Other parallel importation issues

The Commission is investigating two aspects of a requirement by the DVD Copy Control Association in California, USA, for manufacturers of DVD players to incorporate the regional playback control (RPC) system. This effectively divides the world into six regions for the purposes of DVD distribution. First, the Commission 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. Second, the Commission is concerned that the RPC system may enable copyright owners to practise international price discrimination by artificially creating regional barriers. The RPC system may be used to prevent cheap imports in countries in which domestic price competition is limited, such as Australia.

PlayStation 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 distribution regions. 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 Commission is concerned that the main purpose of the RPC restrictions is to prevent parallel imports, not infringement of copyright as alleged by Sony.[11]

Sony Computer Entertainment sought in the Federal Court to have the new anti-circumvention provisions of the Copyright Act applied 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 Commission was granted leave to be heard as amicus curiae (friend of the court) in Sony's action in relation to whether modifying PlayStation consoles infringes the Copyright Act.

The Commission 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'. Sony has appealed. The Commission will seek leave of the court to be heard as amicus curiae in this appeal. The appeal was to be heard 24–25 February 2003.

Conclusions

In Australia the interface between intellectual property laws and the Trade Practices Act is changing. As a result the Commission will have an enhanced role in ensuring that the complementary policies of both sets of legislation are realised. Technological developments also continue to raise new and complex trade practices issues. The Chairman expressed his confidence that both the TPA and the Commission are well placed to face these challenges.

A full transcript of the speech is available from the Commission's website.

The future of competition law in Australia

The following is an edited version of a speech by Commissioner Ross Jones to the Melbourne Institute on 5 December 2002.

Commissioner Jones first outlined the purpose of the Trade Practices Act and the Commission's role in enforcing it. He then discussed how robust domestic competition can contribute to the Australian economy.

11 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.

Recent economic growth

Over the past 10 years Australia has experienced strong economic growth relative to other OECD countries. For example, during the nineties Australia's annual rate of growth, at constant prices, averaged 3.6 per cent. It was 3.2 per cent in the United States, 2.3 per cent in the United Kingdom and 1.9 per cent in both Germany and France.

Now I know some believe our good performance stems from a long-time American expansion (now subdued, of course) and from technological change. In effect this argues that while our economic vices are all our own, our virtues emanate from elsewhere.

But it is an observable fact that Australia has benefited from a marked increase in productivity.

Unlike the 1960s and 1970s, our improved productivity during the nineties was not part of a world-wide productivity boom. Australia was one of only three countries to experience a strong acceleration during the 1990s.[12]

As a result of our own efforts we made productivity gains of 3 per cent per annum. Analysis suggests that reforms leading to sharper competition, a greater openness to trade, investment and technology, and a greater business flexibility have boosted Australian productivity.[13]

As well, research by the OECD shows that anti-competitive market restrictions may act to reduce the employment rate by three percentage points from the OECD average. That is, anti-competitive restrictions cost jobs.[14]

In Australia some credit can therefore be attributed to competition policy and law in generating a substantial boost to both productivity and household incomes.

The Commission is often portrayed as a pro-consumer body that confronts big business over unlawful or allegedly unlawful behaviour.

But, as well as benefiting consumers by tackling businesses, the Commission, by enforcing the Act, works to the real benefit of the business community. This is a point understood by some, but not all, in business.

For example, the small business community, in response to a survey conducted by the New South Wales Chamber of Commerce, indicated that:

- large firms misused their market power in the community (61 per cent)
- the Commission should have more power to halt anti-competitive conduct (67 per cent).

It seems a high percentage of people with experience in small business perceive they have an interest in seeing competition policy applied vigorously and in full, without fear and without favour.

To be fair, I am also aware that the Australian Chamber of Commerce and Industry has survey results that show that large employers overwhelmingly believe that the Commission does not have an appropriate understanding of commercial realities.

Putting aside the question of what is meant exactly by the term commercial realities, we know that there is a divide between large and small businesses. As a general rule, small firms are wary of the market power exerted by large ones, and the large ones are convinced of the need to become larger still.

Generally, large firms hold that it is acceptable for a single firm to dominate the domestic market, and that, in these efforts, firms should not be restrained by the law. In addition, constraints of the law that impede anti-competitive mergers are viewed as being antiquated. For example, Mr Peter Kirby, Managing Director of CSR Limited, has argued that:

> To be strong offshore, you need a strong home base. You need to have a secure cash and profit flow to take risks involved in international expansion. You need a home base which does not unduly distract management attention ... Competition policy does not recognise the mutual benefits available from consolidation ...[15]

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12 G Banks, 'Microreform's Productivity Payoff', published in *The Australian*, 18 February 2002 (under the heading 'Complacency the enemy in maintaining the miracle'), as part of a report in advance of *The Australian/Melbourne Institute Towards Opportunity and Prosperity* conference, 4–5 April 2002.

13 D Parham, *Microeconomic reforms and the revival in Australia's growth in productivity and living standards*, paper presented to the Conference of Economists, Adelaide, 1 October 2002, p. 22, <http://www.pc.gov.au> 20 October 2002.

14 Organisation for Economic Co-operation and Development, *Product and Labour Markets Interactions in OECD Countries*, OECD Working Paper, Working Party No.1 on Macroeconomic and Structural Policy Analysis, ECO/CPE/WP1(2001)16, 12 September 2001.

15 P Kirby, 'Is the branch office all we can aspire to?' Speech to the Securities Institute of Australia, 21 June 2001, p. 6.

Perhaps inadvertently, Mr Kirby's comments echo the observation of the Nobel Prize winner, John Hicks, that the best of monopoly profits is a quiet life.[16]

I do not think that the argument of Mr Kirby can be sustained. The evidence in favour of the benefits of competition—both here and overseas—is just too strong. As Michael Porter states in *The competitive advantage of nations*:

> It is often argued that domestic competition is wasteful, because it leads to duplication of effort and prevents firms from gaining economies of scale ... We found ... few 'national champions', or firms with virtually unrivalled domestic positions, that were internationally competitive. Instead, most were uncompetitive though often heavily subsidised and protected.[17]
>
> ... Companies have a vested interest in having capable, home-based competitors. Part of what makes a nation successful in an industry is vigorous domestic rivalry. Rarely do firms gain and sustain competitive advantage internationally without tough competition at home.[18]

The fact is that, in Australia as elsewhere, competition creates competitive advantage.

It always surprises me that the Commission and big business view merger law enforcement so differently since big business benefits from this law being applied rigorously.

The Commission recognises the broad benefits that may accrue to mergers including such things as imposing discipline on ineffective management; allowing firms to achieve a scale not easily attainable through independent growth; providing access to capital, management, technology and so on.

But they can also have an undesirable effect on competition when they provide increased scope for price rises, coordinated behaviour between competitors and a lessening of the dynamic features of competition leading to innovation and new product development.

In the absence of merger law, Australian firms facing competitive firms would be handicapped. How competitive would Australian exporters be if they had to source finance from a monopoly bank, purchase their energy from a monopoly supply and use a monopoly transport provider?

Further, it seems reasonable to believe that higher levels of market concentration would inevitably lead to higher public demand for direct regulation of business in the most highly concentrated sectors.

As mergers Commissioner, I deal with big business on a daily basis. Quite often I have been explicitly told 'you don't understand commercial realities'. At times I feel like responding 'and you don't understand the Trade Practices Act'. But the facts are the Commission does have a reasonable understanding of commercial reality.

In the six years to 30 June 2002 the Commission examined 1227 mergers. How many got through without any competition issues? 600? 800? 1000? The answer is 69 out of the 1227 generated issues. Of those 69, 37 proceeded after undertakings were provided.

I am pleased to see that the Australian Chamber of Commerce and Industry (ACCI) and the Business Council of Australia (BCA) are no longer advocating weakening the merger provisions. The Commission recognises that many markets are becoming wider than national and its approach to mergers reflects this. In the past decade it has not opposed a single merger if imports were more than 10 per cent of the domestic market, even when the merger led to a domestic monopoly.

However, it is surprising to see the old chestnut of the 'national champion' being resurrected once again. It is difficult to accept the line that Australia should allow the development of domestic monopolies that take advantage of their market power by charging high domestic prices and then use the profits generated to subsidise overseas expansion.

There is no support among leading economists for the 'national champion' argument. Further, in Australia, unlike most countries there is even the option of seeking authorisation for an anti-competitive merger on public benefit grounds.

Improving the law

[Commissioner Jones next presented the Commission's views on improving trade practices law in Australia. These included the need for criminal sanctions and an effects test. He also commented on the suggestions that the governance of the Commission be changed (e.g. by having an ACCC review board).

For information on the Commission's attitude on these issues see the forum sections of *ACCC Journal* nos 41 and 42.]

16 JR Hicks, 'Annual Survey of Economic Theory: The Theory of Monopoly', *Econometrica*, 1935.

17 ME Porter, *The competitive advantage of nations*, Macmillan, London, 1990, p. 117.

18 ibid., p. 597.