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Mr Parnos Munyard
Advocacy and Law Reform
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By Email: *parnos.munyard@accc.gov.au*

Dear Mr Munyard

Draft guidelines on the repeal of subsection 51(3) of the CCA

Free TV Australia thanks the ACCC for the opportunity to consult on the Draft guidelines on the repeal of subsection 51(3) of the CCA (**the Draft Guidelines**).

Free TV has a number of concerns with the drafting of the Draft Guidelines. In summary, we are concerned the Draft Guidelines:

- Do not clearly state the fact that most IP arrangements will not be in conflict with competition laws (and that the repeal of s 51(3) does not impact on these arrangements).

- Suggests that the repeal of section 51(3) will impact significantly more on existing intellectual property arrangements than is actually the case at law. For example, the introductory section to the Draft Guidelines provides that "Following the repeal of subsection 51(3), conduct involving intellectual property rights will be subject to the anti-competitive conduct prohibitions in Part IV of the CCA in the same manner as all other conduct", however it does not clarify that most IP arrangements are at no risk of falling foul of Part IV.

- Do not provide guidance on the matters that the ACCC will take into account in determining whether conduct has actually breached or not in relation to the limited circumstances where competition issues may be in conflict with IP arrangements.

- Provide an example (Example 8) which suggests that exclusive licensing arrangements are now more likely to breach the CCA.

This is contrary to our understanding of the effects of repeal of this provision as well as the proposed clarification that the Draft Guidelines were intended to provide.

Basis of repeal of section 51(3) is that IP rights and competition laws are no longer in conflict

The Productivity Commission's 'Intellectual Property Arrangements' Report sets out the key reason for repealing the provision as follows:

> "*The rationale for the exemption has largely fallen away. IP rights and competition are no longer thought to be in 'fundamental conflict'. IP rights do not, in and of themselves, have significant competition implications. Rather, competition implications arise in those cases where there are few substitutes or where the aggregation of IP rights may create market power*."[1]

This rationale is not clear from the Draft Guidelines. In our view, the Draft Guidelines should a) make this underlying rationale for removing s 51(3) clear, and b) set out the factors that would guide the regulator in determining whether there may be anticompetitive effects, in breach of the law, in the limited circumstances where competition law may be in conflict with IP arrangements. It was our understanding from the Productivity Commission's report that this would be the purpose of any guidelines, to reduce the uncertainty that arises from s 51(3)'s removal.[2]

Exclusivity is fundamental to IP arrangements, broadcasters' businesses and investment in Australian content

The purpose of IP licensing agreements has long been recognised as providing a set of exclusive rights, therefore enabling rights holders to monetise the limited rights the subject of the agreement, and to set out the agreed terms of that exclusive arrangement. The law has allowed these arrangements because of the public benefits that they provide.

Exclusive intellectual property rights recognise the importance of incentivising the creation of intellectual property, and the value of free-to-air broadcasting and dissemination of content to the public. While the purpose of Part IV of the CCA is to prohibit certain restrictive trade practices, the exemption at s 51(3) recognised that the public value in copyright licensing arrangements outweighs any detriment from any anti-competitive concerns that may arise, by explicitly excluding them.

While the exemption may no longer be necessary, the TV industry remains heavily reliant on IP licensing arrangements to ensure there is sufficient incentive for continued investment in creative content. We spend approximately $2 billion per year on content, all of which is subject to IP licensing arrangements. Examples of the types of agreements that broadcasters may enter into, and that we understand would generally not be impacted by the repeal of section 51(3), include sports broadcasting contracts, exclusive arrangements with producers to import formats of programming, and ad hoc exclusive arrangements with individuals and businesses in relation to the licensing of their IP.

Broadcasters may licence these rights in various different ways. For example, the recent trend in commercial sports rights negotiations has seen a series of rights, including TV and radio broadcast, and online audio and video streaming rights, being licensed together as a package of rights. These rights can also include guarantees related to future rights negotiations, for example first right of refusal.

[1] Productivity Commission, Intellectual Property Arrangements, No. 78, 23 September 2016, 443.
[2] Ibid, 443.

The Draft Guidelines should provide certainty that exclusive licensing practices will not breach the CCA

Investing in content via IP licensing arrangements is part of Australian broadcasters' core business. It is critical that broadcasters continue to have certainty in relation to these rights so that the investments they make are not put at risk.

It is clear (including from the Productivity Commission's report), that current exclusive licensing practices such as these are not intended to be impacted by the repeal of section 51(3) and they are not considered to be intrinsically anti-competitive.

However, section 51(3) provided a level of certainty that the investments we make in content are protected from the application of the CCA which has now been removed. Our view is that in the absence of legislative certainty, the Guidelines should provide this certainty to allow broadcasters to operate without the threat of costly legal proceedings.

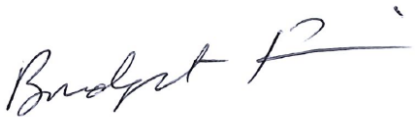
Recommendations

In order to continue to provide broadcasters with certainty in relation to their investments, we therefore recommend:

- The Draft Guidelines explicitly state that section 51(3) was repealed because IP rights and competition laws are no longer thought to be in 'fundamental conflict';
- The Draft Guidelines make clear that the repeal of s 51(3) will have no impact on the intellectual property arrangements mentioned above, and that they will not breach the provisions of the CCA;
- The Draft Guidelines provide guidance on the matters that the ACCC will take into account in determining whether conduct has actually breached the CCA or not in those limited circumstances where competition issues may be in conflict with IP arrangements; and
- Example 8 be removed from the Draft Guidelines or amended to avoid the incorrect representation that exclusive licensing arrangements are more likely to breach the CCA following the repeal of s 51(3).

Please don't hesitate to contact me on 02 8968 7100 if you have any questions or would like to discuss this matter.

Yours sincerely



Bridget Fair
Chief Executive Officer