Law Council
OF AUSTRALIA
Business Law Section

General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600
Via email: competition@treasury.gov.au 15 May 2015

Dear Sir / Madam

Submission in Response to the Competition Policy Review Final Report

The Intellectual Property Committee of the Business Law Section of the Law Council of Australia (***IPC***) welcomes the opportunity to make a submission in response to the Competition Policy Review Final Report (***Final Report***). This submission addresses the Final Report's recommendation that an overarching review of intellectual property (***IP***) be undertaken by the Productivity Commission[1] and the recommendation to repeal section 51(3) of the *Competition and Consumer Act 2010* (Cth) (***CCA***)[2] (collectively, the ***IP Recommendations***).

The IP Recommendations in the Final Report effectively mirror the corresponding draft IP Recommendations in the Competition Policy Review Draft Report (***Draft Report***). The IPC previously made a detailed submission expressing a number of concerns about the draft IP Recommendations. A copy of that submission is attached.

The IPC considers that the concerns it expressed in relation to the IP Recommendations in the Draft Report have not been adequately addressed in the Final Report. As such, the IPC reiterates its concerns in relation to the IP Recommendations.

In particular, the IPC submits that it is premature to recommend the repeal of section 51(3) without first undertaking a comprehensive overarching review of the interaction of the IP law regime with competition policy. In this respect, the IPC notes the following.

1 The Draft Report, while correctly identifying that an appropriate balance between competition and IP must be struck, did not address the underlying policy considerations and competing interests in any detail sufficient to inform the proper striking of that balance. The IPC considers that the Final Report also lacks sufficient detail in that regard.

[1] Final Report, Recommendation 6, page 41.
[2] Final Report, Recommendation 7, page 42.

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2 A broader review which focuses on the underlying issues and overarching policy objectives of both the IP and the competition law regimes, and the relationship between the two, would be a more appropriate forum for detailed discussion about whether a repeal or amendment of section 51(3) is necessary or desired. The recommendation in the Final Report that such a review be undertaken by the Productivity Commission is appropriate, but will only be fully informed and comprehensive if such a review is undertaken by people with expertise in the areas of competition law, IP law and economics.

3 In light of the fact that such a review has not yet been undertaken, Recommendation 7 of the Final Report, which proposes that section 51(3) of the CCA be repealed, should not be adopted.

If you have any questions regarding this submission or would like further information or background to that raised in this submission, please contact the Committee Chair, Sue Gilchrist,

Yours sincerely,

John Keeves, Chairman
Business Law Section

Competition Policy Review Secretariat
The Treasury
Langton Crescent
Parkes ACT 2600
Via email: contact@competitionpolicyreview.gov.au   24 November 2014

Dear Sir or Madam,

Submission in Response to the Competition Policy Review Draft Report

The Intellectual Property Committee of the Business Law Section of the Law Council of Australia (***IPC***) welcomes the opportunity to make a submission in response to the Competition Policy Review Draft Report (***Draft Report***). This submission addresses the Draft Report's recommendation that an overarching review of intellectual property (***IP***) be undertaken by an independent body[1] and the recommendation to repeal section 51(3) of the *Competition and Consumer Act 2010* (Cth) (***CCA***).[2]

Key Summary

1 It is premature to recommend the repeal of section 51(3) without first undertaking a comprehensive overarching review of the interaction of the intellectual property law regime with competition policy.

2 The Draft Report, while correctly identifying that an appropriate balance between competition and IP must be struck, does not address the underlying policy considerations and competing interests in any detail sufficient to inform the proper striking of that balance.

3 A broader review which focuses on the underlying issues and overarching policy objectives of both the intellectual property and the competition law regimes, and the relationship between the two, would be a more appropriate forum for detailed discussion about whether a repeal or amendment of section 51(3) is necessary or desired. The Draft Report's recommendation that such a review be undertaken by an independent body is appropriate, but will only be fully informed and comprehensive if such a review is undertaken by a body consisting of people with expertise in the areas of competition law, intellectual property law and economics.

[1] Competition Policy Review Panel, *Draft Report*, Draft Recommendation 8, page 31 ('***Draft Report***').
[2] Ibid.

4 In light of the fact that such a review has not yet been undertaken, Recommendation 8 of the Draft Report, which proposes that section 51(3) of the CCA be repealed, should not be adopted.

5 The recommendation to repeal section 51(3) without first undertaking a full review is problematic for the following reasons:

- The Draft Report fails to adequately recognise the importance of IP rights as inherently distinct from other forms of property rights, and that they should be treated accordingly. Protection of IP rights is essential for stimulating a pro-competitive and innovative market. Subjecting IP rights to a blanket competition test would serve to decrease incentives to innovate, leading to detrimental consequences for competition, economic investment in Australia and ultimately for Australian consumers.
- There is a lack of any empirical evidence supporting the Draft Report's comments about the anti-competitive effect of certain IP licensing or assignment arrangements, and the situations envisaged by the Draft Report of anti-competitive use of IP rights would *not* in any event attract the protection of section 51(3). They are largely alleged contraventions which relate to section 46 and are not within the scope of section 51(3).
- If section 51(3) were to be repealed, Australia would fall out of step with comparable jurisdictions such as the US, EU, Canada and New Zealand. These jurisdictions all acknowledge and accommodate for the unique nature of IP rights in their respective competition law regimes. For Australia to remove all safe harbours for IP rights would be an anomaly, having regard to the protections afforded in other countries with similar competition laws.
- Repeal of section 51(3) would result in large administrative and transactional costs, both for the regulator and for IP rights holders. In particular the proposal to use notification and authorisation procedures creates the potential for red tape and delay of common IP transactions such as the grant of exclusive licences.

IP rights are inherently distinct from other forms of property rights

6 An appropriate balance must be struck between IP rights and competition. However, the IPC considers that the appropriate balance would *not* be achieved, or improved, by the removal of safe harbour provisions for IP rights and/or subjecting licensing of IP rights to a competition test.

7 As an initial matter, there is no empirical evidence cited in the Draft Report to suggest that IP licensing or assignment arrangements of the kind exempted by section 51(3) are hampering competition in Australia. For example, there is no empirical evidence provided in the Draft Report to indicate that 'accrual of patent

portfolios' and 'cumulative innovation' together with their licensing in a manner exempted by section 51(3) are substantially realised problems in Australia.[3]

8 The main characteristic of IP rights is not physical possession. Rather, they are statutory rights intended to protect and promote innovation where market failure may preclude an innovator from recovering the benefits of innovation (i.e., the costs of undertaking the development and risk of that investment). IP rights act as an incentive to rights owners to invest in new innovations by granting the owner the ability to exclude others from using its rights for a period of time. To propose that such rights should only be exercised in the face of a fully competitive market is fundamentally misconceived and ignores the purpose of granting the rights in the first place.

9 In the economic context, the absence of appropriate protection for IP rights can have serious adverse consequences for the Australian economy. Without adequate protection, organisations will choose not to invest in research and development work in Australia or not to introduce or market their products in Australia. This would result in a limitation in the availability of products to the detriment of consumers.

The policy and scope of section 51(3) does not allow for anti-competitive behaviour

10 Section 51(3), as presently drafted, seeks to maintain a balance between encouraging and rewarding innovative, creative endeavour with regulating uses of IP rights more generally under competition laws. Section 51(3) seeks to draw that balance at the point where the restriction imposed by the term or condition extends beyond the scope of the exclusive right conferred by the relevant IP right or, as explained by Mason J in *Transfield v Arlo*,[4] seeks to gain an advantage collateral to the rights conferred by the intellectual property. Subject to the further points made below, the IPC submits that is the appropriate balance to be drawn and, in an Australian context, is consistent with the approaches taken overseas in different legislative and policy settings.

11 The Ergas Committee's review of section 51(3) of the *Trade Practices Act 1974* (Cth) recognised that "the IP legislation confers upon the intellectual property rights holder a series of exclusive privileges designed to promote innovation. Given that these are conferred by legislation they should be able to be effectively exercised even when this involves (as it generally must) the exclusion of others".[5]

12 The policy rationale behind section 51(3) is economically beneficial, and itself pro-competitive. An intellectual property owner can only obtain a return on their investment by commercialising the innovation themselves, or by permitting a third party to do so on their behalf (for example, by entering into an agreement to

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[3] *Draft Report*, page 82.
[4] (1980) 144 CLR 83 at 103.
[5] Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 211.

licence or assign the property rights to the third party, usually or often on an exclusive basis, in return for a fee or royalty). The latter situation commonly occurs where the innovator lacks the means or desire to exploit their innovation. In such a situation, agreeing to assign or licence their rights simply allows a third party to do what the innovator itself could, but is unable to, do. This situation, which section 51(3) is clearly intended to cover, is readily recognised as being pro-competitive.

13 In fact, it is inconsistent to use IP laws to stimulate innovation and then subject any dealing in commercialising that innovation to the competition test. Doing so will in all likelihood reduce post innovation returns and at worst, result in market failure. The imposition of a substantial lessening of competition test will impose an additional level of complexity into IP contracting which does not currently exist. As many IP licences are entered into at the early stages of research and development in an endeavour to obtain sufficient funding to continue that research and development, or to test for commercialisation of a product, the result may well be that IP rights holders will reduce licensing activities out of fear of contravening the CCA, thus depriving industry of access to new products and processes.

14 For example, if section 51(3) were repealed, exclusive IP licensing agreements would be subject to the prohibition against exclusive dealings in s 47 of the CCA. Not only is it incongruous in principle that IP rights holders would not be allowed to exercise their exclusive rights conferred by statute, but this would also have the effect of discouraging licensing by the rights holder. This in turn can have the downstream effect of reducing competition in the market due to the refusal to licence.

15 The Draft Report has failed to recognise the caveat in section 51(3) that IP licences and assignments will not attract the protection of section 51(3) if they fall within the scope of ss 46, 46A or 48 of the CCA. For example, the Draft Report's suggestion that IP rights "can be used to facilitate monopolistic or anticompetitive behaviour…for example, manifest in owners of IP rights extracting excessive royalties from IP licences or placing unnecessary restrictions on knowledge dissemination'[6] is irrelevant to the discussion of the appropriate scope of section 51(3), as such anti-competitive behaviour would fall within s 46 and therefore not attract the operation of the exemption. Similarly, the statement suggesting that conflicts occur between IP and competition policy "where IP owners are in a position to exert substantial market power to engage in anti-competitive conduct to seek to extend the scope of the right beyond that intended by the IP statute'[7] is not supported by section 51(3) and would fall within the ambit of s 46 of the CCA.

16 Further, the Draft Report's proposal to subject IP licences and assignments to a "substantially lessening of competition" purpose or effect test is unhelpful as the Draft Report has made no attempt to clarify what is meant by a 'substantial

[6] *Draft Report*, page 81.
[7] *Draft Report*, page 82.

lessening' of competition. This is an infamous black hole in Australian competition law, largely because the courts have failed to give any adequate guidance as to what is meant by 'substantial'. For example, the High Court of Australia has said that a 'substantial' lessening of competition is one that is 'meaningful or relevant to the competitive process'.[8] From a practical standpoint in business, that observation is neither meaningful nor useful. This problem would be compounded if, as proposed in the Draft Report, the test were to become the key test of liability for IP licences and assignments.

IP protection in other jurisdictions: The US, EU, Canadian and NZ experience

17 The Draft Report did not give adequate detailed consideration to the relationship between IP and competition in other jurisdictions. A repeal of section 51(3) would be inconsistent and out of step with the competition law regimes in other major jurisdictions, which all have safe harbour provisions to exclude the exercise of IP rights from competition law. This section draws attention to some examples of the safe harbour regimes operating in the US, EU, Canadian and New Zealand jurisdictions.

United States

18 The Draft Report stated that "in other jurisdictions, such as the US, IP rights are subject to the same competition laws as all other property rights".[9] This appears to reflect a fundamental misunderstanding of the operation of US competition law and the lessons that should be drawn for Australian law and policy.

19 First, the US courts employ the use of the "rule of reason", a legal doctrine applied to the interpretation of US antitrust law so as to safeguard against the overly strict interpretation of US antitrust legislation. The rule of reason, which has a long history of judicial interpretation and has particular application in the context of IP, requires a Court to consider the totality of the circumstances in relation to a practice that may be *prima facie* anti-competitive and in violation of the antitrust legislation. Thus, there is protection to be had in the fact that 'in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and public policy which the act embodies must be applied'.[10]

20 Under the rule of reason, a restraint on competition 'must be evaluated to determine whether it is significantly anti-competitive in purpose or effect. In making this evaluation, a court generally will be required to analyse the facts peculiar to the business, the history of the restraint and the reasons it was imposed. If, on analysis, the restraint is found to have a legitimate business purpose whose realisation serves to promote competition, the 'anti-competitive evils' of the challenged practice must be carefully balanced against its 'procompetitive virtues'

[8] *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 71 per Gummow, Hayne and Heydon JJ.
[9] *Draft Report*, page 84.
[10] *Standard Oil of New Jersey* v *US* 221 US 1 at p 67.

to ascertain whether the former outweigh the latter. A restraint will be unreasonable if it has the 'net effect' of substantially impeding competition.'[11]

21 As there is no Australian counterpart, the rule of reason 'defence' would be unavailable against the broadly defined categories of prohibition under the CCA.[12]

22 Secondly, in the application of the rule of reason, the US courts have consistently recognised that there is no antitrust violation simply to exercise the rights conferred by the IP right. What is required typically is an attempt to extend the power conferred by the rights beyond the scope of what is granted. Accordingly, the US Supreme Court declared:

> "the patent laws are *in pari materia* with the antitrust laws and modify them *pro tanto*".[13]

23 As a result, anti-trust enforcement in the courts in the United States is largely predicated on the existence of market power and its misuse under §2 of the Sherman Act (broadly corresponding to s 46 of the CCA) and, even then, confined to a limited sphere. For example, the Federal Circuit Court of Appeals has explained:[14]

> "In the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws. We therefore will not inquire into his subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patented invention may have an anticompetitive effect, so long as that anticompetitive effect is not illegally extended beyond the statutory patent grant."

24 Further, the Department of Justice and the Federal Trade Commission have issued guidelines establishing an anti-trust 'safety zone' in relation to certain types of intellectual property licensing arrangements.[15] In effect, these guidelines provide that the Department of Justice and Federal Trade Commission will not challenge an IP licence provided that it does not include prima facie anti-competitive provisions, such as price fixing, market sharing or other restraints that tend to reduce output or increase prices, and:

> (a) the licensing parties account for less than 20% of any markets significantly affected by the licence; and/or

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[11] *James McCoy (Yazoo) Smith v Pro Football Inc* (1889) Antitrust & Trade Regulation Reports p E1 (DC Circuit 7 Dec 1977).
[12] *Draft Report*, page 84.
[13] *Simpson v Union Oil Co.* 377 US 13, 24 (1964). See also *Eastman Kodak Co. v Image Technical Services Inc.* 504 US 451 fn 29 (1992); *SCM Corp v Xerox Corp* 645 F 2d 1195, 1206 (2d Cir 1981); *Data General Corp v Grumman Systems Support Corp* 36 F 3d 1147 (1st Cir. 1994).
[14] *In re Independent Service Organisations antitrust litigation* 203 F 3d 1322, 1327-8 (2000).
[15] US Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (April 2007).

(b) there are four or more independent entities not parties to the licence that have the ability and incentive to engage in similar research activities to those undertaken by the parties to the licence.

25 Within the context of the Australian courts' approach to anti-competitive behaviour under the CCA, therefore, section 51(3) reflects the same policy recognised by the US courts.

European Union – Block Exemptions

26 The European Commission has issued two block exemptions which expressly exclude IP rights from the operation of the competition law regime, to the extent that the IP rights do not engage the abuse of dominant market position rules. The first exemption, known as the Specialisation Block Exemption Regulation, provides that agreements where (a) one or more of the participants gives up the manufacture of certain products or the provision of certain services in favour of another participant, or (b) the participants undertake jointly to manufacture certain products or provide certain services, then the assignment or use of IP rights are exempted from the anti-competitive conduct rule provided that the agreement does not contain any "hardcore" restrictions on competition and the parties' combined market share in the relevant market does not exceed 20%.[16]

27 The second exemption is the Technology Transfer Block Exemption Regulation (***TTBER***). The TTBER, first adopted in 2004 and revised in March 2014, exempts certain licensing arrangements of patents, knowhow and software IP rights from the operation of the *Article 101(3) of the Treaty on the Functioning of the European Union*, which prohibits anti-competitive agreements and cartel conduct within the EU. Broadly speaking, the TTBER creates a safe harbour for licensing agreements concluded between companies that have limited market power and that respect certain conditions set out in the TTBER. These agreements are deemed to have no anti-competitive effect, or, if they do, the positive effects outweigh the negative ones. For example, the agreements must not contain severely anti-competitive restraints, such as provisions restricting a party's ability to set its own prices. The TTBER is accompanied by Guidelines which provide further detail on the application of the TTBER.

28 After extensive public consultation on the 2004 version of the TTBER, the European Commission expressly recognised that the revised TTBER 'continues to reflect that licensing is in most cases pro-competitive'.[17] In fact, rather than electing to repeal the TTBER, the European Commission recognised that more certainty – not less – was required. Thus, the revised TTBER adopts a more prudent approach of de-classifying certain, specific types of agreement clauses with potential anticompetitive effect, so that they are no longer automatically exempt

[16] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.
[17] European Commission, 'Antitrust: Commission adopts revised competition regime for technology transfer agreements' (21 March 2014) (Press Release).

from antitrust rules. These clauses include no-challenge clauses, such as those which allow the licensor to terminate a non-exclusive agreement if the licensee challenges the validity of the IP right, or exclusive grant-back clauses which force a licensee to licence to the licensor any improvements it makes to the licensed technology on a purely exclusive basis.[18]

29 The Review should also note the genesis of the block exemption concept. The European Commission adopted a very wide view of what constituted a restriction on competition under what was then art. 85 of the Treaty of Rome in its interpretation of a test very similar to what is now proposed in the Draft Report. That had a number of negative consequences.[19]

30 First, it meant that most agreements for the exploitation of intellectual property rights were potentially in contravention and so required exemption from the Commission under then art. 85(3).

31 Secondly, the Commission simply never had enough resources to deal with the number of cases for which exemption was potentially required.

32 Thirdly, that in turn led to the practice of the Commission issuing ‘comfort letters’ the legal effect of which, if challenged in court, was highly doubtful.

33 All of these matters created uncertainty and disincentives to the licensing of IP rights which would otherwise generally be considered pro-competitive by promoting the dissemination of technology.

34 The IPC further notes that block exemptions of the kind adopted in the EU are not in themselves a preferred solution and contrary to the Government’s expressed priority for reducing “red tape”. The block exemption substitutes the regulator’s view for what may be acceptable market arrangements for arrangements freely negotiated in the marketplace. The situations and circumstances in which licensing of IP rights may arise, however, are myriad. That calls for flexibility and innovation in arrangements which typically will be most efficiently achieved by negotiation rather than regulatory fiat.

Canada

35 In Canada, section 79(5) of the *Competition Act 1985* provides that *'an act engaged in pursuant only to the exercise of any right or enjoyment of any interest…pertaining to intellectual or industrial property is not an anti-competitive act.'*

New Zealand

36 Section 45 of the *Commerce Act 1986* (NZ) provides for similar safe harbour provisions to section 51(3). In fact, the New Zealand jurisdiction goes further than

[18] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.
[19] See Valentine Korah, *Know-how Licensing Agreements and the EEC Competition Rules: Regulation 556/89,* (ESC Publishing Limited, Oxford, 1989), 1 – 4.

section 51(3) in protecting statutory IP rights under the broader statutory IP regime – that is, the exceptions extend to any right, privilege or entitled conferred under the patents, designs, trade marks, copyright, plant variety or layout designs legislation.[20] The relevant provision states that:

> *45 Exceptions in relation to intellectual property rights*
>
> *(1) Nothing in this Part, except sections 36, 36A, 37, and 38, applies—*
>
> *(a) to the entering into of a contract or arrangement or arriving at an understanding in so far as it contains a provision authorising any act that would otherwise be prohibited by reason of the existence of a statutory intellectual property right; or*
>
> *(b) to any act done to give effect to a provision of a contract, arrangement, or understanding referred to in paragraph (a).*

<u>Summary</u>

37 Clearly, these examples show that IP rights are not treated like other forms of property in other jurisdictions. In light of the above comparative examples, there ought to be corresponding safe harbour in Australian law, such as that provided by section 51(3), to deal with uses of IP rights that are within the scope of the exclusive rights conferred by the relevant IP statute. The current drafting of section 51(3) appears to have achieved its intended purpose without any obvious hardships or undesirable economic effects.

38 If there is to be a framework review of IP laws in Australia as is suggested by Recommendation 7 of the Draft Report, such a review must be conducted before any fully informed proposal to repeal or amend section 51(3) can be made. Such a review would need to examine the circumstances under which various possible kinds of IP licensing restrictions are or are not justified on efficiency grounds. It would also need to examine the extent to which IP restrictions that are justifiable on efficiency grounds are exempt from legal prohibition and whether existing or proposed avenues of exemption are themselves efficient. This would necessarily involve examination of the treatment of IP licensing efficiencies under the rule of reason test in US antitrust law and *Article 101(3) of the Treaty on the Functioning of the European Union* as compared with their treatment under the amendments to section 51(3) proposed in the Draft Report.

Increasing the regulatory burden and red tape: Administrative, transactional costs and uncertainty in the market

39 The Draft Report's suggestion that IP licensing or assignment arrangements can be granted an exemption from liability under Part IV of the CCA "through the usual notification or authorisation processes" fails to consider the real world practical consequences of such an onerous, inefficient and commercially unrealistic

[20] Section 45(2) *Commerce Act 1986* (NZ).

requirement on commercial businesses. A repeal of section 51(3) will undoubtedly create additional and unnecessary administrative costs in the commercialisation of IP across many business contexts. It would be simply economically unfeasible for the ACCC, as well as wholly unfair for businesses, to require businesses to obtain ACCC authorisation for the many IP licences or assignment arrangements which might have an effect on competition.

40 As commercial transactions involving IP and the management of IP portfolios are a fundamental part of every business, the imposition of this additional obligation would force increased transactional costs as well as adding another layer of 'red tape' in ACCC regulation. This is directly contrary to the Government's policy of reducing regulatory burden and cutting red tape. Increased and unnecessary ACCC administrative regulation resulting in little economic public benefit would be antithetical to cost-effective, efficient competition regulation.

41 Another ancillary concern with the suggestion that IP licensing or assignment arrangements should be subject to ACCC regulatory approval is the appropriateness of vesting in a regulatory authority a practically absolute power to restrict IP rights that have been granted by statute. Apart from the obvious concern with having competition law regulators reviewing and assessing what may be extremely technical IP agreements, the IPC submits that this would merely add another layer of bureaucracy and red tape by virtue of the training and education needed to ensure the proper conduct of any such process by the ACCC.

42 The problems with the Draft Report's approach are illustrated by the Review's apparent endorsement of the ACCC's submission that the demise of the Optus TV Now service is in some way contrary to competition policy.[21]

43 The rights in question, the transmission of football and rugby matches to internet and mobile subscribers, were the subject of a competitive bidding process. That service was already being provided by a competitor of Optus. The issue was Optus' ability to provide the service to its subscribers without permission in competition with that other service (that is, in circumstances where Optus did not bid or was a losing bidder). If Optus could circumvent that process, there would be no incentive for its competitors or for it to bid for such rights in the first place. Correspondingly, internet and mobile service providers would have no, or greatly reduced, incentives to compete on what services they offered their customers. In the absence of undue market power, there is no basis for regulatory intervention to permit Optus to circumvent the licensing arrangements. Such a fundamental interference in the free operation of the market is quite unwarranted. The ACCC provides no analysis of the market to support any view that there was any market failure requiring policy intervention. The ACCC has adopted an *ex post* analysis rather than, as should be the case, viewed the matter *ex ante*.

[21] *Draft Report*, page 83.

44 Further, the Draft Report's proposal to grant the ACCC exemption powers based on a block exemption framework[22] cannot work to address the problems which would be created by the repeal of section 51(3), especially in the face of the ACCC's expressed view that IP exceptions to the competition law regime (such as that provided by section 51(3)) are not necessary or desirable. It would give rise to the problems suffered in the EU referred to above. Moreover, there is an inherent problem in repealing section 51(3) on the basis that the ACCC will have the authority to grant block exemptions when the ACCC has stated that it does not consider that exemption of IP transactions is needed.[23]

45 If the Parliament wishes to regulate this area in a different manner to section 51(3), the proper avenue for evincing its intention to do so is through carefully considered legislative amendment. The amendment should be found in legislation rather than in the exercise of power by a regulatory body. If section 51(3) requires modification (in relation to which no empirical supporting evidence has been brought forward), it is far better to legislate to clarify its scope and application than to grant to a regulatory body a blanket discretionary power to decide (or, more likely in this case, *not* decide) to issue block exemptions, conditions, guidelines and/or additional procedural processes. Such a section would then be clear on its face and would not require separate reference to the policy position of the regulatory body.

The IPC notes that it has had the benefit of reading the submissions of the Competition and Consumer Committee which also supports the view that section 51(3) should be considered as part of the overarching IP review.

If you have any questions regarding this submission or would like further information or background to that raised in this submission, please contact the Committee Chair, Richard Hamer,

Yours faithfully,

John Keeves, Chairman
Business Law Section

[22] *Draft Report*, Draft Recommendation 35, page 53.
[23] *Draft Report*, page 84 citing ACCCC submission 1, page 58.