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By E-mail

Intellectual Property Arrangements Inquiry
Productivity Commission
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Dear Sir / Madam

Submission in response to the Productivity Commission's Draft Report, *Intellectual Property Arrangements* (April 2016)

- 1 We refer to the Productivity Commission's Draft Report, *Intellectual Property Arrangements* dated April 2016 (**Draft Report**).
- 2 We welcome the opportunity to make this submission in response to the Draft Report, as part of the Productivity Commission's Inquiry into Australia's Intellectual Property Arrangements (**Inquiry**).
- 3 The Draft Report covers a broad range of issues regarding Australia's intellectual property regime. In this submission, we focus on the relationship between intellectual property and competition law and, specifically, the proposed repeal of the exception for intellectual property licensing in s 51(3) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). That issue is addressed in Section 14.1 of the Draft Report.
- 4 As noted in our submission dated 30 November 2015 in response to the Inquiry's Issues Paper, the Inquiry's Terms of Reference specifically directed the Productivity Commission to have regard to the findings and recommendations of the Commonwealth government's recent Competition Policy Review, chaired by Professor Ian Harper. We were extensively involved in the Competition Policy Review, and made submissions at each stage of the consultation process.
- 5 For the reasons set out in this submission, we do not support the proposed repeal of s 51(3). We remain of the view that there is a need for a carefully-drawn exception for IP-related transactions to the *per se* rules of competition law. Further, as explained below, it appears that the arguments in favour of repeal are based on a misunderstanding of both the scope of s 51(3) and the recommendations of the Competition Policy Review regarding the *per se* cartel laws.

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The proposed repeal of s 51(3)

- 6 Section 51(3) of the CCA currently provides a limited exception to the restrictive trade practices provisions of the CCA (other than in respect of misuse of market power and resale price maintenance). The exception applies to conditions in intellectual property licensing and assignment arrangements.
- 7 The Draft Report considers that the costs and benefits of the exception are balanced, and acknowledges that many of the arguments for repealing s 51(3) are not based on actual examples of intellectual property arrangements that involve significant harm to competition.¹ The Draft Report refers to a hypothetical situation described by the US Department of Justice and Federal Trade Commission.² That hypothetical situation involves a sham licensing arrangement that is used to disguise a cartel arrangement between competing manufacturers. One of the manufacturers holds a patent over a production process and grants licences to the other manufacturers. The licences contain anticompetitive exclusive territory restrictions on each manufacturer. However, apart from the patent holder, none of the manufacturers actually uses the patented production process.
- 8 In that hypothetical situation, section 51(3) would not protect the sham licensing arrangement. That is because the exclusive territory restrictions do not relate to “the invention to which the patent or application for a patent relates or articles made by the use of that invention”.³ The hypothetical situation does not, therefore, support the argument for repealing s 51(3).
- 9 A number of government reviews have previously considered whether s 51(3) should be repealed or amended. This is acknowledged in the Draft Report.⁴ The previous reviews include the Hilmer Review in 1993, the National Competition Council’s review in 1999 and the Intellectual Property and Competition Review Committee’s (the “Ergas Committee”) review in 2000.
- 10 The Competition Policy Review recommended that this exception be repealed. As we explained in our submission in response to the Inquiry’s Issues Paper:
- (a) The Competition Policy Review was concerned about the exception in s 51(3) applying to restrictions that might substantially lessen competition in cross-licensing arrangements that are entered into to resolve an intellectual property dispute.⁵ However, the Competition Policy Review considered that, as with other “vertical” supply arrangements, intellectual property licences should be exempt from the *per se* cartel provisions of

¹ Draft Report, 390.

² Ibid 391 (Box 14.2).

³ CCA s 51(3)(a)(iii).

⁴ Draft Report, 389 (Table 14.1).

⁵ Commonwealth of Australia, *Competition Policy Review: Final Report* (March 2015) 109.

the CCA and should only be prohibited if they have the purpose, effect or likely effect of substantially lessening competition.⁶

- (b) The Competition Policy Review's recommendation to repeal s 51(3) must therefore be seen in the context of its view that the CCA should not generally interfere in "vertical" supply arrangements.⁷ To that end, the Competition Policy Review recommended that:
- (i) third-line forcing only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition (Recommendation 32); and
 - (ii) the prohibition on exclusive dealing in s 47 of the CCA be repealed (Recommendation 33).

11 In its response to the Competition Policy Review, the government noted the recommendation of the Competition Policy Review regarding s 51(3) and stated that it would have regard to the Productivity Commission's findings on this issue.

12 The Draft Report acknowledges that the *per se* prohibitions "have been a brake on the repeal of s 51(3)" and that the 2000 review of intellectual property legislation under the Competition Principles Agreement considered that, as a result of those prohibitions, there may be negative consequences of simply repealing the exception.⁸ However, the Draft Report argues that this concern no longer applies because:⁹

"Harper et al. (2015) considered each of the *per se* prohibitions and recommended either a competition test (with respect to price fixing and third line forcing) or repeal (with respect to exclusionary conduct). Giving effect to these recommendations would remove the remaining impediment to the repeal of s. 51(3)."

13 With respect, this appears to us to be a misunderstanding of the Competition Policy Review's recommendations. As noted above, the Competition Policy Review recommended that third line forcing be subject to a competition test. However, the Competition Policy Review certainly did not recommend that price fixing — or any other form of cartel conduct — should be subject to a competition test. To the contrary, the Competition Policy Review made clear its view that "[c]artel conduct between competitors is anti-competitive in most circumstances and should be prohibited *per se*."¹⁰ It would have been remarkable and highly unorthodox if the Competition Policy Review had recommended that any form of cartel conduct should not be prohibited unless that conduct was shown to have the purpose, effect or likely effect of substantially lessening competition.

⁶ Ibid 110.

⁷ Ibid 63.

⁸ Draft Report, 395.

⁹ Ibid.

¹⁰ Commonwealth of Australia, *Competition Policy Review: Final Report* (March 2015) 58.

- 14 The Competition Policy Review did recommend the removal of the specific prohibition of exclusionary provisions in s 45(2)(a)(i) and (b)(i) of the CCA. This appears to be what the Draft Report refers to as “exclusionary conduct”. However, the Competition Policy Review’s recommendation regarding exclusionary provisions was made on the basis that such conduct is already prohibited *per se* as market sharing (a form of cartel conduct).¹¹
- 15 The Draft Report’s apparent misunderstanding that all of the relevant *per se* prohibitions in competition law are to be removed seems to have had a significant influence on the conclusion that there is now no barrier to repealing the exception in s 51(3). Given that the *per se* cartel prohibitions will remain, so do the concerns, acknowledged in the Draft Report, with repealing the exception.

“Block exemption” / regulatory guidance

- 16 The Competition Policy Review argued that intellectual property licensing or assignment arrangements that might breach the CCA could be protected by ACCC authorisation or notification, or potentially a “block exemption” (under a new power recommended by that review).¹² The Draft Report refers to the proposed “block exemption power”¹³ and recommends, in place of s 51(3), that the ACCC issue guidelines on the application of competition law to intellectual property.¹⁴
- 17 As stated in our submission in response to the Inquiry’s Issues Paper, we strongly disagree with the proposed reliance on ACCC authorisation or notification or any “block exemption” process. In our view, that would impose an unjustifiable regulatory burden on business. Further, even if this “block exemption” process becomes available, or the ACCC were to issue guidelines on the application of competition law to intellectual property, we consider the exemption should be written into the legislation rather than based on a decision by the ACCC that is subject to a change in the ACCC’s views.
- 18 Please do not hesitate to contact us if you have any queries. We look forward to receiving the Productivity Commission’s final report.

Yours sincerely

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¹¹ Ibid 59.

¹² Ibid 110.

¹³ Draft Report, 393.

¹⁴ Ibid 395 (Draft Recommendation 14.1).