AUSTRALIAN**PUBLISHERS**ASSOCIATION

29 July 2019

Mr Parnos Munyard
Advocacy and Law Reform
Australian Competition & Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

By Email: parnos.munyard@accc.gov.au

Dear Mr Munyard,

The Australian Publishers Association (APA) thanks the ACCC for the opportunity to comment on the draft guidelines the ACCC has prepared following the repeal of subsection 51(3) of the *Competition and Consumer Act 2010* (Cth) (the Draft Guidelines).

The APA is the national body for Australian book, journal and digital publishers. The Association has approximately 210 members and, based on turnover, represents over 90% of the industry. Our members include publishers from all sectors of the publishing industry - trade, independent, children's, schools, tertiary and academic publishing.

The APA has read and supports the comments and recommendations in the submissions from Professor Brent Fisse of Brent Fisse Lawyers, and from Bridget Fair CEO of FreeTV and the joint submission from Screen Producers Australia, the Australian Independent Distributors Association and the Australia New Zealand Screen Association.

Given the repeal of section 51(3) affects both existing and future contracts, the current uncertainty raises doubts about tens, if not hundreds of thousands of agreements in the book publishing industry. Unfortunately, the Draft Guidelines fail to provide either guidance or comfort in relation to these.

By way of general comment on the repeal of subsection 51 (3) of the Competition and Consumer Act (the Act):

- The Competition Policy Review Final Report (Harper Report) recommended that any repeal of subsection 51 (3) be accompanied by the creation of additional exemptions.[1]
- We note the Government's response to Recommendation 27 of the Harper Report, included broadening the joint venture exemption so that it does not limit legitimate commercial transactions, and that this has not been implemented.
- Exposure draft legislation was not circulated to stakeholders in the creative industries who would be directly impacted by the amendments, despite this being a commitment in the Government's response to the report.

[1] https://www.australiancompetitionlaw.org/reports/2015harper-report-law.html#27

- The creative industries, including publishing, were not adequately advised that legislation to repeal s.51(3) would proceed without the connected exemptions recommended by the Harper Report. No opportunity was provided to those industries to alert the Government to the problems, or to comment that the legislation should fully implement the Harper Report recommendation, including the creation of exemptions.

As a result, the ACCC now has the difficult task of drafting guidelines for applying inappropriate legislation that, as it currently stands, will capture common and long-standing agreements between authors and publishers; between publishers and publishers; and between publishers and distributors that are either pro-competitive or that have no anti-competitive effect.

The APA has a number of concerns with the current Draft Guidelines:

- The Draft Guidelines do not provide sufficient assurance that the ACCC recognises that IP arrangements will not be considered fundamentally anti-competitive and therefore not subject to Part IV of the Act.
- The Draft Guidelines do not provide assurance that the ACCC, in the exercise of its discretion, will not target common and long-standing IP licensing practices that are either pro-competitive or neutral in their effect on competition.
- The Draft Guidelines fail to give specific examples of the types of licensing practices that the ACCC will target and regard as a high priority for compliance action.
- Example 8 in particular should be re-worked to illustrate where such licensing practices are highly likely to make an arrangement anti-competitive. In its current form, the example strongly suggests that all exclusive dealing is likely to be prohibited, which would put at risk a very large number of existing contracts for the use of intellectual property, including most book publishing contracts. If that is the case, then it is all the more urgent for the ACCC to support swift amendment of the Act and (pending such amendment) promptly to implement a class exemption.

We particularly direct the attention of the ACCC to the attached examples that we provided to Treasury in December 2018, at their request, to show the forms of common publishing arrangements that could be impacted by the repeal. The APA urges the ACCC to ensure that the Draft Guidelines are amended to make clear to the industry and to publishers the specific circumstances in which such common and pro-competitive practices will be likely to attract the ACCC's attention.

It is salutary to revisit the Productivity Commission's analysis of the issue. The Commission stated that part of the rationale[2] for the repeal of section 51(3) was that IP arrangements were no longer considered automatically in conflict with competition principles. Further, it suggested (p. 452) that "a more nuanced approach — which gives the ACCC the power to address genuinely anticompetitive conduct while at the same time minimising uncertainty for rights holders and licensees where practices are socially valuable — would provide more meaningful benefits"

The Productivity Commission concluded, on the basis of advice from the ACCC that "the number of arrangements that are affected by removal of the exemption is likely to be small as ' … the vast

[2] Productivity Commission, Intellectual Property Arrangements, No. 78, 23 September 2016, p443.

majority of arrangements where IP rights are licensed or assigned to other entities are likely to be pro-competitive' (ACCC, sub. 35, p. 14) and therefore *not likely subject to enforcement action by the ACCC under the competition provisions of the CCA*. In economic terms, a pre-condition for an anti-competitive effect is that one of the parties to the arrangement has sufficient market power to influence prices in a market. Most businesses are not in that position." [emphasis added]

The Draft Guidelines do not reflect this analysis.

The Productivity Commission (p.453) suggested that "one way of addressing genuinely anticompetitive conduct while also minimising uncertainty for rights holders and licensees where practices are socially valuable, would be to repeal s. 51(3), at the same time as the ACCC issuing guidelines and addressing concerns about the per se prohibitions under the CCA." The use of Guidelines in this manner was endorsed by stakeholders including the ACCC and the Copyright Council.

The current Draft Guidelines do not achieve this objective. To the contrary, they increase uncertainty for rights holders and licensees, and threaten practices that are socially valuable with a virtually per se prohibition on exclusive licensing. They do not, at present, perform the function they were set up to do.

We therefore urge the ACCC not only to attend to our concerns in relation to the Draft Guidelines, but also to support urgent amendment of the Act, and to fast track a class exemption for industries such as the book industry for the common conduct and licencing practices outlined in the attached examples.

Yours sincerely,

Michael Gordon-Smith
Chief Executive

Appendix A

ISSUES PAPER:

REPEAL OF SECTION 51(3) OF THE *COMPETITION AND CONSUMER ACT 2010*

1. Background

Below we give examples of licensing arrangements, currently common in the publishing industry, that may raise at the very least uncertainty and, potentially, the risk of liability for cartel conduct once the repeal of section 51(3) comes into effect.

In this context, we note that, as a practical and commercial matter, the existence of section 51(3) has meant that copyright owners and exclusive licensees entering into licensing agreements have not previously had to examine their licensing agreements on a clause-by-clause basis to assess whether or not a particular condition gives rise to an issue of cartel conduct. The repeal of section 51(3), however, significantly changes that, hence the concerns we have expressed to Treasury and the ACCC in relation to uncertainty and complexity (with their attendant transaction costs).

As discussed in our telephone conferences, we are therefore concerned not only that the practical protection provided by section 51(3) is being removed without any replacement, but that the government takes the view (as expressed in the Explanatory Memorandum at paragraph 4.7) that:

> *The repeal of subsection 51(3) brings Australia into line with other comparable jurisdictions. As noted by the Competition Policy Review, the United States, Canada and Europe do not provide an exemption from competition laws for conditions of IP transactions. In those jurisdictions, IP assignments and licences and their conditions are assessed under competition laws in the same manner as all other commercial transactions.*

As discussed in our telephone conferences, our view is that the above is misleading: it ignores the various ameliorating provisions and conditions available both in each of the jurisdictions expressly referred to and in other comparable jurisdictions (including the United Kingdom, New Zealand and Singapore).[3] These ameliorating provisions or conditions greatly reduce the risk of everyday copyright transactions being found to constitute *per se* cartel conduct (with potentially severe civil and criminal consequences).

2. Overarching concerns

2.1 *What constitutes a market in the context of copyright materials*

[3] See, for example, sections 32 and 45 of the NZ *Commerce Act 1986*; section 8 of the Third Schedule of the *Competition Act 2004* in Singapore; block exemptions available in the EU; the “rule of reason” principle and block exemptions available in the US; the block exemptions available in the UK (under section 9 of the *Competition Act 1998*), together with the exemptions in sections 39 and 40 for “*small agreements*” and “*conduct of minor significance*”; and section 79(5) of the Canadian *Competition Act 1985*; As discussed, each of these operate slightly differently to section 51(3), but show a clear commitment in the relevant jurisdiction to ensuring that provisions targeting cartel conduct are properly focussed on activity that is truly anti-competitive.

Given the general acknowledgement (including by the ACCC) that there is no fundamental conflict between IP rights and competition law, we understand that the market for a particular copyright good (such as a book) is not to be viewed as only that particular good.

However, it is not clear whether the relevant market is likely to be the market for books, generally, or the market for books aimed at a particular audience (for example, the educational market or the home-consumer market) or the market for goods in a particular format (for example, for books, the market for books in print or in digital or in audio formats) or even a market being defined as entertainment – or educational – goods more broadly.

This is important in that, the broader the market, the more likely that publishers and their licensees will, as further discussed below, be either competitors or potential competitors in that market. Nonetheless, given distribution and licensing models commonly (and sensibly) used in digital commerce in particular, even a narrow construction of what constitutes the relevant market will likely raise concerns.

2.2 *When parties to licensing arrangements are in competition*

Among the concerns held by the APA is the extent to which its members, as a natural and normal part of their businesses – and their digital businesses in particular – may be characterised as being in competition with their licensees.

This principally arises from the common practices (particularly in distribution agreements for digital products) whereby a publisher may:

(a) reserve the ability to compete with the licensee by offering sales of their own copyright goods through or from their own website; and

(b) license or appoint different distributors as agents, who are in competition with each other.

We further note that these concerns are heightened as a result of the recent High Court judgement in *ACCC v Flight Centre Travel Group Ltd* (2016) 339 ALR 242, in which the High Court found that Flight Centre was in competition with the airlines on whose behalf it was selling tickets, even though the relationship was one of agent and principals.

The APA's view is that – whether constructed as licensing or agency arrangements – arrangements under which publishers potentially compete with licensees are generally pro-competitive as they give consumers more outlets from which to purchase copyright goods and enable such goods to be accessed by different sectors of consumer markets at different price-points.

3. Some scenaria

Against the above background (and particularly the background relating to when publishers may compete or potentially compete with licensees), the following licensing scenaria raise potential cartel and other competition issues that the APA would like to see both Treasury and the ACCC consider and address (including as a result of the repeal of section 51(3)).

The APA's position is not that, where the relevant preconditions of competition in the same market exist, each of the scenario below or each of the listed type of licensing terms and conditions would necessarily either be anti-competitive or currently covered by section 51(3), but we put these on the table so as make Treasury and the ACCC aware of situations that the APA would like addressed, including given that such were covered in the 1991 publication from the Trade Practices Commission publication entitled *Application of the Trade Practices Act to Intellectual Property* but that much has changed since then insofar as cartel conduct provisions are concerned.

3.1 *Distribution agreements*

As noted above, it is common for distribution agreements to reserve the right of a publisher to continue to distribute copyright goods itself to the market (generally, though direct sales from its own website). Alternatively, distribution agreements may be restricted to distribution in a particular format, with the publisher retaining distribution rights in other formats.

It is not uncommon for such agreements to contain:

(a) an exclusive grant of rights (other than in relation to digital distribution, in which case non-exclusive licences or appointments are more common);

(b) territorial restraints (for example, limiting distribution to Australia or, separately, to New Zealand and prohibiting export);

(c) restrictions relating to market segments (for example, for books, licensing for the education market separately to the retail market);

(d) quality requirements;

(e) post-termination restrictions (for example, by granting a limited sell-through period or by imposing obligations to return or destroy stock on termination); and

(f) sub-licensing restrictions.

In addition, the experience of the APA and book publishers is that it is not uncommon for the major digital distributors (such as Amazon) to refuse to negotiate to delete "Most Favoured Nation" clauses from distribution agreements – an approach that essentially forces publishers into the unpalatable commercial choices of signing agreements that may be anti-competitive or risk going under through their copyright goods being made unavailable through what are now major distribution channels.[4]

3.2 *Sub-publishing agreements*

While publishers will generally gather in a broad grant of rights from their authors and illustrators, many of these are then sub-licensed to third parties (including third parties in the Australian and/or NZ markets).

In these cases, the scope of what constitutes "the market" will have a particularly important impact on whether conduct (including licensing terms and conditions) will constitute cartel conduct.

This is because publishers may well sub-license the copyright by reference to formats – for example, they may retain hardcopy print rights, but sub-licence reproduction and distribution of audio (and even digital) formats to other publishers or companies. If the relevant market is in competition law terms seen as being for books, generally (or for entertainment goods even more generally), then publishers will run into cartel conduct problems. On the other hand, if the market to be used for competition law purposes is for books in a particular format only, the range of conduct that may be characterised as cartel conduct will be narrower.

As with distribution agreements, sub-licences may be predicated on a range of licence terms and conditions, including:

[4] See page 8 of the APA's submission dated 3 April 2018 to the ACCC's enquiry into digital platforms, available at: https://www.accc.gov.au/system/files/Australian%20Publishers%20Association%20%28April%202018%29.pdf.

(a) an exclusive grant of rights;

(b) territorial restraints (for example, limiting distribution to Australia or, separately, to New Zealand and prohibiting export);

(c) restrictions relating to market segments (for example, in publishing, licensing for the education market separately to the retail market);

(d) quality requirements;

(e) post-termination restrictions (for example, through limited sell-through periods or obligations to return or destroy stock on termination);

(f) guaranteed minimum payments;

(g) sub-licensing restrictions; and

(h) grant-back / licence back provisions (so the publisher retains copyright over all formats and versions of the work – an approach particularly common with translations).

3.3 *Other licensing agreements*

Other licence arrangements into which publishers enter include agreements such as the following:

(a) grants of rights for various verbatim uses of the copyright material (either exclusive or non-exclusive) for narrow purposes such as quotation, anthology use and serialisation, in which licence terms and conditions may include:

(i) territorial restraints (for example, limiting distribution to a particular region or area within Australia or New Zealand and prohibiting export);

(ii) restrictions relating to market segments (for example, in publishing, licensing for the education market separately to the retail market);

(iii) quality requirements;

(iv) post-termination restrictions (for example, through limited sell-through periods or obligations to return or destroy stock on termination);

(v) guaranteed minimum payments; and

(vi) sub-licensing restrictions;

(b) grants of rights (usually on an exclusive basis) for various “transformative” uses of the copyright materials, such as for films, stage-plays, animated or other illustrated versions, the licence conditions for which may not be subject to territorial restrictions but which generally may be subject to:

(i) quality requirements; and

(ii) guaranteed minimum payments;

and

(c) grants of rights for merchandising, subject to terms and conditions that may include:

(i) territorial restraints (for example, limiting distribution to a particular region or area within Australia or New Zealand and prohibiting export);

(ii) quality requirements;

(iii) post-termination restrictions (including either limited sell-through periods or obligations to return or destroy stock on termination);

(iv) guaranteed minimum payments;

(v) quota restrictions; and

(vi) sub-licensing restrictions.

3.4 *Settlements*

In cases where publishers settle disputes over alleged infringements, it is not uncommon for the settlement agreement or deed to contain provisions that either:

(a) licence the alleged infringer to continue to distribute or reproduce the copyright good (in which case the terms and conditions may include many of those already outlined above in sections 3.1 to 3.3); or

(b) do not contain any such ongoing licence, but do contain terms and conditions under which the alleged infringer grants back any rights to the extent that they have created a new version of the copyright good to the publisher and which also contain provisions that may be characterised as “no challenge” provisions.