Australian Recording Industry Association Ltd.
ABN 72 002 692 944 ACN 002 692 944
Level 4, 11-17 Buckingham Street
Surry Hills NSW 2010
PO Box Q20
Queen Victoria Building
NSW 1230
Telephone: (02) 8569 1144
Facsimile: (02) 8569 1181
Website: www.aria.com.au

10 June 2014

Competition Policy Review
Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

www.competitionpolicyreview.gov.au

Competition Policy Review – Response to Issues Paper: Submission by ARIA

Thank you for the opportunity to make a submission to this important review.

It may be helpful to explain the role of the Australian Recording Industry Association (**ARIA**). ARIA is the peak trade body for the recorded music industry in Australia. It is a national industry association proactively representing the interests of its members.

ARIA has more than 100 members ranging from small "boutique" labels typically run by 1-5 people, to medium sized organisations and very large companies with international affiliates.

ARIA is active in many key areas of the music industry:

- acting as an advocate for the industry, both domestically and internationally;
- supporting Australian music, and creating opportunities to help it be heard;
- playing an active role in protecting copyright and making submissions to government on copyright reform, piracy, regulation and other issues where it has the information and expertise to do so;
- collecting statistical information from members and retailers and compiling numerous ARIA charts with data provided by over 1,100 retailers and data suppliers;
- providing, in certain cases, a reproduction licensing function for various copyright users; and
- staging the highly prestigious annual ARIA Music Awards.

ARIA's primary objective is to advance the interests of the Australian recording industry. The role of ARIA is not to monitor, supervise or intervene in the pricing or other commercial decisions of its members.

In this submission we comment on the following issues raised in the Competition Policy Review Issues Paper published in May 2014:

1. *Are there unwarranted regulatory impediments to competition in any sector in Australia that should be removed or altered? (Issues Paper section 2.3).*

2. *Is there a case to regulate international price discrimination? If so, how could it be regulated effectively while not limiting choice for consumers or introducing other adverse consequences? (Issues Paper section 2.7).*

3. *Are there restrictions arising from IP laws that have an unduly adverse impact on competition? Can the objectives of these IP laws be achieved in a manner more conducive to competition? (Issues Paper section 2.18)*

4. *Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change? (Issues Paper section 5.3)*

5. *Do the provisions of the CCA on cartels, horizontal agreements and primary boycotts operate effectively and do they work to further the objectives of the CCA? (Issues Paper section 5.21).*

6. *Should the price signalling provisions of the CCA be retained, repealed, amended or extended to cover other sectors? (Issues Paper section 5.22)*

ARIA's response to each question is set out below:

1. Are there unwarranted regulatory impediments to competition in any sector in Australia that should be removed or altered? (Issues Paper section 2.3)

The Issues Paper refers to the IT pricing inquiry in 2013 by the House Standing Committee on Infrastructure and Communications but does not refer specifically to recommendations made in the report of the Standing Committee.

One recommendation made by the Standing Committee was that:

> "*the Australian Government investigate the feasibility of amending the Competition and Consumer Act so that contracts or terms of service which seek to enforce geoblocking are considered void*" (*At what cost? IT pricing and the Australia tax*, Recommendation 10, p 116).

In ARIA's view, the possible amendment suggested by the Standing Committee in relation to geoblocking is highly problematic:

- Such an amendment would seek to void licensing or other contracts that are based on IP rights that reflect Australia's obligations under international treaties to recognise and uphold IP rights. Those obligations arise under the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS**) and the intellectual property provisions of agreements such as the Australia-United States Free Trade Agreement (**AUSFTA**). The report of the Standing Committee does not tackle the implications or the feasibility of an attempt under domestic law to override those international obligations.

- The amendment suggested does not seem consistent with the current recognition of IP rights under s 51(3) of the Competition and Consumer Act. If the relationship between IP rights and competition and consumer law is to be reviewed by the Review Panel, that review should address the relationship comprehensively and avoid piecemeal consideration of particular areas such as geoblocking. Such a review is a large task and, if it is to be undertaken, warrants a separate full inquiry of the kind raised by the Productivity Commission in its Annual Trade & Assistance Review 2011-2012, ch 4, p 96.

2. Is there a case to regulate international price discrimination? If so, how could it be regulated effectively while not limiting choice for consumers or introducing other adverse consequences? (Issues Paper section 2.7)

ARIA's view is that there is no justification for attempting to prohibit international price discrimination. The main reasons are as follows:

- The standard assumption in industrial economics, as supported by empirical studies, is that price discrimination is not inherently anti-competitive and often promotes economic efficiency and consumer welfare.

- There are many cost-related factors which account for differences in the price of goods or services from country to country. Proving or disproving that a price in Australia is justifiably higher or lower than that for the same or similar goods or services in another country or other countries would often require complex, costly and protracted inquiries. The cost of doing so would be high and unlikely to be outweighed by the benefit which is likely to be low given that price discrimination often enhances efficiency and consumer welfare.

- The former prohibition against price discrimination in s 49 of the Trade Practices Act was repealed in 1995 in accordance with a recommendation of the Hilmer Report (1993). The prohibition was repealed partly because of inconsistency with economic principle and partly by reason of the considerable practical difficulties associated with trying to ascertain whether or not differences in prices were justified.

- The Dawson review reconsidered the question of price discrimination and recommended against reinstating a prohibition against price discrimination (Review of the Competition Provisions of the Trade Practices Act (2003) ch 4).

- The IT pricing inquiry in 2013 by the House Standing Committee on Infrastructure and Communications did not support the introduction of a prohibition against international price discrimination (*At what cost? IT pricing and the Australia tax*, para 4.113).

- Australia could contravene its international trade obligations if it sought to restrict price discrimination in cross-border trade.

- The prohibition against price discrimination in the US under the Robinson-Patman Act has been roundly criticised by lawyers, economists and businesses on the grounds of departure from economic principle and undue regulatory burden; repeal has been widely recommended for over 50 years (see eg H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2006) ch 8).

- On February 11, 2014, the Canadian government advanced a proposal to give the Competition Bureau additional powers to prohibit unjustified geographic price discrimination in an apparent effort to reduce the gap between higher consumer prices in Canada as compared to those in the United States. This proposal has been widely criticised on the grounds of impracticality, departure from economic principle, and diversion of the regulator away from competition regulation into price regulation.

3. Are there restrictions arising from IP laws that have an unduly adverse impact on competition? Can the objectives of these IP laws be achieved in a manner more conducive to competition? (Issues Paper section 2.18)

ARIA is opposed to the recommendation by the House Standing Committee on Infrastructure and Communications in the 2013 IT pricing inquiry that the IP exemptions in s 51(3) of the Competition

and Consumer Act be repealed (*At what cost? IT pricing and the Australia tax*, Recommendation 8, p 112). In ARIA's view, that recommendation should be rejected given the following considerations:

- The 2013 IT pricing inquiry did not address the full legal and commercial implications of repealing s 51(3) but was limited to the implications of s 51(3) in relation to the IT and other prices that were the subject of that inquiry. It would be perverse and irresponsible to repeal s 51(3) on the basis of so narrow and so limited a review.

- The need or otherwise to repeal or amend s 51(3) was considered by the Ergas Committee in 2000 and in the Response of the Government to the recommendations made in the Ergas Committee Report. The recommendations of the Ergas Committee and the Government's Response need to be revisited and considered carefully.

- The idea that there is no need for the s 51(3) exemption because IP should be treated like any other form of property is simplistic and misleading. The exemptions under s 51(3) serve partly as a safety net where broadly defined prohibitions under the Competition and Consumer Act would otherwise be too far-reaching. The cartel prohibitions, the prohibition against anti-competitive agreements under s 45 and the prohibition against exclusive dealing under s 47 are all broadly defined and can easily catch conduct that is efficiency enhancing (there is no rule of reason defence in Australia). The exemptions under s 51(3) are important because they avoid liability where IP licensing conditions are efficiency enhancing. The alternative to reliance on s 51(3) of requiring licensing conditions to be authorised by the ACCC is bureaucratic, costly and commercially unrealistic.

- The Ergas Committee recommended that, to qualify for exemption under the Act, an IP licensing condition must not be likely to substantially lessen competition in a market. In ARIA's view, that approach is too stringent. Unlike the US rule of reason, a substantial lessening of competition test does not take sufficient account of efficiencies. If s 51(3) needs to be qualified by requiring that an IP licensing condition be efficiency-enhancing, the test should be whether the condition is efficiency-enhancing, not whether it is likely to substantially lessen competition.

- The wording 'to the extent that the condition relates to' in section 51(3) is notoriously uncertain and requires clarification (see *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83; National Competition Council (Australia), Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974: Final Report (1999) pp. 183–6). The NCC Review did not generate a useful recommendation. The words 'relates to' should be given a broad interpretation consistently with the case law on the interpretation of such terms in other contexts (see Pearce & Geddes, *Statutory Interpretation in Australia* (6th ed) section 12.7). Uncertainty about the meaning of 'relates to' in s 51(3) arises because of the disparate views expressed by some members of the High Court in *Transfield v Arlo*. Consideration should be given to replacing the words 'relates to' in s 51(3) with the words 'connected with' in order to rectify the uncertainty created by *Transfield v Arno*.

The statutory pricing caps set out in s152(8)[1] and s152(11)[2] of the *Copyright Act 1968* (the **Copyright Act**) which artificially limit the amount of fees payable by radio broadcasters to sound recording copyright owners, is a clear example of a restriction in IP laws that has an adverse impact on competition. Not only do these provisions in the Copyright Act adversely impact competition, these restrictions also create market distortions and reduce economic efficiency. The Ergas Committee recommended the following:

"To achieve competitive neutrality and remove unnecessary impediments to the functioning of

[1] This section provides that the Copyright Tribunal must not fix an annual licence fee in excess of 1% of gross revenue of a radio broadcaster who holds a licence allocated under the Broadcasting Services Act for that broadcaster's use of sound recordings.

[2] This section provides that the Copyright Tribunal must not fix an annual licence fee in excess of 0.5 (i.e. $0.005) cents per person of Australia's population for radio broadcasts made by the Australian Broadcasting Corporation.

markets on a commercial basis, the Committee recommends that s.152(8) of [the Copyright Act] be amended to remove the broadcast fee price cap."[3]

Despite the recommendation of the Ergas Committee and the recommendation by the Attorney General Phillip Ruddock that these pricing caps be removed[4], they still remain in place. These pricing caps are an unwarranted legislative impediment to competition and are anachronistic. ARIA is of the view that there is no rational policy reason as to why an arbitrary price cap that was set by the Government in 1968 should determine the price that radio stations pay for music, a key business input, nearly 50 years later. For further information, please refer to the PPCA Submissions to the ALRC review of Copyright and the Digital Economy.[5]

4. Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change? (Issues Paper section 5.3)

In ARIA's view, the Competition and Consumer Act is less than fully effective because it is too complicated and too prescriptive to be complied with readily by business organisations. Many of the provisions are convoluted and prolix. Plainly they have not been drafted from the standpoint of ease of comprehension or ease of application.

Such complexity should be avoided, for the reasons recently summarised by a judge of the Federal Court:

> *First*, attempts at codification involving many permutations on a theme are inevitably complex and likely to miss something, *secondly*, complexity can, and often is a handmaiden of incomprehensibility, *thirdly*, the unravelling of complexity requires time and effort, *fourthly*, the more detailed and complex legislation is, the harder it is for the ordinary person, including the scions of the business community, to grasp the point and comply, *fifthly*, complexity makes litigation more complex, lengthy and expensive for the parties and, *sixthly*, those factors create the need for the Courts to deal with more and more in judgments or summings up to juries leading to delay, the greater likelihood of appellate challenges and, of course, error. (Justice Rares, "Competition, Fairness and the Courts", Competition Law Conference, Sydney, 24 May 2014).

ARIA submits that the Competition and Consumer Act should be simplified by following the guidance given in the Office of the Parliamentary Counsel's *Developing Clearer Laws Quick Reference Guide* (2010). Many provisions in the Act are inconsistent with that *Guide*. If the *Guide* were followed, the competition laws would be no more complex than is necessary to give effect to policy, and would enable those affected to understand how the laws apply to them.

5. Do the provisions of the CCA on cartels, horizontal agreements and primary boycotts operate effectively and do they work to further the objectives of the CCA? (Issues Paper section 5.21)

As an industry association, ARIA has taken precautions to comply with the Competition and Consumer Act. In part this has required attention to the cartel-related amendments to the Act in 2009. In ARIA's experience, those amendments are unnecessarily complicated.

ARIA supports the much simpler and more effective cartel-related provisions proposed in the Commerce (Cartels and Other Matters) Amendment Bill 2011 as reported by the NZ Commerce Committee in May 2013.

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3 Page 14 and 116 of the Ergas Report

4 Attorney General, Philip Ruddock recommended the removal of the statutory pricing caps. See http://pandora.nla.gov.au/pan/21248/20060722-0000/www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006.html

5 See: http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc

6. Should the price signalling provisions of the CCA be retained, repealed, amended or extended to cover other sectors? (Issues Paper section 5.22)

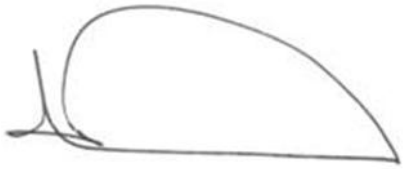
ARIA submits that the price signalling provisions in Div 1A of Part IV of the Competition and Consumer Act should be repealed.

As a matter of economic principle and international practice, information disclosure should attract liability only insofar as it evidences collusion or facilitates co-ordination of conduct between competitors in a market, thereby removing the need for competitors to collude explicitly. Information disclosure or exchanges between competitors are addressed overseas in the context of collusion. There is no equivalent to the prohibitions in Div 1A in other countries including the United States, Europe, Canada and New Zealand.

Div 1A applies only to classes of goods or services prescribed by a regulation. That is highly unsatisfactory. Competition laws should apply generally and not be directed to particular industries. That policy was strongly endorsed by the Hilmer Committee and the Dawson Committee. Furthermore, regulations are not subject to the same extent or degree of Parliamentary scrutiny as legislation and Div 1A does not set out clear criteria for determining which sectors may be prescribed.

We trust that the above submission will be useful for the Review Panel and welcome any questions that the Panel may have.

Yours sincerely,



Lynne Small
General Manager