Intellectual property and Competition

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1 Introduction

Today I would like to address the interaction of intellectual property rights with competition policy.

I frame my discussion in this way.

First, I would like to canvass some of the conceptual thinking that underpins the notion of intellectual property rights and competition law.

Then, I would like to discuss the response of the Government to the report of the Intellectual Property and Competition Review Committee. I take it as a given that you are aware, in the broad, of the establishment of this committee in 1999, and of the recommendations contained in the final report. In particular I will canvass aspects of the Government's decision that affect section 51(3) of the Trade Practices Act, and the operation of copyright collecting societies.

As a final issue I would like to make some remarks on parallel imports, which has been a matter of policy discussion for some twenty years. The key issues from the Commission's perspective are the impact of the removal of parallel importation restrictions on sound recordings in 1998. You may be aware of the recent court case involving illegal conduct by two major record companies to prevent parallel imports of CDs despite the lifting of legislative bans on such imports in 1998. I will talk more about that later.

The Commission is also keenly interested in the current parliamentary debate about the parallel importation restrictions that apply to books and computer software; the Government has introduced legislation to remove these restrictions. To assist this debate, we have updated our earlier price surveys. I would like to talk about the findings of those surveys later.

We have also been keeping a close eye on a couple of other recent developments that may impact on parallel imports; namely, Regional coding of DVDs and Sony Playstations. I would also like to give a little attention to these matters today.

Underpinning my comments throughout this speech is an understanding that the issues about the appropriate interface between intellectual property and competition laws are complex, and that a fine balance needs to be struck between important and sometimes competing principles. Nevertheless, I want to leave you with the key message that the laws can be improved to

provide enhanced public benefit particularly as there has been some history of producer interests driving the law at the expense of the public interest in certain areas of intellectual property law. Such improvement is therefore worthy of your detailed consideration and your strong support.

2. Intellectual property rights and competition law

I want now to briefly discuss the conceptual issues associated with intellectual property. As a starting point, intellectual property laws encourage innovation by granting statutory exclusive property rights. Without intellectual property laws, third parties might copy the goods produced through the application of intellectual property without paying appropriate remuneration, thus reducing the incentives to create further intellectual property.

The possibility of success in the market place, attributable to superior performance, provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavours, these incentives would be much diminished.

Accordingly, intellectual property laws can contribute to a more competitive economy.

It was once thought that intellectual property laws gave the owners of intellectual property a legal or economic monopoly over a particular piece of intellectual property. This led to concern that the unrestrained application of competition law to intellectual property may undermine the intellectual property rights.

It is now accepted that, because they do not necessarily, or even very often, create legal or economic monopolies, intellectual property laws do not necessarily clash with competition laws because the goods and services produced using intellectual property compete in the marketplace with other closely-substitutable goods and services.

In most instances, competition and intellectual property laws can be seen as complementary, seeking to promote innovation to the benefit of consumers and the economy. Only in particular cases will there be an apparent conflict between the two underlying policies. This might occur where intellectual property owners are in a position to exert substantial market

power or to engage in anti-competitive conduct. In these instances, holders of intellectual property rights may seek to extend the scope of the right beyond that intended by the intellectual property statute.

The key issue, therefore, is finding an appropriate balance between intellectual property and competition laws. This raises a crucial question about the types of incentives that are needed to encourage innovation.

There are two unresolved aspects to this question: the first is whether providing greater proprietary rewards to the innovator or increasing competition is the best way to spur innovation efforts to the level that is 'best' for society. The second is whether society benefits most if it rewards initial innovation through broad intellectual property protection, or if it fosters successive innovations by requiring access to the intellectual property of the initial innovator.

People often talk about how important patents are to promote innovation, because without patents, people do not appropriate the returns to their innovation activity. On the other hand, some people jump from that to the conclusion that the broader the patent rights are, the better it is for innovation.

This is not always correct because we have an innovation system in which one innovation builds on another. If monopoly rights exist down at the bottom, this may stifle competition and innovation in markets that use those patents later on In these instances, the breadth and utilisation of patent rights can be used not only to stifle competition, but also have adverse effects in the long run on innovation.

Much of this comment arises in the context of antitrust enforcement to prevent anti-competitive combinations of research and development. It also involves newer kinds of intellectual output such as computer software and biotechnology. Intellectual property advocates have asked whether antitrust enforcers can make sound judgements without more information about how much competition is necessary to maintain innovation.[1] Future

[1] For an interesting discussion of the dynamic issues associated with this debate see Michael E Porter, "Competition and Antitrust: towards a Productivity Based Approach to Evaluating Mergers and Joint Ventures", *Antitrust Bulletin*, Winter 2001.

customers, by contrast, have stressed the importance of maintaining at least a few innovation efforts to ensure timely, high quality, and competitively priced new products.

Strong enforcement of intellectual property rights might be appropriate where a patent or copyright has the proper scope. The point has been made, however, that innovators in biotechnology and software often receive very broad intellectual property rights that, when combined with strong enforcement, allow intellectual property rights to become tools for anti-competitive conduct.

Finally, some debate has also arisen in the context of networks and the standards that networks require for inter-operability. Here, some argue that the initial innovation that built a network or standard to which access is desired would be deterred if access were required. Others counter that successive innovation will be deterred if access is not required.

In total, the information currently available supports anti-trust enforcement that is assertive in maintaining competition as a spur to innovation, yet cautious to avoid unwarranted interference with intellectual property incentives for innovation.

2.1 Licensing of Intellectual Property

I think it is useful at this point to consider briefly how and when the exploitation of intellectual property rights might conflict with the Australian trade practices legislation. The Commission's views will be set out fully in the forthcoming draft Intellectual Property Guidelines that I will discuss later on. The views expressed in my paper today are only preliminary.

In general, the Trade Practices Act will not require an intellectual property owner to licence the intellectual property. However, if certain intellectual property rights limit competition in a market, the refusal to license such rights might have an anti-competitive effect in certain circumstances. Similarly, a refusal to disclose confidential information relating to a product may also inhibit competition. Many businesses are engaged solely in servicing another's product or in providing additional products or facilities to be used in conjunction that primary product. If the manufacturer refuses to disclose information enabling competitors to supply , say, spare parts, or in the case of computer equipment, to interface components that provide

additional facilities, competition in these dependent or subsidiary industries may be restricted. As such, refusal to license may infringe s.46 (which deals with the misuse of market power).

Section 46 proscribes a business that has a substantial degree of power in a market from taking advantage of that power for the purpose of eliminating, damaging or restricting existing or potential competitors. Intellectual property rights have the potential to provide their holders with the means to achieve one or other of these ends. However, in all cases, conduct would only be prohibited by s. 46 if it was engaged in by an owner taking took advantage of its substantial market power for one of the proscribed purposes.

Aside from a blanket refusal to license, licence terms and conditions may be applied to anti-competitive effect. A licence or assignment of intellectual property rights may make it possible for an owner to restrict the extent to which a licensee is able to compete with the owner or other right-holders. It is also possible for the owner to restrict competitive supply by third parties to the licensee. Provisions that substantially lessen competition may infringe sections 45 (unless exempted). Those that are imposed for the purpose of deterring or preventing an agent from engaging in competitive conduct may infringe s. 46.

The forms of such restrictions can be varied, and could include: exclusive licensing; territorial restraints; price or quota restrictions; quality or minimum royalty/quantity requirements; sub-licensing restrictions; no challenge and non-competition clauses; and leveraging. The competitive impact of these restrictions depends on the characteristics of the market in which the licensing occurs and/or has effect.

Sometimes, owners of intellectual property rights may wish to pool their rights with those of other owners, maybe even their competitors and sell collectively the pooled intellectual property rights for a single price. Alternatively, intellectual property owners may wish to cross-license their intellectual property with that of another owner. In many, if not most instances, these pooling and cross-licensing arrangements facilitate access to, and the exploitation of, the intellectual property. Thus, in the main, they are pro-competitive. However, competition concerns may arise if the arrangements are used to exclude competitors in a market, or to raise prices in the direct or related markets.

3. Australian Intellectual Property Policy Issues

One general outcome of the Australian policy debate about intellectual property is that a great deal of interest has developed in the economic justification for intellectual property laws, an area previously neglected by economists and general policy makers. There has been focus particularly on the justification for statutory restrictions on parallel imports of copyright products.

Given the rapid and unparalleled integration of national economies, there is, not surprisingly, an international dimension to these issues.

In my view, the balance of intellectual property law both globally and in Australia has been biased towards international producer interests. Nearly everywhere intellectual property law making has been captured by the interests of producers at the expense of users and consumers.

We need to take this into account in reviewing intellectual property laws and contributions to global forums where intellectual property laws is made.

In my view, the TRIPS (Trade Related Intellectual Property Rights) policy making has been unduly tilted in favour of United States interests. A clear example is the extension of patent law rights in the last global trade round.

Australia was not the only loser.

Other losers included most developing countries.

I also believe that Europe, on balance, is a net loser from parallel import restrictions. Broadly, Europe allows parallel import within its borders but prohibits parallel imports from non-EU countries. This issue is becoming more important in Europe with pressure mounting on the EU, for instance, to review the *Trade Mark Directive.*

An important policy discussion in Australia, and of great interest to the Commission, is the treatment of intellectual property under the Trade Practices Act and how the generally complementary goals of intellectual property law and competition policy should be balanced.

The Trade Practices Act already takes specific account of intellectual property rights and establishes an interface between those rights, and conduct prohibited under the Act. In

particular, s.51(1) makes it clear that anti-competitive conduct permitted under IP legislation is not exempt from the Trade Practices Act.

But this is qualified by s.51(3).

Section 51(3) of the Trade Practices Act exempts conditions of licences and assignments from ss. 45 (agreements that substantially lessen competition), 47 (exclusive dealing) and 50 (mergers that substantially lessen competition) to the extent that they relate to the subject matter of the relevant intellectual property, or, in the case of trade marks, only to the extent that they relate to the kinds, qualities and standards of goods bearing the trade mark.

Part IIIA of the Trade Practices Act establishes an access regime in relation to essential services. However, intellectual property is exempted by s.44B of the TPA from this regime.[2] This means that the access regime embodied in Part IIIA can not be used to address situations where an owner or holder of an intellectual property right refuses to licence the intellectual property for an anti-competitive purpose.

3.1 Review of Intellectual Property and Competition Law

I now turn to the work of the Intellectual Property and Competition Review Committee.

In June 1999, the Commonwealth Government established the Intellectual Property and Competition Review Committee to review the competition aspects of intellectual property legislation.

The Committee issued its final report in September 2000, and made a series of recommendations to change Australia's intellectual property laws, thereby improving the balance between those laws and competition policy.

The Committee also made some recommendations for changing the way that the Trade Practices Act applies to intellectual property licensing and assignment, and suggested a role for the Commission in the negotiation of terms and conditions of copyright licensing by copyright collecting societies.

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[2] In s.44B, the use of intellectual property is excluded from the definition of 'service' for the purposes of Part IIIA of the Trade Practices Act.

In August 2001, the Government announced its response to the final report.

In the main, the Government accepted most recommendations.

You will appreciate that there are too many decisions for me to talk about at this forum so I intend to focus on s51(3) of the Trade Practices Act and the Commission's role in the activities of copyright collecting societies as these are of particular relevance and interest to us.

In passing, though, I would note that the Government also decided to:

? add a competition test to the existing tests as an additional ground on which a compulsory licence for a patent can be obtained[3];

? amend the Copyright Act to allow decompilation of computer software for the purposes of interoperability;

? retain the existing term of copyright protection; and

? amend the assignment provisions of the Trade Mark Act to prevent an assignment being used to prevent parallel importation of legitimately trademarked goods.

3.1.1 Section 51(3) of the Trade Practices Act

The Government accepted the IPCRC's view that intellectual property rights should continue to be accorded distinctive treatment under the Trade Practices Act. Section 51(3) will be amended so that intellectual property licensing would be subject to the provisions of Part IV, but a contravention of the *per se* prohibitions of ss. 45, 45A and 47, or of s. 4D would instead be subject to a substantial lessening of competition test. This largely reflects the Committee's recommendation.[4]

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[3] The IPCRC recommended that the Australian Competition Tribunal consider an application for compulsory licence in the first instance. The Government considered that all applications for compulsory licences should be considered by the Federal Court in the first instance.

[4] The IPCRC recommended that an IP licensing or assignment condition should not breach Part IV of the Trade Practices Act unless it substantially lessens competition.

The Commission believes that this decision is a large step forward as the amendments will expose intellectual property licensing and assignment to the strictures of the Trade Practices Act to a greater extent than is currently the case. However, the Commission remains of the view that intellectual property should be fully subject to Part IV of the Trade Practices Act, as are other forms of property.

There may be quite a degree of uncertainty among intellectual property holders and their advisers as to how the Commission will enforce the new provisions. In an attempt to reduce this uncertainty, it has been decided that the Commission would issue guidelines outlining its enforcement approach to Part IV as it applies to intellectual property.

The guidelines would define:

? when intellectual property licensing and assignment conditions might be exempted under s. 51(3);

? when intellectual property licences and assignments might breach Part IV; and

? when conduct that is likely to breach the Act might be authorised.

The Government expects the Commission to consult with interested parties in the preparation of these Intellectual Property Guidelines. We will also consider overseas approaches to antitrust enforcement of intellectual property, including intellectual property guidelines issued by the US, UK and Canadian authorities.[5]

I expect that we will release the draft Intellectual Property Guidelines and call for public comment before finalising the Guidelines.

While I expect that the Guidelines will help to reduce uncertainty about the Commission's enforcement approach in relation to intellectual property licensing and assignments, I would like to stress two points.

First, the Guidelines will outline the Commission's enforcement approach and provide guidance as to when the Commission is likely to take action against a potential breach of Part

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[5] See Appendix A.

IV. However, as with all actions taken under the Act, it will ultimately be for the courts to determine whether a breach has occurred.

Secondly, the Guidelines will not provide any assurance that intellectual property holders will not be subject to private action for licensing and assignment conditions that may appear unlikely to breach the TPA on the basis of our intellectual property Guidelines.

3.1.2 Copyright Collecting Societies

Copyright collecting societies are an administratively efficient way for copyright owners to enforce their intellectual property rights and to collect and distribute copyright licence fees. However, as monopolies, their existence gives rise to potential competition concerns including the potential abuse of market power to extract high licence fees from users.

While there is currently uncertainty about the scope of the s.51(3) exemptions, the Commission nevertheless has some experience in assessing the potentially conflicting competitive and efficiency effects of copyright collecting societies. In 1997, the Australasian Performing Rights Association (APRA) applied for authorisation of its input and output arrangements, involving exclusive licensing of copyright works by composers to APRA (the input arrangements) and the provision of blanket licences by APRA to users which enable users to broadcast the entire APRA repertoire (the output arrangements), its distribution arrangements and overseas arrangements. The Commission took the view that there were both costs and benefits associated with the collective licensing of musical works. The Commission considered that a better balance could be struck between the costs and benefits of the scheme if it allowed for direct dealing and blanket licence fees were appropriately adjusted. APRA would not agree to amend their licensing arrangements to meet the Commission's requirements, hence authorisation was denied for all but the overseas arrangements.

This decision was referred to the Australian Competition Tribunal for review. After reviewing the evidence, the Tribunal considered that if APRA's input arrangements were modified to allow for the introduction of a non-exclusive licence-back scheme and a simplified dispute resolution scheme was introduced, authorisation should be granted for the applications which were not authorised by the Commission. The matter was adjourned to allow APRA an opportunity to devise a non-exclusive licence-back scheme and a simplified dispute resolution

scheme, On 20 July 2000, the Competition Tribunal made a determination granting authorisation to APRA, endorsing the agreed dispute resolution procedure and non-exclusive license-back scheme. The Tribunal also set aside the Commission's notice under s. 93(3) to revoke the authorisation. Further details of the APRA matter are contained in Appendix B.

Returning to the review of intellectual property laws, the Government accepted the IPCRC recommendation that the existing powers of the Copyright Tribunal to review output arrangements of declared collecting societies, which are licensing arrangements between the Society and users or potential users of the copyright material so administered, be extended to cover the output arrangements of voluntary collecting societies not administered under a statutory licence. The Government also outlined a role for the Commission in relation to the extension of the Copyright Tribunal's powers.

The Commission will be required by statute to issue guidelines on what matters it considers to be relevant to the determination of reasonable remuneration for copyright holders in negotiations between societies and users of copyright material.

The main purpose of the guidelines would be to facilitate licence negotiations and minimise recourse to the Copyright Tribunal for a determination. In the event that negotiations failed and one or other party applied to the Tribunal for a determination, recourse to the Tribunal would not be restricted in any way. The Commission's guidelines would be advisory, not determinative.

The *Copyright Act 1968* will be amended so that the Copyright Tribunal has the discretion to take account of the guidelines and to admit the Commission as a party to Tribunal proceedings.

The Commission welcomes the Government's decision as a means of improving the balance between the costs and benefits associated with collective licensing and thus reducing the potential for such licensing to have anti-competitive effects.

4. Parallel Imports

I now turn to the issue of parallel imports, which in Australia, has been a long and involved debate.

As background, the Copyright Act originally prohibited parallel imports except for personal use. In 1983 the question of whether the importation provisions of the Copyright Act should be reformed was referred to the Copyright Law Review Committee. It reported in 1988 but felt itself unable to evaluate the conflicting claims about the likely consequences of reform for prices. It was, however, concerned about problems in the availability of some copyright product, in terms of delayed release and range of products.

The report of the Copyright Law Reform Committee was followed by work by the Prices Surveillance Authority (PSA), which most notably investigated the prices of books, recorded music and computer software.

While availability was still an issue, particularly in relation to books and to a lesser extent sound recordings, the PSA's main focus was on international price discrimination. It found that Australia was paying higher prices for all these products than consumers overseas, particularly in North America and that this was the result of the parallel import restrictions.

4.1 Changes to the law

In 1991, the Copyright Act was amended to allow limited parallel importation of books. Parliament then repealed the restrictions on parallel importing of sound recordings in 1998. It also amended the Copyright Act to prevent copyright in labels and packaging being used to control parallel importing of products with such labels and packaging.

Last year, the Government introduced legislation to remove parallel import restrictions on books and computer software and to close the loophole which may allow copyright holders of sound recordings to restrict parallel imports by attaching 'accessories' to CDs. That legislation lapsed with the calling of the Federal election late last year. However, earlier this year the Government introduced a new bill that is effectively the same as the lapsed bill.[6]

4.2 Parallel Importing of Sound Recordings

The removal of the restrictions on parallel imports of sound recordings in July 1998 has been the most well known recent development in Australian copyright law. Since there has been so

[6] *The Copyright Amendment (Parallel Importation) Bill 2002.*

much heat and noise generated over this issue, it is appropriate to review what has happened since the passage of the legislation.

Court cases

You may be aware that the Commission has just won a very significant case in the Federal Court on the parallel importation of CDs. It was found that certain record companies engaged in anti-competitive conduct in order to discourage or prevent Australian businesses from selling parallel imported compact discs.

This is an important case, so it is worthwhile spending a little time canvassing the issues.

In September 1999, the Commission instituted proceedings against Universal Music, Sony Music and Warner Music (and the Australian Record Industry Association and Music Industry Piracy Investigation Pty Ltd) alleging breaches of ss. 45 (contracts, arrangements or understandings that restrict dealings or affect competition), 46 (misuse of market power) and 47 (exclusive dealing) of the Act.

The ACCC's investigation began after reports that the major record companies had threatened to withdraw significant trading benefits from retailers who stocked parallel imports. In several cases record companies had allegedly cut off supply to retailers who stocked parallel imports.

The ACCC alleged that by virtue of the action that Universal, Sony and Warner took to prevent retailers from stocking parallel imports they had breached both ss.46 and 47 of the TPA. The ACCC also alleged that Universal, Sony and Warner had each colluded with Asian record companies to try to prevent Asian wholesalers from supplying compact discs to Australian businesses. It was alleged that ARIA and MIPI assisted Sony Music to cut off these trading opportunities. These arrangements were alleged to be in breach of s.45 of the TPA.

In March 2001, the ACCC settled its action with MIPI, Michael Speck and Sony's individual respondents. There was no admission of liability and no penalties imposed.

In April 2001, the ACCC settled its action against Sony. As a result, Sony Music Entertainment (Australia) Limited and Sony Music Entertainment Holdings (Australia) Pty Limited, without admitting liability, gave the following undertakings to the Federal Court:

? Sony will, for a period of two years, not withdraw trading benefits from Australian retailers parallel import copies of recorded music contained in Sony's Australian catalogue;

? Sony will implement a Trade Practices Compliance Program in respect of Part IV;

? Sony will, for a period of two years, not take any action to hinder of prevent independent foreign distributors from exporting parallel products to Australia.

To date, it appears that Sony is meeting the undertakings.

In December 2001, the Federal Court (Justice Hill) found that Warner Music and Universal Music had breached ss46 and 47 of the TPA. Senior executives of those companies were held to be knowingly concerned in the contravention of their employers. Justice Hill did not find that either Warner or Universal had breached s.45.

Both Universal and Warner were concerned that competition from cheaper, imported CDs would affect their profits. Justice Hill found that Universal and Warner tried to stop alternative, imported supplies of non-infringing recordings of titles in the companies' catalogues. Justice Hill found that neither Warner nor Universal could establish that it had a separate aim of preventing 'free-riding' and rejected 'any attempt on the part of Universal to suggest that the action taken by it was taken to prevent piracy'.

In March 2002, Justice Hill penalised Universal, Warner and their senior executives and ordered both Universal and Warner to pay penalties of $450,000 each. Individual penalties of $45,000 or $50,000 were ordered against four senior executives (two from each company).

Injunctions were granted to permanently prevent Warner and Universal from refusing or threatening to refuse supply to retailers who had, or proposed to, parallel import copies of music within Warner's or Universal's catalogue.

Justice Hill's findings are an important win for Australian consumers. They mean that retailers will be able to access freely cheaper, legal, imported CDs without fear that they will lose supply of other stock. This was the precise intention of the Australian Parliament when it amended the Copyright Act in 1998 to allow parallel imports of sound recordings.

Justice Hill's findings also set an important precedent in relation to s.46 of the Trade Practices Act. In particular, they challenge the view that market share is the major determinant of market power. Justice Hill held that Universal and Warner had a substantial degree of market power in the wholesale recorded music market with market shares of 15-17% and 17-18% respectively. In most industries, market shares of this size would not be indicative of market power, a fact acknowledged by Justice Hill. Nevertheless, Justice Hill considered that in the sound recording industry, the question of market power should not be determined solely by market share. Justice Hill explained:

> *'It is relevant to consider not merely the fact that there are differentiated products, albeit with sometimes a short life time in the charts, but also the commercial need for retailers, big and small, to be able to access for sale to customers the whole catalogue of a record company, chart or non-chart, depending on the retailer's degree of specialisation and the music genre the retailers sells.'*[7]

Justice Hill accepted the ACCC's expert witness' view that even if a company's price is constrained by its competitors, its non-price conduct may not be. In other words, the commercial need for retailers to access the entire catalogue, and the commercial difficulties associated with importing and distributing this catalogue themselves, meant that Universal and Warner's threats and actions to cease supply of its catalogue to retailers were sufficient to deter some retailers from engaging in parallel importation of chart music. Under these circumstances, a supplier can exert market power even if its individual share of the market is not at a level traditionally required to establish the existence of market power

The importance of barriers to entry in determining market power has also been challenged by Justice Hill's findings. Historically, the existence of structural barriers to entry have been crucial to a finding of market power, but there has been little attention given to, or importance placed on, strategic entry barriers. Justice Hill found that there were really no significant structural barriers to entry to the record industry generally. However, he found that the ability of the major record companies to prevent retailers from selling imported CDs is a barrier to entry into the market of sellers of imported CDs. There is also a distinction to be drawn

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[7] Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd & Ors [2001] FCA1800 @382.

between entry at the fringe, ,which in this matter Justice Hill found can be done easily, and entry or expansion to the core, which is more difficult[8]

In March 2002, the ACCC appealed against the corporate penalties.

Both Warner and Universal have appealed the findings or ss46 and 47, the accessorial liability and the relief granted.

The appeal before the Full Federal Court took place on 25-27 November 2002. The presiding judges were Wilcox, French and Gyles. Their decision has been reserved.

This case illustrates the point, I think, that Commission has a strong bias, not towards imports, but towards increased competition. In the sound recordings market, this means allowing music product legally produced and marketed overseas to be available to Australian consumers. This has already improved the supply side of the market with tangible benefits to music consumers, and few, if any, negative effects elsewhere.

Price Surveys

The Commission conducts periodic surveys of CD prices in specialist and non-specialist music stores in Australia. These surveys are not intended to give a comprehensive indication of actual prices, price movements or comparisons with overseas prices. They are, however, a useful guide to how the music industry is coping with deregulation.

The latest survey, for the September 2002 quarter, indicates that the average GST-inclusive Australian price of a Top 40 CD at specialist music stores in September 2002 was $26.41. This is the price that you or I would actually pay for the CD. This is a useful 'headline' price for consumers but it is not particularly helpful for the purposes of policy analysis. This is because the retail price includes taxes which do not impact directly on the decision whether to parallel import or not. Furthermore, as the Australian tax system changed in 2000, it is not sensible to compare the current 'headline' retail price with the corresponding price that prevailed prior to deregulation. To make these types of comparisons, the Commission takes taxes out of all prices. When taxes are excluded, the average retail price in September 2002

[8] Ibid @ 422.

was $2.02, or 7.9%, less than the tax-exclusive price that prevailed immediately prior to deregulation.[9] The ACCC's surveys indicate that average nominal tax-exclusive Top 40 prices have been lower at all times post-deregulation than the price prevailing immediately prior to deregulation.

The average GST-inclusive Australian price of a Top 40 CD in September 2002 at non-specialist stores such as Target and Grace Brothers was $21.98. The Commission has only just started to collect this type of price information so I can not comment on how tax-exclusive prices in these outlets, or availability of product, have changed since 1998. However, what is apparent, is that these non-specialist outlets are a source of price competition to the specialist stores, for the chart CDs at least.

The surveyed average tax-adjusted Australian price for September 2002 was 17.2 per cent lower than the surveyed tax-adjusted US price and 28.1 per cent lower than the surveyed tax-adjusted UK price, but 12.9 per cent higher than New Zealand's tax-adjusted surveyed price.[10]

Over time, CD prices might be expected to rise because of general inflationary pressures. Recent exchange rate depreciations have also put upward pressure on imported CD prices. In the absence of potential competition from parallel imports, therefore, it is likely that tax-exclusive CD prices would, on average, be higher than prices that prevailed in August 1998. However, the ACCC's surveys confirm that Australian nominal tax-adjusted prices (excluding the impact of the switch to the New Tax System which was expected to cause a fall in retail prices of CDs) have, in fact, fallen since deregulation despite the upward pressures exerted by general inflation and the exchange rate. In September 2002, average Australian tax free retail prices were $5.72 or 19.3 per cent lower than would be expected if CD prices had risen in line with inflation of 14.2 per cent since August 1998.

Apart from price effects, we have also seen attempts by Australian suppliers to differentiate their product from imported supplies. Australian-made product is now often enhanced by the

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[9] Taxes are excluded because in August 1998, sound recordings were subject to a wholesale sales tax whereas current prices are subject to a GST. Hence, tax-inclusive prices from August 1998 to the present are not directly comparable. Furthermore, the retail price of CDs was expected to fall as a result of the New Tax System (NTS). Removing taxes from the historic price comparison removes the price effect of the NTS.

[10] Using three month average exchange rates.

inclusion of a CD ROM feature, foldout booklets, bonus tracks or bonus CDs. This is good, but the Commission is still interested in seeing head-to-head competition - it may be that consumers want the standard music product at reduced prices instead of the enhanced product at higher prices.

Only market competition can resolve this.

Retailers report that advertising and promotional spending is continuing and the indent services provided by producers has improved. Very little has been heard about damage to artists' incomes from parallel imports. Few Australian artists sell their music overseas, so it was no surprise that this did not become an issue. While the industry predicted rampant piracy, the available reports are that the incidence of piracy is low and arises mainly from Australian and electronic sources. This latter point even seems to be conceded by the industry. I note that Mr Michael Speck, manager of Music Industry Piracy Investigations, has been reported as saying that in the past 18 months there has been a shift in music piracy away from industrialised techniques to using PCs.[11]

The situation is obviously fluid, but these are all important developments.

4.3 Parallel imports of books and computer software

I want now to turn to the issue of parallel imports and books and computer software.

In December 1998 the Government asked the Commission to report on the potential consumer benefits of repealing the importation provisions of the Copyright Act as they apply to books and computer software.

The intention was to provide the Government with up-to-date and rigorous comparisons between book prices and computer software prices in Australia and those prevailing overseas.

In addition, the Commission also considered the likely impact of an open market on producers, distributors and retailers of books and computer software.

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[11] Kirsty Needham, "Escapologist Williams Ducks CD Pirates", *Sydney Morning Herald*, 16 November 2002, p.3.

The Commission identified that the likely benefits of repeal included lower prices and improved availability of these products. We noted that the importation provisions grant an import monopoly to the local copyright holder, which cut out competitive supply channels.

4.3.1 Books

In 1989, the PSA found that the lack of international competition in the book trade had resulted in price discrimination, poor availability, and high costs.

Following the release of this report, amendments were made to the Copyright Act in 1991 which enabled copyright holders to retain exclusive distribution rights provided they can guarantee supply within a specified time frame.

The PSA was asked by the Government to monitor and report on the effects of the 1991 reforms on the price and availability of books.

In 1995 the PSA held a full public inquiry.

It concluded that, while the 1991 amendments had resulted in an improvement in distribution efficiencies and improved the speed with which most new releases became available in Australia, prices of some books continued to be high relative to overseas, particularly in the technical and professional and mass market paperback areas.

Furthermore, booksellers had also found the 1991 amendments difficult and costly to implement.

The PSA considered that only an open market, with no restrictions on parallel imports could deliver competitive prices over the long term and overcome the administrative difficulties inherent in the 1991 reforms. The PSA recommended that the importation provisions be repealed in full, or as a fallback position that the 1991 reforms be simplified and streamlined.

As mentioned, the Government has introduced a bill to amend the Copyright Act to allow for parallel importation of books and computer software. The Commission has updated its books price comparisons in anticipation of the parliamentary and public debate associated with the Bill. The best seller books price comparisons are updated to the end of June 2002. The technical and professional book price comparison has been updated to May 2002. These are

directly comparable with all previous price surveys undertaken by the ACCC (and PSA). The full survey findings are shown in Appendix C. They can be summarised as:

Latest Books Survey Findings

The key findings of the updated books survey are:

? For the 14 years from 1988-89 to June 2002, Australians have been paying, on average, 41.9 per cent more for best selling paperback fiction than US readers, and 7.3 per cent more than UK readers;[12]

? For the period 1994-95 until June 2002, Australians have paid on average, around 16.5 per cent more for all best sellers than US readers. [13]

? Australians paid, on average, 8.5 per cent, or $27 more than US readers in May 2002 for certain medical titles and 9.1 per cent more, or $31, than readers in the UK.

The latest findings indicate that there are still substantial differences in the sectors that have consistently been highly priced in Australia, namely best selling paperback fiction relative to the US, and technical and professional. This suggests that there would be immediate gains from parallel importing for consumers in those areas. Some books in Australia are currently priced competitively with their overseas counterparts. For those books, repeal of the importation provisions would ensure that that situation continued.

The ACCC's price surveys focus primarily on price, rather than availability. The data underlying the surveys suggest, however, that availability of some books remains of concern. In particular, it appears that some titles are only made available in Australia in the large format paperback version whereas there is a hardback version available overseas. Other titles may not be available at all.

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[12] For the twelve months to June 2002, the Australian price for best selling paperback fiction exceeded the US price, on average, by 16%, higher than the differential for 2000-01 of 11.1%. In relation to the UK, prices in Australia for best selling paperback fiction were, on average 8.6% below prices in the UK. In 2000-01, Australian prices were, on average 6.2% less than in the UK.

[13] For the twelve months to June 2002, the Australian price for all best sellers were broadly the same (0.7% below) prices in the US and 13.1% less than comparable prices in the UK. For the period 2000-01, Australian prices were, on average 3.3% higher than in the US and 8.3% lower than in the UK.

4.3.2 Computer software

The Commission has also updated its spot price comparisons of leading business software and PC computer games with the USA, the UK and NZ.

The key findings of our survey, conducted in May-June 2002,are:

? Advertised prices of 50 popular business software packages on a selection of Australian websites were higher, on average, than comparable products advertised on US, UK and New Zealand web sites. This general finding is consistent with the ACCC's earlier spot price comparisons of business software packages. Specifically, in May-June 2002, Australian prices were 20.7% higher than prices advertised on US websites; 1.4% higher than in the UK and 3.9% higher than in New Zealand;[14]

? Advertised prices of 25 popular PC games on a selection of Australian websites were, on average, 12.5 per cent lower in Australia than the US, 2.7% lower than in the UK and 8.7% higher than in New Zealand. These results are broadly consistent with previous ACCC surveys. [15]

The findings in relation to business software are significant because such software is used as a business productivity tool. Hence the savings to be made from allowing parallel imports are greater than the direct reduction in price arising from greater competition. Lower prices would also encourage greater usage of business software which should boost the productivity of both households and businesses that use the product.

Earlier time series data indicate that prices of business computer software in Australia has been persistently high compared with the USA since at least 1988-89.

These latest figures are a 'snap shot' of prices on a particular day and are not exactly comparable with the earlier time series. I do not claim that. Taken together, however, the

[14] In February- March 2001, advertised prices of business software on Australian web sites were, on average 11.5% higher than in the US.

[15] In February-March 2001, advertised prices of PC software games in Australia were, on average 3.6% lower than in the US.

surveys suggest that one consequence of parallel import restrictions is that prices of some computer software in Australia are too high.

The Commission's work has shown that parallel import restrictions have harmed Australia by raising prices over many years and restricting supplies. They have no justification. The Commission welcomes the Government's introduction of legislation to remove parallel import restrictions on books and computer software.

The ACCC's surveys help to inform the Australian debate about the anti-competitive consequences of bans on parallel imports. It is also useful to look at the New Zealand experience, another small net-importer of copyright products.

Parallel imports of all copyright works and subject matter have been allowed in New Zealand since 1998.[16]

The newly elected New Zealand Government undertook in 2000 to review the parallel importation arrangements with a particular focus on the impact of parallel imports on New Zealand's creative industries. The review, which involved public consultation, did not find substantial evidence that reintroducing bans on parallel imports would stimulate investment in, and overseas promotion of, New Zealand's creative talent.

In December 2001, the New Zealand Government announced its response to the review. It decided that parallel import bans would not be reintroduced for sound recordings, books or computer software. However, the Government will continue to review the impact of parallel imports on those copyright products for the next three years.

Legislation would be introduced in early 2002, however, to ban parallel imports of films, videos and DVDs for 9 months from a title's first international release. This would allow for the orderly international release of such titles. The legislation will also change the onus of proof in piracy proceedings to make it easier for actions to be taken against pirates.

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[16] *Copyright (Removal of Parallel Importation) Amendment Act 1998* (NZ)

4.4 Other Parallel Importation Issues

Manufacturers of DVD players are required by the DVD Copy Control Association in California (USA) to incorporate the Regional Playback Control (RPC) system. The RPC effectively divides the world into six regions for the purposes of DVD distribution. It employs digital encryption to prevent a DVD produced for one region from being played on a DVD player manufactured for another region. It is justified by the industry as an anti-piracy device.

The ACCC is investigating two aspects of this arrangement. First, the ACCC is concerned that Australian consumers who purchase DVDs from other regions may be unaware that these authorised copies may not be playable on DVD players purchased in Australia. Secondly, the ACCC is concerned that the RPC system may enable copyright owners to practice international price discrimination by artificially creating regional barriers. The RPC system may be used to prevent cheap imports in countries where domestic price competition is limited, such as Australia.

4.4.1 Court Case

In a related matter, Sony Computer Entertainment produces and distributes its PlayStation console incorporating region coding. The effect of this coding is to create three mutually exclusive geographic regions for the purposes of distribution. As with the RPC system, region coding means that Australian consumers who buy legitimate PlayStation games overseas may not be able to play those games on consoles distributed in Australia. The PlayStation region coding means that while you can make a copy of a PlayStation game, you can not play it on the PlayStation console. However, the RPC restrictions in PlayStations can be overcome by installing a mod chip in a PlayStation console. The ACCC is concerned that the main purpose of the RPC restrictions is to prevent parallel imports, not to prevent infringement of copyright as alleged by Sony.[17]

[17] RPC in DVD players can also be chipped to overcome zoning arrangements. The Commission is not aware of any action taken by movie studios or equipment manufacturers to prevent such chipping. However, there is a new form of technology, known as Region Code Enhancement, being applied to some DVD movies which prevents a movie from being played if it detects that the DVD player has been modified.

Under the new anti-circumvention provisions of the Copyright Act the manufacture and supply of devices, or the provision of services which over-ride copy control measures is outlawed if the copyright protection measures have no commercially significant purpose other than to prevent infringement. Sony Computer Entertainment sought in the Federal Court to have these provisions of the Copyright Act applied in such a manner as to prevent consumers from having a mod chip installed in their PlayStation console, thus preventing them from playing legitimate games purchased overseas, as well as copies made for legitimate backup purposes under the Copyright Act.

In September 2001, the ACCC was granted leave to be heard as amicus curiae in Sony's action in relation to whether modifying PlayStation consoles infringes the Copyright Act.

The ACCC submitted to the court that RPC does not exist to protect against copyright infringement. It prevents the use of imported games and backup copies authorised by statute. Under the current legislation it is not illegal to play either imported or copied games although the act of importation or of copying may constitute an infringement in some circumstances. The act of simply playing a disc does not constitute a breach of copyright.

In July 2002, the Federal Court ruled that Sony PlayStation owners have the right to have their consoles 'chipped'. In doing so, the Court agreed with the ACCC's submission that the RPC system goes beyond having the single purpose of preventing copyright infringement. The Court accepted that the effect of RPC is to restrict the playback of certain games, noting that the Copyright Act does not make it illegal for consumers to play computer games, only to copy them illegally. The Court further noted that RPC does not serve the purpose of preventing or inhibiting the copying of games and was therefore not worthy of protection under Australian copyright laws.

Sony has appealed the Court findings. The ACCC will seek leave of the Court to be heard as amicus curiae in this appeal. A date for hearing of appeals has not been set.

5. CONCLUSIONS

The specific reports of the Commission's predecessor, the PSA, triggered some of the Australian debate about the relationship between intellectual property and competition laws, especially in relation to the impact of parallel import restrictions. That debate continues.

The Intellectual Property and Competition Review Committee also raised a wide range of important issues. The Government's response to their final report will change the existing interface between the intellectual property laws and the Trade Practices Act. It will also greatly enhance the Commission's role in ensuring that the underlying complementary policies of both sets of legislation are realised; that of enhancing innovation to the benefits of consumers and the economy.

Technological developments also continue to raise new and complex trade practices issues.

However, I am confident that both the Trade Practices Act and the Commission are well placed to face these all of these new challenges.

Appendix A: International Guidelines on Intellectual Property Licensing

United States

In 1995 the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued joint 'Antitrust Guidelines for the Licensing of Intellectual Property', setting out their approach when assessing whether intellectual property rights may infringe competition law.

The guidelines embody three general principles, namely:

? for the purpose of antitrust analysis, the DOJ and FTC regard intellectual property as being essentially comparable to any other form of property;

? the DOJ and FTC do not presume that intellectual property creates market power in the antitrust context; and

? the agencies recognise that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive.[18]

The US Agencies are particularly concerned about horizontal arrangements (where owners of competing technologies agree to pool the technologies or research efforts, or where one firm buys the rival's competing technology). They are also concerned where licence conditions restrict output, create or consolidate market power, increase the risk of coordinated pricing, or shut competitors out of markets or raise their costs (for example, by lifting the price of vital inputs).

The US agencies have also created a 'safety zone' in the guidelines to assist the DOJ and FTC to determine whether a particular intellectual property licensing agreement may need to be examined. he guidelines indicate that the DOJ and FTC will not challenge a licensing arrangement when:

? the restraint is not facially anti-competitive; and

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[18] The United States Department of Justice (DOJ) and the Federal Trade Commission (FTC), 'Antitrust guidelines for the Licensing of Intellectual Property', April 1995, p.3.

? the licensor and licensee collectively account for no more than 20 per cent of each relevant market significantly affected by the restraint.

Furthermore, the US agencies will not challenge a restraint when four or more corporations (in addition to the parties subject to the licensing arrangement) possess assets, characteristics and incentives to engage in research and development that is a close substitute for that in the licensing arrangement.

Canada

In 2000 the Competition Bureau Industry of Canada ('the Bureau') issued 'Intellectual Property Enforcement Guidelines', setting out their approach when assessing whether intellectual property rights may raise concerns under the Canadian *Competition Act*.

The Bureau considers intellectual property licensing to be procompetitive as it encourages firms to conduct research and development, which creates new markets for new technologies or products. However, the Bureau does acknowledge that in some instances intellectual property licensing can have an adverse impact on competition. The guidelines have identified two broad categories in relation to conduct involving intellectual property or intellectual property rights:

? those involving something more than the mere exercise of the intellectual property right; and

? those involving the mere exercise of the intellectual property right and nothing else.

The Bureau will administer the general provision of the *Competition Act* to address the former conduct and the special remedies provision of the *Competition Act* to address the latter conduct.

The Bureau considers that 'market conditions and the differential advantages (that) intellectual property provides should largely determine commercial rewards flowing from the exploitation of an intellectual property right in the market in which it relates'.[19] However, if the intellectual

[19] The Competition Bureau Industry of Canada, 'Intellectual Property Enforcement Guidelines', 2000, p.15.

property holder misuses its market power the Bureau may intervene. The Bureau may intervene in court cases when it forms the opinion that it is important to address a competition issues in court proceedings if the other parties will not address competition issues.[20]

United Kingdom

In 2001 the Office of Fair Trading (OFT) issued 'Intellectual Property Rights', a draft guideline explaining how the OFT will assess business arrangements involving intellectual property rights in relation to competition law. The OFT recognises the importance of intellectual property rights as they encourage innovation and in turn increase consumer benefits. However, there may be some instances in which intellectual property rights raise concerns under the *Competition Act*.

Restrictive agreements which include intellectual property right provisions will be assessed on a case-by-case basis by taking account of the market conditions, the duration of the conduct, and the licensor and the licensee in the relevant market/s.

The OFT have created a 'safety zone' in the guidelines. The OFT will not challenge a licensing arrangement when the combined market share of the relevant market does not exceed 25 per cent. Furthermore, the OFT will generally regard any agreement which:

? directly or indirectly fixes prices or shares markets; or

? imposes minimum resale prices; or

? is one of a network of similar agreements which have a cumulative affect on the market in question as being capable of having an appreciable effect even when the combined market share falls below the 25 per cent threshold'.[21]

European Union

[20] Ibid.

[21] Office of Fair Trading, 'Intellectual Property Rights: A draft Competition Act 1998 Guideline', November 2001, p.9.

The European Union ('EU') has taken a different approach when assessing whether intellectual property rights may result in anti-competitive conduct. Intellectual property licensing arrangements are subject to Article 85(3) of the Treaty of Rome, which permits agreements to be exempted from Article 85(1) of the Treaty of Rome as they are assist in 'improving the production and distribution of goods or to promoting technical and economic progress'. However, these agreements must provide consumers 'with a fair share' of their resulting advantages and only impose restrictions that are 'indispensable' to the agreement. Furthermore, the agreement cannot create the 'possibility of eliminating competition in respect of a substantial part of the products in question'.

The application of Article 85(3) to intellectual property licensing agreements is complicated by other articles in the Treaty of Rome in relation to the free movement of goods and to the production of national intellectual property rights. The Court of Justice has considered the interface between competition and national intellectual property rights by finding that the 'existence of a right was preserved under the treaty but the exercise' of the right could still be regulated. Hence, the interface between Article 85(3) and the other articles in relation to intellectual property rights is discussed on a number of decisions by the Court of Justice and the EC Commission.

Japan

In 1999 the Japanese Fair Trade Commission ('FTC') released 'Guidelines for Patent and Know-how Licensing Agreements' for the treatment of intellectual property rights under the *Antimonopoly Act*. The FTC considers intellectual property licensing to be procompetitive as it encourages firms to conduct research and development, which creates new markets for new technologies or products. However, the FTC does acknowledge that in some instances intellectual property licensing restrictions can have an adverse impact on competition. The guidelines identify three categories of restrictions:

? 'the restrictions that in principle fall within the category of unfair trade practices and are in violation;

? the restrictions that in certain circumstances fall within the category of unfair trade practices and are in violation; and

? the restrictions that do no, in principle, fall within the category of unfair trade practices'.[22]

The FTC indicates that matters which may raise concerns which may fall within the category of unfair trade practices will be examined on a case-by-case basis following an assessment which will take into account of the market conditions, the duration of the conduct, and the licensor and the licensee in the relevant market/s. In relation to restrictions that are highly likely to fall within the category of unfair trade practices and are in violation, the FTC will form the opinion that the agreement is unfair unless the parties can present a specific justification for the restriction.

[22] Japanese Fair Trade Commission, 'Guidelines for Patent and Know-how Licensing Agreements' 1999, p.4.

Appendix B: Australasian Performing Rights Association

On 15 October 1997 the Australasian Performing Rights Association (APRA), a voluntary collecting society, lodged eight applications for authorisation and one notification in relation to its standard arrangements for the acquisition and licensing of the performing rights in it music repertoire. APRA submitted that the conduct was exempted from the Trade Practices Act by virtue of s.51(3). However, the Federation of Commercial Television Stations (FACTS) had challenged the conduct in a private action (which began in the Copyright Tribunal and spilled over into the Federal Court) and prompted the authorisation application.

The arrangements fall into four categories:

- Input arrangements – the assignment of performing rights by members to APRA and the terms upon which membership is granted;
- Output arrangements – the licensing arrangements between APRA and users of musical works;
- Distribution arrangements – the arrangements under which APRA distributes to members the fees it has collected from licences (with a rule that composers receive at least 50% of the royalties collected for their work); and
- Overseas arrangements – the reciprocal, exclusive arrangements between APRA and overseas collecting societies under which each grants the other the right to license works in their repertoire.

The Commission took the view that there were both costs and benefits associated with the collective licensing of musical works. On the benefit side there were considerable efficiencies to be gained in the administration and enforcement of copyrights for both owners and users and the "blanket licence" offered by APRA provided a new product which was particularly useful for users with spontaneous and unpredictable requirements, e.g. shops and restaurants. On the cost side, APRA essentially enjoyed a monopoly over performing rights, since members had to assign the performing rights in all current and future works exclusively to APRA, replacing potential competition between composers. This has the effect of inflating prices and restricting access to works while encouraging arguably excessive production of new

works (due to APRA's use of a flat fee for unlimited access to any individual work but which was unrelated to the number of works accessed). Some users, particularly those with planned and predictable requirements for musical works, e.g broadcasters and cinemas, would benefit from direct dealing with composers. The Commission considered that a better balance could be struck between the costs and benefits of the scheme if it allowed for such direct dealing and blanket licence fees were appropriately adjusted. APRA would not agree to amend their licensing arrangements to meet the Commission's requirements.

The Commission concluded that the overseas arrangements were likely to give rise to a balance of public benefits and anti-competitive detriments such that authorisation could be granted, provided that the standard agreement was altered to entitle parties to terminate an agreement by giving the other six months notice in writing. This change came into effect on 31 December 1998.

In January 1998, the Commission issued a determination denying authorisation in respect of APRA's proposed input, output and distribution arrangements, granting conditional authorisation in respect of APRA's proposed overseas arrangements until 31 December 2002 and revoking the notification relating to APRA's proposed input arrangements.

On 4 February 1998, APRA applied to the Australian Competition Tribunal for a review of the Commission's determination denying authorisation of the proposed input, output and distribution arrangements and revoking the notification relating to the proposed input arrangements.

After reviewing the evidence, the Tribunal saw merit in opening up the market for musical works to some degree of competitive licensing, through the introduction of a non-exclusive licence back arrangement as proposed by the Commission, whereby artists could licence individual works from APRA (who would retain ownership of the work's copyright) for use in dealings with parties who do not hold a blanket licence. This would allow competitive licensing of musical works by individual composers where users know their requirements in advance, including for commissioned works. It would then be up to the Copyright Tribunal to adjudicate on the appropriate adjustment of blanket licence fees for residual needs. It also saw merit in the development of an alternative dispute resolution system for those small users with spontaneous use (such as fitness centres, shops and restaurants) for whom direct licensing was

not an option and the Copyright Tribunal was not a practical forum for the resolution of licensing disputes with APRA. The matter was adjourned to allow APRA an opportunity to devise a non-exclusive licence-back scheme and a simplified dispute resolution scheme. After consultation with the Commission and FACTS on these schemes the matter returned to the Tribunal. On 20 July 2000, the Competition Tribunal made a determination granting authorisation to APRA, endorsing the agreed dispute resolution procedure and non-exclusive license-back scheme. The Tribunal also set aside the Commission's notice under s. 93(3) to revoke the authorisation.

Appendix C – Commission's Survey of Book and Computer Software Prices

This appendix presents the results of books and software price surveys undertaken by the Commission in May-June 2002. It updates the April 2001 Summary of the Commission's March 1999 Report on *The Potential Consumer Benefits of Repealing the Importation Provisions of the Copyright Act 1968 as they apply to Books and Computer Software*.

Update of Book Prices

The results of the Commission's June 2002 update of its book price comparison are presented below. This includes mass-market paperbacks, hardback fiction, hardback non-fiction, paperback non-fiction and children's books between Australia and the US and Australia and the UK. The methodology used is the same as contained in previous updates and is outlined in Appendix 2 of the Commission's March 1999 Report. The comparison of technical and professional books has also been updated to May 2002.

Paperback Fiction

Table 1 shows that for the 14 year period from 1988-89 to June 2002, Australians have been paying on average 41.9 per cent more for best selling paperback fiction than US readers and 7.3 per cent more for best selling paperback fiction than UK readers. The April 2001 Report found that for the 12 ½ year period between 1988-89 and December 2000, Australians paid on average around 44 per cent more for bestselling fiction paperbacks than US readers, and on average around 9 per cent more than UK readers.

The differentials for the US are positive throughout the period surveyed, and recently have risen despite depreciation of the Australian dollar. The price differentials between Australia and the UK have been quite volatile during the entire survey period.

Table 1: Average Price Differentials for Best Selling Paperback Fiction: Australia, the US and UK, 1988-89 to 2001-02

	Australia and the US	Australia and the UK
Year	**Extent to which Australian price exceeds US (%)**	**Extent to which Australian price exceeds UK (%)**
1988-89	77.8	26.3
1989-90	50.0	27.5
1990-91	54.5	6.2
1991-92	51.6	2.3
1992-93	41.8	6.7
1993-94	35.2	16.6
1994-95	47.3	10.4
1995-96	53.4	21.6
1996-97	50.2	6.5
1997-98	35.9	-2.8
1998-99	30.6	-5.1
1999-00	30.6	0.8
2000-01	11.1	-6.2
2001-02	16.0	-8.6
Extent to which Australian price exceeds overseas Average for 1988-89 to 2001-02 (%)	**41.9**	**7.3**

Source: 1988-89 to 1993-94 from PSA (1995). For the UK, 1994-95 to 2001-02 derived by ACCC from Bookseller and Publisher (Australia) and The Bookseller (UK). For the US, 1994-95 to 2001-02 derived by ACCC from Bookseller and Publisher (Australia) and Publishers Weekly (US).

All Best Sellers

Table 2 below provides a comparison of the price differentials for all best seller books, which includes the categories of fiction paperback, non-fiction paperback and hardback and childrens.[23] For the period 1994-95 until June 2002, Australians have paid on average around 16.5 per cent more for best sellers than US readers, and 1.4 per cent less for best sellers than their UK counterparts. The April 2001 Report had indicated that between 1994-95 and December 2000, Australians paid on average around 18 per cent more than US readers and 0.2 per cent on average more than UK readers for all best sellers. The fall in differentials is partly explained by the depreciation of the Australian dollar which raises the Australian dollar price of products in overseas countries and thereby reduces the positive differences between Australian and overseas prices.

[23] From 1994-95 onwards fiction hardback are not included in the analysis.

Table 2: Average Price Differentials for All Best Sellers[a]: Australia, the US and UK, 1988-89 to 1993-94; 1994-95 to 2001-02[b]

	US	UK
Year[a]	**Extent to which Australian price exceeds US (%)**	**Extent to which Australian price exceeds UK (%)**
1988-89	40.8	17.9
1989-90	29.3	18.6
1990-91	32.3	-0.9
1991-92	24.7	-3.5
1992-93	12.8	-1.2
1993-94	5.6	3.3
1994-95	24.6	3.8
1995-96	33.3	12.2
1996-97	39.3	4.5
1997-98	24.2	4.9
1998-99	-4.6	-11.3
1999-00	12.8	-3.8
2000-01	3.3	-8.3
2001-02[(b)]	-0.7	-13.1
Extent to which Australian price exceeds overseas Average for 1994-95 to 2001-02 (%)	**16.5**	**-1.4**

Notes: a: Figures for 1988-89 to 1993-94 include fiction paperback and hardback, trade and children's. b: Figures for 1994-95 to 2001-02 include fiction paperback, trade and children's but exclude fiction hardback.

***Source*:** 1988-89 to 1993-94 from PSA (1995). For the UK, 1994-95 to 2001-02 derived by ACCC from Bookseller and Publisher (Australia) and The Bookseller (UK). For the US, 1994-95 to 2001-02 derived by ACCC from Bookseller and Publisher (Australia) and Publishers Weekly (US).

Reference Books

Table 3 summarises the survey of technical and professional book prices for May 2002. Since the last update in March 2001, the price differentials between Australia and the US and UK have fallen. Australians paid on average 8.5 per cent, or $A27 more than US readers in May 2002 for certain medical titles compared with 23.2 per cent or $A53 in March 2001. Compared with the UK, Australian readers paid on average 9.1 per cent, or $A31 more in May 2002, compared with 18.4 per cent, or $A51 in March 2001. This is partly due to the weakening of the Australian dollar. The nominal prices of the surveyed books have risen only marginally in all three countries between 2001 and 2002. It should be noted that the availability of the reference books in Australia was very limited. In fact, most of the nineteen books surveyed were not currently in stock in Australia, but more readily available in the US and the UK.

Table 3: International Price Comparisons for Technical and Professional Books, Australia, the US and UK, March 2001 and May 2002

Averages	2001	2002
Australia and the US		
Price Difference[a] (Australian Price – US Price) ($A)	$53	$27
Percentage Difference[a] (Price Difference as % of US Price)	**23.2%**	**8.5%**
Australia and the UK		
Price Difference[a] (Australian Price –UK Price) ($A)	$51	$31
Percentage Difference[a] (Price Difference as % of UK Price)	**18.4%**	**9.1%**

Notes: a: Price difference is calculated using the Australian RRP less GST.

Source: Prices were sourced from the following websites: Australia – www.coop-bookshop.com.au; UK – www.amazon.com.uk; and US – www.textbook.com and www.medbookstore.com.

Update of Computer Software Prices

Prices for personal computer (PC) software for business and games in Australia were compared with the US, the UK and New Zealand at various dates over May and June 2002[24].

The update for May-June 2002 follows earlier ones by the PSA[25], the Commission in December 1998 (March 1999 report), June 2000, and Feb-March 2001. The software prices have been obtained since June 2000 from internet websites originating in the four countries surveyed. The composition of the samples in each survey has changed and reflects changes in sales, availability and the introduction of new products. These changes are particularly rapid for software compared with most other goods, and affect the comparability as a time series. The wider sample used in the survey of business software this time includes some upgrades of previously surveyed software. It captures the range of software for various purposes which is regularly in the bestseller lists of Amazon and other websites offering software for sale. These surveys do not attempt to adjust for volume effects because the Commission does not have access to reliable data on sales volume. Products that undergo substantial modification to suit Australian conditions, such as accounting packages, are excluded because of lack of

[24] Prices for the range of sampled software remained stable through the two month period.

[25] PSA (1992), Inquiry into Computer Software Prices, Reports No. 44 and 46.

comparability. The full list of software products sampled for the most recent survey are listed in Table 4 at the end of this appendix.

Key findings

The key findings of the May-June 2002 surveys are that advertised prices of 50 popular business software products on a selection of Australian websites were, on average, 20.7 per cent *higher* than prices advertised on US websites. Australian prices were on average 1.4 per cent above the surveyed UK prices and on average 3.9 per cent above surveyed NZ prices. The range of price differences was wide for business software. Forty-five of the total of 50 business software items surveyed (90 per cent) were priced higher on average in Australia than the US. Twenty-four (48 per cent) of the 50 business software items were more than 20 per cent higher in price in Australia than the US.

In the May-June 2002 survey the advertised prices of 25 popular PC games on a selection of Australian websites were, on average 12.5 per cent per cent *lower* in Australia than the key market of the US, and on average 2.7 per cent lower than the UK. They were on average 8.7 per cent higher than NZ. As with business software, there was considerable variation in the differentials for individual products, with seven items (28 per cent) having higher prices in Australia than the US. Australian prices ranged up to almost 30 per cent above US prices.

The cross country price comparisons for business and games software show a divergence between games software prices and business software prices. There is also a large range of cross country price differences within each of the two software segments. The sample sizes for business and games software have increased significantly since previous surveys.

Table 4: Software Products sampled by the ACCC in May-June 2002

Business Software Products	Game Software Products
Filemaker Pro v5.5 Win	Neverwinter nights
Filemaker Pro v5.5 Win Upgrade	Warcraft 3 Reign of Chaos
Norton Antivirus V8.0 2002	Grand Theft Auto 3
Norton Antivirus V8.0 2002 pro	Medal of Honor: Allied Assault
Norton Ghost 98/nt4/w2k/wme/xp	Dungeon Siege
Norton SystemWorks 2002	Unreal Tournament 2003
pcAnywhere 10.5 Host and Remote	Star Wars Jedi Knight 2: Jedi Outcast
Winfax Pro 10.02	Star Wars: Galactic Battlegrounds
Corel Wordperfect Office 2002 Standard	Star Wars Galactic Battlegrounds: Clone Campaigns
Corel Wordperfect Office 2002 St Upgrade	Microsoft Flight Simulator 2002 Professional
Corel Wordperfect Office 2002 Pro	Microsoft Train Simulator
Corel Wordperfect Office 2002 Pro Upgrade	Zoo Tycoon
CorelDraw 10.0 w2k/98/nt	Zoo Tycoon: Dinosaur Digs Expansion Pack
CorelDraw 10.0 w2k/98/nt upgrade	Roller Coaster Tycoon
MS Windows 98 2nd Edn	Soldier of Fortune 2: Double Helix
MS Windows 98 2nd Edn Upgrade	The Sims
MS Windows 2000 Professional w2k	The Sims Vacation Expansion Pack
MS Windows 2000 Professional w2k Upgrade Pup	The Sims Livin' Large Expansion Pack
MS Windows XP Home Ed	The Sims Hot Date Expansion Pack
MS Windows XP Home Ed Upgrade	Sid Meier's Civilization 3
MS Windows XP Professional	Hoyle Card Games 2002
MS Windows XP Professional Upgrade	Heroes of Might and Magic 4
MS Frontpage 2002 98/wme/nt/w2k	Age of Wonders II: the wizard's throne
MS Frontpage 2002 98/wme/nt/w2k Upgrade	The Elder Scrolls III: Morrowind St Ed
MS Works 6.0: Win9X/ME/2k/nt3	Diablo II
MS Works suite 2002: Win9X/ME/2k/nt3	
MS Office XP 98/wme/nt/w2k	
MS Office XP 98/wme/nt/w2k Upgrade	
MS Office XP Pro: Win98/ME/NT4/2K	
MS Office XP Pro 98/wme/nt/w2k Upgrade	
Microsoft Outlook 2002	
Word 2002 98/wme/nt/w2k	
Word 2002 98/wme/nt/w2k Upgrade	
Excel 2002 98/wme/nt/w2k	
Excel 2002 98/wme/nt/w2k Upgrade	
Powerpoint 2002 98/wme/nt/w2k	

Powerpoint 2002 98/wme/nt/w2k Upgrade	
Adobe Photoshop 7.0 98/wme/nt/w2k/xp	
Adobe Acrobat 5.0: Win9x/me/nt4/2k	
Adobe Acrobat 5.0 Upgrade	
Adobe Illustrator 10.0 nt4/98/wme/w2k/wxp	
McAfee Virusscan 6.0: Win9x/me/2k/nt4/xp	
McAfee Virusscan Pro 6.0: Win9x/me/2k/nt4/xp	
Nero Burning Rom 5.5	
Easy CD Creator 5.0 Platinum	
Flash MX Win	
Flash MX Win Upgrade	
Dreamweaver 4.0: Win9X/ME/NT/2K	
Jasc Paint Shop Pro 7.0: Win9x/2k/nt4	
DVD MovieFactory	

Appendix D: ACCC survey of CD prices

The Commission regularly conducts quarterly surveys of CD prices to assess the movements in prices over time, both in Australia and internationally. The aim is to provide quantitative information to help to assess the impact on the Australian market of the removal of the ban on parallel imports of sound recordings in August 1998.

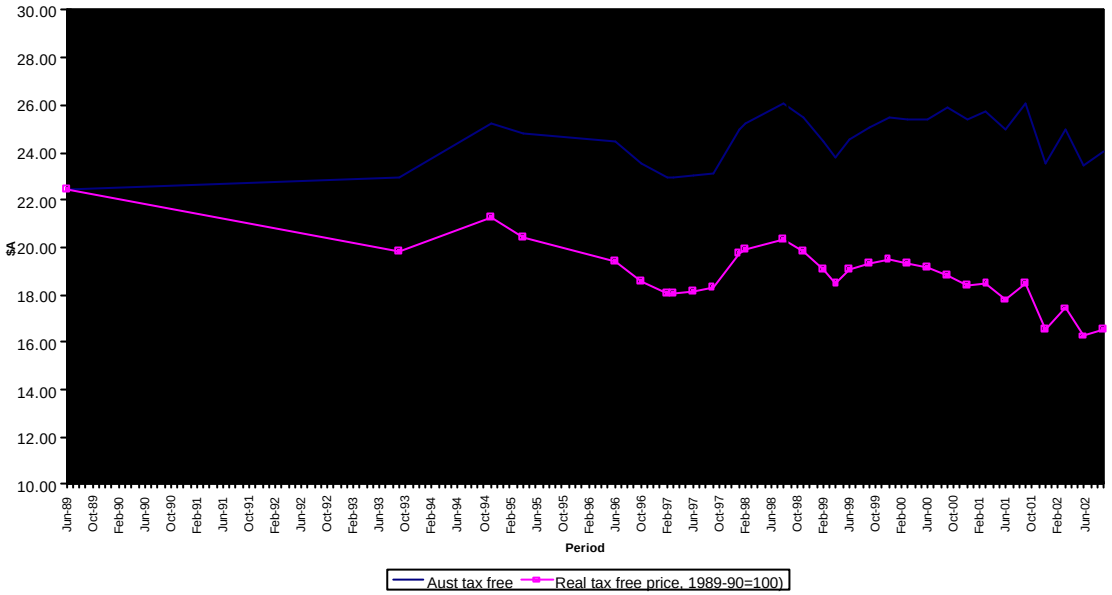
Australian Results

The prices at non-specialist stores are compared with those offered at the specialist stores (ie music stores). Non-specialist stores have been in the Commission's survey since September 2000. The average nominal GST-inclusive price of surveyed CDs in specialist stores in Australia was $26.41 in September 2002, up 54 cents or 2.1 per cent from $25.87 in June 2002.

In order to compare the current surveyed nominal average price to that of August 1998 prior to the change in legislation, the effect of changes in sales tax on CD prices with the introduction of the GST must be taken into account. The tax exclusive price is $24.01 from this survey. After adjusting for taxes, average nominal CD prices are 7.8 per cent lower in September 2002 than they were immediately prior to deregulation (August 1998 tax-exclusive price ($26.03)).

Chart 1 below tracks movements in the average nominal and real tax-exclusive CD prices from June 1989 to June 2002.

Chart 1: Average Tax-Exclusive Retail Prices of Chart CDs, Nominal and Real, Australia, June 1989 to September 2002



Non-Specialist stores

Prices have been surveyed at selected non-specialist stores of Myer/Grace Brothers, Target/K Mart, and Woolworths/Big W (where located) since September 2000. The average tax-inclusive price was $21.98 in September 2002. The September 2002 non-specialist average price of $21.98 was $4.43 below the specialist average price of $26.41. The surveys consistently show that non-specialist retail outlets are offering consumers lower-priced options for purchasing top selling CDs compared with specialist music stores.

International Results

The international price comparisons were achieved by removing where necessary the percentage of foreign tax from the foreign price and converting into Australian currency by a three month average exchange rate. The Australian tax percentage was then added. The Australian price was subtracted from the foreign price in $A and the difference was taken as a percentage of the foreign price.

Internationally, comparing Australian CD prices with those of other countries, the September 2002 survey found that Australian prices were lower than the UK (by $A 10.34 or 28.1 per cent) and the US (by $A5.50 or 17.2 per cent) but higher than New

Zealand (by $A3.02 or 12.9 per cent). In the previous quarter June 2002, the Australian price was $A6.03 or 18.9 per cent less than the US price, $10.03 or 27.9 per cent lower than the UK, and $A4.79 or 22.7 per cent higher than NZ.

Impact of Inflation and Exchange rate movements since August 1998

The effect of CPI increases and depreciation cannot readily be taken together to discover what individual price movements would have been in the absence of import policy changes, because CPI and depreciation influence each other over time. If CD prices had risen in line with inflation since August 1998, CD prices in September 2002 would have been $29.73. The current CD price of $24.01 is $5.72 (or 19.3 per cent) lower than this estimate.