



INSTITUTE OF
PUBLIC
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**Response to ACCC
Draft Guidelines on
the repeal of
subsection 51(3) of
the Competition
and Consumer Act
2010**

19 JULY 2019

Introduction

The Institute of Public Accountants (IPA) welcomes the opportunity to make a submission on the draft Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010.

The IPA is one of the three professional accounting bodies in Australia, representing over 35,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants but also small business and their advisors. The IPA was first established (in another name) in 1923.

The IPA-Deakin SME Research Centre submission has been prepared with the assistance of the IPA and the Faculty of Business and Law, Deakin University. The IPA-Deakin SME Research Centre Submission has benefited from consultation with Rachel Burgess, Researcher, Deakin SME Research Centre.

We would welcome an opportunity to discuss this submission at your convenience. Please address all further enquires to Vicki Stylianou at vicki.stylianou@publicaccountants.org.au or on 0419 942 733.

Yours sincerely



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The Chairman
Australian Competition and Consumer Commission
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Draft Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010

The IPA-Deakin SME Research Centre welcomes the opportunity to comment on the Draft Guidelines on the repeal of subsection 51(3) of the Competition and Consumer Act 2010 issued by the ACCC for consultation.

General comments

The publication of Guidelines by the ACCC is welcomed by the IPA-Deakin SME Research Centre as they can greatly assist in understanding the application of the law.

The licensing and/or assignment of intellectual property rights is a key part of the operations of many small businesses in Australia. The repeal of section 51(3) has the potential to significantly impact small business. Whilst it is acknowledged that arrangements ‘collateral to’ the intellectual property licensing and/or assignment were never protected, the repeal of subsection 51(3) will arguably and in some cases, most certainly, expose small businesses to greater legal uncertainty regarding their intellectual property agreements, rights and obligations.

Moreover, the repeal of subsection 51(3) has not been widely publicised, indeed with what appears to be only one ACCC media release on the subject thus far (<https://www.accc.gov.au/update/removal-of-the-ip-exemption-in-s513-of-the-cca>). The release of the draft Guidelines suddenly appeared without it seems, any significant media attention. Whilst the repeal does not take effect until 13 September, the IPA-Deakin SME Research strongly encourages the ACCC to more widely publicise this significant change in policy so that small businesses can seek any necessary advice.

Guidelines for Small Business

The draft Guidelines are stated to be “for the general guidance of legal practitioners and business advisors”. The draft is comprehensive and will provide great assistance to this group of professional advisers, but in our view, is far too complex to assist small businesses. In this sense, we hope that the ACCC be also be publishing a guide for small business that explains the key concepts in simpler terms.

Examples in the draft Guidelines

The examples provided throughout the draft Guidelines are very helpful. However, many examples highlight agreements that have arguably not benefited from the section 51(3) exemption. There is limited discussion about the ACCC’s view of the competition issues

associated with those scenarios which did benefit from the section 51(3) exemption. For instance, in **Example 4: Time Restrictions**, the ACCC correctly identifies that the condition imposed that extends beyond the *term of the circuit layout right*, would never have benefited from the section 51(3) exemption, but it does not comment on how the quality requirements would be treated now without the availability of the exemption.

Examples dealing with common licensing conditions, that are not collateral to the licensing of the IPR, would be beneficial. For example, what is the view of the ACCC in relation to a licence condition that imposes an output restriction on the licensee? It seems from other comments made in the Guidelines that this type of condition is likely to infringe section 45 (subject to the substantial lessening of competition test being satisfied). This is a common licensing condition and, if prohibited, is likely to stifle competition rather than encourage it. Without the ability to control how intellectual property is to be used, a licensor may be reluctant to licence the intellectual property at all. This will be detrimental for downstream competition and also deter innovation. Small businesses will not be in a position to determine whether such a condition is likely to substantially lessen competition in the relevant market, in order to have certainty about their legal position.

Class Exemption for Intellectual Property Agreements

Given the concerns raised in the previous paragraph, the IPA-Deakin SME Research Centre considers that the licensing and/or assignment of intellectual property rights would be appropriate to be considered for a class exemption. The creation of a safe harbour for agreements of this nature would provide legal certainty for small businesses with key intellectual property assets that they wish to licence or assign, as well as for small businesses taking licences or assignments of intellectual property from others. As outlined in the draft Guidelines, the sanctions for getting this wrong are potentially severe. However, an overly cautious approach, where businesses are reluctant to licence their intellectual property because they are unable to impose restrictions without risking a competition law breach, is harmful to growth and innovation.

As the ACCC will be aware, the European Commission has adopted a block exemption that applies to Technology Transfer agreements (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0316&from=EN>), known as the Technology Transfer Block Exemption (TTBE). The 2004 TTBE was renewed (with amendments) from March 2014. The exemption applies where the market shares of the parties to the agreement do not exceed the thresholds (20% where the agreement is between competitors and 30% where the agreement is between non-competitors). The TTBE also contains hardcore restrictions which do not benefit from the safe harbour. These 'hardcore restrictions' include a prohibition on restricting passive sales and grant back obligations.

The IPA-Deakin SME Research Centre believes there would be significant benefit in a class exemption of this nature. The problematic conditions set out in the draft Guidelines (paragraph 3.15) relating to time restrictions, grant-back and no challenge provisions could be included as 'hard-core' restrictions.