AUSTRALIAN VIDEO RETAILERS ASSOCIATION LIMITED

SUBMISSION TO THE DAWSON COMMITTEE

REVIEW OF THE TRADE PRACTICES ACT 1974

1. Introduction

The Australian Video Retailers Association (AVRA) is pleased to make this submission to the Dawson Committee.

The issues of concern to AVRA relate to the operation of section 46 of the *Trade Practices Act*. These concerns arise in part from recent case law involving the section, and more recent litigation in which AVRA itself has been involved.

The submissions below are largely responsive to the submission made by the Australian Visual Software Distributors Association (AVSDA) to the Dawson Committee, which calls for the extension of existing exemptions in relation to intellectual property rights to include conduct that would otherwise attract the operation of section 46. AVRA is opposed to the position adopted by AVSDA, for the reasons set out in this submission.

2. Australian Video Retailers Association

The Association is a company limited by guarantee established for the purpose of promoting and fostering the development of video retailing in Australia. Its members include businesses of all sizes, including small and medium sized business who are engaged in the business of renting or selling video cassettes or DVD discs to customers for private home viewing.

AVRA's members deal for the most part exclusively with the large distributors of movies, who control by far the majority of video and DVD product. The major distributors include Warner, Buena Vista. Universal, 20th Century Fox, Columbia, Paramount, MGM, Dreamworks and Roadshow. By virtue of the continuing ban on parallel importation of cinematograph films imposed by the *Copyright Act*, the distributors (who are controlled by the major film studios) have monopoly control in Australia over their own films.

3. The AVSDA submission

AVSDA has submitted as its primary position that at present there is much uncertainty concerning the status of intellectual property rights holders in the context of section 46, and that this situation requires remedy. It proposes three solutions:

- Amendment of section 51(3) of the Act to include section 46 in its ambit.
- Amendment of section 46 to provide more protection to intellectual property rights holders.
- At minimum, ACCC guidelines to give holders certainty as to the extent to which the ACCC will challenge the exercise of intellectual property rights as a breach of Part IV of the Act.

The basis of the submission that such solutions are required is the proposition by AVSDA that the Australian courts are moving away from traditional section 46 analysis and putting intellectual property rights holders at risk of infringing section 46 in circumstances where they are only exercising their (otherwise legitimate) rights.

AVSDA discusses in detail the well-recognised conflict between the monopoly rights granted to the creators or holders of intellectual property on the one hand, and the prohibitions on certain forms of anti-competitive conduct imposed by Part IV of the Act.

Section 51(3) at present excludes from the ambit of Part IV, in broad terms, the exercise of intellectual property rights in respect of copyright, trade marks, designs, patents and EL rights. The exclusion does not apply in respect of sections 46 and 48. The policy basis for the general exclusion is obvious and, despite various reviews referred to by AVSDA, has never been seriously challenged.

4. Defects in AVSDA's argument

In AVRA's view, AVSDA's argument is defective in two substantial respects.

<u>Criticism of the ACCC's approach</u>

AVSDA's submission includes the following reference to two statements:

> The Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs "*Cracking Down on Copycats: enforcement of Copyright in Australia*" November 2000 (**"Piracy Report"**) stated:

> *"Copyright infringement is a real problem affecting Australia's economy… The Committee recommends that the industry be encouraged to develop technological protection devices that are used to protect copyright material".*

The ACCC has stated:

> *"The ACCC is currently investigating whether Australian consumers are paying higher prices for DVDs because of the ability of copyright owners, such as film companies, to prevent competition by restricting imports from countries where the same (authorised) video titles are sold more cheaply".*

AVSDA contrasts these two statements in support of the proposition that there is a conflict between the position of the Government, in that it is pressing industry to develop devices to combat piracy, and the ACCC, in that it is said to consider that the implementation of such devices will raise Part IV concerns.

This is a disingenuous proposition. The ACCC's statement is directed at the status quo in the DVD industry, which dictates that there is only one source of supply into Australia of each DVD title. Because there is no parallel importation, the copyright owner of the film title can dictate supply into Australia of that title. The ACCC's concern is that this situation may be causing Australian consumers to pay higher prices for DVDs than they would if imports were not restricted. The ACCC was a strong advocate of the amendments to the *Copyright Act* that allowed parallel importation of sound recordings, for exactly the same reason.

The ACCC's statement says nothing about, and is irrelevant to, considerations of piracy and the implementation of devices to prevent piracy. The ACCC has given no cause for concern that the development or implementation of devices that are designed to prevent piracy will somehow lead to the risk of Part IV prosecution.

<u>The Warner/Universal case</u>

Much of AVSDA's submission deals with the recent Federal Court first instance decision in *ACCC v Universal Music Australia Pty Limited* (2002) ATPR 41-855.

AVSDA expresses two concerns arising out of the Universal case:

(a) it appears that possessing copyright in a popular title is equated with possessing a temporary monopoly which in turn is found to constitute substantial market power, in circumstances where:

- they each possessed less than a 30% market share;
- products are differentiated such that a small change in consumer demand will affect price; and
- there was strong countervailing power.

(b) that a portfolio of exclusive intellectual property rights gives rise to market power in itself.

We take the liberty of further quoting part of AVSDA's conclusion as follows:

> Conduct by an intellectual property rights holder to protect those rights in accordance with intellectual property legislation, for example, taking action to prevent the importation and retail sale of pirate copies of works in which the corporation is the copyright holder, could have the effect of damaging an importer who specialises in importation and distribution of pirated works. If an effects test is introduced to section 46, there is an even stronger argument to amend section 46, insofar as it applies to an intellectual property rights holder who has a substantial degree of market power, applying the proper analysis set out above, so that conduct by that rights holder to enforce those rights does not constitute a contravention of section 46 of the *Trade Practices Act.*

The thrust of AVSDA's submission is that, if upheld, the Universal decision will have the effect that a company can be held to possess substantial market power solely by virtue of the fact that it holds intellectual property rights. The legitimate exercise of those rights can then constitute an infringement of section 46, because section 46 is excluded from the ambit of section 51(3).

This is a misleading argument. What AVSDA fails to mention anywhere in its submission is that the Universal case did not involve the legitimate exercise of intellectual property rights.

The Universal case involved conduct by two major distributors, Universal and Warner, the purpose of which (as found by the Court) was to prevent or deter retailers and wholesalers of music CDs from acquiring stocks of CDs from overseas, where those CDs contained sound recordings of which Warner or Universal are the copyright holders. This followed immediately upon the amendments to the *Copyright Act* that allowed, for the first time, parallel importation of sound recordings into Australia.

The conduct essentially involved threatened and actual refusals to supply. The Court found that this was for a proscribed purpose (in effect, to protect the monopoly that the distributors had previously enjoyed but which had now been removed by the legislature).

The conduct did not involve, nor was it suggested that it involved, the exercise of intellectual property rights by Warner or Universal. There was no suggestion of pirated products or other infringement of copyright. The parallel imports were perfectly legitimate.

The Universal case and its outcome do not support AVSDA's stated concerns. There has been no development in the case law on section 46 that suggests that intellectual property rights holders are now at risk of falling foul of the provision purely by exercising their legitimate rights.

5. Should section 46 or 51(3) be amended?

AVRA considers that there is no justification for further extending the power of intellectual property rights holders. When legitimately exercising their rights, they are immune from suit or prosecution under Part IV of the Act, with two exceptions. One relates to resale price maintenance, a perfectly sensible exception, and the other to section 46.

It would make no sense to provide immunity to intellectual property rights holders from section 46 action. Section 46 is only enlivened when, in addition to a finding of substantial market power, there exists a proscribed purpose. In essence, the purpose must be truly anti-competitive – to damage competition or a competitor. If an intellectual property rights holder engages in conduct which is designed to damage competition or a competitor, as opposed to merely protecting its statutory rights, there is no reason for it to be protected from the consequences of section 46.

6. Substantial market power

The other aspect of the Universal case attacked by AVSDA is the finding that Universal and Warner possess substantial market power in the market for recorded music, notwithstanding that they each had relatively low market shares.

AVRA is opposed to any amendment to section 46 that would undercut the findings in the Universal case in respect of substantial market power. It is perfectly possible, in AVRA's submission, that a company can possess substantial power in circumstances where its market share based on sales is comparatively low. The reasoning of the primary judge in the Universal case is correct in AVRA's submission, and the same reasoning applies equally to the industry in which AVRA's members operate.

As in the case of the music retail industry, the flow of product to the video and DVD rental and retail industry is characterised by "temporary monopolies" in favour of the various large distributors. None of them has a market share exceeding 30%, but their market shares vary dramatically depending on the titles released by them from time to time. In order to compete,

retail and rental stores must have access to the full range of titles from each of the major distributors. Therefore, notwithstanding that the distributors may be unable to raise their prices without concern, they possess market power for the same reasons that the music distributors possess market power.

Any legislative amendment that reduces the distributors' risk of being found to possess market power would be potentially detrimental to the video industry, because it would remove the last check on the distributors' exercise of their monopoly powers imposed by Part IV of the Act.

7. Pre-empting the Universal case

Relying on its argument that the *Universal* case and other recent cases (*Melway, Boral, Safeway*) have significantly expanded the reach of section 46 and created uncertainty particularly for intellectual property rights holders, AVSDA calls for legislative amendment to pre-empt the outcome of the appeal process in the *Universal* case (and presumably at least *Boral* as well).

AVRA takes the view that the appeal process should be allowed to run its course in the *Universal* case before any question of legislative amendment is considered. The High Court has not previously had the opportunity to consider the so-called "temporary monopoly" argument in a section 46 context.

If the finding in the *Universal* case of substantial market power based on temporary monopolies does not survive appeal, then in AVRA's view the question of amendment to the legislation will arise. It is plain, in AVRA's submission, that a temporary monopoly situation can give rise to substantial market power within the wording of section 46, in certain types of industries. The music and video/DVD industries are obvious examples, because of the tightly held product supply dominated by a number of large distributors who hold monopoly intellectual property rights, and the relatively low degree of substitution between titles. If the appellate courts ultimately take a view contrary to that of Justice Hill in *Universal*, there will be a need for legislative intervention. However, now is not the time to consider that issue.

8. Conclusion

AVRA is opposed to the reform proposals put forward in the submission by AVSDA, so far as AVSDA calls for amendments to either section 46 or section 51(3) of the Act. AVRA submits that vigilance must be maintained to ensure that, under the guise of a plea for certainty, the already powerful position enjoyed by intellectual property rights holders in Australia is not further

enhanced at the cost of those with whom the holders deal. This is particularly so in the video and DVD industry, where copyright holders enjoy continued protection from parallel imports.