SUBMISSION ON ACCC DRAFT GUIDELINES ON REPEAL OF CCA S 51(3)

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I Failure to reflect the overreach of the cartel prohibitions under the CCA unless there is a competitor supply/acquisition exemption as recommended in Recommendation 27 of the Competition Policy Review Final Report

1. Thank you for the opportunity to make a submission on the Draft Guidelines on the repeal of subsection 51(3) of the CCA.

2. The text and the examples given in the Draft Guidelines fail to reflect the overreach of the cartel prohibitions under the CCA unless there is a competitor supply/acquisition exception as recommended in Recommendation 27 of the *Competition Policy Review Final Report* (31 March 2015) (Harper Report).[1] Ignoring this overreach, as the Draft Guidelines do, is misleading and unsatisfactory.

3. The Treasury Laws Amendment (2018 Measures No. 5) Act 2019 (**TLA Act**) repealed 51(3) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The TLA Act did not include a supply/acquisition agreement excepting supply agreements between competitors from the application of the cartel prohibitions under the Act (**Competitor Supply/Acquisition Cartel Exception**). The lack of any accompanying supply/acquisition exception is inconsistent with Recommendation 27 of the *Competition Policy Review Final Report* (31 March 2015) (Harper Report).[2] Recommendation 27 is that the repeal of s 51(3) of the CCA be accompanied by a Competitor Supply/Acquisition Cartel Exception.

4. Liability for cartel conduct often depends on whether or not an exemption under the CCA applies without the need to apply for authorisation. Authorisation is costly, bureaucratic, and limited to a public benefit test (the no-SLC limb of the test that applies

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1 Available at http://competitionpolicyreview.gov.au/.

2 Available at http://competitionpolicyreview.gov.au/. On the need for a competitor supply/acquisition exception see further C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) 8.6.

to anti-competitive agreements under s 45 does not apply in relation to the per se cartel prohibitions).[3]

5. Part II below sets out six examples that demonstrate the overreach of the cartel prohibitions unless there is a Competitor Supply/Acquisition Cartel Exception.[4]

II Examples that demonstrate the overreach of the cartel prohibitions unless there is a Competitor Supply/Acquisition Cartel Exception

6. The examples below demonstrate the overreach of per se cartel prohibitions in the context of IP licensing unless there is a suitably drafted Competitor Supply/Acquisition Cartel Exception. Examples 1 ─ 3 illustrate situations where the s 51(3) exception would or would be likely to have applied. Examples 4 ─ 6 illustrate situations where the s 51(3) exception would not have applied or would be unlikely to have applied but where per se liability for cartel conduct is unwarranted because the anti-competitive effects are non-existent or uncertain in the absence of case-by-case assessment.

7. These examples are hardly exceptional or surprising. They spell out what Recommendation 27 of the Harper Report took to be self-evident. They are consistent with: Recommendation 15.1 of the Productivity Commission's Report, *Intellectual Property Arrangements* (2016); the recommendation of the Ergas Report in 2000 that IP licensing conditions be excluded from per se liability;[5] and the literature on the competition effects of IP licensing conditions.[6]

Example 1 ─ territorial restriction

8. A and B manufacture batteries for e-vehicles. A is based in California, B in Geelong. A plans to establish a manufacturing base in Australia unless it can obtain sufficient revenue by licensing its patented technology to a manufacturer that already has a

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3 CCA s 90(8)(a). See further *Competition Policy Review: Final Report*, 398-399.

4 See further B Fisse, "Harper Report Implementation Breakdown: Repeal of Section 51(3) of the Competition and Consumer Act 2010 (Cth) and lack of Proposed Supply/Acquisition Agreement Cartel Exception" (2019) 47 ABLR 127.

5 Australia, Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement*, Final Report (September 2000) 215.

6 See eg US DOJ & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* (2017); American Bar Association, *Intellectual Property and Antitrust Handbook* (2nd ed 2015); H Hovenkamp, M Janis, M Lemley, C Leslie & M Carrier, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* (3rd ed 2016); RD Anderson & NT Gallini (eds), *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy* (1998); SD Ackerman (ed), *The Interface Between Intellectual Property Rights and Competition Policy* (2007); RJ Gilbert, "Competition Policy for Intellectual Property" in P Buccirossi (ed), *Handbook of Antitrust Economics* ((2008) ch 14; GK Leonard & RO Mortimer, "Antitrust Implications of Pharmaceutical Patent Litigation Settlements" in GK Leonard & LJ Stiroh (eds), *Economic Approaches to Intellectual Property, Litigation, and Management* (2005) ch 17.

manufacturing plant in Australia. A licenses its patented technology to B on terms that satisfy A's commercial strategy. A condition of the licensing agreement is that B will not export batteries that it manufactures using A's patents unless A consents in writing in advance (the "Non-Export Provision").

9. An IP licensing condition of this kind is not unusual and will not necessarily be anti-competitive.[7]

10. The patent licence in this example contains a cartel provision. The purpose condition under s 45D(3(a)(iii) applies: the Non-Export Provision has the substantial purpose of restricting or limiting the supply of goods made by the use of A's patents in a market in Australia.[8] The competition condition under s 45D(4) applies: but for the patent licensing agreement with B, A is a likely competitor of B in Australia in relation to the supply of batteries for e-vehicles.

11. The s 51(3) exception is likely to have applied in this example. A territorial restriction of this kind probably "relates to" A's patents within the meaning of the subsection.[9]

12. The exclusive dealing exception under s 45AR would not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).

13. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.

14. The Non-Export Provision would be covered by the Exposure Draft Bill (October 2016) s 44ZZRS exception (see subsection (1)(a)(iii)).

15. There is the limited and bureaucratic possibility of authorisation. The test for authorisation in relation to cartel prohibitions is whether the public detriment of the cartel provision is sufficient to outweigh any public detriment. It is insufficient to show that the cartel provision does not have the purpose, effect or likely effect of substantially lessening competition in a market.

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7 See TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 22-23; American Bar Association, *Intellectual Property and Antitrust Handbook* (2nd ed 2015) 80-84.

8 One of several purposes is sufficient if it is a substantial purpose: CCA, s 4F(1)(a). The better view is that a substantial immediate purpose is sufficient to satisfy the purpose condition under s 45AD(3): see "Australian Cartel Law: Biopsies" (2018) 11-13, at: https://www.brentfisse.com/images/Australian_Cartel_Law_Biopsies_050518_2.pdf.

9 TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 22. For an incisive analysis of the s 51(3) "relates to" test see F Hanks, "Intellectual property rights and competition in Australia" in SD Ackerman (ed), *The Interface Between Intellectual Property Rights and Competition Policy* (2007) 315, at 322-324.

Example 2 – field of use restriction

16. A devises a new resin for use in fibreglass and supplies fibreglass products using this resin in several fields, namely boats, planes, and swimming pools. It has strong distribution and marketing channels in the fields of boats and planes, but not in that of swimming pools. B is a competing supplier in all three fields but has a particularly strong position in the field of swimming pools. A decides to maximise the value of its patented formula for the new resin by licensing the patent to B in the field of swimming pools ("Field of Use Provision").

17. An IP licensing condition of this kind is not unusual and will rarely be anti-competitive. The orthodox view is that:

    (a) patent owners may grant licences extending to all uses or limited to use in a defined field; and

    (b) the possibility of anti-competitive effects should be tested by assessing the competition effects, not by resorting blindly to per se liability.[10]

18. The patent licence in this example contains a cartel provision. The purpose condition under s 45D(3(a)(iii) applies: the Field of Use Provision has the substantial purpose of restricting or limiting the supply of goods made by B with the use of A's patent in a market in Australia. The competition condition under s 45D(4) applies: A is a competitor of B in relation to the supply of swimming pools.

19. The s 51(3) exception is likely to have applied in this example. A field of use restriction of this kind "relates to" A's patent within the meaning of the subsection.

20. The exclusive dealing exception under s 45AR will not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).

21. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.

22. The Field of Use Provision would not be covered by the Exposure Draft Bill s 44ZZRS exception. The drafting of Exposure Draft Bill s 44ZZRS does not cover a field of use restriction such as this.

23. There is the limited and bureaucratic possible solution of authorisation: see [15] above.

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10 American Bar Association, *Intellectual Property and Antitrust Handbook* (2nd ed 2015) 85-89.

Example 3 — quality restriction

24. A and B compete in the market for building cladding products. A supplies "SafeClad" cladding materials. A has a registered trademark for SafeClad materials. B is contracted to distribute SafeClad cladding materials in Australia. The contract licenses the use of the trademark SafeClad by B. One condition is that B will not use the SafeClad trademark on any cladding materials unless the materials have been tested by an independent testing lab and have passed the exacting "X-FLAM" anti-flammatory safety standard specifications specified by A in the licensing agreement (the "Anti-Flammatory Provision").

25. An IP licensing condition of this kind is hardly uncommon and will rarely be anti-competitive. Such a provision is intended to ensure that the IP owner's brand reputation is not damaged by the use of a defective or unsafe product.[11]

26. The patent licence in this example contains a cartel provision. The purpose condition under s 45D(3(a)(iii) applies: one substantial purpose of the Anti-Flammatory Provision is to restrict or limit the supply of goods bearing the with the SafeClad mark in Australia. The competition condition under s 45D(4) applies: A is a competitor of B in relation to the supply of building cladding products.

27. The s 51(3) exception would have applied in this example: see s 51(3)(c).

28. The exclusive dealing exception under s 45AR will not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).

29. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.

30. The Anti-Flammatory Provision would not be covered by the Exposure Draft Bill s 44ZZRS exception. The drafting of Exposure Draft Bill s 44ZZRS does not cover an IP licensing restriction such as the Anti-Flammatory Provision.

31. There is the limited and bureaucratic possible solution of authorisation: see [15] above.

Example 4 — removal of blocking patent restriction

32. A and B compete in the market for smartphone chip technology in Australia. Each holds a patent that blocks the other from using market-leading smartphone chip technology in their smartphones. A licenses its blocking patent to B and B licenses its blocking patent to A. The licences are non-exclusive. They are unrestricted except that the

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11 TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 25.

parties agree not to commence litigation for infringement of each other's blocking patent ("Non-Litigation Provision") during the term of the reciprocal licensing agreement. A and B wish to avoid any further distraction and cost from continuing to litigate their respective patent claims.

33. IP licensing conditions imposed in settlement of IP disputes may be anti-competitive but often are pro-competitive.[12] The Non-Litigation Provision here is efficient and not a "naked" anti-competitive restraint.[13]

34. However, the cross-licensing agreement in this example contain a cartel provision. The purpose condition under s 45D(3(a)(iii) applies: one substantial purpose of the Non-Litigation Provision is to restrict the supply of smartphone chip technology by A and B by constraining A and B from fully exploiting their respective patent rights. The competition condition under s 45D(4) applies: A is a competitor of B in relation to the supply of smartphone chip technology in Australia.

35. The s 51(3) exception seems unlikely to have applied in this example: the non-litigation provision may not "relate to" the underlying patents in the sense required by the subsection. The view has been expressed that:[14]

> Conditions prohibiting a licensee from challenging the owner's intellectual property rights do not relate to the subject matter of the licence. Furthermore, they give an owner a collateral advantage by entrenching the owner's statutory rights by contract.

36. The exclusive dealing exception under s 45AR will not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).

37. There is no joint venture between A and B hence the joint venture exceptions under s 45AO and s 45AP will not apply.

38. The Non-Litigation Provision would not be covered by the Exposure Draft Bill s 44ZZRS exception. The drafting of Exposure Draft Bill s 44ZZRS does not cover an IP licensing restriction such as a no-challenge provision.

39. There is the limited and bureaucratic possible solution of authorisation: see [15] above.

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12 See further H Hovenkamp, M Janis & M Lemley, "Anticompetitive Settlement of Intellectual Property Disputes" (2003) 87 Minnesota Law Review 1719.

13 See further TK Cheng, "Antitrust Treatment of the No Challenge Clause" (2016) 5 Journal of Intellectual Property & Entertainment Law 437.

14 TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 27.

Example 5 – grant-back restriction

40. A and B compete in a market for the development of certain kinds of cancer-removal technology. A has a killer patent for a leukaemia-related technology and licenses the technology to B on condition that B grant a non-exclusive licence back to A of further leukaemia-related discoveries by B ("Grant-Back Provision").

41. A non-exclusive licence of this type is pro-competitive absent unusual circumstances.[15]

42. The licensing agreement in this example contains a cartel provision. The purpose condition under s 45D(3(a)(iii) applies: one substantial purpose of the Grant-Back Provision is to restrict B's choice of to whom it will supply the service of a patent licence to use a further discovery. The competition condition under s 45D(4) applies: A is a competitor of B in relation to the supply of patent-licences for leukaemia-related technology.

43. The s 51(3) exception would not have applied in this example. The Grant-Back Provision relates to future discoveries. It does not relate to the patent that A licenses to B.[16]

44. The exclusive dealing exception under s 45AR will not apply. The condition imposed by A is not an exclusive dealing condition as defined by s 47.

45. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.

46. The Grant-Back Provision would not be covered by the Exposure Draft Bill s 44ZZRS exception unless the further discovery was "substitutable for, or otherwise competitive with" the IP license; the further discovery may not necessarily meet that requirement. The drafting of Exposure Draft Bill s 44ZZRS does not adequately cover an IP licensing grant-back provision in all situations where such a provision is unlikely to be anti-competitive.

47. There is the limited and bureaucratic possible solution of authorisation: see [15] above.

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15 See American Bar Association, *Intellectual Property and Antitrust Handbook* (2nd ed 2015) 136-142.

16 TPC, *Application of the Trade Practices Act to Intellectual Property* (1991) 27.

Example 6 —anti-cloning restriction

48. Apple and Microsoft entered into a cross-licensing agreement. The agreement covered technical and design patents and also sought to prevent verbatim copying of products by means of an anti-copying provision ("Anti-Cloning Provision").[17]

49. IP licensing conditions of this kind seem a normal incident of industrial self-protection. They are hardly a "naked" restraint that warrants per se liability.

50. In Australia, the Anti-Cloning Provision is a cartel provision. The purpose condition under s 45D(3(a)(iii) applies: a substantial purpose of the Anti-Cloning Provision is to prevent the parties from supplying copies of each other's technology. The competition condition under s 45D(4) applies: the parties are competitors in the relevant market/s for the kinds of computer technology affected by the cross-licensing agreement.

51. The s 51(3) exception probably would not have applied in this example: the Anti-Cloning Provision does not appear to "relate to" the underlying patents in the sense required by the subsection.

52. The exclusive dealing exception under s 45AR will not apply. The condition imposed by the parties is not an exclusive dealing condition as defined by s 47. For instance, the condition does not fall within s 47(2) or (4).

53. There is no joint venture between A and B and hence the joint venture exceptions under s 45AO and s 45AP will not apply.

54. The Anti-Cloning Provision would not be covered by the Exposure Draft Bill s 44ZZRS exception. The drafting of Exposure Draft Bill s 44ZZRS does not cover an IP licensing restriction of this kind.

55. There is the limited and bureaucratic possible solution of authorisation: see [15] above.

VII Conclusion

56. The repeal of s 51(3) in the TLA Act without any proposal for introducing a Competitor Supply/Acquisition Cartel Exception is inconsistent with Recommendation 27 of the Harper Report. The examples of commonplace IP licensing restrictions in Part II above demonstrate the overreach of per se cartel prohibitions unless there is a suitably drafted Competitor Supply/Acquisition Cartel Exception.

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17 "Apple and Microsoft cross-license deal includes 'anti-cloning' protections going back to 1997" The Verge, Aug 13, 2012, 279, at: https://www.theverge.com/2012/8/13/3239977/apple-and-microsoft-cross-license-agreement-includes-anti-cloning.

57. ACCC Guidelines fall well short of having a Competitor Supply/Acquisition Cartel Exception; they are merely guidance. Moreover, the Draft Guidelines provide very limited guidance: they do not adequately address cartel-related issues raised by IP licensing conditions in licensing arrangements between competitors or likely competitors.

58. The Government has never published a Harper Report implementation plan.[18] Given the delay that has occurred in implementing the Harper Report (it is now over 4 years since the Report was published), the Government should provide a Harper Report Implementation Update. The Update should include details about what exactly the Government proposes to do about a Competitor Supply/Acquisition Cartel Exception and the repeal of s 47.

59. In the meantime, the Draft Guidelines should address IP licensing examples of the kind set out in Part II above where the IP licensing conditions are pro-competitive or neutral and yet where the cartel prohibitions will apply unless a Competitor Supply/Acquisition Cartel Exception is enacted or the conduct is authorised.

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18 Not the same as the *Government response to the Competition Policy Review* (24 November 2015) at: https://treasury.gov.au/publication/government-response-to-the-competition-policy-review/