



STANDING COMMITTEE ON INFRASTRUCTURE AND COMMUNICATIONS

Inquiry into IT Pricing

Public Hearing Wednesday 31 October 2012

Question on Notice – Australian Competition and Consumer Commission (ACCC)

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Written Question – Mr Champion (Chair)

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**Mr Bezzi:** We can give you a copy of 51(3) if you wish.

**CHAIR:** Yes. And you might want to provide an answer to us on notice about what effects that has and why you might want it repealed.

**Mr Bezzi:** Certainly.

**ANSWER**

Section 51(3) of the *Competition and Consumer Act 2010* (the CCA) provides a limited exception for certain licence conditions from the competition provisions of the CCA (misuse of market power and resale price maintenance are not excepted). While the extent of the exception is unclear, it potentially excludes significant anti-competitive conduct, with substantial detrimental effects on efficiency and welfare, from the application of the CCA. A copy of section 51(3) is provided at [Attachment 1](#).

The object of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection.<sup>1</sup> While recognising the importance of granting and protecting exclusive intellectual property rights, the ACCC considers that the subsequent licensing or assignment of those intellectual property rights should be subject to the same treatment under the CCA as any other property rights.

A more detailed outline of the ACCC's view in relation to section 51(3) is provided in the ACCC's submission in response to the ALRC Copyright and the Digital Economy Issues Paper, which is available at <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc>.

The ACCC also draws the Committee's attention to the recent (December 2012) Draft Report of the Productivity Commission in relation to the Compulsory Licensing of Patents which gives further consideration to the arguments for repeal of section 51(3) and makes a relevant draft finding. The Draft Report is available at <http://www.pc.gov.au/projects/inquiry/patents/draft>.

<sup>1</sup> See section 2 of the *Competition and Consumer Act 2010*.

**Attachment 1 - Section 51(3) of the *Competition and Consumer Act 2010***

- 51 (3) A contravention of a provision of this Part other than section 46, 46A or 48 shall not be taken to have been committed by reason of:
- (a) the imposing of, or giving effect to, a condition of:
    - (i) a licence granted by the proprietor, licensee or owner of a patent, of a registered design, of a copyright or of EL rights within the meaning of the *Circuit Layouts Act 1989*, or by a person who has applied for a patent or for the registration of a design; or
    - (ii) an assignment of a patent, of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design; to the extent that the condition relates to:
      - (iii) the invention to which the patent or application for a patent relates or articles made by the use of that invention;
      - (iv) goods in respect of which the design is, or is proposed to be, registered and to which it is applied;
      - (v) the work or other subject matter in which the copyright subsists; or
      - (vi) the eligible layout in which the EL rights subsist;
  - (b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules applicable under Part XI of the *Trade Marks Act 1955*, or the giving effect to such a provision; or
  - (c) the inclusion in a contract, arrangement or understanding between:
    - (i) the registered proprietor of a trade mark other than a certification trade mark; and
    - (ii) a person registered as a registered user of that trade mark under Part IX of the *Trade Marks Act 1955* or a person authorized by the contract to use the trade mark subject to his or her becoming registered as such a registered user;
- of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.