened*” (see also French CJ at [9], [20], [27], [29]);
- (b) [191]-[193], [279]-[280] noted acceptance by the government in the 1990 *Act* of IPAC’s recommendation not to codify exclusions from MM and, with French CJ [46], [50] and Gageler J [314], rejected the exclusion of methods of medical treatment from the concept of MM as “*an anomalous qualification on the principles governing patentability*” (emphasis added); and

(c) [290] rejected “a *reinvigorated attack on novelty, or a suggestion of obviousness, in the guise of a s 18(1)(a) objection*”.

18. In *Myriad*, the plurality explained at:

(a) [18] that the “*widening conception*” of MM is a “*necessary feature*” of the development of patent law;

(b) [26] that the concept of MM was to be understood and developed through the modest and constrained role of the courts in the common law tradition spoken of in *Breen v Williams* (1996) 186 CLR 71, 115; and

10 (c) [28] that the two factors identified in *NRDC* are “*necessary*” to characterisation of an invention claimed as a MM, and “*will also ordinarily be sufficient*” (emphasis added) where, as here, the invention falls within the existing boundaries of the concept of MM.

19. This Court has established the following principles in respect of MM.

20. First, the principles to be applied, as articulated in *NRDC*, are universal in their application to technologies falling within the existing bounds of MM (*Myriad* [28]) – anomalous exclusions must be rejected (*Apotex* per French CJ [46], [50], Gageler J [314]).

21. Second, “[*e*]ach of the grounds of invalidity...is distinct from the others” (***Lockwood Security Products Pty Limited v Doric Products Pty Limited*** (2004) 217 CLR 274, [48], citing *CCOM 291*; *Myriad* per Gageler and Nettle JJ [129]-[131]). See also *N.V. Philips GloeilampenFabrieken v Mirabella International Pty Limited* (1995) 183 CLR 655, 664-5; *Advanced Building Systems Pty Limited v Ramset Fasteners (Aust) Pty Limited* (1998) 194 CLR 171, [40]).

22. Third, the assessment of MM is to be undertaken, as a matter of substance, by reference to “*the subject matter of the claims*”, having regard to “*the utility of the claimed invention*” in a field of economic endeavour (*Myriad* [92]-[93], see also [12]-[14]). In each of *NRDC*, *Apotex* and *Myriad*, this Court assessed whether the claimed inventions, not specific integers, were a MM. The *Act* is concerned with “*the invention described by the integers of the claim*” (***Calidad Pty Ltd v Seiko Epson Corporation*** (2020) 94 ALJR 1044, [66] per Kiefel CJ, Bell and Keane JJ). It is wrong to assess MM by reference to the “*novelty conferring*” or “*inventive*” integer of a claimed invention. To adapt the observations of this Court in *Ramset* [33] to ss 18(1) and (1A) of the *Act*, “[*n*]ovelty and obviousness are dealt with specifically and exhaustively” in sub-paragraph (b).

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***The general principles apply to inventions which utilise computers, including EGMs***

23. There is no foundation for “*computer-implemented inventions*” to be treated differently from other categories of patent eligible subject matter. The *Act* contains no reference to “*computer-implemented inventions*” or their exclusion.
24. This Court in *Data Access Corporation v Powerflex Services Pty Limited* (1999) 202 CLR 1 [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ) affirmed the applicability of the general principles of patent eligibility to computer-implemented inventions: “*In Australia claims to computer programs which are novel, not obvious and otherwise satisfy the Patents Act 1990 (Cth) and which have the effect of controlling computers to operate in a particular way, have been held to be proper subject matter for letters patent, as* 10 “*achieving an end result which is an artificially created state of affairs of utility in the field of economic endeavour*”, within the meaning of [NRDC]” (citing *CCOM* 295).
25. As recognised in *CCOM* 292B per Spender, Gummow and Heerey JJ, the filter is not whether an invention is “computer-implemented”, but whether it is a “*mere scheme*” (see *Grant* [14] per Heerey, Kiefel and Bennett JJ; PJ [100]; CAB 35). This is to be “*gathered from the specification itself*” (*Commissioner of Patents v Microcell Limited* (1959) 102 CLR 232, 250; *NRDC* 262; *CCOM* 291B; *Mirabella* 665; *Ramset* [38]-[39]).
26. The FFC in *CCOM*, held that a claim to a “*computer processing apparatus for assembling text in Chinese language characters*” was a MM (see the claim at 270C, 295C). The FFC 20 applied the general principles of patent eligibility identified in *NRDC* (289B-C, 295C).
27. In criticising the primary judge’s approach in that matter, the FFC in *CCOM* explained (at 291C, cited with approval by this Court in *Lockwood* [48]) (emphasis added):
- “*[I]n the 1990 Act, manner of manufacture, novelty, inventiveness and utility are stated as distinct requirements of a patentable invention. Thus, whilst a claim for the ball point pen now would fail for anticipation and obviousness, it would still be a claim for a manner of manufacture. Yet in the present case there are passages in the reasons of the primary judge (at 593) which suggest he was influenced in the determination of the issue as to ‘manner of manufacture’ by asking whether what was claimed involved anything new and unconventional in computer use.*”
- 30 28. The FFC in *CCOM* held that it was not relevant to the assessment of MM, that all that a patentee might have done was select a desirable characteristic of a computer and claimed all computers possessing that characteristic (294G-295A). This might be relevant to other

grounds of invalidity under the *Act*, but did not give rise to “*an independent ground of objection as to patentability*” (295A-B).

29. In *Grant* at [29], the FFC approved *CCOM*, as providing a “*useful analysis of the development of patent law*” in the context of computer programs. In *Grant* at [30], the FFC approved *Welcome Real-Time SA v Catuity Inc* (2001) 113 FCR 110, as a case in which the application of a method in a physical device created an artificial state of affairs within the concept of *NRDC*. In *Grant*, the FFC followed the reasoning in *NRDC* as providing the basis for a determination of what is patentable, explaining that “*a mere scheme or plan*” is not a MM (at [7], [14]), and that a “*physical effect in the sense of a concrete effect or phenomenon or manifestation or transformation is required*” to give rise to an artificial effect (at [32]). The FFC observed that “[*t*]he ability to adapt the notion of patentability to new scientific discoveries and technologies **should not be fettered by contrived constraints**” (at [8], emphasis added), and that what is required is “*a practical and useful result*”, so that more than “*intellectual information*” is involved (at [29]).
30. The general principles of patent eligibility have been applied to EGMs (*Aristocrat Technologies Australia Pty Limited v Konami Australia Pty Limited* (2015) 114 IPR 28 and *Neurizon Pty Ltd v LTH Consulting and Marketing Services Pty Ltd* (2002) 58 IPR 93) as within the existing concept of MM (see *Myriad* [28]).
31. There is no support in *CCOM*, *Data Access*, *Lockwood*, *Myriad*, *Grant*, *Catuity*, *Konami* or *Neurizon* for “computer-implemented inventions” (or EGMs) to be treated differently from other patent subject matter.

***The development of fetters on the patentability of computer-implemented inventions***

32. The FFC has, in a series of decisions post-dating *CCOM* and *Grant*, erred by developing “*contrived constraints*” which, anomalously, fetter the patentability of inventions which utilise a computer: *Research Affiliates LLC v Commissioner of Patents* (2014) 227 FCR 378; *Commissioner of Patents v RPL Central Pty Ltd* (2015) 238 FCR 27; *Encompass Corporation Pty Ltd v InfoTrack Pty Ltd* (2019) 145 IPR 1; and *Commissioner of Patents v Rokt Pte Ltd* (2020) 277 FCR 267.
33. In *Research Affiliates*, the FFC addressed the question of whether “*computer implementation of an otherwise unpatentable business scheme is sufficient to make the claimed method properly the subject of letters patent*” (at [1], emphasis added). The FFC was concerned with the principles to be applied to determine whether the computer



implementation of an *otherwise unpatentable scheme* might give rise to an artificially-created state of affairs of economic utility which constitutes a MM.

34. The FFC correctly identified the relevant principles of MM arising from *NRDC* (at [8]). In seeking to answer the question of when the computer implementation of an otherwise unpatentable scheme might constitute a MM (the second question identified by the primary judge in this proceeding), the FFC considered “[t]he position in other jurisdictions” (at [15]-[60]).
35. The FFC in *Research Affiliates* considered recent “UK decisions” to be “of assistance” (at [23]; [60]) and endorsed “a test of ‘technical contribution’” (at [36]). The requirement that an invention have “technical features” or “features which contribute to the technical character of the invention”, and that “[patentability,] novelty and inventive step...be established on the basis of [such] technical features”, is a principle of EU patent law (*Symbian Ltd v Comptroller General of Patents* [2009] RPC 1, [9]), not Australian law.
36. The FFC in *Research Affiliates* also surveyed the US cases and considered them to be “consistent with” the “Australian approach to patentability” ([60]). The FFC in *Research Affiliates* at [104], citing *Alice Corporation Pty Ltd v CLS Bank International*, 573 US 208 (2014), endorsed an enquiry into whether there is “an improvement in the computer”.
37. In drawing such principles from the UK and US case law, the FFC in *Research Affiliates* failed to exercise the caution advised by this Court in *Aktiebolaget Hässle v Alphapharm Pty Limited* (2002) 212 CLR 411, [36] or to heed the admonition in *CCOM* (at 288C).
38. Insofar as the recent UK case law was concerned, the FFC in *CCOM* 288C-289B-C had explained that “the Jacobean Statute as interpreted in *NRDC* no longer supplies a criterion for patentability in the British legislation” and that “[s]ome care is needed” when referring to UK decisions “post-dating the 1977 Act” (see also: *Apotex*, French CJ [13]-[16]; Crennan and Kiefel JJ [188]-[191]). The **relevant** principles on MM, as a matter of UK law (before the 1977 Act), had been set out in *International Business Machines Corporation’s Application* [1980] FSR 564 (*IBM*) (see: *CCOM* 292E-F).
39. The requirement of a technical effect or technical contribution of the claimed invention, as a substitute for “artificial effect”, came from Art 52 of the European Patent Convention (**EPC**) (*Research Affiliates* [18]-[24]), which reflects a codified approach to MM rejected in Australia (*Apotex*, per French CJ [16]; Crennan and Kiefel JJ [186]-[193]). It has no counterpart in Australian law, nor in the UK before the 1977 Act (*IBM* 572-573).

40. Insofar as the US case law was concerned, the jurisprudence in the United States has developed in the context of §101 of **Title 35** of the United States Code, which makes no reference to the *Statute of Monopolies* or the concept of MM (*Apotex*, per Crennan and Kiefel JJ [221]). The law of patents “*is not harmonised across countries*” (*Calidad*, [146] per Nettle, Gordon and Edelman JJ) and patent law in the US is different to Australia (*Calidad*, [196]-[198] per Nettle, Gordon and Edelman JJ).
41. The genesis of the US enquiry into an improvement in a computer is the text of §101, which requires a “***new and useful process, machine...or any new and useful improvement thereof***” (see eg *Alice* 216, 225, emphasis added). SS 18(1)(a) and (1A)(a) of the *Act* do not require an “*improvement*” to a “*machine*” for MM to be met in Australia.
42. The US Supreme Court has interpreted §101 of Title 35 as requiring a two-step enquiry. First, are the claims directed to a patent-ineligible concept? Second, and if so, do the claims contain “***an inventive concept***” sufficient to “*transform*” the claimed abstract idea into a patent-eligible application”? (*Alice* 217-218, 221, emphasis added). The second stage of that enquiry involves the very sort of “*overlap*” between the “*§101 patent-eligibility inquiry*” and “*§102 novelty inquiry*” (*Mayo Collaborative Services v Prometheus Laboratories Inc.*, 566 US 66 (2012) 90), which has been rejected by this Court (*Apotex*, per Crennan and Kiefel JJ [290]; *Lockwood* [48]; *Ramset* [36]-[40]). There is no foundation for such an enquiry in ss 18(1)(a) and (1A)(a) of the *Act*.
43. The US approach to patent eligibility, in the context of §101, has also resulted in chaos. Members of the US Court of Appeals for the Federal Circuit have complained that “[*t*]he court’s rulings on patent eligibility have become...diverse and unpredictable” (*American Axle & Manufacturing, Inc. v Neapco Holdings LLC*, 966 F.3d 1347 (2020) 1357) and “*a mess*” (*American Axle & Manufacturing, Inc. v Neapco Holdings LLC*, 967 F.3d 1285 (2020) 1319). It stands in contrast to the clarity of analysis in *NRDC* – a “*watershed*” (*Joos v Commissioner of Patents* (1972) 126 CLR 611, 616) and “*celebrated judgment*” (*The Grain Pool of Western Australia v The Commonwealth of Australia* (2000) 202 CLR 479 [45]).
44. Having taken guiding principles from the UK and US cases in considering whether the computer implementation of an otherwise unpatentable business method gave rise to a MM (Cf. the correct approach by the FFC in *Ariosa Diagnostics, Inc v Sequenom, Inc* (2021) 391 ALR 473 [165]), the FFC then applied those principles by asking whether “*any part of the inventive step lies in the computer implementation*”, concluding that “[*i*]t

is no part of the claimed method that there is an **improvement** in what might broadly be called “computer technology” (*Research Affiliates* [119], emphasis added). That approach:

- (a) assessed MM by reference to an abstraction, the “*inventive step*” of the claimed invention, and not “*the subject matter of the claims*” (Cf. *Myriad* [92]-[93]), and thereby committed the very “*fallacy*” rejected in *NRDC* 264;
- (b) overlapped MM with inventive step (Cf. *CCOM* 291C; *Lockwood* [48]; *Myriad* per Gageler and Nettle JJ [129]-[131]; *Ramset* [36]-[40]); and
- (c) distracted attention from the relevant enquiry identified in *NRDC* 269, *CCOM* 295B-C, *Grant* [32] and in *Ariosa* [114], [120], [155], [159].

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***The subsequent application by the FFC of the principles developed in Research Affiliates***

45. In *RPL*, the FFC applied the principles previously articulated in *Research Affiliates* (in the context of “*an otherwise unpatenable business scheme*” ([1])), as if they constituted rules governing the patentability of **any invention** implemented using a computer (*RPL* [37], [96]). Although correctly noting that computer-implemented inventions are not “*a new class of case*” ([115]), the FFC failed to recognise that the two criteria identified in *NRDC* are ordinarily sufficient to establish patentability (*Myriad* [28]; *CCOM* 295B-C; *Data Access* [20]; *Grant* [7]). As in *Research Affiliates*, the FFC in *RPL* sought to identify “*where the inventiveness or ingenuity is said to lie*” (at [112], emphasis added), again overlapping MM with inventive step and novelty.

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46. The FFC in *RPL* then converted the reference to an improvement in computer technology in *Research Affiliates* [118] into a *threshold* requirement for patent eligibility: “*A claimed invention must be examined to ascertain whether it is in substance a scheme or plan or whether it can broadly be described as an improvement in computer technology*” (at [96], emphasis added). Having done so, the FFC enquired, in assessing MM (at [99], [110]), whether the claimed invention involved “*generic computer implementation*” (Cf. *CCOM* 292F, 294B&G, 295A; *IBM* 572).

47. Instead, the FFC should have addressed, as the first question, whether the invention was a mere scheme or was, on the face of the specification, proper subject matter for the grant of a patent. If it concluded that the invention was a *mere* scheme, the FFC should *then* have addressed the question of whether, either in its implementation or otherwise, there was something that rendered the claimed invention patentable. The FFC should not have

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fettered its analysis with unnecessary constraints incorporated from principles developed in the UK/EU and the US, by following the approach adopted in *Research Affiliates*.

48. In *Encompass* (where only the application, and not the correctness, of *Research Affiliates* and *RPL*, was challenged ([77])), the FFC created additional constraints for the patentability of computer-implemented inventions. The FFC converted the reference to “*generic computer implementation*” in *RPL*, into a prohibition on patentable subject matter, holding that if a claimed invention “*merely require(s) generic computer implementation...then the method cannot be a manner of manufacture*” (*Encompass* [108], emphasis added; Cf. *CCOM* 292F, 294B&G, 295A). The FFC further held that because the claims did not secure, “*as an essential feature of the invention*”, the use of “*particular software or programing*”, the claimed invention was merely an “*abstract method*” (*Encompass* [100]-[102]; Cf. *Data Access* [21]-[22]; *Lockwood* [81]-[84]). This confused the *functional* role of a patent claim with the role of *expression in a material form* of a copyright work. It also failed to consider whether the claimed invention was a patentable combination (Cf. *NRDC* 264).
49. Finally, in *Rokt*, the FFC drew on *Research Affiliates*, *RPL* and *Encompass*, to hold that a claim to a “*computer implemented method*” (at [33]) was not a MM.
50. First, the FFC characterised (at [108]) the invention as “*a marketing scheme*”, denuding the claimed invention by discarding integers of the claim (Cf. s 18(1)(a): “*so far as claimed in any claim*”) and failing to assess MM, as a matter of substance, by reference to “*the subject matter of the claims*”, having regard to “*the utliity of the claimed invention*” in the relevant field of economic endeavour (Cf. *Myriad* [92]-[93]).
51. Second, the FFC assessed (at [108]) whether the “*marketing scheme*” (an abstraction, not claimed) was a MM, by asking “*whether it can broadly be described as an improvement in computer technology*” (Cf. *CCOM* 291C, 292F, 294B&G, 295A). The FFC failed to consider whether the claim was to a patentable combination.
52. Third, the FFC applied *Encompass* at [100]-[102], and held that, because the claim only involved the “*general application of computer technology*” (at [111]) for its “*well-known and understood functions*” and did not include specific software code but only functional directions – which is the appropriate role of patent claims (at [114]), it was not a MM.
53. The cumulative effect of *Research Affiliates*, *RPL*, *Encompass* and *Rokt* has been to create a collection of restrictive principles, inconsistent with *NRDC*, *Apotex*, *Myriad*, *CCOM* and *Grant*. In so doing, the FFC has:

- (a) overlapped MM with novelty and inventive step (Cf. *CCOM* 291C; *Lockwood* [48]; *Myriad* per Gageler and Nettle JJ [129]-[131]; *Ramset* [36]-[40]);
- (b) created an anomalous qualification on the principles governing patentability (Cf. *Apotex* per French CJ [46], [50], Gageler J [314], Crennan and Kiefel JJ [279]);
- (c) placed “*an unjustifiable gloss on the statutory language*” (Cf. *Calidad*, [110] per Kiefel CJ, Bell and Keane JJ), which has no foundation in the terms of the *Act*, *NRDC* or *Myriad*, and which is inconsistent with *CCOM* and *Grant*; and
- (d) “*fettered by contrived constraints*” the patent eligibility of computer-implemented inventions (Cf. *Grant* [8]), to introduce a narrowing conception of MM (Cf. *NRDC* 270; *Myriad* [18]; *Apotex*, per Crennan and Kiefel JJ [224], [241]; per French CJ [20], [27], [29]).

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54. These restrictive principles lack “*logic, simplicity and coherence with legal principle*” (*Calidad* [76], [109] per Kiefel CJ, Bell and Keane JJ; Cf. the appropriate approach in *Ariosa* [114], [120], [155], [159]). They are wrongly founded upon specific exclusions to patent eligibility codified in the UK 1977 Act and EPC and developed under US §101, which are not part of Australian law. These restrictive principles proceed from the erroneous premise that any invention implemented utilising a computer is a mere scheme.

#### ***The reasons of the primary judge***

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55. The primary judge (Burley J) correctly identified the relevant question as “*whether the invention as claimed is a proper subject of letters patent according to the principles for the application of s 6 of the Statute of Monopolies*” (PJ [86]; CAB 31). He answered this question (a) “*according to a common law methodology under the rubric of [MM]*” (PJ [86]; CAB 31, citing *Myriad* [18], *NRDC* 269 and *Rokt* [68]) and (b) following *CCOM*, independently of any consideration of the other requirements in s 18(1A) of the *Act* which are, for the purpose of assessing MM, assumed to be satisfied (PJ [84]; CAB 31) and which, in fact, here, had been accepted as satisfied by the Commissioner.

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56. Burley J posed two questions: see paragraphs 12-13, above. In addressing the “*initial question*”, and characterising the invention, he correctly found that “*the invention described and claimed, when understood as a matter of substance, is [not] to a mere scheme or plan. It is to a mechanism of a particular construction, the operation of which involves a combination of physical parts and software to produce a particular outcome in the form of an EGM that functions in a particular way*” (PJ [95]-[98]; CAB 33-5).

57. In so finding, the primary judge rejected the approach of the Commissioner, who sought to characterise the claimed invention as a “*mere scheme*” by reference to its “*inventive concept*” (PJ [99]; CAB 35). The primary judge correctly held that such an approach risked “*denuding an invention of patentability by prematurely discounting elements of the claim*” and was contrary to authority of this Court (PJ [101]; CAB 35-6).
58. Having characterised the claimed invention not as a “*mere scheme*” but as “*a machine of a particular construction*” and thus a MM (PJ [95], [98]-[101]; CAB 33, 35), the primary judge correctly held that “*it is unnecessary to consider the second enquiry*” (PJ [95]; CAB 34).
- 10 59. At trial, given the FFC decisions in *Research Affiliates, RPL, Encompass* and *Rokt*, each of the parties adduced expert evidence going to the technical advances achieved by the claimed invention(s). The primary judge held that much of the expert evidence was “*extraneous to the real dispute between the parties*” (PJ [28]; CAB 15); aside from assisting the Court in construing the specification, the role of expert evidence in relation to MM is limited to placing the Court in the position of the person skilled in the art at the priority date (PJ [27]; CAB 14-5). The question of whether there is a MM can be determined by a consideration of the face of the specification itself (*Microcell* 250; *CCOM* 291B; *Mirabella* 665 and *Ramset* [38]-[39]).

***The decision of the FFC – the majority, Middleton and Perram JJ***

- 20 60. The FFC majority held that the invention of claim 1 of the 967 Patent is not a MM (FCJ [94]; CAB 96).
61. The FFC majority only accepted the “*two step approach*” of the primary judge as workable where the invention is a method to be implemented in “*something which is undoubtedly a computer*”, without explanation (FCJ [22], [24]; CAB 77). However, the FFC majority considered that the “*two step approach encounters problems where the claim includes a physical object which contains or may itself be a computer*” and where there is a question as to whether it is a computer-implemented invention or something else (FCJ [25]; CAB 78).
- 30 62. Having rejected the two step approach of the primary judge, the FFC majority at FCJ [26]-[27] (CAB 78) then articulated a “*Proposed Alternative Approach*” comprising two questions:

“(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?*” (defined as the **new test**)

The majority then stated that: “*If the answer to (b) is no, the invention is not patentable subject matter. Of course if the answer to (a) is no, one must then consider the general principles of patentability*” (ie, such principles do not otherwise apply).

63. The FFC majority:

- 10 (a) wrongly rejected as incorrect the primary judge asking if the invention in claim 1 was a *mere* scheme (FCJ [28]; CAB 78) or business method (Cf. the authorities cited in paragraph 25, above), while acknowledging no authority on MM has ever required the characterisation of an invention as “*computer-implemented*” (FCJ [22]-[25], [29]; CAB 77-9);
- (b) wrongly focused on whether the EGM claimed was a computer (FCJ [32]-[49]; CAB 79-85) when such a characterisation is irrelevant as a matter of law in determining MM; and
- (c) in advancing their new test, neither followed the common law methodology identified by this Court in *Apotex* per French CJ at [17]-[18] and Crennan and Kiefel JJ at [224] and in *Myriad* per French CJ, Kiefel, Bell and Keane JJ (the plurality) at [23]-[28], nor identified any other jurisprudential foundation.

20 64. The FFC majority characterised the claimed invention as a “*computer-implemented invention*” by reference only to integers 1.10 to 1.12 of claim 1, concluding that, in substance, it was a feature game implemented on a computer (FCJ [56]; CAB 86). They held that a “*computer-implemented invention*” could **only** be patentable if “*it represents an advance in **computer technology***” (emphasis added) (FCJ [26]-[27], [57], [63 and heading]-[65], [87], [91]; CAB 78, 86, 88, 94, 95).

30 65. The FFC majority failed to distinguish between a *mere* scheme and a patentable combination. This error can be seen also to underlie the approach of the FFC in *Encompass* and *Rokt*: see paragraphs 48 and 51, above. In each case, the FFC moved directly to assess the claim as a mere scheme that does not make a technical contribution, without considering whether the integers of the claim have a working inter-relationship that characterises a patentable combination (see *NRDC* 264; *Minnesota Mining and*

*Manufacturing Company v Beiersdorf (Australia) Limited* (1980) 144 CLR 253, 266; *Lockwood* [59]-[60], [78]; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd [No 2]* (2007) 235 CLR 173 (***Lockwood No 2***) [124], [153], [167]). In error, the FFC majority said that it had not been contended that claim 1 of the 967 Patent was a combination claim (FCJ [3], [9]; CAB 70, 73; Cf. *Aristocrat FFC Outline* [22] (AFM 34-36) and FFC transcript at T:44-45; 55-56; 62-63; 67) (AFM 37-44).

66. The FFC majority (and also Nicholas J) erred by isolating integers 1.10 to 1.12, which they considered to be the novel or inventive aspect of claim 1, using only these as central to their enquiry as to whether the invention was a MM (FCJ [3], [6], [10 and heading]-[15], [31], [54], [56]-[60]; CAB 70, 71, 73-5, 79, 86-7), even though they recognised the need to read the claim as a whole (FCJ [52]; CAB 85). MM should be determined independently of questions of inventive step and novelty.
67. Considering only the feature game in integers 1.10 to 1.12, the FFC majority concluded that their new test was not satisfied, any potential advance being in *gaming* rather than *computer* technology (FCJ [63]-[65]; CAB 88; Cf. Nicholas J at [119]-[120], [142]-[144]; CAB 105, 111-112).
68. The FFC majority sought to justify their focus on specific integers of the claim by reference to *Myriad*. This was in error for the following reasons:
- (a) *First*, according to *Myriad* [92]-[93], and consistently with *NRDC*, the criterion for determining the “substance” of a claimed invention is those aspects which give the claimed invention utility in a field of economic endeavour (namely, in *Myriad*, the information content of the gene, which permitted diagnosis of a heightened breast cancer risk).
  - (b) *Second*, neither the FFC majority (nor Nicholas J) undertook an analysis of the substance of the invention of the kind described in sub-paragraph (a), above.
  - (c) *Finally*, the FFC majority (and Nicholas J) erred by using, as the criterion for determining the “substance” of the claimed invention, those aspects which they considered gave the claimed invention its novelty/inventive step/innovative step and ignored the claim as a whole as a combination of integers interacting with each other to produce a new result (Cf. *NRDC* 264; and see paragraph 65 above).
69. The FFC majority wrongly suggested that the FFC in *CCOM* had held that the invention in that case constituted an advance in computer technology (FCJ [86]; CAB 93-4; Cf.



CCOM 287C, 291C and 295B-C). The FFC majority declined to follow the decisions in *Konami* and *Neurizon* (FCJ [66]; CAB 88) because their new test was not satisfied in either case: “*the question of computer implementation was not addressed*” in *Konami* (FCJ [80]; CAB 92); no advance in computer technology was identified in *Neurizon* (FCJ [86]; CAB 93-4).

70. Finally, the FFC majority in acknowledging that their “*Proposed Alternative Approach*”, the new test in FCJ [26]-[27] (CAB 78), “*is likely to overlap with the question of novelty*” ([FCJ [93]; CAB 95) disclosed further error (see paragraphs 17, 21, 27, 42, above). MM is concerned with the “*the boundaries of patentability*” (*Myriad* [18]). The new test  
10 wrongly overlaps the enquiry into patentable *subject matter* (ie into MM under s 18(1A)(a)) with the separate and distinct inquiries into any *advance* over the prior art (ie the inquiries into novelty and innovative step under s 18(1A)(b)).

***The decision of the FFC – Nicholas J in dissent***

71. Nicholas J rightly rejected the new test of the FFC majority, concluding “*it is not appropriate to adopt an excessively rigid or formulaic approach*” to determining MM (FCJ [110], [116]; CAB 101, 104), consistently with *Myriad* [21 last sentence], [26]-[28].
72. Nicholas J correctly held that there is no requirement for “*an advance in the field of computer technology*” (FCJ [116]-[120]; CAB 104-5). There is a long line of authority to the contrary - see paragraphs 25 to 29, above, and ***Burroughs Corporation (Perkins)*** *Application* [1974] RPC 147 at 160.30. As Nicholas J observed, the law has long  
20 recognised that “*a computer implemented scheme or idea...may be patentable even though the relevant technical contribution resides in the scheme or idea rather than in the workings of the computer*” (FCJ [116]-[120]; CAB 104-5).
73. Nicholas J fell into error, however, by adopting the erroneous reasoning in *Research Affiliates*, *RPL*, *Encompass* and *Rokt* (see paragraphs 32 to 53, above) and seeking to incorporate into the application of the *NRDC* criteria, as rules, concepts from the UK/EU and US law which are foreign to the principles of MM developed by this Court. In so  
30 doing, Nicholas J (FCJ [110], [112] [115], [117]; CAB 101-2, 104-5) wrongly equated the question identified by this Court in *NRDC* at 277, as to the presence of an artificially created state of affairs, with the enquiry in *Research Affiliates* at [115]-[119], as to whether the claimed invention resulted in a technical innovation, technical contribution or technical effect (see also *RPL* [100]).

74. The approach of Nicholas J differed from that stated by the FFC (of which Nicholas J was a member) in each of *RPL*, *Encompass* and *Rokt*, and of the FFC majority in this case (see paragraph 64, above). Whilst the FFC in *Research Affiliates* (see *RPL* [99]) did not expressly confine itself to an improvement in computers (Cf. *RPL* [96]), Nicholas J stated expressly that “[t]here may well be a technological innovation **in the field of technology to which the invention belongs even though it cannot be said that there has been some technological innovation in the field of computers**” (FCJ [116], emphasis added; CAB 104), and that the claimed invention would comprise a MM if it involved “a technical contribution to the field of gaming technology” (FCJ [120], [124], [142], [143]; CAB 105-6, 111; Cf. FCJ [64]-[65], [87]; CAB 88, 94).
75. Nicholas J did not identify what constitutes a “mere scheme”, nor why the claimed invention was not to an EGM or a patentable combination.
76. Nicholas J wrongly rejected “the two step approach” of the primary judge (FCJ [135]; CAB 110), saying he would have remitted the matter for consideration of whether any claims, including claim 1, involved a technical contribution in the field of gaming technology (FCJ [142]-[144]; CAB 111-12). This was in error for the reasons in paragraph 35, above.

***The FFC majority failed to apply the reasoning required by this Court in NRDC, Apotex and Myriad***

- 20 77. The FFC majority accepted that claim 1 was within the existing boundaries of the concept of MM (FCJ [62]; CAB 87; *Myriad* [23], [28]). However, contrary to the reasoning of this Court in *NRDC*, *Apotex* and *Myriad*, the FFC majority wrongly held that “the general principles of patentability” do not apply to “computer-implemented inventions” (FCJ [26]-[27]; CAB 78).
78. The FFC majority’s new test is not based on analogical reasoning from established legal principle. Instead, it seeks to give effect to a new policy consideration, identified only by the FFC majority as “the encouragement of novel uses of computers to advance computer technology” (FCJ [93]; CAB 95). As discussed in the authorities in paragraphs 17, 21, 27, 42, above, MM should not involve considerations of novelty or obviousness. It is the specific grounds of novelty and inventive step in s 18(1)(b) of the *Act* that should be used
- 30 to filter out claimed inventions that fail to satisfy those criteria.

79. This reasoning by the FFC majority is an attempt to “fetter” by unnecessary constraints the patentability of an invention falling within existing boundaries of the concept of MM.
80. Consistently with this Court in *Apotex* (see paragraph 17, above) there is no foundation for “computer-implemented inventions” to be subjected to “contrived constraints” (*Grant* [8]) or treated differently from other patent eligible subject matter. The *Act* contains no reference to “computer-implemented inventions” or their exclusion. The constraints identified by the FFC below are not an appropriate substitute for assessing whether the invention is a mere scheme and, if so, whether there is something more, perhaps in its implementation, that renders it a MM.
- 10 81. The FFC majority defined a computer in terms that encompass, practically, any device containing a processor and memory (FCJ [32], [34]; CAB 79-80), which, under their new test, will be excluded from patentability, if it only results in an advance in areas *other* than computer technology. This will have significant ramifications for industry, affecting manufacturers of a wide range of goods, as diverse as digital clocks (FCJ [90]; CAB 95), refrigerators (FCJ [120]; CAB 105), writing instruments (PJ [102]; CAB 36) and EGMs, indeed the whole Internet of Things (see generally, IP Forum Issue 127, at page 38 column 1 [2]-[3]).

***The new test – rigid and formulaic contrary to NRDC, Apotex and Myriad***

- 20 82. In not applying the breadth of the concept of MM developed in *NRDC*, *Apotex* and *Myriad*, the FFC majority erred by articulating a rigid formula, to determine if computer-implemented inventions are a MM (FCJ [26]-[27]; CAB 78).
83. In *NRDC* at 271, this Court held that “[i]t would be unsound to the point of folly” to attempt to place on the concept of MM “the fetters of an exact verbal formula”. In *Apotex*, Crennan and Kiefel JJ at [224] observed that “any attempt to define...the expression “manner of manufacture”...is bound to fail” (see also Hayne J [82], Gageler J [309]). In *Myriad* at [5], French CJ, Kiefel, Bell and Keane JJ warned against “the use of any verbal formula in lieu of “manner of manufacture”” (see also *Myriad* [18]-[20]; *CCOM* 289D; *Research Affiliates* [117]; *RPL* [98]; *Encompass* [79]-[83], [90]).

***The FFC majority’s new test detracts from coherence***

- 30 84. The new test detracts from coherence of the law in relation to MM (*Myriad* [28](4), [30]). It leads to the logical “anomaly” in PJ [102] (CAB 36) that a mechanical equivalent to the invention claimed would be patent eligible, but the invention claimed would not; a

matter the FFC majority acknowledged but said was a “*disjunct*” (FCJ [88], [90]-[91]; CAB 94-5). As the primary judge observed, that anomaly is antithetical to the encouragement of invention/innovation (PJ [102]; CAB 36) (Cf. the objects clause of s 2A of the *Act*). There is no logical or normative distinction for differing treatment between mechanical devices and their electronic equivalents. The existence of this “*disjunct*” detracts from coherence of the law (*Myriad* [30]; *Apotex* [44], [281]-[282], [314]). The FFC majority has created incoherence in the law by taking a view contrary to *Konami* and *Neurizon* and in circumstances where the Commissioner has previously granted over 1,500 patents in the gaming field (PJ [11]; CAB 10-11).

10 ***The determination that the claimed invention was not a MM is wrong***

85. Applying the general principles of patentability (paragraphs 16-22, above), the invention, so far as claimed in claim 1, was properly found by the primary judge to be a MM.

86. The primary judge at PJ [95] (CAB 33-4) rightly found that the invention, so far as claimed in claim 1, is a MM: see paragraph 56, above. The primary judge’s characterisation of the claimed invention was undertaken, as a matter of substance, consistently with the approach in *Myriad* at [92]-[93], by reference to “*the subject matter of the claims*”, having regard to “*the utility of the claimed invention*” in a field of economic endeavour.

20 87. That the primary judge’s approach in the present case represented an orthodox application of the general principles of patentability, set down in *NRDC* and *Myriad*, is apparent when the FFC’s analysis in *CCOM 295C* is applied to the present case:

- (a) a relevant field of economic endeavour is gaming;
- (b) the end result achieved is an EGM which provides a feature game having specific characteristics, including that it meets relevant regulatory standards; and
- (c) the mode or manner of obtaining this, which provides particular utility in achieving the end result, is the particular combination of hardware, firmware and software functionality described in PJ [96] (CAB 34-5), each element interacting with each other.

30 88. This Court in *Lockwood No 2* [59]-[60] and [66] (relied upon by the primary judge at PJ [101]; CAB 35-6) emphasised the distinction between the *idea* or concept or principle informing an invention and the *means* of carrying it out or embodying it in a manner of

new manufacture, saying that “*manner of manufacture*” requires “*something of a corporeal and substantial nature*”. The claimed invention clearly satisfies these matters.

89. To find otherwise, the FFC had to, *first*, erect an exclusion for inventions involving a computer from the general principles of patentability and, *second*, devise new fetters contrary to these general principles of patentability. The FFC majority imposed a requirement of “*an advance in computer technology*”. Nicholas J imposed a requirement of “*a technical contribution*” or “*technological innovation*” in the field of technology to which the invention belongs. In doing so, the FFC fell into error by characterising the claimed invention by reference to perceived novelty conferring or inventive integers as opposed to by reference to the invention “*so far as claimed*” (s 18, the *Act*).

90. The FFC’s approach in the present case is not an outlier. It is the culmination of a flawed approach to “computer-implemented inventions” that started with the FFC’s decision in *Research Affiliates* and was further developed in *RPL*, *Encompass* and *Rokt*.

91. This Court ought to overrule the FFC’s approach as being contrary to the general principles of patentability identified by this Court as arising under s 6 of the *Statute of Monopolies* and the *Act*.

**Part VII: Orders sought**

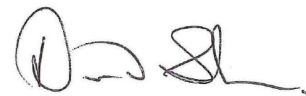
92. The appeal be allowed with costs.

93. The orders made by the FFC on 6 December 2021 be set aside and, in lieu thereof, the appeal to the FFC be dismissed with costs.

**Part VIII: Oral argument**

94. The appellant estimates that approximately 3 hours will be required for its oral argument.

Dated: 20 April 2022



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This submission was prepared by David Shavin QC, Cynthia Cochrane SC, Peter Creighton-Selvay and Wen Wu of counsel.

**ANNEXURE**

**RELEVANT STATUTORY PROVISIONS**

***PATENTS ACT 1990 (CTH)***

**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*

(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

20 (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*

(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.

10

(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.*]

20 **EUROPEAN PATENT CONVENTION**

ARTICLE 52

(1) European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application.

(2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1:

- (a) discoveries, scientific theories and mathematical methods;
- (b) aesthetic creations;

(c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;

(d) presentations of information.

(3) Paragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.

***UNITED STATES CODE, TITLE 35 – PATENTS, CHAPTER 10 – PATENTABILITY OF INVENTIONS***

§101 Inventions patentable

10       Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

***STATUTE OF MONOPOLIES 1623 (UK)***

6    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.