



AIIA SUBMISSION TO THE REVIEW OF THE TRADE PRACTICES ACT 1974

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1 Executive Summary

The Australian Information Industry Association (AIIA) welcomes the current review of Trade Practices Act (TPA) and is pleased to provide a submission for consideration by the Review Committee. AIIA believes the Review is both an important and timely process.

AIIA has chose to focus our comments to those areas surrounding intellectual property and competition policy, which are of particular interest to AIIA and our members.

AIIA's submissions to the Review Committee are summarised as follows:

- A flourishing information and communication technology (ICT) industry is crucial to the continued growth of the Australian economy. It is therefore imperative that the industry has sufficient certainty regarding the regulatory environment for intellectual property licensing.
- The Review Committee should consider the characteristics of intellectual property, and the reliance of ICT industries on intellectual property (particularly copyright) licensing in its considerations of the operation of Parts IV and VII of the *Trade Practices Act 1974*.

The Review Committee should endorse the proposition that:

- (a) there is no inherent inconsistency between IP laws and restrictive trade practices laws; and
- (b) the existence of an intellectual property right does not of itself equate to market power.

The Review Committee should recommend the development of guidelines on the interaction of IP licensing and the TPA which:

- are developed in conjunction with AIIA members, and other industries dependent on the exploitation of IP rights;
- take into account internationally recognised principles in relation to IP and competition laws; such as those contained in guidelines adopted by our major trading partners; and
- endorse and complement the principles in the Commonwealth IT IP guidelines for the commercialisation of intellectual property.

AIIA is grateful to the Review Committee for the opportunity to present these comments. AIIA would be happy to appear before the Committee to provide further information on any aspect of this submission.

2 Introduction

The Australian Information Industry Association (AIIA) is the peak national body representing suppliers of information technology and telecommunications goods and services. AIIA has over 370 member companies that generate combined revenues of more than \$40 billion, employ over 100,000 Australians and have exports of over \$2 billion. AIIA's members represent a significant proportion of the Australian hardware and software industries.

One of AIIA's key objectives is to assist with the creation of a policy and investment environment in Australia that facilitates the continued strong growth of ICT industries, both in Australia and internationally. AIIA supports an open and competitive environment where barriers to effective competition are removed.

3 Background

3.1 The ICT industry in Australia

The ICT industry in Australia is one of the fastest growing and innovative in the Australian economy, with a sustained average annual growth rate approaching 12%. This is more than 2.5 times the average growth rate of the Australian economy as a whole. In addition, the ICT industry accounts for approximately 10% of gross domestic product.

Small businesses (employing fewer than 20 persons) dominate the ICT industry in Australia, with 96% of all Australian ICT businesses classified as 'small'. These businesses account for approximately 24% of employment and 12% of the total ICT income of around \$70 billion.

ICT is one of the main drivers of Australia's economic productivity. A recent Productivity Commission report entitled *Information Technology and Australia's Productivity Surge* found that the rapid uptake of ICT contributed to Australia's strong productivity performance in the 1990's, generating a productivity improvement of 1.1 percentage points from ICT use and other factors.

3.2 IT industries and intellectual property (IP)

IP, and particularly copyright, is one of the most valuable assets of any ICT company, and constitutes the core asset of many AIIA companies. For example, computer software developers are almost entirely reliant on copyright protection and resultant licensing to commercialise and exploit their intellectual capital.

The importance of the exploitation of IP rights to Australian ICT industries has been recognised by the Commonwealth Government in the development of the Commonwealth IT IP guidelines for the management and commercialisation of intellectual property in the field of information technology (IT IP Guidelines). AIIA

endorses the statement by the Minister for Communications, Information Technology and the Arts in the foreword to the IT IP Guidelines:

"Australians have a great capacity to invent and to innovate - history has proven that. But unless we successfully commercialise our intellectual wealth and get it into the global marketplace we cannot maintain a competitive edge in the global economy ... part of our response lies in promoting to industry how to successfully commercialise intellectual property".

IP rights are most successfully exploited using licensing arrangements. The interaction between IP products where one technology may 'build upon' another protected technology creates the need for a licensing arrangement. In addition, licensing arrangements are often the most efficient mechanism for exploiting copyright products (for example, via a software licence). ICT industries are therefore heavily dependent on contractual arrangements in the conduct of their businesses.

Further, the nature of the majority of copyright products means it is extremely difficult to prevent 'free riding' as products are easily copied, often in 'perfect' digital formats. This is evidenced by software piracy levels in Australia, currently estimated by the Business Software Alliance Australia as costing the Australian software industry \$268 million per year in lost sales. In June 2002 the Business Software Alliance's seventh annual benchmark survey on global software piracy reported that Australia experienced a 27% piracy rate, revealing that over one out of every four software programs are pirated.

This creates the need for ICT businesses to place controls in contractual arrangements involving copyright and other IP products in order to appropriately protect their investment in such easily appropriated products.

AIIA submits that both the importance and the special nature of IP - and of industries dependent on the exploitation of IP rights - should be taken into account in reviewing the operation of Part IV of the TPA.

4 IP and competition policy

4.1 No conflict between IP laws and competition laws

AIIA supports the proposition that the existence of IP rights in an economy should generally be seen as welfare-enhancing and advantageous to competition. This is particularly the case with ICT industries, which rely to such a great extent on exploiting and commercialising IP rights. In the absence of strong IP protection, there would be reduced incentives to create the developments in technology so crucial to the continued growth of the information economy in Australia.

It has been recognised both in Australia and internationally that there is no inconsistency between IP laws and competition laws, and that the existence of an

exclusive IP right does not of itself breach competition laws, nor constitute market power.¹

The ACCC appears to have accepted that IP laws do not necessarily clash with competition laws². In addition, in its competition policy review of Australian IP laws, the Intellectual Property and Competition Review Committee (Ergas Committee) recognised that harm to competition cannot be inferred from the mere existence of an exclusive IP right, and stated that:

"Incumbent firms whose intellectual property benefits from protection may be subject to rivalry from numerous sources, including from other firms supplying differentiated but substitutable products.³

These comments are directly relevant to AIIA members. For example, although companies in the software industry leverage the copyright rights in their software products, there is any number of differentiated and substitutable products available to consumers of software products in Australia.

AIIA submits that the Review Committee in considering its recommendations in relation to Part IV TPA, and the Terms of Reference generally, should accept the proposition that:

- (a) there is no inherent inconsistency between IP laws and restrictive trade practices legislation; and
- (b) the existence of an IP rights does not without more equate to the gain or exercise of market power.

4.2 The Ergas Committee

The Review Committee would be aware that the Final Report of the Ergas Committee made a number of recommendations in relation to:

- s.51(3) of the TPA;
- the appropriate treatment of IP licensing and other arrangements under the TPA;
- when conduct or arrangements involving IP should be authorised; and
- the role of the ACCC in relation to enforcing the TPA with respect to IP industries.

¹ Canadian Competition Bureau *Intellectual Property Enforcement Guidelines* 2000, US Department of Justice and Fair Trading Commission *Antitrust Guidelines for the Licensing of Intellectual Property*, 1995

² Speech by Prof. Allan Fels, 22 July 1999

³ Ergas Committee Final Report, p25

AIIA accepts that it is not within the Review Committee's Terms of Reference to revisit previous consideration of s.51(3) of the TPA. However AIIA submits that the implications of the Government's response to the Ergas Committee's recommendations have the potential to impact on ICT industries in a manner that is relevant to the current TPA review.

The practical effect of the Government's response to the Ergas Committee's recommendations is that the majority of IP licensing arrangements will no longer be automatically exempted by s.51(3), but will instead be subject to a 'substantial lessening of competition' test in order to determine whether a breach of Part IV has occurred.

Under the existing TPA, s.51(3) applies to all provisions in Part IV except for ss.46, 46A and 48.

The 'new regime' for Part IV in relation to IP when the proposed amendments are implemented, will operate as follows:

Part IV provision	Treatment of conduct or arrangements involving IP
45	51(3) no longer applies - test is 'substantial lessening of competition'
45A	51(3) no longer applies - test is 'substantial lessening of competition'
47	51(3) no longer applies - test is 'substantial lessening of competition'
50/50A	51(3) continues to apply

As explained above, IP licensing is the primary means by which many AIIA members produce, develop, commercialise and exploit their business products. This is particularly the case for the software industry, where the primary product of this industry is essentially copyright works. The Government response to the Ergas Committee's recommendations potentially has enormous ramifications for the Australian ICT industry if the bulk of the 'everyday' licensing that constitutes the core business of an ICT company is no longer automatically exempt from Part IV TPA.

AIIA has three key concerns in this regard:

- the uncertainty of what a 'substantial lessening of competition' test will mean in the context of IP licensing;
- the potential cost to the Australian ICT industry if businesses are required to seek authorisation from the ACCC for arrangements which have traditionally been exempted by s.51(3); and

- the loss of certainty for participants in the ICT industry flowing from the proposed amendments, in particular for the 96% of industry participants classified as small businesses.

AIIA submits that these concerns fall squarely within the Terms of Reference for the current Review, which requires the Review Committee to determine whether the existing TPA regime provides adequate protection for the commercial affairs of business, and allows businesses to exercise rights and obligations under the TPA with certainty and transparency. The Terms of Reference also recognise the need for industry to have reasonable certainty about the requirements for compliance with, or authorisation under, the Act.

The ICT industry requires certainty about the scope of IP rights and the level of freedom to exercise those rights commercially before coming into conflict with competition laws and regulators. AIIA urges the Review Committee to recognise that the proposed amendments to the TPA resulting from the Ergas report have the potential to significantly undermine the certainty available to the Australian ICT industry in relation to TPA compliance by potentially subjecting the majority of IP licensing arrangements in Australia to uncertain treatment under the TPA. AIIA submits that in the absence of clear guidance about the operation of a 'substantial lessening of competition' test, the level of certainty required for a flourishing ICT industry will not be achieved.

AIIA notes that the Government response to the Ergas report also requires the ACCC to develop industry guidelines, which will provide information and guidance to industry about when conduct and arrangements involving IP might breach Part IV of the TPA, when conduct likely to breach Part IV might be authorised, and the enforcement approach that the ACCC will take to these provisions.

AIIA submits that it is critical that if the proposed amendments to the TPA become law, guidance on the application of Part IV to ICT and other IP reliant industries be provided as a matter of urgency. AIIA also notes that guidelines developed immediately would be useful for continued regulatory certainty for its members, particularly in light of the interpretation of market power in relation to copyright industries taken in the ACCC v Universal case⁴.

5 ACCC guidelines

5.1 International approaches

Australian ICT industries are becoming increasingly global in their focus. The commercialisation of IP, both in Australia and internationally, is at the heart of the IT IP Guidelines. It is therefore imperative that any developments in competition policy or trade practices regulation applicable to ICT industries in Australia be consistent with approaches adopted by our major trading partners. AIIA notes that paragraph four of

⁴ ACCC v Universal Music Pty Ltd [2001] FCA 1800 (14 December 2001)

the Terms of Reference requires the Review Committee to consider international experience in addressing the issues raised in this Review.

The special relationship between antitrust and competition principles and IP laws has been widely recognised overseas. The European Union has created 'block exemptions' for technology transfer arrangements and research and development agreements, and the United States and Canada have both developed guidelines applicable to the interaction between antitrust laws and conduct and arrangements involving IP. These guidelines recognise many important principles to ICT industries, including the recognition that IP rights are generally pro-competitive, and that the mere exercise of an IP right is not an anti-competitive act. Importantly, both the US and Canadian guidelines confirm that for the purposes of antitrust analysis, there should be no presumption that IP rights create market power.

AIIA submits that the Review Committee should consider international experience in this area, and recommend that any guidelines developed by the ACCC recognise internationally accepted principles in relation to IP licensing and competition laws.

5.2 Need for guidelines

The need for guidance about the application of Parts IV and VII of the TPA is critical for ensuring a certain and stable environment for the development of the Australian information economy. This is particularly critical when it is recognised that the majority of participants in the ICT industry in Australia are small businesses. AIIA submits that the Review Committee recommend that the ACCC be directed to immediately create guidelines for IP-reliant industries about the treatment of IP rights under Part IV of the TPA. These guidelines should take into account internationally recognised principles, and should clarify that:

- there is no inconsistency between IP rights and competition laws;
- the exercise of an IP right, including by way of an IP licensing arrangement, is not of itself an anti-competitive act, or an act that will result in a substantial lessening of competition; and
- the ownership of an IP right, without more, does not give rise to market power.

It is critical that any guidelines to be developed by the ACCC should be developed in consultation with AIIA members and other affected industries, and should complement and endorse the principles contained in the IT IP Guidelines.