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Hold on to your licences – IP exemptions in Australia's Competition Act set to be repealed

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On 20 September 2018, the Treasury Laws Amendment (2018 Measures No. 5) Bill 2018 (**Bill**) was tabled in Australia's House of Representatives. Among the amendments proposed was the repeal of Section 51(3) of the Competition and Consumer Act 2010 (Cth) (**CCA**), a change that could significantly impact IP licensing and assignment arrangements within Australia.

The section 51(3) exemption

Part IV of the CCA covers restrictive trade practices, including cartel conduct and contractual provisions that have the effect of substantially lessening competition in the market.

Section 51(3) exempts certain conduct from the prohibitions in Part IV, in particular the conditional licensing, assignment, and contracting of IP rights such as patents. If the Bill passes both Houses of Parliament, section 51(3) will be repealed on the day after 6 months of the date of Royal Assent.

No "fundamental conflict" between IP rights and competition

Chapter 4 of the Bill's Explanatory Memorandum (**EM**) indicates that the motivation for the repeal comes from the Government's response to recommendation 15.1 in the Productivity Commission's (**Commission**) 2016 Report into Australia's IP Arrangements.

The Commission recommended repealing section 51(3) as, in its view:

> "The rationale for the exemption has largely fallen away. 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 arise in those cases where there are few substitutes or where the aggregation of IP rights may create market power."

The Commission considered that commercial transactions involving IP rights should be subject to the CCA in the same manner as transactions involving other property and assets.

The Government supported this view and commented that IP rights and competition both "share

the purpose of promoting innovation and enhancing consumer welfare." Where there was evidence of anti-competitive conduct, the Government considered that such conduct should be appropriately regulated.

The EM also comments that the repeal brings Australia in line with other comparable jurisdictions such as the United States, Canada and Europe.

Finding the right balance

The Government accepts that the costs and benefits of removing the exemption are "finely balanced". Of immediate concern is that organisations and individuals are left in a precarious position of knowing that limitations will be placed on their IP rights, with little guidance on the extent of the limitations.

For example, the EM suggests that a benefit of the repeal would be an increase in licensing and cross-licensing in the pharmaceutical and communications markets. However, the repeal could also have a chilling effect on such activity if it does not pass the tests in Part IV that IP licences will soon be subject to. For example, the Commission's report noted that "patent thickets" generated by large-scale cross-licensing of innovation patents can inhibit market entry. Rights holders therefore have to operate within a threshold, the parameters of which are currently unclear.

Proactive guidance from the regulator would be a good first step to overcoming such issues. Indeed recommendation 15.1 stated that the Australian Competition and Consumer Commission (**ACCC**) should issue guidance on the application of Part IV of the CCA to IP rights. This would greatly assist rights holders and, hopefully, the ACCC takes up this recommendation sooner rather than later.

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