

**VICTORIAN EMPLOYERS' CHAMBER OF  
COMMERCE AND INDUSTRY**

**INTERNATIONAL TRADE COMMITTEE**

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**PARALLEL IMPORTING**

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This speech borrows heavily from an article written by Dr Jill Walker of the ACCC for the  
UK Consumers Association Journal.

## **1. INTRODUCTION**

Good morning.

Thank you for the opportunity to address the Victorian Employers' Chamber of Commerce and Industry's International Trade Committee. Today I intend to discuss the ACCC's interest in the impact of restrictions of so-called parallel imports of goods and the legislative amendments which have been passed to remove these competitive impediments.

## **2. THE ROLE OF THE ACCC**

I will firstly outline the framework within which the ACCC operates. Among other legislation, the ACCC administers the primary piece of consumer protection and fair trading legislation in Australia – the *Trade Practices Act 1974*.

The stated aim of the Trade Practices Act is to enhance the welfare of Australians through the promotion of competition and fair trading and consumer protection.

In particular it focuses on:

- unfair prices
- the abuse of market power; and
- the violation of consumer rights

for the whole of Australia.

The role of the ACCC is to apply the Trade Practices Act properly, without fear or favour to anyone, no matter how powerful economically or politically, for the benefit of consumers of all kinds everywhere in Australia, including household consumers; small, medium and big business; farmers; local, state and federal governments; and all people everywhere, in capital

cities, country towns and farms. All have an interest in being supplied competitively and efficiently at low prices with good service; and where they sell, to sell to buyers who have to compete for their output.

In general, the ACCC is not involved in advocating changes in the law, even where laws are anti-competitive, for example, laws that restrict entry into a profession; laws that restrict shopping hours; or laws that confer monopoly power.

The ACCC is therefore not involved in the numerous reviews of laws carried out under the National Competition Policy, many of which lead to a deregulation process. However, the ACCC is often involved in the aftermath of this process.

### **3. APPLYING THE LAW**

The ACCC is, as always, committed to vigorous enforcement of the law. The goals of the Commission in taking enforcement action are:

- to stop unlawful conduct;
- to seek compensation for those damaged by unlawful behaviour;
- to secure compliance with the law;
- to seek deterrence and, if appropriate, punishment.

Although the Commission is committed to the vigorous enforcement of the Trade Practices Act, it is equally committed to following lawful processes. It is always careful to stay within the law in its own behaviour. There are important safeguards for business in the Act. Essentially the Commission must prove its case in court, usually against well heeled highly defended litigants.

No one likes having the law applied to them. The usual fear and loathing apply to the regulator. When the Commission applies the law to someone a frequent response is:

- the behaviour did not occur;
- if it occurred, it was not unlawful;
- if it was unlawful, it was justified in the circumstances;
- the business is being unfairly picked upon;
- others in the industry or in other industries are breaking the law more than this business and should be the target of the Commission rather than this business;
- the Commission should exercise its discretion not to apply the law;
- if the law must be applied there should be absolute minimal resolution, e.g. by means of a warning or exchange of letters between the Commission and the offending party.

The Commission's view is that the Trade Practices Act is an important economic law and reflects a view of the Parliament that it be upheld. There should be no special favours to any groups. In short, the law should be applied without fear or favour in the way Parliament clearly intended.

#### **4. INTELLECTUAL PROPERTY**

The Commission, and the then Prices Surveillance Authority, have taken a keen interest in the potentially anti-competitive impact of intellectual property laws for a decade or so now. The Commission's interest in the impact of restrictions of so-called parallel imports of goods containing intellectual property is probably the highest profile aspect of its work in the intellectual property area. The process of raising awareness of these restrictions and, where appropriate, changing legislation to remove legislative impediments to competition has been fairly difficult. However, several events have occurred recently that have put intellectual property issues firmly back in the spotlight.

## **5. LEGISLATIVE REVIEW**

You will be aware that one aspect of the National Competition Policy is the review of all legislation that potentially restricts competition under the Competition Principles Agreement. The guiding principle of the review is that legislation should not restrict competition unless it can be demonstrated that the benefits to the community outweigh the costs, and that the objectives of the legislation can only be achieved by restricting competition.

The Commonwealth government has prepared its schedule for the review. This includes several pieces of intellectual property legislation. So, for example, the Copyright Act, the Designs Act, the Patents Act and so forth are scheduled to be reviewed soon, although a firm timetable has not been set. The Commission will probably have some input into these reviews, as an interested party.

As part of the Commonwealth government's legislative review, the National Competition Council (NCC) is currently examining the exceptions provided by section 51(3) of the Trade Practices Act.

Section 51(3) of the Trade Practices Act excepts conditions of licences and assignments of intellectual property from the operation of sections 45 (agreements that substantially lessen competition), 47 (exclusive dealing) and 50 (mergers that substantially lessen competition) of the Act to the extent that they relate to the subject matter of the relevant intellectual property.

Our view is that intellectual property should be fully subject to the Trade Practices Act as are other forms of property. We put this to the NCC in our first submission to its review where we recommended the repeal of section 51(3).

Since then, the NCC has issued a draft report which recommends that section 51(3) be repealed. We provided a second submission to the NCC in response to this draft and in support of the draft recommendation. The recommendation recognises that Part VII of the Trade Practices Act (the authorisations and notifications provisions) empowers the ACCC to authorise some agreements that may otherwise breach Part IV of the Act. The authorisation provisions allow the public

benefits and detriment of such agreements to be assessed publicly on a case by case basis. Our decisions are appealable to the Australian Competition Tribunal.

## **6. PARALLEL IMPORTS**

Restrictions on parallel imports have been used by firms supplying copyright products to segment international markets, charging higher prices to those countries in which price elasticity of demand is low and/or domestic competition is limited and lower prices in countries where demand is more price elastic and/or competition more vigorous. In other words, they have been able to charge what each market will bear because the possibility of international arbitrage has been eliminated. Independent traders are not able to move goods from low priced countries to high priced countries, hence the price discrimination can be sustained. The high prices affect consumers directly and may also undermine the international competitiveness of user industries. Consumers are further disadvantaged in terms of the range and availability of goods covered by these restrictions.

In Australia, the debate over parallel imports of copyright protected products has spanned nearly two decades. The *Copyright Act 1968* originally prohibited parallel imports except for personal use. In 1983 the question of whether the importation provisions of the Act should be reformed was referred to the Copyright Law Review Committee (the Committee), who reported in 1988. The Prices Surveillance Authority (the PSA) also did a lot of the early work in this area and raised awareness of the impact that parallel import restrictions contained in the Copyright Act have on the prices and availability of sound recordings, books and computer software.

The Commission has continued the PSA's advocacy of repealing the importation provisions of the Copyright Act. We believe that this would lead to greater competition in supply with consequent reductions in prices and improvements in the speed with which products are available in Australia and also the range that is available.

I will now discuss amendments to the Copyright Act which have, or will have, the effect of opening up the Australian book, sound recording and trademarked goods sectors to competition from parallel imports.

## 6.1 BOOKS

Both the Committee and the PSA released reports about the availability of books to Australian readers and the prices of books in Australia compared to prices of identical books in other countries.

The major proponents for change at that time were the specialist booksellers who were frustrated at not being able to meet the requirements of their customers and the Committee was concerned by evidence of problems accessing specialist material.

The 1989 PSA report focused on pricing issues. The PSA compared the prices of identical books sold in the UK, Canada and Australia, each of which formed part of the British publishers traditional territory. The PSA found that book prices in Australia were significantly higher than those in Canada and the UK. This price discrimination was partly attributed to price coordination of British publishers and their ability to prevent arbitrage through controls over parallel imports. In Canada the publishers had to compete with cheaper US editions of the same book available across the border, whereas the Australian market was relatively isolated. The PSA also found that the protection afforded by the importation provisions had fostered inefficiencies in distribution and stockholding within the industry.

Heated public debate followed the release of the PSA report, with publishers and authors claiming the recommendations would spell the end of Australian literature and the Australian publishing industry. Eventually, in 1991 amendments were made to the Copyright Act 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 which concluded that while the 1991 amendments had resulted in an improvement in distribution efficiencies and improved the speed with which most new releases become 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. Further, 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. No action has yet been taken on these recommendations, but the current Government is considering further reform following a recent report from the Commission.

## **6.2 SOUND RECORDINGS**

As with books, the Committee's consideration of sound recordings focused on the issue of availability. The main supporters of reform were again the specialist record sellers who wanted to be able to satisfy their customers demand for specialist and overseas versions of records and compact discs.

The PSA focused its 1990 report on the pricing of sound recordings. International price comparisons were made over a period of 20 years and Australian prices were found to be consistently high compared to the rest of the world. The PSA partly attributed these high prices to an absence of price competition between the six major recording companies and their ability to prevent international arbitrage through controls over parallel importing.

As in the case of books, the industry argued that an open market would jeopardise investment in Australian industry and Australian artists, arguments rejected by the PSA. Investment would continue as long as there was a market for Australian music and artists royalties could increase if sales and total revenue grew with lower prices. Piracy was also a major issue raised in the PSA inquiry, the industry arguing that an open market would see a flood of pirate imports onto the Australian market. The PSA rejected these arguments too. Pirate imports would still be illegal and could just as easily enter a closed market as an open market, had Australia had the type of informal retail sector and culture of non-compliance which encourages piracy. Indeed lower prices for legitimate recordings would discourage piracy.

Again the PSA report was followed by considerable public debate. In July 1998 the Copyright Act was amended to allow parallel imports from all countries with effective copyright

protection. To allay concerns about increased piracy, the Bill also placed the onus on the importer to establish the legitimacy of parallel imports and increased fines for piracy. Since then, the Commission has been regularly monitoring the impact of this change. What we have seen is the gradual rise in competition from lower priced parallel imports. This seems to be resulting in lower prices of both imported and locally made CDs. It also appears that non-traditional suppliers of CDs are entering the market by supplying low priced imports.

### **6.3 COPYRIGHT IN TRADE MARKS**

The *Trade Marks Act* provides only limited and uncertain protection against parallel imports, hence many importers and distributors of branded products had been relying on the Copyright Act to protect them from parallel import competition.

It was argued before the Committee that such protection was necessary to preserve the health and safety of Australian consumers. The ACCC argued that copyright was a blunt instrument to deal with these issues, which should be, and largely are, covered by health and safety regulations, applying equally to parallel importers as to licensed distributors. It was further argued that control over parallel imports was necessary to support investment in advertising, marketing and distribution of brand name products in Australia. The ACCC rejected these arguments, arguing that any free riding problems should be overcome contractually rather than by a blanket legislative exclusive licence. It argued in favour of deregulation, to inject competition into the sourcing and distribution of trade marked goods, with the expectation of benefits to consumers in terms of price and service.

Parliament has passed the amendments but the date of effect has been delayed for 18 months to give licensed importers time to adjust. The market will be opened up to competition from parallel imports on 30 January 2000.

## **7. FURTHER REFORM?**

The potential for further changes to the Copyright Act, along the lines of those made in relation to sound recordings, is still very much on the Government's agenda. We have recently reported to the Government on the potential consumer benefits of repealing the importation provisions as

they apply to books and computer software. That report has not been made public as yet. However, I think that I can say that we concluded that there are potentially significant benefits that could be gained for both consumers of books and software if the importation provisions are repealed.

## **8. CONCLUSION**

To conclude, the ACCC has a role to defend:

- consumers
- small business
- rural Australia, and
- others

from

- unfair prices
- the abuse of market power
- the violation of consumer rights

It administers a strong, valuable Act; its role is to enforce it properly now and in the years ahead.

The ACCC advocates repealing the importation provisions of the Copyright Act. It is to be hoped that the Government will maintain the momentum of reform it has started in relation to sound recordings and trade marks.

Thank you.