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Competition Policy Review
Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Submission by ARIA

Thank you for the opportunity to make a supplementary submission to this important review.

We have explained ARIA's role in the music industry in our submission to the Competition Policy Review in June 2014.

In this supplementary submission we focus on the Draft Report's recommendations about: the IP exemptions under s 51(3) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (section 1 below); and the joint venture exceptions to cartel prohibitions under the CCA (section 2 below).

1. The IP exemptions under s 51(3) of the CCA

The Draft Report recommends at p 88 that there be a framework-style review of IP:

> *Determining the appropriate extent of IP protection is complex. Given the complexity of the issues, there is a case for conducting an independent framework-style review of IP. The review should look at competition policy issues, new developments in technology and markets and international trade agreements.*

The draft Report also recommends, at pp 86-87, that s 51(3) of the CCA be repealed:

> *IP rights, like all property rights, can potentially be used in a manner that harms competition. The Panel considers that it is appropriate that commercial transactions involving IP rights, including the transfer and licensing of such rights, be subject to the CCA, in the same manner as transactions involving other property and assets.*
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> *Accordingly, the Panel considers that the IP licensing exception in subsection 51(3) of the CCA should be repealed. As is the case with other vertical supply arrangements, however, IP licences should be exempt from the cartel provisions of the CCA. This means that IP licenses and assignments will only contravene the competition law if they have the purpose, or would have or be likely to have the effect, of substantially lessening competition.*
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> *As noted by the ACCC, IP licensing or assignment arrangements that are at risk of breaching Part IV of the CCA, but which are likely to produce offsetting public benefits, can be granted an exemption from the CCA through the usual notification or authorisation processes.*

ARIA has a number of significant concerns about these recommendations:

First, if there is to be a framework review of IP laws in Australia, it is pre-judgmental to recommend repeal of s 51(3) before the full review proposed has been conducted. For instance, if s 51(3) is to be repealed, the full inquiry proposed could well lead to recommendations for amending s 51(3) in ways that differ from the approach recommended in the Draft Report. For example, one would expect a full inquiry by, for example, the Productivity Commission to explore the efficiencies of IP protection in detail. The inquiry 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. One important aspect of that examination would be the treatment of IP licensing efficiencies under the rule of reason test in US antitrust law and Article 101(3) of the EU Treaty as compared with their treatment under the amendments to s 51(3) proposed in the Draft Report. As discussed below, the substantially lessening competition (SLC) test proposed in the Draft Report would not adequately take efficiency justifications for IP licensing restrictions into account. Moreover, as also discussed below, the avenues of notification and authorisation are not efficient or commercially realistic ways of exempting justifiable licensing restrictions from liability under Part IV of the CCA.

Secondly, the Draft Report states that the amendments to s 51(3) that are proposed would mean that : 'IP licenses and assignments will only contravene the competition law if they have the purpose, or would have or be likely to have the effect, of substantially lessening competition' and that IP licensing or assignment arrangements that are at risk of breaching Part IV of the CCA, but which are likely to produce offsetting public benefits, can be exempted by means of notification or authorisation. That approach is supported partly on the basis of an ACCC submission that IP rights in the US and other jurisdictions are treated like other forms of property and are subject to the same competition laws (p 84). However, the draft Report does not examine a key feature of US and EU competition laws, which is that efficiency-enhancing restrictions in IP licences or assignments are exempted under the rule of reason test or, in the EU, under Article 101(3) of the EU Treaty. The implicit assumption of the Draft Report appears to be that the existing notification and authorisation processes are adequate to deal with cases where restrictions on competition are justifiable on efficiency grounds. However, the notification and authorisation processes are bureaucratic and costly and the antithesis of cost-effective, efficient competition regulation. This is partly why there are no such notification or authorisation processes in the US or the EU in this context. It is no answer to say that questions of efficiency are not justiciable. Questions of efficiency are considered and assessed in the US, the EU and the UK by courts, businesses and practitioners on an everyday basis when applying competition law.

Thirdly, the amendments to s 51(3) proposed in the Draft Report are advanced without discussing in any detail the relationship between IP and competition law in other jurisdictions, including the US and the EU. In ARIA's view, the need to find some workable accommodation of IP protection on competition law is much too important to be treated in so brief and incomplete a way. For example, in the EU (see Faull & Nikpay, *The EU Law of Competition* (2014) ch 10) use of an IP right in a manner which ensures for the right holder the benefit of the specific subject matter is regarded as preserving the existence of the right. Only the use of an IP right in a manner which goes beyond the specific subject matter of the right is subject to EU competition rules. On that approach, IP rights are not treated like other forms of property. Yet the approach in the Draft Report is premised on the assumption that IP rights are the same as other property rights. That assumption is misleading unless qualified by recognition of the need to ensure that IP right holders have the benefit of the specific subject matter protected by statutory IP rights.

Fourthly, the approach proposed in the Draft Report would increase compliance costs considerably, for no good reason. To take a simple case, copyright licenses typically limit sub-licensing. One commercial justification is that recording agreements often provide the artist / creator with control over, for example, the types of products their performances are associated with. Consequently it is routine for the distributing label or copyright owner to confirm agreement for such arrangements directly with the relevant artist and their management. For many artists, some of whom may be self-managed, it is simply not practical or desirable to deal with a number of sub licensees on such issues, or to have their personal contact details widely disseminated At present, any such limitations on sub-licensing are covered under s 51(3) and will be exempted from liability under s 45 and s 47. However, there would be no such exemption under the approach recommended in the Draft Report and the conduct could be caught by s 45 or s 47. Such a restriction, or at least multiple restrictions of the same kind where a standard licence is granted to many users (as is often the case) (see s 45(4), s 47(10)), may have the purpose, effect or likely effect of substantially lessening competition in the market for content of the kind licensed. This would depend on the substitutability of the content, the number of competitors able to offer substitutable content and other market factors affecting competition. Under the amendment to s 51(3) proposed in the Draft Report, such a restriction would require licensors and licensees to run the gauntlet of the ill-defined SLC test or to seek authorisation or, if s 47 applies (it may not) notification. Given the commonplace nature of such a restriction, those hurdles would be costly and absurd. It should be noted that many restrictions imposed in IP licences or assignments arise from understandable commercial efficiency-based justifications and that, given s 51(3), there is currently no need to delve into the SLC test or to try to work out whether a licensing restriction is an issue under the CCA. That expediency would be destroyed if the recommendation about s 51(3) in the Draft Report were to be adopted. In ARIA's view, and with all respect, the Draft Report's views on s 51(3) have run off the rails of efficiency and productivity on which the Review Panel is meant to travel.

Fifthly, the proposed amendment to s 51(3) places considerable weight in the SLC test yet the Draft Report makes no attempt to clarify what is meant by a 'substantial lessening' of competition. This is an infamous black hole in Australian competition law, largely because the courts have failed to give 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 not 'meaningful or relevant to the competitive process' (*Rural Press Ltd v ACCC* (2003) 216 CLR 53 at 71 per Gummow, Hayne and Heydon JJ). 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 SLC test were to be given a pivotal role in the context of IP licenses and assignments.

ARIA therefore submits that the Final Report should either not include any recommendation that the present s 51(3) be repealed or, if there is to be such a recommendation, that the Review Panel give due consideration to:

(a) creating a new exemption for conduct that seeks only to give IP rights holders the benefit of the statutory rights;

(b) clarifying what is meant by a 'substantial lessening of competition' in such a way as to avoid the uncertainty that often makes the concept impossible to apply with any confidence in practice;; and

(c) introducing in Part IV of the CCA a rule of reason exception or defence akin to the US rule of reason or an exemption comparable to that under Article 101(3) of the EU Treaty..

2. The joint venture exceptions under ss 44ZZR0 and 44ZZRP of the CCA

In our submission last June ARIA supported the replacement of the cartel-related provisions of the CCA with the much simpler and more principled statutory provisions proposed in the Commerce (Cartels and Other Matters) Amendment Bill 2011 as reported by the NZ Commerce Committee in May 2013.

As in the economy generally, collaborative ventures are important in the music industry today. The Draft Report leaves much up in the air as regards joint venture exceptions under the CCA. ARIA submits that further clarification needs to be given in several respects:

- Sections 44ZZRO, 44ZZRP and 4J should be repealed. The provisions impose arbitrary limitations, including limitations on the type of collaborative ventures that can be exempted. Moreover, the meaning of the terms 'joint venture' and 'purposes of a provision' is unclear. The drafting of the existing provisions is also tortured and inconsistent with the recommendation of the Review Panel that the Act be simplified (Draft Report, section 3.1). A fresh start needs to be made.

- The Draft Report refers to the collaborative venture exemption proposed in the Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ) as one possible approach but states that 'the New Zealand exemption may be too broad' (p 224). The Final Report should give more guidance for the redrafting of the Act by the expert legal panel proposed in the Draft Report (p 189) and should recommend either the adoption of an exemption closely similar to the collaborative activity exemption in the New Zealand Bill or an alternative model. The New Zealand provisions on collaborative ventures have been the subject of extensive consultation and wide support by business and competition law practitioners (see http://www.med.govt.nz/business/competition-policy/cartel-criminalisation). They are also the subject of detailed practical draft guidelines prepared by the Commerce Commission (see http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaborationguidelines/).

- In ARIA's view, the term 'collaborative activity' in the New Zealand Bill is not too broadly defined. Under the proposed s 31(2) of the Commerce Act, 'collaborative activity means an enterprise, venture, or other activity, in trade, that - (a) is carried on in co-operation by 2 or more persons; and (b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties.' An important safeguard under the proposed s 31(1)(a) is the requirement that the alleged cartel provision be 'reasonably necessary for the purpose of the collaborative activity'. The meaning of the term 'reasonably necessary for the purpose of the collaborative activity' is the subject of detailed practical guidance in draft guidelines prepared by the Commerce Commission. Those guidelines seek to apply the term 'reasonably necessary' clearly and in a commercially realistic way.

- The Draft Report does not indicate whether or not the term 'for the purposes of a joint venture' in sections 44ZZRO and 44ZZRP should be retained. The term is notoriously unclear and should be repealed.

We trust that the above submission will be useful for the Review Panel and welcome any questions that the Panel may have.

Yours sincerely,

Dan Rosen
Chief Executive Officer