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By online submission:
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Professor Ian Harper
Chair
Competition Policy Review Panel
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Professor Harper

Policy review – parallel imports of trade marked goods Policy review – parallel imports of trade marked goods

I am writing this submission to you not on behalf of my firm, Corrs Chambers Westgarth, but rather in my own name as a partner of a firm who has for the last thirty years worked for a very wide range of clients in a diverse number of industries who have encountered significant problems with parallel importation. I am thus addressing the question: "Should any current restrictions on parallel importation be removed or altered in order to increase competition?"

The purpose of my letter is to urge the Competition Policy Review Panel (**Panel**) to consider carefully the issue of parallel importation, not in abstract economic terms, but with close attention to an empirical study of the actual impact of parallel importation on Australian consumers and business.

As the Panel will know, Australia's copyright and trade mark legislation was amended in the early 1990s in response to recommendations made concerning the prospective positive impact on consumers of parallel importation, which benefits were principally said to be lower prices for goods. Clearly any the laws that are designed to maintain monopoly rents, per se, are undesirable. However, from my experience, the legislation designed to have a beneficial impact by ensuring that Australia's IP laws could not be used to prevent parallel importation had:

- 1 a real impact, in terms of better pricing for consumers, substantially lower than was expected; and
- 2 numerous other unintended consequences that cause detriment not only to consumers but also to Australian businesses.

As the call for submissions to which I am responding did not seek evidence, I have not attached to this submission any detailed material relating to or which supports the

submissions set out below. However, I would be more than happy to provide such information to the Panel (subject to any necessary permission from various clients).

The consumer and business detriment that parallel importation very commonly cause include the following situations (which are not limited to isolated cases).

- 1 It is commonly the case that the parallel imported products are of a different (and sometimes inferior) quality to the original products historically and continuously imported into Australia through the normal distribution channels. This leads to consumers being misled or deceived when they acquire the parallel imported products expecting to receive the same product that they have normally acquired. Whilst such expectations can be properly managed by parallel importers bringing to consumers' attention the fact that the product that is being sold is of a different quality, nature or type, my clients' experience is that this does not occur. Indeed, it is rarely in the interests of parallel importers to disclose to prospective consumers the fact that the lower prices they are receiving for the parallel imported goods may derive by reason of the fact that the goods are not of the same quality or type as the goods otherwise normally found in the Australian marketplace.

In 2012 and 2013, I ran a Federal Court action which was, fortunately for the parties involved, settled in which this exact scenario took place. My client, which was the Australian subsidiary of a foreign manufacturer, was faced with a large Australian retailer which was parallel importing genuine goods but of a different quality to those imported by my client, putting the parallel imported goods on sale for a substantial discount. However, the parallel imported goods did not include all of the usual accessories which were included in the product sold through the usual authorised channels. If consumers were required to purchase all of the additional accessories, they would have had to pay more from the parallel importer than what was actually charged to consumers for the products through the usual channels.

In that case, the parallel importer did in fact put warning stickers to consumers on the products in correction. However, they were clearly not satisfactory, even though they were altered on two occasions by the parallel importer. The Australian subsidiary received many dozens of email complaints by consumers that the product was not up to its usual quality and complaining about the lack of accessories. A Federal Court action was eventually started but, as I noted above, settled.

- 2 A second problem that commonly occurs is that parallel importers mix genuine products with counterfeit products. One case that I have samples of in my office includes six-packs of beer where four of the six bottles in the six-pack are genuine but two in each six-pack were counterfeit. The parallel importer tried to use the genuine products to mask the counterfeit products.

We had to commence a Federal Court action for two other producers in the clothing trade against a parallel importer who was, again, importing mixed batches of genuine goods and counterfeit goods.

- 3 Yet a third issue that often occurs is that parallel importers commonly refer consumer complaints, warranty claims and the like to the normal authorised importers. The authorised importers do not have any legal liability to honour the warranty claim or complaint but commonly do so in order to retain their credibility and the reputation of their products. On the other hand, the parallel importers are successfully avoiding their legal obligations to satisfy consumer complaints or warranty claims and free-ride on the authorised suppliers.
- 4 It is very common for parallel importers who do not wish their sources of the parallel imported products to be traced to remove lot numbers or code numbers from the parallel imported products. A key problem that arises is that should there be any need to carry out a product recall, the absence of lot numbers makes the carrying out of a recall virtually impossible, as it is not possible to identify the affected lots of the parallel imported products. This problem is common in both the cosmetics and alcohol sectors.
- 5 Yet another issue arises where the parallel imported products might be new and, arguably, genuine, but where they have been altered in some manner without the knowledge, let alone consent, of the trade mark or copyright owner. In such situations, again, it is the authorised supplier which receives the consumer complaints and warranty requests and who must thus bear the burdens of undoing the damage caused by persons in the parallel supply chain.
- 6 It is very common for parallel importers to buy job lots of genuine products without complying with the obligation to bring spare parts into Australia for those products. Leaving aside again the issue of free-riding, this commonly results in authorised importers being required to supply the spare parts, often for free, in order to keep angry or frustrated consumers' loyalty. Thus the parallel importers are not complying with their own legal obligations.

Whilst it is easy to point to the alleged higher prices for products as the cost of allowing parallel importation to be stopped, what is not taken into account is the detriment that consumers and, indeed, legitimate businesses suffer when parallel importation is carried out. Were parallel importation to be specifically allowed, then in order to make the market function efficiently, to avoid springboard advantages being taken, to protect those who invest in Australian businesses (whether it be distributors or subsidiaries) and to protect consumers, very significant restrictions would need to be placed on parallel importers.

Thus I respectfully submit that, rather than analysing the question of parallel importation in the abstract or simply from the point of view of looking at the apparent cost benefits to consumers (which, I understand, are not necessarily usually passed on to consumers), a full analysis of all of the impacts on consumers and businesses needs to be considered and done so from an empirical perspective. This is a clear situation where the theory does not translate into the reality and where there are many unintended and possibly unexpected consequences with which the Panel may not be familiar. I would urge the Panel to speak widely amongst the business community before reaching any conclusions. As I indicated above, I have encountered these problems from clients involved in an extremely wide variety of industries, including the cosmetics, alcohol and liquor, food products, luxury goods, cooking equipment, clothing and footwear and the like sectors.

This may well be a case where the legislation should restrict competition given that there is a real body of evidence that suggests that the benefits of the restriction to the community as a whole outweigh the costs.

I would naturally be happy to answer any queries that you might have.

Yours sincerely



Stephen Stern
Partner