Has the repealed limited exemption for Intellectual Property Rights in sub-section 51(3) of the *Competition and Consumer Act* 2010 (Cth), finally been put to rest?

Dr Dimitrios Eliades[1]

Introduction

After many years of scrutiny, the limited exception contained in the *Competition and Consumer Act* 2010 (Cth) ("CCA") Part IV s.51(3) was repealed. The focus had always been on intellectual property rights ("IPR") in licences and assignments as this was generally the limitation contained in the exemption provision itself.

Contrary to earlier thoughts that IPR and competition law were polarized, the reports and conclusions justifying the repeal were based on theoretical conclusions that IPR and competition law were basically compatible, as they both promoted innovation.

This conclusion has underestimated the nature of IPR, in particular the right to take enforcement action, which will in the circumstances of a common litigation scenario, contravene the cartel provisions.

Background

On 13 September 2019, the repeal of the limited exemption for IPR under the CCA, came into effect.[2] Some were relieved that it had finally happened, some were disappointed, but many were and continue to be, unsure as to the practical effects of the repeal.

The current perspective and the impetus behind the Government's repeal of s.51(3), is that competition policy and IPR are now no longer considered to be driven by polarized perspectives.[3] All of the reviews involving this limited exemption focused on licensing IPR and the assignment of those rights. This is understandable as s.51(3) dealt predominantly with conditions in licences and assignments involving IPR.[4]

However, this article considers that there is another IPR which has not been considered in the long debate over s.51(3), which was not caught by the exemption when it existed, but which exposes all IPR owners seeking to enforce their IPR, to potential contravention of the cartel provisions. This IPR is perhaps the "purest" IPR – it is the right to take action to enforce the IPR.

There has been such a preoccupation with conditions in licences and assignments, sometimes referred to as "front-end" intellectual property ("IP"), that there has been a total failure to appreciate the potential exposure of IPR stakeholders in "back-end IP" as it related to Part IV conduct.[5]

This article argues that a commonplace IPR enforcement scenario will contravene the cartel provisions.[6] Corporations and individuals making or giving effect to contracts, arrangements, or understandings containing cartel provisions expose themselves to contravention of both civil and criminal prohibitions. For example, the penalty for a corporation making a contract or arrangement, or arriving at an understanding in which such contract, arrangement or understanding contains a cartel provision may amount to $10,000,000 or more depending on the value of the benefits received.[7] Further an offence under s.45AF(1) of the CCA is an indictable offence.[8]

The circumstances arise where, in an IPR enforcement proceeding, a resolution of the dispute results in an agreement which removes the respondent's allegedly infringing product from the market. In certain circumstances, the restraint in the settlement agreement may, in addition, contravene s.45(1) of the CCA by lessening competition. This conduct cannot be dismissed as being outside the radar of cartel conduct because such conduct arguably harms consumers business and the economy by reducing consumer choice.[9]

The scenario involves the resolution of an intellectual property enforcement proceeding before determination by the primary judge. Where a settlement agreement is entered into by the parties to the proceeding, requiring inter alia, that the respondent will cease to manufacture, sell or offer for sale the allegedly infringing product, there appears to be an exposure to the cartel provisions.

The repeal of s.51(3) did not impact on this situation. It seems that this exposure has always been the case. However, it is the attention that s.51(3) has received up to and after it repeal, that has caused IPR professionals to come to grips with the full exposure of IPR to Part IV of the CCA.

To be clear, this article is not saying that the repeal of s.51(3) has now exposed IPR owners in the common litigation scenario considered to Part IV contraventions. It is saying that in considering the effects of the repeal, a very common occurrence in IPR enforcement litigation, is exposed into the light of Part IV of the CCA conduct, particularly in relation to the cartel provisions. This will have implications for IPR owners and their advisers.

There has been a lot of attention in the last 20 years at least, to the interaction between IPR and competition law. That attention has exclusively considered the position from the perspective of license agreements and to a lesser extent, assignments of IP. For example, in the ACCC Guidelines, all 13 examples relate to licensing situations. There are none relating to assignments.

This article considers the scope of the former s.51(3) of the CCA, as interpreted by the courts, and considered in the more recent reviews being, the Harper Report (2015)[10] and the PC Report (2016)[11], and the Government responses to the recommendations in those reports. This analysis will not be exhaustive. However, it is necessary in order to show that the focus has consistently been on the interaction between IPR and competition law from the perspective of licences and assignments but has not considered the effect of the repeal from a litigation perspective.

The Government adopted the recommendations of the Harper Report and the PC Report to repeal s.51(3), however it did not follow all the recommendations of those inquiries in relation to the repeal, specifically in relation to the cartel provisions. The exposure of IPR to all competition law provisions in Part IV of the CCA gives rise to an exposure to the cartel provisions for IPR stakeholders enforcing their IPR, which was previously not apparent.

To highlight the exposure, this article considers an agreement which often arises in IPR enforcement actions. This scenario is the resolution, before trial, of the dispute whereby the respondent agrees to withdraw its allegedly infringing product from the market. On closer examination, this agreement appears to contravene the cartel provisions in the CCA. In addition, it may also contravene the prohibition against arrangements which have the likely effect of substantially lessening competition. However, as the issue of whether conduct substantially lessens competition is a matter which will depend on several factors, such as the number of alternative product equivalent suppliers, it is not the focus of this article. The focus here is squarely on the cartel provisions and their application to the common litigation scenario proposed in this article.

Finally, the article identifies several courses of action which will minimise, or extinguish in some cases, any risk of contravention. However, ultimately it is a "gap" which will need to be reconsidered by Government and hence the title of this article.

The scope of the former s.51(3) of the CCA

The Australian Competition and Consumer Commission ("ACCC") considered that the precise scope of the exemption under s.51(3) was uncertain.[12] Sub-section 51(3) provided:

> *(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.

Section 51(3) therefore provided a limited exemption to contraventions of provisions in Part IV of the CCA in licensing and assignment of IPR. With the exceptions under sections 46, 46A or 48, the contravention would not have been taken to have been committed by reason of a condition in a licence or assignment relating to a patent, registered design, a copyright, EL rights or relating to the right to apply for those rights. There were similar exemptions for provisions in a contract, arrangement or understanding in relation to trade marks. The exemption did not protect:

- A corporation that had a substantial degree of power in a market, from misusing market power by engaging in conduct that substantially lessened competition: s.46.
- A corporation that had a substantial degree of power in the trans-Tasman market, from misusing market power by engaging in conduct that substantially lessened competition: s.46A.
- A corporation or other person who engaged in the practice of resale price maintenance: s.48.

Leaving aside trade marks, which had their own specialised treatment, the exemption did not cover an agreement that involved IPR which was not contained in a licence or an assignment of IPR.

There has been limited treatment of the scope of s.51(3) by the courts. However, in *Transfield Pty Ltd v Arlo-International* Ltd ("*Transfield*"),[13] the High Court considered two provisions in a sub-licence from a corporation associated with the patentee, of a process for the manufacture and erection of steel poles filled with concrete for use in the construction of electricity transmission lines (the "Arlo pole"). The sub-licence granted to the appellant by the respondent was an exclusive licence for the Commonwealth of Australia, its territories and protectorates. This included the Territory of Papua New Guinea, in which to make, use, exercise and vend the patented process for the purpose of electricity transmission lines, poles and any non-loadbearing poles of a like nature.[14]

The dispute revolved around a tender to the Electricity Commission of New South Wales ("the Commission") for the construction of a high voltage transmission line between Picnic Point and Minto, a total distance of some 36 kilometres. The appellant responded to the tender initially with the patentee's Arlo pole, but ultimately, the Commission awarded the contract to the appellant upon the footing, that the appellant's pole and not the Arlo pole would be used in the construction.

The respondent claimed inter alia, breaches of two relevant provisions in the sub-licence. Firstly, that the appellant advanced its own power pole and not the Arlo pole, contrary to an obligation to use best endeavors to promote the Arlo pole. Secondly, that information acquired through its sub-licence was utilised in the development and use of the appellant's pole, which was the subject of the successful tender.

The relevant provisions of the sub-licence were:

(a) Clause 7 stated:
The Licensee covenants during the period of the Power Transmission Line Licence at all times to use its best endeavours in and towards the design

fabrication installation and selling of the ARLO PTL pole throughout the licenced territory, and to energetically promote and develop the greatest possible market for the ARLO PTL pole.

(b) Clause 11 stated:
Neither the Licensor nor the Licensee shall disclose any of the data supplied hereunder relative to the ARLO PTL pole without the prior consent of the other save and except to the extent necessary for the proper carrying out of the terms and conditions of this Deed.

The appellant attacked those provisions on the basis that the following legislation provided the appellant with a complete defence:

- the *Patents Act* 1952 (Cth) s.112 which provided for the avoidance of conditions attached to the sale, lease or licence of patented products; and
- the *Trade Practices Act* 1974 (Cth)("TPA") s.45, as amended, which rendered unenforceable, as against a corporation, a provision of a contract which had the purpose, or had or was likely to have the effect, of substantially lessening competition.

Relevantly, the respondent submitted before the High Court, that even if s.45 of the TPA applied to Clause 7 of the sub-licence, s.51(3) would operate to save it.[15] Barwick CJ, Stephen, Mason and Wilson JJ (Murphy J dissenting) dismissed the appeal. In their Honours' reasons, the majority generally considered that there was no evidence to support the appellant's proposition that Clause 7 had the effect of substantially lessening competition.

The primary judge found that s.51(3) did apply, but did not analyse the arguments in detail.[16] In the New South Wales Court of Appeal, in relation to s. 45 of the TPA, the Full Court merely affirmed the decision of the primary judge without expressing reasons.[17]

The extent of the exemption, however, and its reason d'etre, were the subject of observations by Mason J (as his Honour then was). Relevantly, his Honour observed:

> *In bridging the different policies of the Patents Act and the Trade Practices Act, s. 51 (3) recognizes that a patentee is justly entitled to impose conditions on the granting of a licence, or assignment of a patent, <u>in order to protect the patentee's legal monopoly.</u> Even under American antitrust law, where there is no equivalent exception to s. 51(3), the patentee is entitled to exercise some measure of control over the licensee, consistent with the scope of the patent monopoly, though there has been some controversy as to the scope of permissible control: see Donald and Heydon, Trade Practices Law (1978), vol. 1, pp. 117, 118; Ward S. Bowman, Jr., Patent and Antitrust Law (1973), ch. 7 and ch. 8; P. Areeda, Antitrust Analysis, 2nd ed. (1974), pp. 448 et seq. (at p103).*
>
> *Section 51(3) determines the scope of restrictions the patentee may properly impose on the use of the patent. Conditions which seek to gain advantages collateral to the patent are not covered by s. 51(3). Section 8(4) of the Restrictive Trade Practices Act, 1956 (U.K.) contained a clause in similar terms to s. 51(3) (a) (iii) (see W.M.C. Gummow, Sydney Law Review, vol. 7(1976), 339, at p. 357).*[18] (Emphasis added).

The ACCC Guidelines in relation to the repeal, note his Honour's confirmation that the scope of the protection under s.51(3) did not extend to other provisions in contracts, arrangements or understandings between competitors, which sought to gain an advantage collateral to the IPR.[19] The ACCC Guidelines confirm its position that such collateral advantages beyond the rights associated with the IPR, would not come within s.51(3), particularly the cartel provisions, which applied regardless of their effect on competition.[20]

In *Transfield* Mason J accepted that the justification for s.51(3) was that it was expected that a stakeholder may impose conditions in an assignment, lease or licence "in order to protect the patentee's legal monopoly." It follows from that line of reasoning that the right to take legal action to protect the IPR is also justified and should not be caught by the cartel provisions.

- Specifically, these circumstances arise where an IPR owner, or a party entitled to initiate such an action, such as an authorised user under the *Trade Marks Act* or an exclusive licensee under the *Copyright Act*, commences an action for infringement of their IPR which is subsequently discontinued before final orders by the primary judge, by reason of a settlement on agreed terms which include, the removal of the respondent's allegedly infringing product from the market.[21]

The restraint conditions are legitimately imposed in order to protect the IPR owner's legal monopoly, but which may simultaneously, also contravene the cartel provisions. In such a situation, the right to maintain the IPR monopoly meets the anti-competitive behaviour head on, by removing a potential competitor's product from the market.

Prior reviews of s.51(3)

An earlier review in 1993 identified the tension between on the one hand licensing IPR benefitted the competitive process by accelerating the commercial application of innovations and providing incentive to innovate, whilst also having the capacity to cartelise and strengthen market power.[22] Although the Hilmer Report saw force in the reform and possible removal of the limited IPR exemption, then under the *Trade Practices Act*, it considered that it was not in a position to make expert recommendations on the matter and recommends that the current exemption be examined by relevant officials, in consultation with interested groups.[23]
Similarly, the National Competition Council ("NCC") in its review in March 1999, did not recommend the repeal of s.51(3). The NCC after a careful assessment of the costs and benefits of s.51(3), and of alternatives, recommended that the exemption in s.51(3) be retained, but amended to remove protection of price and quantity restrictions and horizontal agreements. Notably it recommended the extension of the exemption to *Plant Breeder's Rights Act* 1994 (Cth).[24]

Recommendations for the repeal of s.51(3) (of the former *Trade Practices Act* 1974 (Cth)) commenced from at least 2000, when the Intellectual Property and Competition Review Committee conducted its *Review of Intellectual Property Legislation Under the Competition Principles Agreement*, Final Report, (September 2000) ("Ergas Report").[25]

The Ergas Report recommended repealing s.51(3) of the *Trade Practices Act.*[26] The then Government accepted the recommendation, but no legislation was introduced to effect the change.

The Australian Law Reform Commission in 2004, conducting its inquiry on gene patenting, however recommended in relation to s.51(3), that:

> [*t]he Trade Practices Act should be amended to clarify the relationship between Part IV of the Act and intellectual property rights, and the ACCC should issue guidelines to provide further clarification*.[27]

A further call for the repeal of s.51(3) was made in 2013 by the House of Representatives Standing Committee on Infrastructure and Communications *Inquiry into IT Pricing* ("the IT Pricing Inquiry").[28] The IT Pricing Inquiry referred to the ACCC's long-standing position in favour of repealing s.51(3). [29] Specifically, the IT Pricing Inquiry noted the ACCC's position in relation to:

- The potential misuse of the exemption:

  > *Section 51(3) … 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 exempted). 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.*[30]

- The circumstances originally giving rise to the limited exemption:

  > *… it was likely that IP laws were believed to confer on the owners of IP a limited economic monopoly. This led to a concern that the unrestrained application of competition law to IP could undermine IP rights. This original rationale is no longer relevant. It is now accepted that, generally, IP laws do not create legal or economic monopolies*.[31]

- The ACCC has long held the belief that IPR should be treated the same as any other rights and s.51(3) should be repealed. In its submission, the Commission said that:

  > *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. 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*.[32]

Similarly, in 2013, the Australian Law Reform Commission inquiry *Copyright and the Digital Economy* ("ALRC Report")[33] also recommended the repeal of s 51(3) "as an integral aspect of equipping copyright law for the digital economy."[34] In doing so, the ALRC noted the ACCC position as follows:

> *The ACCC considers that intellectual property should be regarded in the same light as other property, and that the authorisation process in the* Consumer and Competition Act *is appropriate in assessing whether licensing activity confers benefits that outweigh anti-competitive effects:*

It is now accepted that, generally, IP laws do not create legal or economic monopolies. IP laws create property rights and the goods and services produced using IP rights compete in the marketplace with other goods and services.[35]

This leads to the two most recent reviews – the Harper Report (2015) and the PC Report (2016). The PC Report tables and summarises the various recommendations on s.51(3) of the CCA since 1999. [36]

The Harper Report and the PC Report both recommended that s.51(3) should be repealed.[37] Both inquiries considered that the historical view that IPR and competition law reflected competing policy objectives was now no longer the case. The inquiries concluded, and the Government accepted, that the old view had been superseded by the view that both are largely compatible, as they both encourage innovation. In this regard, the Harper Report noted the ACCC submission to the Harper Inquiry. The Harper Report stated:

> *The Australian Competition and Consumer Commission (ACCC) claims that, in the vast majority of cases, granting an IP right will not raise significant competition concerns:*
>
> > *... rights holders are entitled to legitimately acquire market power by developing a superior product to their rivals, and pursuant to the policy purpose of IP regulation, the temporary market power from an IP right provides the very incentive to invest in the production of new IP. Such innovation is also a key goal of competition law. In this respect, IP and the competition law are for the most part complementary, both being directed towards improving economic welfare. (ACCC sub 1, page 59)*
> >
> > *However, conflicts between the two policies can occur '<u>where IP owners are in a position to exert substantial market power or engage in anti-competitive conduct to seek to extend the scope of the right beyond that intended by the IP statute</u>' (ACCC sub 1, page 59).*[38] (Emphasis added).

The Harper Report also noted the ACCC submission to the ALRC in these terms:

> *In a recent submission to the ALRC Inquiry into Copyright and the Digital Economy, the ACCC also argued 'it is important that the rights created through IP laws should be subject to competition laws to ensure they are pro-competitive rather than anti-competitive in effect or purpose: Australian Competition and Consumer Commission 2012, ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper, Canberra, page 12.*[39]

The example of an IPR enforcement proceeding highlights that IPR are sufficiently different by their nature from other rights. How? The difference comes from the nature of IPR. They are negative in nature. The inventor/owner of a patent does not need the Government to give IPR rights to exploit the patent or an author the right to reproduce a literary work. They have that already. The IPR is a negative right in that it preserves the exclusivity of those rights to the IPR holder.[40] The right to a product in specie or even a bare unregistered design for a new chair to not carry with it the granting of a right to exploit the IPR exclusively. In enforcing the IPR the rights holder is enforcing an inherently monopolistic right.

The question which is raised is whether the action of commencing enforcement proceedings to protect the IPR and the conduct resolving the litigation in the example considered below, should give rise to an exposure to the cartel provisions or any Part IV provisions of the CCA.

The Ergas Committee, as noted by the Harper Committee, identified a difference of IPR from other property rights:

> *The Ergas Committee considered that IP rights were sufficiently different from other property rights and assets to warrant special treatment under the (then) Trade Practices Act 1974 (TPA). However, the existing IP exceptions under subsection 51(3) were 'seriously flawed, as the extent and breadth of the exemptions are unclear, and may well be over-broad'*.[41]

Contrary to the view expressed in the Harper Report and the PC Report, the author considers that the right to preserve that granted exclusivity and to take action to prevent others from exploiting a product or method which encroaches within the field of that exclusive protection betrays a fundamental incompatibility between the IPR and competition policy. This incompatibility is best seen from an enforcement perspective because the IPR holder is necessarily seeking to limit the competition to its product, method work or design. That difference is not answered by an explanation from a competition perspective, that the two cultures have a common goal of encouraging innovation. It is raw. The IPR owner has a statutory monopoly. They have the right to take action to preserve that monopoly. The result of taking that action may be, that an actual or potential competitor is removed from the market, not by court order, but by an agreement.

In the author's experience in a litigated enforcement setting, respondents who have agreed in settlement discussions to a provision in a settlement agreement restraining them from conduct reserved for the IPR holder. In relation to the allegedly infringing product, resist vehemently the restraint being made by a specific order of the court. A similar response does not arise where the court notes the settlement agreement in making orders to finalise the matter.

The reason parties resist a court order in the actual terms of the restraint provision or any material provision the agreement of course, is that if the party does not comply with the action or steps ordered, the other party is left to seek specific performance of the settlement agreement,[42] rather than moving for orders for contempt of court.

However, where the restraint for example, is an order made by consent, which is in injunctive terms restraining the conduct, so that the Court is making the injunctive order (as opposed to noting an agreement which contains a restraint), then there is a potential contempt of court case as well as an enforcement of an agreement case.

The author considers that the effect of this difference, that is, having the court order the restraint by consent, removes the threshold requirement for "a provision of a contract, arrangement or understanding" in s.45AD(1). The parties would have up draft orders for the court's consideration by consent, which would include an order restraining, for example, a respondent from reproducing and/or communicating the copyright in an artistic work.In the common scenario which follows, the focus is on conduct which does not "extend the scope of the right beyond that intended by the IP statute”. However, in doing so, it can give rise to conduct contravening the cartel provisions in Part IV of the CCA.

Relevant to its recommendation, the Harper Report explained the nature of anti-competitive agreements, arrangements and understanding in terms of horizontal and vertical arrangements as follows:

> *The Competition and Consumer Act 2010 (CCA) prohibits certain types of provisions within agreements, arrangements and understandings between competitors. These types of arrangements are commonly called horizontal arrangements because they occur between competitors trading at the same level of the supply chain. Cartel provisions and exclusionary provisions (where competitors agree not to supply or acquire from particular persons or classes of persons) are prohibited per se. Other provisions are prohibited if they have the purpose, effect or likely effect of substantially lessening competition. The CCA also prohibits certain types of conditions that are imposed as part of trading arrangements between suppliers and their customers. These types of arrangements are commonly called vertical arrangements because they occur between firms that trade at different levels of the supply chain.*

The Harper Report did recommend repeal of s.51(3). However, the committee did recognise and take into account in relation to IPR, that this might unwittingly trigger the cartel provisions because IPR, it was said, were predominantly vertical arrangements. The Harper Panel’s full recommendation was to allow the exemption for IPR to remain in relation to cartel provisions. It noted:

> *The Panel considers that the IP licensing exception in subsection 51(3) of the CCA should be repealed. However, as is the case with other vertical supply arrangements, IP licences <u>should remain exempt from the per se cartel provisions of the CCA insofar as they impose restrictions on goods or services produced through application of the licensed IP.</u>* (Emphasis added).

The Government responded to the Harper Report on 7 September 2016. It noted the recommendation and determined it would wait upon the Productivity Commission’s review of the intellectual property arrangements before making a final decision on the repeal recommendation.[43]

The PC Report recommended to repeal the exemption under s.51(3) of the CCA, but:

> *at the same time as giving effect to recommendations of the (Harper) Competition Policy Review on the per se prohibitions*.

The PC Report expressed the view that “IP rights holders currently enjoy an exemption from aspects of Australia’s competition law; however, 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.”[44]

In accepting the recommendation to repeal s.51(3), the Government also accepted the position that IPR and competition law were not in conflict:

> *It is now generally agreed that there is no fundamental conflict between IP rights and competition policy; rather, they share the purpose of promoting innovation and*

enhancing consumer welfare. However, where there is evidence of anti-competitive conduct associated with IP licensing arrangements, it is important that such conduct is appropriately regulated. If anti-competitive conduct in this space is nonetheless in the public interest, authorisation will be available under Part VII of the Competition and Consumer Act.[45]

The Government also accepted the PC Report recommendation to have the ACCC issue guidance on the application of Part IV of the CCA to intellectual property.[46]
However, the Government did not adopt the recommendation of both the Harper Report or the PC Report, to continue the exemption for cartel arrangements, citing that it considered "per se prohibitions, authorisations and notifications are already being implemented."[47]
By this the Government indicated that the cartel provisions now operate in respect of all contracts, arrangements or understandings which involve IPR.

The Emphasis on Licensing and Assignment

The Harper Report, the PC Report and the ACCC Guidelines, approach the issue of the repeal of the exemption from the perspective of licensing and assignment of IPR. This is understandable as s.51(3) only considered the imposition of conditions in licences and assignments as requiring an exemption from anti-competitive conduct. However, the right to enforce the monopoly and the practical consequence of "shutting down" a competitor, has existed as long as the IPR have existed.

The Harper Report relevantly states:

Subsection 51(3) of the CCA provides a limited exception from most of the competition law prohibitions for certain types of transactions involving IP. The exception covers conditions in licences or assignments of IP rights in patents, registered designs, copyright, trademarks and circuit layouts, where broadly, the condition relates to products that are the subject of the application of the IP right."[48]

The PC Report states:

***The exemption for licensing or assignment of IP**": "Part IV of the CCA prohibits companies from engaging in certain types of conduct that reduce competition (box 15.1). Section 51(3) of the CCA provides an exemption from part IV for conditions in licences and assignments of patents, registered designs, copyright, or eligible circuit layout rights*.[49]

The ACCC Guidelines have 13 examples to provide guidance and assist IPR stakeholders and their advisers in the transition. The Guidelines exclusively relate to licensing arrangements. [50]
None deal with the resolution of the IP enforcement proceedings resulting in the respondent ceasing to make the competitive product. Certainly, s.51(3) only referred to licences and assignments, however the views expressed in favour of the repeal largely speak of IPR in a collective sense. That is, IPR per se, not IPR in the context only of licenses and assignments.

The ACCC also identifies that "[f]ollowing the repeal of subsection 51(3) of the CCA, the prohibitions against cartel conduct now cover all conditions of a licence or assignment, including any that relate to the subject matter of an intellectual property right."[51] Similarly, the ACCC states that it will enforce the cartel prohibitions and sections 45 and 47 of the CCA in respect of:

- the granting of licences, the making of assignments, or the entering into of contracts, arrangements, understandings or concerted practices on or after 13 September 2019, or

- the giving effect on or after 13 September 2019 to conditions in licences, assignments, contracts, arrangements, understandings or concerted practices, even where entered into before 13 September 2019. [52]

The previous exemption was limited to licence and assignment arrangements. It has received, as indicated, a great deal of attention over an extended period. Notwithstanding, this focus on licenses or assignments of IPR, there has been no consideration of the effect of Part IV of the CCA on the actions surrounding the enforcement of IPR. More so, it is difficult to find where any of the examinations considered the litigation aspect of IPR enforcement, let alone from the perspective that the effect of the litigation involving IPR may result in a potential competitor being excluded from the market.

A Common Litigation Scenario

The following litigation scenario is suggested as being a common occurrence in IPR enforcement proceedings:

- Party A has an IPR for Product A which it markets in trade or commerce; for argument, we can say it is a software program protected by copyright.
- Party B accesses the source code of Product A and develops a competitive product equivalent, Product B, for commercialisation. The functionality of Product B is therefore directed to the same performance results as Product A.
- Product B is the only other product equivalent in the market, excepting the product protected by the IPR.
- Product B is launched on the market, but Party A believes and is advised, that Product B infringes the IPR of Product A, and commences enforcement proceedings to seek, amongst other things, injunctive relief restraining Party B from manufacturing, selling or offering for sale (directly or indirectly), Product B in Australia.[53]
- At the mediation in the proceeding directed by the Court, the parties resolve their dispute by an agreement that, inter alia, provides that Party B will cease to make and sell or offer to sell Product B, or to authorise or participate with anyone else to do so (the Restraint).
- This agreement, now reduced to writing in a deed of settlement, allows Party B to sell off existing stock of the allegedly infringing Product B, but ultimately, within 6 months of the agreement, Party B agrees not to manufacture, sell or offer for sale Product B any longer.

It is also presumed that in most enforcement actions, the IPR owner is seeking to stop the allegedly infringing conduct rather than co-exist in a manner involving IPR licences or assignments.

The Relevant Provisions of the CCA:

The cartel conduct provisions are found in Part IV Division 1 of the CCA. Section 45AD(1) establishes the foundation of the contravening conduct by its requirement that a cartel provision must have:

- a purpose/effect condition; <u>or</u>
- a purpose condition; <u>and</u>
- a competition condition.

Each of these terms is further identified in the subsequent sub-sections.

A purpose/effect condition is characterised by the conduct set out in s.45AD(2) of the CCA. This sub-section relates to the direct or indirect fixing, controlling or maintaining of a price. This article does not consider this aspect of the contravening conduct, as it is not common in settlement agreements resolving enforcement of IPRs. The most common relief sought is that the respondent cease to infringe the applicant's IPR.

Relevant to this article, s.45AD(3)(a)(i) sets out the purpose condition. It provides that:

> *(3) The* ***purpose condition*** *is satisfied if the provision* ***has the purpose*** *of* ***directly or indirectly****:*
> *(a)* ***preventing, restricting or limiting****:*
> *(i)* ***the production****, or likely production,* ***of goods by any*** *or all* ***of the parties*** *to the* ***contract, arrangement or understanding****; or*
> *(ii) ...*
> *(iii) ...*
> *(iv) ...*[54]
> (Emphasis added).

The competition condition, the second limb requiring satisfaction so as to constitute a "cartel provision", is set out in s.45AD(4). Again, relevantly, this provides:

> *(4) The* ***competition condition*** *is satisfied* ***if at least 2 of the parties*** *to the* ***contract, arrangement or understanding****:*
> *(a)* ***are*** *or are likely to be; or*
> *(b)* ***but for*** *any* ***contract, arrangement or understanding****,* ***would be*** *or would be likely to be;*
> ***in competition with each other*** *in relation to:*
> *(c) ...*
> *(d) ...*
> *(e) ...*
> *(f) if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of goods - the production of those goods in trade or commerce; or*
> *(g) ...*[55]
> (Emphasis added).

The ACCC has noted that where conduct does not satisfy the "competition condition", the "purpose/effect condition", or the "purpose condition", as required under the cartel provisions, it may still contravene another section of the CCA if it meets the requirements of that section.[56]

It is convenient therefore to briefly raise the "lessening competition" consideration under s.45 of the CCA. The cartel provisions apply irrespective of the impact on competition.

Section 45(1) provides:

> *(1) A **corporation** must not:*
> *(a) **make a contract or arrangement**, or arrive at **an understanding**, if a provision of the proposed contract, arrangement or understanding has **the purpose**, or would have or be likely to have **the effect**, of **substantially lessening competition**; or*
> *(b) ...*
> *(c) ...*
> (Emphasis added).

Only a brief consideration will be given to this provision as there may be circumstances where the common litigation scenario may contravene s.45(1), however, the facts given in the common scenario do not give sufficient information to determine whether the conduct meets the substantial lessening of competition threshold.

The questions which arise under the cartel provisions

The cartel provisions make it clear that a purpose condition and a competition condition are both required in order to constitute cartel contravening conduct.

The purpose condition is the first limb. This requires that a provision has the purpose of directly or indirectly, preventing, restricting or limiting the production, or likely production, of goods by any or all parties to the contract, arrangement or understanding.

There is the threshold question, whether the settlement agreement between the parties, usually documented, is a "contract, arrangement or understanding". There can be little doubt that a settlement agreement, whereby Party A agrees to forego a right to prosecute a claimed infringement of the IPR and discontinue the IPR enforcement action and possibly the other party foregoes a revocation action by cross-claim, on certain terms requiring the performance of certain obligations, is at the very least an understanding. The term "contract" is defined to include a covenant,[57] which has been defined to mean "an agreement, usually formal, between two or more persons to do or not do something specified".[58]

The fact that the settlement agreement may be the basis of a party taking further action for failure to perform an obligation under the settlement agreement further supports the case that it is a contract, arrangement or understanding within the meaning of s.45AD.

Secondly, the purpose of the restraint (although it does not have to be the sole purpose),[59] is to directly prevent or restrict the production of Product B by Party B, a party to the contract, arrangement or understanding. The ACCC considers that 'Purpose' refers to a firm's intention to achieve a particular result.[60] The particular result Party A intends to achieve with the restraint is stop Party B competing in the market with its allegedly infringing product.

The second limb required to be satisfied in order to constitute cartel infringing conduct, is the competition condition. As the above construction involved s.45AD(3)(a)(i), consideration is directed toward s.45AD(4)(f) to determine if the second and final limb is satisfied by the facts of the common scenario. The competition condition is satisfied where Party A and Party B, the parties to the settlement agreement, are, or are likely to be, or but for the settlement agreement, specifically the restraint, in competition with each other.

In most cases where an IPR owner institutes proceedings for infringement, the parties are, or are likely to be, in competition. It is usually this very reason the IPR owner commences proceedings to protect their monopoly.

The restraint therefore meets the necessary requirements. Namely, it:

- is a provision in a contract, arrangement or understanding – the settlement agreement
- has the purpose of directly or indirectly, preventing or restricting the production, or likely production, of goods – Product B;
- the said production, or likely production, of goods is by a party to the contract, arrangement or understanding – Party B;
- the parties to the contract, arrangement or understanding are, or are likely to be or but for the settlement agreement, would be or would be likely to be in competition with each other – Party A and Party B; and
- that competition is in relation to preventing or restricting the production, or likely production, of goods in trade or commerce – removing Product B from the market.

There are exceptions, but none of the exceptions apply to the facts of the scenario.[61]

The conclusion is that, in this common scenario of settling the infringement action before trial, an IPR owner has effectively removed from the market a competitor's product equivalent. Surely, this is where IPR and the competition laws collide head on?

Further, it must be remembered that the IPR owner has removed a competitor and their competitive product <u>before</u> a finding of infringement at trial. It may be that in fact it was found that Product B did infringe Product A. However, it may also be the case that Product B did not infringe Product A; or worse, that Party B's cross-claim challenging the IPR succeeds and the IPR is revoked or removed from the register.[62]

Does this mean that IPR enforcement actions cannot be resolved before trial? To suggest that all IPR enforcement actions must go to trial is counterproductive and against all alternative dispute resolution principles. It is the basic entitlement of IPR owners to take action to enforce their statutory monopoly. In doing what Party A is entitled to do, it appears, on this construction, that the parties to settlement agreement will be exposed to the cartel provisions.

The questions which arise under the "lessening competition" provision

As stated above, the common scenario is void of information from which even a preliminary view on whether there is a substantial lessening of competition can be reached. Notwithstanding this, it is plausible to argue that the parties to the settlement agreement in the scenario may be making a contract or arrangement, or have arrived at an understanding, if the

Restraint has the purpose, or would have or be likely to have, the effect of substantially lessening competition.

Indeed, leaving aside for the moment the determination of the question of whether the Restraint substantially lessens competition, the other elements of s.45(1) are present in the common scenario. That is, the parties to the settlement agreement are making a contract, arrangement or understanding which contains a provision, which may have or is likely to have, the effect of substantially lessening competition.

In the scenario, Party B is the only other party entering the market and providing a product equivalent to Product A. If there were a number of equivalent products by different suppliers available to the public this may reduce the risk of contravening s.45, but this is only one factor to consider for the question of whether the restraint in the settlement agreement has, or is likely to have, the effect of substantially lessening competition. However, assuming the other factors indicate that the restraint has such an effect, why should A's unfettered right to take action to enforce the IPR, granted under Commonwealth law, be limited by an additional consideration before the proceeding is commenced, of whether its success in stopping Product B from entering the market has, or is likely to have, the effect of substantially lessening competition.

Will Party A be forced to go to trial, <u>even if Party B agrees to the restraint,</u> because the removal of Product B by the Restraint may amount to conduct contravening s.45(1)? Such a limitation is unacceptable and a serious limitation on the IPR. Further there has been no consideration of this effect by the Harper or PC inquiries.

Why is this important?

It is important because it appears that Government has accepted that competition law and IPR are no longer seen as being polarised and consideration has not been given to the impact on settlement agreements in IPR enforcement actions. The current perspective adopted by Government, that IPR and competition law are mainly not polarised but rather have a common goal, does not, it would appear, take into account that the right to take action to enforce the statutory monopoly may necessarily mean the exclusion from the market of a competitor and their product.

It is important because other dealings, other than those involving licences and assignments, such as settlement agreements containing the restraint, are likely to expose the parties to the cartel provision in s.45AD, simply be resolving the enforcement action with a restraint provision removing the competitor. This exposure is not because of the repeal of s.51(3), but because the effects of such an IPR settlement agreement were obscured by the uncertain scope of s.51(3). The Restraint at least in theory, is open to contravene s.45AD of the CCA.

It is important because the parties' legal advisers will have a duty to advise their clients seeking to enforce their IPR, that there is a likely contravention of s.45AD of the CCA, if they resolve the litigation with the restraint.

It is not only a concern for the beneficiary of the testraint ("Party A"), but also the respondent ("Party B"). The CCA provides that a corporation contravenes the cartel provision if the corporation makes a contract or arrangement, or arrives at an understanding and the contract, arrangement or understanding contains a cartel provision.[63] Part B is a party to the settlement agreement.

Finally, it is important because the penalties for contravention of a cartel provision are substantial. The ACCC has wide powers which include:

- to investigate cartels other anti-competitive behavior;
- to compel any person or company to provide information about a suspected breach of the law by providing document or giving verbal evidence,
- to apply for warrants and execute these on companies including the premises of company officers and notify the Federal Police.

The Australian Federal Police have the power to collect evidence using phone taps and other surveillance devices. Additionally, the ACCC may refer serious breaches for prosecution to the Commonwealth Director of Public Prosecutions. The potential penalty for a contravention of Part IV of the CCA is the greater of $10 million and three (3) times the value of the benefit obtained from the offence, and 10 percent of the offender's annual turnover (if the value of the benefit cannot be easily determined).[64]

Is there a solution?

The ACCC has suggested that where a party considers that it may be entering an arrangement which would, or might, contravene the anti-competitive conduct prohibitions of the CCA, they can seek authorisation from the ACCC.[65]

The ACCC has published in March 2019, Guidelines for Authorisation of Conduct in non-merger situations ("GAC").[66] The process commences with a meeting with the ACCC officers to discuss the factual basis as to why a party or parties believe they may contravene the anticompetitive conduct prohibitions.[67]

Cartel practices (s.45AD) and concerted practices (s.45) may be authorised,[68] although the ACCC has no power to grant authorisation in relation to conduct engaged before any authorisation.[69] The ACCC encourages applicants to contact it for informal discussions before lodging an application for authorisation.[70]

The party or parties who can apply for the authorisation includes:

- any party intending to engage in conduct that may be at risk of breaching the competition provisions of the Act.[71]
- Any party on behalf of other parties for conduct that the applicant and those other parties propose to engage in, such as a professional association on behalf of its members.[72]

It is not necessary for an applicant to show that the proposed conduct for which authorisation is sought, would breach Part IV of the CCA in order to apply for authorisation. Authorisation is available where the conduct the parties intend to engage in, would or might constitute a breach of the relevant provisions of the CCA.[73]

The practical difficulty in the case of the common litigation scenario considered in this article is that:

- Resolution is sought at mediation or a settlement conference, and not subject to obtaining an authorisation, which may take several months to obtain.

- Additional costs will be incurred in the authorisation process, including submissions setting out the perceived contravening conduct as well as attendances at meetings with the ACCC and legal advisers.
- An authorisation would need to be sought in advance of the mediation, so that an authorisation might be available at the mediation, as the ACCC cannot authorise past conduct. In this case, the ACCC could not ratify a settlement agreement after it has been entered into, which is too late.
- It is reasonable to expect that the respondent will not be willing to participate in the authorisation process, because it would telegraph that it would be willing to cease producing the allegedly infringing product; a position which is adverse to any defence to infringement or any cross-claim challenging the IPR.

A more practical solution would be, to have the court order the restraint by consent. This would have the effect that neither s.45AD nor s.45 of the CCA would apply, as there is no contract, arrangement, or understanding enforcing the restraint, but rather, the restraint is the subject of an order of the court.

Respondents may not be willing to submit to such an order, preferring to require the IPR owner to rely on enforcement of the settlement agreement rather than deal with a possible contempt of Court. The potential exposure to the cartel provisions can now provide a basis for the parties to seek to have the restraint ordered by a court, as it will protect both parties. . Another reason for the respondent's reticence to submit to a court order restraining use of the IPR, may also be that, having seen the applicant's case they may wish to continue the conduct but try to work around the IPR. A direct order restraining the respondent from the court as part of the resolution to the litigation, heightens such a risk.

Further, there is no reason why the respondent could not consent to the restraint order without admission. The author has recently put this method into practice in a recent trade mark dispute. The dispute was resolved in mediation a few weeks prior to hearing and the essential terms, including a license to the respondent for his geographic and online locations, were made part of the orders, removing the need for an agreement, which arguably could have triggered the cartel provisions.

Conclusion

There is a live issue exposing parties to an IPR enforcement proceeding from resolving the dispute, where a term of the resolution will require the respondent's allegedly infringing product, being removed from the market.

There does not appear to have been any consideration of this IPR enforcement scenario by either the Harper Report, the PC Report, by Government or in the ACCC Guidelines. There appears to have been a pre-occupation with contracts, arrangements and understandings, specifically licenses and assignments, involving IPR.

The reason for this is that these committees in considering the previous limited exemption, focused upon the rights granted by the IPR statutes, such as the right to "exploit" the invention, or to reproduce or communicate a copyright work.

There seems to be a void in the debate about the fundamental right of the IPR – the right to take enforcement action to preserve the monopoly. Accepting that s.51(3) was limited to licences and assignments, the conclusions reached by the Harper Committee, the PC Report and Government as to the two areas now being compatible, assumes a global approach to all IPR, not a splintered approach limited to licences and assignments.

It is the exercise of the right to enforce IPR, that challenges the conclusion the committees and Government have reached. It is the very right to take action to protect and preserve the monopoly granted, which may give rise to exposure to Part IV of the CCA contravention. This is because invariably, it is the IPR owner's aim is to shut down a potential or actual competitor from marketing its product or services to the public.

The Government should, respectfully, make clear that restraints arising from IPR enforcement processes, should be exempt from Part IV of the CCA.

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[1] Barrister, Queensland.
[2] *The Competition and Consumer Act* 2010 (Cth), in so far as the removal of s.51(3) was concerned, was amended by the *Treasury Laws Amendment (2018 Measures No. 5) Act* 2019 (Cth) Schedule 4.
[3] *Guidelines on the Repeal of Subsection 51(3) of the Competition and Consumer Act 2010 (Cth),* ("the ACCC Guidelines"): <https://www.accc.gov.au/publications/guidelines-on-the-repeal-of-subsection-513-of-the-competition-and-consumer-act-2010-cth> citing the *Competition Policy Review Final Report 2015* ("the Harper Report") < https://treasury.gov.au/publication/p2015-cpr-final-report>; Productivity Commission, *Intellectual Property Arrangements Inquiry Report No. 78*, Canberra, 23 September 2016 ("PC Report"): <https://www.pc.gov.au/inquiries/completed/financial-system#report> .
[4] The former limited exemption for trade marks spoke in terms of a "contract, arrangement or understanding": s.51(3)(b) and (c) of the CCA.
[5] In this essay "back-end IP" broadly, is that area of intellectual property which deals with enforcement of the IPR as opposed to "front-end IP", which focusses on the exploitation and commercialisation of the IPR, characterised by licensing arrangements involving IPR and assignment of IPR.
[6] CCA Part IV, Division 1, particularly s.45AD.
[7] CCA s.45AF(3).
[8] CCA s.45AF(4).
[9] Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct p.1 [1.1] < https://www.cdpp.gov.au/sites/default/files/MR-20140910-MOU-Serious-Cartel-Conduct.pdf>.
[10] *The Competition Policy Review Final Report* – 31 March 2015 ("Harper Report").
[11] Productivity Commission, *Intellectual Property Arrangements Inquiry Report No. 78*, Canberra, 23 September 2016.
[12] The ACCC Guidelines [1.8].
[13] (1980) 144 CLR 83.
[14] *Transfield* [1].
[15] *Transfield* [22] per Stephen J.
[16] *Transfield* per Mason J [2].
[17] *Transfield* per Mason J [3].
[18] *Transfield* per Mason [24] and [25].
[19] The ACCC Guidelines [3.12] and [3.21].
[20] The ACCC Guidelines [3.2].
[21] The term "product" is used for convenience. The IPR may be a method patent.
[22] *National Competition Policy Review* – 25 August 1993 ("Hilmer Report") p.150.
[23] Hilmer Report p.151.
[24] National Competition Council, *Review of sections 51(2) and 51(3) of the Trade Practices Act* 1974 (Cth) p.243.
[25] <https://www.ipaustralia.gov.au/sites/default/files/ergas_report_september_2000.pdf>.
[26] The Ergas Report p.215.
[27] < https://www.alrc.gov.au/inquiry/gene-patenting/>.

[28] The IT Pricing Inquiry, Recommendation 8, p.112.
<https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm>.
[29] The IT Pricing Inquiry, Recommendation 8, p.112 [4.95].
[30] IT Pricing Inquiry p.111 [4.92] referencing the Australian Competition and Consumer Commission, Submission 100, p. 1.
[31] IT Pricing Inquiry p.112 [4.94] referencing the Australian Competition and Consumer Commission, ("ACCC") submission to the ALRC *Copyright and the Digital Economy Issues Paper*, November 2012, pp. 31-32
[32] IT Pricing Inquiry p.112 referencing the Australian Competition and Consumer Commission, Submission 100, p. 1.
[33] ALRC Report 122: <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/>.
[34] ALRC Report 122 [3.98].
[35] ALRC Report 122 [3.87].
[36] The PC Report p.447.
[37] The Harper Report Recommendation 7 p.42.
[38] The Harper Report [9] p.101.
[39] The Harper Report [9.2] p.105.
[40] *JT International SA v Commonwealth of Australia* [2012] HCA 43 per French CJ [36].
[41] The Harper Report p107.
[42] *Hafertepen v Network Ten Pty Limited* [2020] FCA 1456 per Katzmann J.
[43] Parliamentary Library, Research Paper Series, 2016 – 17:
<https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4803053/upload_binary/4803053.pdf;fileType=application/pdf>.
[44] PC Report p.23.
[45] *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, August 2017 p. 17: < https://www.pc.gov.au/inquiries/completed/intellectual-property/intellectual-property-government-response.pdf>.
[46] *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, August 2017, p.17 : <https://www.pc.gov.au/inquiries/completed/intellectual-property/intellectual-property-government-response.pdf>.
[47] Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements, August 2017 p.17 : <https://www.pc.gov.au/inquiries/completed/intellectual-property/intellectual-property-government-response.pdf >.
[48] Harper Report p.105.
[49] PC Report p.445.
[50] The Harper Report states at p.41: "The Panel considers it appropriate that commercial transactions involving IP rights, including the assignment and licensing of such rights, be subject to the CCA, in the same manner as transactions involving other property and assets". The PC Report states at p.445 under the heading "The exemption for licensing or assignment of IP": "Part IV of the CCA prohibits companies from engaging in certain types of conduct that reduce competition (box 15.1). Section 51(3) of the CCA provides an exemption from part IV for conditions in licences and assignments of patents, registered designs, copyright, or eligible circuit layout rights."
[51] ACCC Guidelines [3.13].
[52] ACCC Guidelines [1.7].
[53] The author has used general terms of conduct rather than for example, referring to the rights exclusively given in the *Copyright Act* 1968 (Cth), s.31.
[54] Note 2 to s.45AD extends the reach of the purpose condition by providing that the The purpose condition can be satisfied when a provision is considered with related provisions--see subsection 45AD(9).
[55] The author understands that arguments could be constructed under s.45AD(4)(g)(h) and (i), however, the focus is on the commonest scenario whereby the IPR owner seeks to restrain an actual or imminent direct competitor.
[56] ACCC Guidelines [3.4].
[57] CCA s.4.
[58] Dictionary.com <https://www.dictionary.com/browse/covenant?s=t>.
[59] CCA s.4F.
[60] ACCC Guidelines [2.10] and [3.7].
[61]Conduct notified under a collective bargaining notice (s.45AL of the CCA); authorised conduct (s.45AM of the CCA); contracts, arrangements, or understandings between related bodies corporate (s.45AN of the CCA);

joint venture conduct (s.45AO and s.45AP of the CCA); conduct relating to resale price maintenance (section 45AQ of the CCA); conduct relating to exclusive dealing (s.45AR of the CCA); dual listed company arrangements (s.45AS of the CCA); acquisitions of shares or assets (s.45AT of the CCA), and collective acquisitions (s.45AU of the CCA): ACCC Guidelines [3.15].

[62] In the common scenario involving copyright where rights are not registered to be effective, the cross-claim could be challenging originality or standing.

[63] CCA, s.45AJ.

[64] CCA, s.45AF(3) and s.45AG(3); ACCC Guidelines [7.2].

[65] ACCC Guidelines [6.1].

[66] <https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger>.

[67] The author has commenced such a process by a letter to the ACCC in mid-February 2020, setting out the factual issue. Although an officer of the ACCC contacted the author to understand the issue further some time after writing, no appointment to discuss the issue has been set up within 6 weeks from writing. In fairness, the restrictions surrounding COVID-19 are in play and the author's experience should not be taken to be the ACCC's usual response which it seeks to do quickly and efficiently: ACCC Guidelines [6.6].

[68] GAC [2.8].

[69] ACCC Guidelines [6.4].

[70] GAC [3.1].

[71] GAC [2.5].

[72] GAC [2.6].

[73] GAC [2.16].