

Australian Competition & Consumer Commission

**Supplementary submission to the
Productivity Commission Inquiry into Intellectual
Property Arrangements in Australia**

Section 51(3) of the CCA

1 April 2016

1. Supplementary submission on section 51(3)

The ACCC would like to thank the Productivity Commission (PC) for the opportunity to make a supplementary submission to the one submitted on 30 November 2015.¹

The ACCC recognises that there are sound economic reasons for creating exclusive IP rights. On the extent of IP rights, the ACCC considers that IP rights should strike a balance with regards to incentives to invest in and create IP, with incentives to make maximum use of IP material once invented.

On the use of IP rights, the ACCC reiterates its long-standing view that the CCA should apply to commercial transactions involving intellectual property rights in the same way it applies to other property rights. In the broader context of exceptions to the CCA, the ACCC maintains the view that the onus should be on those seeking the retention of an exception to make the case that special treatment is justified and that there remains a clear policy rationale.

The purpose of this submission is to further develop the ACCC's recommendation that section 51(3) of the *Competition and Consumer Act 2010* (CCA) should be repealed. Specifically, this submission makes further comment on the following issues connected with section 51(3):

- The policy rationale for repeal; and
- The potential associated costs and benefits.

This submission also provides two case studies (**Attachment A**) that illustrate situations where the interpretation of section 51(3) could potentially affect the liability of parties for dealings in IP.

2. Policy rationale for repeal of 51(3)

The ACCC considers that in circumstances where there is the potential for anti-competitive outcomes and effects, there is no strong policy rationale that supports the treatment of IP rights differently from the way other property rights are dealt with under the CCA.

Where holders of IP rights contend that the public benefits of restricting use of those rights outweigh the anticompetitive detriments, the provisions of the CCA already provide for an authorisation process which provides for legal protection in those circumstances.

As noted in the ACCC's initial submission to this inquiry, a number of advisory panels have recommended the repeal of section 51(3). Most recently, the Harper Review Panel proposed the repeal of section 51(3) in its 2015 final report. Other advisory panels to recommend its repeal include the Australian Law Reform Committee (ALRC) (in their review into Copyright and the Digital Economy), who in November 2013, noted that the repeal of section 51(3) is an integral aspect of equipping copyright law for the digital economy. In addition, in July 2013, the House of Representatives Standing Committee on Infrastructure and Communications recommended the repeal of section 51(3) on the basis that it constrains the ACCC unjustifiably from investigating restrictive trade practices in relation to IP rights. The ACCC also notes that comparable jurisdictions internationally, such as the United States, Canada and the European Union, do not have an equivalent to section 51(3).

¹ The ACCC's initial submission can be found at <http://www.accc.gov.au/system/files/ACCC%20Submission%20-%20PC%20inquiry%20into%20IP%20arrangements%20in%20Australia%20-%2030%20November.pdf>

In light of the above factors, the ACCC submits that the removal of the exemption together with the availability of the normal authorisation process for IP arrangements would provide the appropriate certainty and flexibility.²

3. Costs and benefits associated with section 51(3)

The ACCC considers that the blanket exception from competition law currently provided by section 51(3) is not justified on cost benefit grounds.

Firstly, the section provides little if any benefit to rights holders. This is because rights holders can exploit their rights in a number of ways that do not risk breaching competition law. Further, the extent of the exception contained in section 51(3) is highly uncertain, given limited jurisprudence, but potentially very narrow. As a result, rights holders face significant uncertainty if they rely on section 51(3) to protect them from competition law claims being brought against them.

Secondly, the section comes at some cost to competition and economic efficiency.

This would certainly occur to the extent that anti-competitive conduct is put beyond the remit of competition law in a strict legal sense. Examples of such conduct can be drawn from international literature, such as guidelines issued by competition regulators overseas.³

That said, the ACCC is unaware of Australian competition law cases that have been successfully defended in reliance on section 51(3), and so it is difficult to point to real life Australian examples where this has occurred.

Of more importance, however, is the potential for the section to encourage or legitimise anti-competitive business practices, so that, in a practical sense, such practices become more widespread or continue over a longer timeframe.

In this regard, a rights holder could impose anti-competitive terms in the course of its business in the belief that the conduct was not amenable to competition law due to a misunderstanding of the scope of protection the section provides. This uncertainty would similarly make it more difficult to resolve disputes between the rights holder and an aggrieved party. In some cases, there is potential for an aggrieved party to not pursue its claims due to the greater cost and complexity with bringing legal proceedings in light of the purported availability of a statutory defence to the claims.

Attachment A provides details of two cases that the ACCC has commenced regarding the exploitation of IP rights alleging breaches of competition law in which section 51(3) has been raised as a defence.

Finally, to the extent that a rights holder could benefit from greater certainty *ex ante* – for instance, in those limited occasions where a rights holder intends to exploit its rights in a manner that could risk contravening competition law, there are better ways in which the

² ACCC, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, November 2012 & *ACCC submission to the ALRC Copyright and the Digital Economy Discussion Paper*, 31 July 2013.

³ The ACCC notes that the Canadian Intellectual Property Enforcement Guidelines (online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03935.html>) and the US Antitrust Guidelines for the Licensing of Intellectual Property (online at: <https://www.justice.gov/atr/antitrust-guidelines-licensing-intellectual-property>) provide instructive examples of both pro-competitive and potentially problematic business conduct involving IP. The ACCC considers that some of the problematic conduct highlighted in these examples may not be captured in Australia due to the operation of section 51(3).

rights holder could gain certainty over the legality of the intended conduct that would not bring these economic costs.

This can be done via existing authorisation processes provided under the CCA. In this regard, guidelines issued by the ACCC could provide rights holders with guidance on whether conduct is likely to breach the CCA, and when authorisation might be available.

Case study 1: ACCC action against Pfizer for alleged anti-competitive conduct

Pfizer exclusive dealing conduct in supply of atorvastatin

This case raises an important competition issue regarding the conduct of a patent holder nearing the expiry of the patent and what constitutes permissible competitive conduct.

The ACCC instituted proceedings in the Federal Court⁴ against Pfizer Australia Pty Ltd (Pfizer) for alleged misuse of market power and exclusive dealing, in contravention of the CCA, in relation to its supply of atorvastatin to pharmacies.

Atorvastatin is a pharmaceutical product used to lower cholesterol. Pfizer's originator brand of atorvastatin, Lipitor, was for a number of years the highest selling prescription medicine under the Pharmaceutical Benefits Scheme. Prior to loss of patent protection in May 2012, Lipitor was prescribed to over one million Australians with annual sales exceeding \$700m.

The ACCC alleged that Pfizer offered significant discounts and the payment of rebates previously accrued on sales of Pfizer's Lipitor, conditional on pharmacies acquiring a minimum volume of up to 12 months' supply of Pfizer's generic atorvastatin product.

The offers were made prior to Pfizer's loss of patent protection for the Atorvastatin molecule, when other suppliers of generic medicines were prevented from making competing offers to supply a generic atorvastatin product to pharmacies.

The ACCC alleged that Pfizer engaged in this conduct for the purpose of deterring or preventing competitors in the market for atorvastatin from engaging in competitive conduct as well as for the purpose of substantially lessening competition.

The Court dismissed the ACCC's application, finding that Pfizer had not contravened section 46 or 47 of the CCA.

In March 2015, the ACCC lodged a Notice of Appeal from the Federal Court's decision and an Appeal Hearing was conducted from 23-27 November 2015. Judgment has been reserved.

With respect to the alleged contravention of section 47 of the CCA (exclusive dealing), Pfizer raised section 51(3) as an exception to this provision through an amendment to its defence in the course of the pre-hearing phase of the matter. The ACCC addressed this defence in its written and oral submissions. The exemption was one issue in a matter which involved a number of significant areas of dispute concerning the key aspects of both section 46 and 47.

Given the finding that Pfizer had not contravened the exclusive dealing provisions at section 47, Pfizer's 51(3) defence did not need to be resolved. Nevertheless, it was considered sufficiently important to be addressed, with the judgement finding the following:

Had it been necessary to resolve this argument, it would have been rejected for either of two reasons, namely:

o the sale of the atorvastatin by Pfizer to the pharmacies would not have been held to involve the granting of any "licence";

and, perhaps more relevantly:

the "condition" otherwise contained within any such licence would not have been held to constitute a "condition" to which s 51(3) applied. Section 51(3), it has been said, "determines the scope of restrictions the patentee may properly impose on the use of the patent. Conditions which seek to gain advantages collateral to the patent are not covered by s 51(3)": *Transfield*

⁴ ACCC v Pfizer Australia Pty Ltd (NSD 146/2014)

Proprietary Limited v Arlo International Limited [1980] HCA 15; (1980) 144 CLR 83 at 103 per Mason J.

The relevant “*conditions*”, it would have been concluded were “*conditions*” which sought to gain “*advantages collateral to the patent...*”.

While Pfizer’s section 51(3) defence was addressed only briefly, it added additional uncertainty to the outcome of the proceedings. Had the ACCC succeeded in proving all elements of section 47, there would still have been the potential for s 51(3) to be applied in an unexpected manner given the lack of legislative and judicial guidance regarding the provision. This uncertainty imposes an additional burden on the parties when preparing their cases and submissions.

The ACCC is of the view that, particularly with regards smaller entities, there is the potential for a private competition litigation matter to be significantly impacted if section 51(3) is raised at any stage, including within the later stages of preparation for hearing.

Case study 2: Golden West

With the uncertainty regarding the scope of section 51(3), it is not clear whether it would apply to the type of conduct which the ACCC has previously considered to be a likely breach of the CCA. An example is provided by the Golden West matter, where the conduct persisted for a number of years before the matter was ultimately settled out of Court and the agreements in question were terminated.

Proceedings brought by the ACCC against Seven, Nine, and Golden West networks

Nine Network Australia Pty. Limited entered into an exclusive licence agreement on 31 October 1995 with Golden West Network Pty and Seven entered into an exclusive supply agreement with Territory Television (a Nine subsidiary).

In 1996, the ACCC instituted proceedings in the Federal Court against the Seven, Nine and Golden West networks and others in relation to long term program supply agreements. The agreements were:

1. an agreement between Nine and Seven not to pursue their interest in acquiring a second commercial television licence for regional Western Australia and Darwin respectively;
2. an exclusive 15-year program supply agreement between Golden West and Nine. At the time, Golden West operated the sole commercial television station in regional WA and was associated with the then Chairman of the Seven Network, Mr Kerry Stokes; and
3. an exclusive 10-year program supply agreement between Territory Television, a Nine Network subsidiary which operated the sole commercial television station in Darwin, and Amalgamated Television Services, a Seven Network subsidiary.

The ACCC alleged that the object of these agreements was to hinder or prevent potential entrants from acquiring any second commercial television licences for Darwin and regional Western Australia. This would put Territory Television and Golden West in a position to gain any second commercial television licences for Darwin and regional WA licence areas respectively. The ACCC alleged that the overall market sharing agreement between the Seven and Nine Networks contained an exclusionary provision and, alternatively, had the effect of substantially lessening competition for commercial free-to-air television services in the Darwin and regional Western Australia markets by preventing entry (s.4G), in breach of sections 45 or 47 of the then Trade Practices Act (now the CCA).

The ACCC's belief that section 51(3) did not apply to the agreements was in accordance with the approach suggested by Mr W.M.C. Gummow (who later became a member of the High Court of Australia) in an article entitled "Abuse of Monopoly: Industrial Property and Trade Practices Control" (1976). Mr Gummow said that in the case of copyright, section 51(3) concerns are relevant to, the literary dramatic or artistic work itself, rather than collateral agreements between licensor and licensee. In its defence, Nine argued that the exclusive copyright licence to Golden West was in the form of the licence granted by the copyright owner. This related to the subject matter in which the copyright subsists (i.e. to the programs to be broadcast), allowing the licensee to gain the benefit of the copyright work while conferring no collateral benefit. As such, Nine argued that section 51(3) applied to the agreements, thus exempting it from the application of sections 45 and 47. Seven and Golden West simply denied the ACCC's allegations.

The matter was eventually settled out of court in 1998. Nine agreed, among other things, to terminate the exclusive program supply agreement between its subsidiary, Territory Television, and Seven. Seven terminated its exclusive program supply agreement with Territory Television. Telecasters Australia Limited (a Network Ten affiliate in regional Queensland and northern NSW) subsequently acquired the second commercial television licence in Darwin and entered into an agreement with Seven for the exclusive supply of Seven programs to Telecasters for its Darwin operations.