Submission in response to the ACCC's draft guidelines on the repeal of ss 51(3) of the Competition and Consumer Act 2011 (Cth)

Joint Submission

26 July 2019

1 About us

1 This submission is made on behalf of Screen Producers Australia (SPA), the Australian Independent Distributors Association (AIDA) and the Australia New Zealand Screen Association (ANZSA). These associations represent a cross-section of the film and television industry that contributed $5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.[1]

2 General comments

2 The Australian Film & TV Bodies welcome the opportunity to provide feedback on the draft "Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 (Cth)" (the **Draft ACCC Guidelines**) and to identify amendments, where appropriate, to give effect to their purpose.

3 The Australian Film & TV Bodies support the intended purpose of the Draft ACCC Guidelines to provide guidance to IP owners and users about the potential impact of the repeal of s 51(3) CCA coming into effect in September 2019. Guidance is certainly required, given the extent of the change from the long-standing position in Australia.

4 However, the Draft ACCC Guidelines are intrinsically limited in what they can achieve, particularly at this point in time. As noted on page 1, the ACCC acknowledges that "*set out the ACCC's current understanding and interpretation of the law following the repeal*" and, as "*Australian courts are ultimately responsible for interpreting the CCA, determining if a provision has been contravened, and determining what, if any, penalty or other orders should be imposed*", and that they will need to be amended "*[f]ollowing any relevant court decisions*".

5 In reality, on the repeal of s 51(3) there will be virtually no precedents under Australian law to enable predictions to be made about how competition laws will apply to intellectual property rights in a post-repeal environment.[2] Nor will there be any other binding source of law (such as a class exemption).

6 The only extrinsic material that will be available to a Court will be Chapter 4 of the Explanatory Memorandum to the *Treasury Laws Amendment (2018 Measures No. 5) Bill 2018* (Cth) (**EM**), which contains the following general statements:[3]

> *"4.4 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*

[1] Access Economics, *Economic Contribution of the Film and Television Industry* (February 2015) Australian Screen Association http://anzsa.film/downloads/Economic-Contribution-Report—-February-2015.pdf

[2] Other than *Transfield v Arlo* (1980) 144 CLR 83 at 103 regarding the scope of s 51(3), the only other reported case regarding IP rights and competition law is *Australian Competition and Consumer Commission v Pfizer Australia Pty Ltd* [2018] FCAFC 78, which deals with historic provisions of the *Competition and Consumer Act 2011* (Cth) (**CCA**).

[3] Paragraph 4.3 also notes (incorrectly) that "*the number of arrangements that are affected by the removal of the exemption is likely to be small*". Given the uncertainty and breadth of relevant principles, it can be expected that most if not all IP licences and assignments will need to be analysed afresh.

arise in those cases where there are few substitutes or where the aggregation of IP rights may create market power."

7 The statements provide no practical guidance about the application of competition laws to arrangements for the licensing of intellectual property rights. No examples of how the statements would work in practice are provided.

8 While authorisation is available (Draft ACCC Guidelines, section 6.1 and 6.7), it is not a practical alternative to guidance being given on repeal for IP owners and users. Authorisation is not a realistic process for the large numbers of IP licences that exist and will exist in the future. The process limits the ability of companies to keep their contractual arrangements confidential, effectively telegraphing their commercial dealings to competitors. Authorisation is also slow – it can be expected to take six months and is a public process (Draft ACCC Guidelines, section 6.5). This is not a realistic timeframe for the efficient licensing of IP rights in highly competitive market segments.

9 Without detailed guidelines and legislative protections, IP owners and users in Australia will be disadvantaged when compared with other comparable jurisdictions. The United States, Canada and Europe have specific binding legislation, regulations and case law that underlie detailed guidance and provide a much higher degree of certainty to intellectual property licensing markets:

(a) In the United States, the substantial body of case law establishing the 'rule of reason' and a range of specific examples of the application of antitrust laws to intellectual property rights underlies the detailed US Department of Justice and Federal Trade Commission *Antitrust Guidelines for the Licensing of Intellectual Property* (12 January, 2017) (**US Guidelines**).[4]

(b) In Canada, ss 79(5) of the *Competition Act* acknowledges that the mere exercise of an IP right is not an anti-competitive act for the purposes of the abuse of dominance provision. In practice this means that the mere exercise of an IP right is not of concern under the general competition provisions, although this may raise a competition issue "*under the very rare circumstances set out in section 32* [special remedies]". As a result there is a practical distinction between the competition law analysis of conduct that involves the mere exercise of the IP right, and conduct that involves something more than the mere exercise of the IP right: the Competition Bureau outlines its approach to these two types of conduct in detail in its *Intellectual Property Enforcement Guidelines* (the **Canadian Guidelines**), which were updated in March 2019 to reflect recent case law.[5]

(c) In Europe, as well as a substantial body of case law on the interaction between competition law and intellectual property rights, the Technology Transfer Block Exemption Regulation[6] prescribes a safe harbour from the prohibition on anti-competitive agreements, and is

[4] This is evident on a review of the 36 page document with its extensive case citations. In relation to the 'rule of reason', see e.g. sections 3.4 and 4 of the US Guidelines.

[5] See e.g. paragraphs 35 to 41 of the Canadian Guidelines (a highly detailed 233 paragraph document).

[6] Commission Regulation 316 / 2014.

accompanied by detailed guidelines which are binding on the European Commission (**EU Guidelines**).[7]

10 The Australian Film & TV Bodies believe that legislative protections are required post-repeal of section 51(3) to provide the necessary certainty in the context of IP licensing, and that the Canadian model (section 79(5)) would be an appropriate starting point.[8] Australia does not have the volume of litigation capable of establishing the required case-precedents, even in the medium term, and in any event it is not appropriate to require market participants to be exposed to the risk of enforcement action in circumstances where there is inadequate guidance about the new legal environment that has been imposed on them.

11 A class exemption should still be introduced for IP licensing. This was the recommendation of the *Competition Policy Review Final Report* (March 2015) (**Harper Report**) associated with the recommendation to repeal s 51(3) CCA: it followed on from a proposal from the ACCC that the block exemption power could be used in this way, and the Final Report expressly referred to the EU Technology Transfer Block Exemption.[9] In these circumstances it would be more appropriate for the ACCC to initiate consultations on an IP licensing class exemption, than expecting IP owners and users to bear the burden of advocating for an exemption.

12 The introduction of a class exemption for IP licensing that provided 'safe harbours' for specified conduct would be consistent with international practice, not only in the EU, but also in the US where the US Guidelines set out an "Antitrust 'safety zone'":

> *"Because licensing arrangements often promote innovation and enhance competition, the Agencies believe that an antitrust "safety zone" is useful in order to provide some degree of certainty and thus to encourage such activity."* (US Guidelines, section 4.3, page 24).

13 Pending a full class exemption, the Draft ACCC Guidelines should introduce "safe harbours" into the ACCC's enforcement policy, along the lines of the US "safety zone". This is particularly the case to avoid unwarranted enforcement activity by the ACCC, particularly involving the cartel provisions.

3 Specific comments on the Draft ACCC Guidelines

14 The Australian Film and TV Bodies are concerned that the Draft ACCC Guidelines are too short, involve too high level a summary of some of the issues likely to arise in the application of Australia's competition laws to IP rights, and do not adequately address the market environment post-repeal.

15 The Draft ACCC Guidelines do not need to be prepared in isolation: they can, and should, be developed based on the work that has gone into equivalent guidelines in other jurisdictions, such as the US Guidelines and the Canadian Guidelines (referred to in paragraph 9 above).These documents

[7] Guidelines on the application of Art. 101 of the Treaty on the Functioning of the European Union to technology transfer agreements. There are also further block exemptions and associated binding guidelines that are relevant to IP although not specific to it, for vertical agreements and concerted practices and for research and development agreements and specialisation agreements, and horizontal agreements.

[8] See also paragraphs 39 to 46 below in relation to the need to implement the recommended exception to the per se cartel provisions.

[9] Harper Report, Recommendation 7, pages 27 and 110.

are detailed, and provide a meaningful reference point for any competition law analysis of different types of IP licences likely to occur in Australia. Relevantly, they accurately identify the unique features of IP rights and IP licences and their effects on competition in a much more detailed and sophisticated way than the Draft ACCC Guidelines, making them far more useful in practice to IP owners and users.

16 The approach taken in the development of the Canadian Guidelines was based on existing best practice rather than attempting to start from scratch. As the Canadian Competition Bureau acknowledged, the Canadian Guidelines "*took into account…guidance documents released in other jurisdictions such as the United States and the European Union*" (paragraph 8). The Draft ACCC Guidelines should be developed in a similar way.

3.1 Application to existing arrangements (paragraphs 1.6 to 1.8)

17 It remains a significant concern that the repeal of s 51(3) will apply to existing arrangements. Six months is too short a period for IP owners and users to review and potentially also renegotiate existing arrangements, particularly medium to long term arrangements that have been entered into and priced on the basis of the legal position at the time and which may have no mechanism for early termination. [10]

18 In paragraph 1.7 of the Draft ACCC Guidelines, the ACCC states that that relevant provisions will only be enforced in respect of:

> "*<u>the giving effect to</u>, on or after 13 September 2019, conditions in licences, assignments, contracts, arrangements, understandings or concerted practices, even where entered into before 13 September 2019*" (emphasis added).

19 In practice, this does not account for the fact that market participants may not have a practical ability to renegotiate their historic arrangements prior to 13 September 2019 and will have no choice but to give effect to them where they are embedded in existing contracts. An example is an option that has already been paid and negotiated for and to which pre-agreed terms apply.

20 The ACCC's enforcement approach from 13 September 2019 needs to take full account of this commercial reality. One way of doing this (in the absence of a grandfathering provision) would be to provide the relevant party with informal notice of the concerns that could be used as a basis for communications with the counterparty to address the matters of concern. This would at least give the parties a fair opportunity to consider whether they need to revise or amend their arrangements prior to any enforcement action.

21 In relation to rights granted or agreements entered into during the statutory grace period, the ACCC should take into account the extent to which the relevant party has had an opportunity to review its arrangements at the time of the grant or agreement when assessing its enforcement options. This is particularly important given that the grace period began in March 2019 but the Draft ACCC Guidelines

[10] Please note that this will disproportionally affect small businesses, with 95% of the screen industry made up of companies with less than 20 FTE., https://www.abs.gov.au/ausstats/abs@.nsf/mf/8165.0

were only released in late June 2019 and are not expected to be final until immediately prior to 13 September 2019.

3.2 General principles (paragraphs 2.1 to 2.5)

22 The Australian Film & TV Bodies acknowledge the ACCC's statement of principles regarding IP and market power described in paragraphs 2.2 and 2.3 as reflecting international practice, as well as the principles regarding the pro-competitive benefits of the licensing and assignment of IP in paragraphs 2.4 and 2.5 of the Draft ACCC Guidelines.

23 However, the Draft ACCC Guidelines would be substantially improved if this content was expanded to address the particular features of IP rights and dealings in much more detail, along the lines of the approach taken in the US Guidelines, the European Guidelines and the Canadian Guidelines.

24 First, the Draft ACCC Guidelines do not address the nature of IP rights or recognise that they provide incentives for firms to make significant (and often risky) investments in innovation by providing limited statutory rights to control and monetise uses of the IP results resulting from successful innovations, something which is particularly important given that IP is costly and time-consuming to develop and easy to copy. This is an important underlying theme common to each of the US, European and Canadian Guidelines.[11] This recognition of the unique nature of IP, including the fact it allows more than one person or entity to use IP at one time (either based on the nature of the rights themselves or as a result of licences)[12] and that products incorporating IP rights can be freely traded once legitimately put on the market,[13] is critical to any balanced competition law analysis of IP rights and should be reflected in the Draft ACCC Guidelines.

25 These principles squarely apply in the case of film and television content, which involves very substantial investment, no certainty about returns (films and TV shows can be "hits" or "bombs") and revenues that are very substantially compromised by online piracy. On the other hand, once a film or TV show is released into cinemas or onto streaming services or television, it can be freely accessed by legitimate viewers, and a distribution cycle evolving from cinemas to pay television to free-to-air television allows the content to be viewed by a wide range of audiences at different price points.

26 Secondly, an important general principle not addressed in the Draft ACCC Guidelines is the question of whether or not there is an obligation by a single firm to license its IP. It follows from the nature of IP rights described above that there should not be such an obligation, i.e. a mere refusal to license is not itself anticompetitive, and this is recognised in the US Guidelines in the context of market power ("*Nor does such market power impose on the intellectual property owner an obligation to license the use of that property to others*", page 4). It is also recognised in the Canadian Guidelines more generally, as follows (and later by reference to reported cases):

> "*Unilaterally exercising the IP right to exclude does not violate the general provisions of the Act no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights,*

---

[11] See e.g. US Guidelines at section 1.0 (last paragraph in particular), EU Guidelines at paragraphs 6-8 (particularly 8), 17, and Canadian Guidelines (e.g. at paragraphs 27 and 28).

[12] See e.g. Canadian Guidelines at paragraph 27 and US guidelines at pages 1-2.

[13] See e.g. EU Guidelines at paragraph 6.

impair or remove the economic, cultural, social and educational benefits created by them, and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary".[14]

27 Thirdly, the Draft ACCC Guidelines would also benefit from addressing the status of typical conditions of IP licences. In practice, the nature of IP rights and IP licensing is such that almost every IP licence will contain one or more of the following restrictions:

(a) Territorial restrictions;

(b) Field of use restrictions;

(c) Quality requirements; and

(d) Other controls relating to the licensed IP (e.g. intended to protect the IP from unauthorised exploitation).

28 These restrictions are inherent to the basic entitlement of the IP owner under IP laws to protect and commercialise the licensed IP rights (for example, by granting rights in particular territories and fields of use as part of a commercialisation strategy). In the case of copyright, the *Copyright Act 1968* (Cth) (**Copyright Act**) expressly recognises the right of the copyright owner to grant licences limited by geography, time and the relevant copyright right (e.g. communication of a film via the internet).[15] Quality requirements and other controls are required to protect the licensed IP – in the case of security controls this is a practical issue given the ease of copying digital content in particular. In the case of quality restrictions this is not only a commercial issue but in the case of trade marks it is required to maintain the validity of licensed trademarks.[16] It is not possible or practical to expect IP owners to license IP without these standard terms.

29 The US Guidelines expressly recognise this reality and note that the ultimate result is pro-competitive (assessed against the situation where a licence is not granted):

"*Field-of-use, territorial, and other limitations on intellectual property licences may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialisation and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free riding on the licensee's investments by other licensees or by the licensor. They may also increase the licensor's incentive to license…*" (pages 5-6)

30 This is followed by a hypothetical example which sets out the types of provisions that would be a concern, and confirms that the standard arrangement set out in the example "*is merely a subdivision*

[14] Canadian Guidelines at paragraph 37; see also paragraph 36 and (summarising reported cases) paragraphs 40-41.

[15] Section 196(2) provides that assignments and licences of copyright "may be limited in any way, including any one or more of the following ways". See *Phonographic Performance Company of Australia Limited v Copyright Tribunal of Australia* [2019] FCAFC 95 at [129]-[130].

[16] The Full Court has set a high standard for control of trade mark licensees that a registered trade mark owner is required to meet in order to establish the trade mark use required to maintain their trade mark registration: *Lodestar Anstalt v Campari America LLC* (2016) 244 FCR 557. The first component of this standard requires detailed quality controls in the trade mark licence agreement – see e.g. Besanko J at [106]-[109].

of the licensor's intellectual property amongst various fields or use and territories" and as there are no provisions of concern "*the licensing arrangement does not appear likely to harm competition among entities that could have been actual or potential competitors if ComputerCo had chosen not to license the computer program*".[17]

31 The same approach was recognised in the Harper Report as a core part of the recommendation to repeal s 51(3), and should be reflected in the Draft ACCC Guidelines.[18] The approach of analysing IP licences and the restrictions in them against "the level of competition that would have existed but for the licence" should be expressly referred to in the summary of the "with or without test" in paragraph 2.13 of the Draft ACCC Guidelines.

32 It would also be relevant and important in reducing uncertainty for the Draft ACCC Guidelines to expressly address exclusive licensing of IP and confirm its procompetitive benefits in standard situations, as well as the types of scenarios requiring further analysis. Exclusive licences have a special status under IP legislation in that they are required for the licensee to have standing to sue.[19] As a result they are very common and should be addressed.

33 Examples of the pro-competitive benefits of exclusive licensing include:

(a) In the context of film and TV content the ability to grant exclusive licences is key to the ability to monetise content, and therefore to the ability to finance and produce the content in the first place. The importance of exclusivity is indicated by the significant investment streaming platforms around the world are making in their own original content (e.g. Netflix Originals, Amazon Prime Originals, and in Australia the original content being produced and distributed by Stan and Foxtel). Platforms market themselves based on the exclusive content they have to offer, meaning that the grant of an exclusive licence provides an incentive for the licensee to invest in marketing the content that it has licensed exclusively. A platform with an exclusive licence from one content provider is free to enter into other exclusive licence deals with other content providers, and to develop its own original content.

(b) In a technology context, exclusive licensing is a legitimate way for the IP owner to commercialise its rights, especially when different technologies are involved, and incentivise the development of the relevant technology.

(c) with the cost of production rising almost 6% year on year[20], the removal of the exemption afforded by section 51(3) of the CCA in the context of exclusive licensing on a 'with or without basis' would be significantly detrimental to the sustainability of the industry and incentives for innovation.

[17] US Guidelines, pages 6-7; see also Canadian Guidelines at paragraph 34 and EU Guidelines at paragraph 9.

[18] Harper Review Final Report, page 109, ("The Panel…the exemption is not required").

[19] See e.g. Copyright Act s 119 "Rights of exclusive licensee".

[20] *Submission by FreeTV Australia*, Pre-Budget submission 2019-20, February 2019

34 In these ways, many exclusive licences *enhance* competition. This dynamic is recognised in the comparable international guidelines,[21] which recognise the procompetitive benefits of exclusive licensing and provide guidance about the types of exclusive arrangements necessitating further analysis. Further, the procompetitive benefits of such arrangements must have regard to the geographic scope of the market for screen content, taking into account the global nature of production and distribution of screen content and how this allows Australian businesses to remain competitive at an international level.

35 Exclusive licensing arrangements also provide significant benefits to consumer welfare. These include:

(a) improved quality by allowing consumers access to key content and premium content than what would otherwise be available without such exclusive licensing arrangements;

(b) innovation by allowing for a greater diversity of screen content than would otherwise be available without such exclusive licensing arrangements. This also serves broader public interest of developing and reflecting a sense of Australian identity, character and cultural diversity across the broadcasting industry in Australia;

(c) increased choice and lower prices, by providing incentives for broadcast platforms in Australia to pass on efficiencies to consumers and increase the volume of content they make available to Australian consumers than would otherwise be available without such exclusive licensing arrangements.

36 IP owners and licensees would be provided with significantly more certainty about standard arrangements if the approach outlined above were to be adopted in the Draft ACCC Guidelines.

37 Finally, the general principles set out in the Draft ACCC Guidelines are out of step with comparable international jurisdictions as they do not recognise business efficiencies and justifications for any particular conduct, which ultimately result in pro-competitive effects. This is a core part of the US Guidelines and the Canadian Guidelines, and implied throughout the EU Guidelines based on Art. 101(3) of the Treaty on the Functioning of the European Union, and the ACCC should adopt this approach in its attitude to the application of competition law to IP rights and dealings.[22]

3.3 Application of competition law to intellectual property

38 Section 3 of the Draft ACCC Guidelines should be amended to reflect the impact of the general principles outlined above, as well as the following specific matters.

Cartel conduct

39 There is a risk that standard conditions of IP licences and arrangements will be inappropriately caught by the per se cartel provisions following the repeal of s 51(3), in circumstances where they are procompetitive or neutral. This should not occur without having regard to whether or not there is a purpose, effect or likely effect of substantially lessening competition.

[21] See e.g. US Guidelines at 4.1.2, Canadian Guidelines at paragraphs 83-87 (and cf Examples 3B and 4) and EU Guidelines at paragraph 194 (cf 190-193 and 195-6).

[22] See US Guidelines at section 4.2 (and general approach based on the 'rule of reason') and Canadian Guidelines at 71-73.

40 This was recognised by the Harper Report, which recommended (Recommendation 27) an "*exemption for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including intellectual property licensing), recognising that such conduct will be prohibited by section 45 of the CCA (or section 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition*".[23]

41 The Productivity Commission made the same recommendation, recognising that the exception "*would address legitimate concerns that socially valuable activities are not impeded*".[24]

42 The exemption was included in the Exposure Draft Bill in October 2016 (s 44ZZRS),[25] but expressly reserved for future legislation in the Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*.[26] However, the EM did not consider this recommendation in the context of the repeal of s 51(3) CCA.

43 Examples of standard IP licensing restrictions with pro-competitive or neutral effects in supply and acquisition agreements between competitors that could currently be inappropriately caught by the per se cartel provisions include the type of standard territorial, field of use and quality restrictions referred to in paragraphs 27 and 28 above.[27]

44 Pending correction of this issue, the Draft ACCC Guidelines should be amended to clarify that the ACCC's enforcement approach will be in line with the recommendations of the Harper Report and the Productivity Commission summarised above. The Draft ACCC Guidelines should also explicitly include guiding principles, such as transparency and proportionality, that are set out in the ACCC's *Compliance and Enforcement Policy & Priorities*, including alternatives to enforcement action such as education and market analysis.

45 Combined with the general approach outlined in section 3.2 above, this will address the concerns of many IP owners and users about the apparent breadth of the references to "territorial restraints" in paragraph 3.8 (see also paragraph 3.2) of the Draft ACCC Guidelines. The content of the "cartel conduct" section of the Draft ACCC Guidelines is currently very high level and does not provide very much practical guidance. For example, it would be useful for the Guidelines to provide examples of acceptable conduct in the context of IP licensing as well as the existing examples of potentially problematic conduct. It should be noted that the ACCC's website states that the guidelines "provide examples of conduct that the ACCC would now consider likely **or unlikely** to breach the anti-competitive conduct provisions of the CCA" [emphasis added]. On this note, the current draft contains no practical guidance on how the ACCC would assess whether conduct would be unlikely to breach the CCA.

[23] See also p 110 of the Harper Report ("However…substantially lessening competition."

[24] Productivity Commission Report *Intellectual Property Arrangements* (23 September 2016), Recommendation 15.1.

[25] That draft provision was not fit for purpose in the context of IP licensing restrictions, as it does not apply to relevant restrictions: see B Fisse, [7], [20].

[26] Paragraph 15.57.

[27] For more detail, including a step by step analysis of the application of the current law to these types of restrictions in specific scenarios, see B Fisse, 'Harper Report Implementation Breakdown: Repeal of s 51(3) of *Competition and Consumer Act 2010* (Cth) and lack of proposed supply/acquisition agreement cartel exception', 19 February 2019, available at: https://www.brentfisse.com/images/Fisse_IP_licensing_and_need_for_competitor_supply_agreement_exception_140219.pdf.

46 This is also the case for the application of the exemptions to the cartel conduct prohibitions in paragraph 3.9. As already noted, there is very little certainty for IP owners in this area, and so detailed guidance would be appropriate in the circumstances.

Contracts, arrangements, understandings and concerted practices

47 The broad references to "grant-back" provisions" and "no challenge" provisions in paragraph 3.15 represent a potentially inaccurate assessment of the potential purpose, effect and likely effect of these provisions that is likely to cause concern in the context of standard IP arrangements.

48 In some cases "no challenge" provisions in IP licences can be a standard provision that simply reflects the requirement on the licensor to control the use of the licensed IP (for example, in the context of trade marks – see paragraph 28 above).[28] These types of provisions need to be distinguished from no-challenge clauses in the context of patent licensing that may impact on competition, particularly in the pharmaceutical sector (see e.g. paragraph 203 of the Canadian Guidelines). The Draft ACCC Guidelines currently do not provide any detail on situations in which no-challenge clauses may require further analysis.

49 The discussion of "grant-back" provisions in paragraph 3.15 and Example 5 of the Draft ACCC Guidelines is overly simplistic and risks adversely impacting standard technology licensing arrangements.

50 As recognised by section 5.6 of the US Guidelines:

> *"Grantbacks can have procompetitive effects, especially if they are non-exclusive. Such arrangements provide a means for the licensee and the licensor to share risks and reward the licensor for making possible further innovation based on or informed by the licensed technology, and both of these benefits promote innovation in the first place and promote the subsequent licensing of the results of the innovation…*
>
> *A non-exclusive grantback allows the licensee to practice its technology and license it to others. Such a grantback provision may be necessary to ensure that the licensor is not prevented from effectively competing because it is denied access to improvements developed with the aid of its own technology."*

51 This section of the US Guidelines sets out the analysis that will be applied to both exclusive and non-exclusive grant-backs.

52 The potential concerns with exclusive grant-backs are more accurately summarised in the EU Guidelines:

> *"An exclusive grant back is defined as a grant back which prevents the licensee (which is the innovator and licensor of the improvement in this case) from exploiting the improvement (either for its own production or for licensing out to third parties).*
>
> *…*

[28] See also paragraphs 135 and 138 of the EU Guidelines.

When grant backs are made against consideration it is less likely that the obligation creates a disincentive for the licensee to innovate".[29]

53 In this context, the Draft ACCC Guidelines adopt too simplistic an approach to grant-backs.

54 "Improvements" are typically understood in IP licensing and development arrangements as developments, modifications and adaptions of an IP right that fall short of being a "new" IP right (e.g. a new patentable invention).[30] In that context, the comment in Example 5 that ownership of improvements does not relate to the IP rights that are the substance of the licence is factually inaccurate.

55 In any event, the international comparisons referred to above indicate that the grant-back and cross-licensing of improvements can often have pro-competitive effects in encouraging innovation: licensees will often make improvements to a licensed technology and the licensor will be disincentivised from licensing it if the licensee is entitled to solely retain those improvements. In that sense a non-exclusive grant-back will generally be pro-competitive. On the other hand, unless the licensee is paid to exclusively license back improvements, an exclusive grant-back might warrant further investigation.

56 The scenario in Example 5 reflects a standard application of these principles in IP arrangements, in that the licensed technology and improvements to it are kept between the parties involved in the development of the technology and the improvements to it (see also paragraph 26 above regarding refusals to licence). The provision that Firm A will not license the improvements to any other firm can be seen as an appropriate incentive for the efforts of Firms B and C in developing the improvements. The example should be amended to reflect this.

Exclusive dealing

57 The only guidance provided in the Draft ACCC Guidelines about the application of the exclusive dealing provisions of the CCA to IP arrangements are in Examples 7, 8 and 9.

58 Each of these examples is very high level and does not provide substantive guidance to IP owners or users. Not only do they not resolve uncertainty, but they are likely to create increased uncertainty in this area. For example, Example 8 merely notes that this type of exclusive film licensing arrangement may now fall to be considered under s 47 CCA ("Following the repeal, the ACCC would consider whether firm A's conduct would be likely to have the purpose, effect or likely effect of substantially lessening competition"). The guidance that the Draft ACCC Guidelines should provide, and that is included in guidelines issued in comparable international jurisdictions, is missing (see for example paragraphs 32 to 36 above).

59 The examples and guidance in this section should be further developed to provide real guidance to IP owners and users, based on a recognition of the principles and features of IP rights and arrangements discussed in section 3.2 above.

[29] EU Guidelines, paragraphs 129 and 130. See also paragraphs 131 and 132 in relation to non-exclusive grant-backs.

[30] See e.g. *Fermiscan v James* (2009) 81 IPR 602.

60 The Australian Film and TV Bodies would be able to provide further information to assist with the development of the Draft ACCC Guidelines and other measures in this policy area if this would be of assistance. For example, the screen industry involves several examples of asymmetric demand and supply side substitutability of screen content. Given the variability in the quality of screen content and capabilities of screen production firms, there are inherent difficulties involved in not only characterising the relevant market, but also in determining how any such exclusive licensing arrangements would be considered to be for the purpose, effect or likely effect of substantially lessening competition, or for that matter, be considered pro-competitive. The Australian Film and TV Bodies consider it prudent to be able to provide the ACCC with further guidance on these matters as part of developing its Final Guidelines.

4 Appendix A: Full descriptions of the parties to this submission

This submission is made on behalf of Screen producers Australia (SPA), the Australian Independent Distributors Association (AIDA) and the Australia New Zealand Screen Association (ANZSA). These associations represent a cross-section of the film and television industry that contributed $5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.[31]

a. Screen Producers Australia (**SPA**) was formed by the screen industry over 60 years ago to represent large and small enterprises across a diverse production slate of feature film, television and interactive content. As the peak industry and trade body, we consult with a membership of more than 500 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and appointed Policy Working Group representatives. Our members employ hundreds of producers, thousands of related practitioners and drive more than $1.7 Billion worth of annual production activity from the independent sector as well as nearly $1 Billion in export earnings and tourism expenditure within the overall screen industry. On behalf of these businesses we are focused on delivering a healthy commercial environment through ongoing engagement with elements of the labour force, including directors, writers, actors and crew, as well as with broadcasters, distributors and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

b. AIDA is a not-for-profit association representing independent film distributors in Australia, being film distributors who are not owned or controlled by a major Australian film exhibitor or a major US film studio or a non-Australian person. Collectively, AIDA's members are responsible for releasing to the Australian public approximately 75% of Australian feature films which are produced with direct and/or indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).

c. ANZSA represents the film and television content and distribution industry in Australia and New Zealand. Its core mission is to advance the business and art of film making, increasing its enjoyment around the world and to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs, to highlight to movie fans the importance and benefits of content protection. The ANZSA has operated in Australia since 2004 (and was previously known as the Australian Federation Against Copyright Theft) and has operated in New Zealand since 2005 (and was previously known as NZ Fact and the New Zealand Screen Association). ANZSA works on promoting and protecting the creative works of its members. Members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc., and Fetch TV.

[31] Access Economics, *Economic Contribution of the Film and Television Industry* (February 2015) Australian Screen Association <http://screenassociation.com.au/wp-content/uploads/2016/01/ASA_Economic_Contribution_Report.pdf> iv.