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Trade Practices - legalisation of parallel importation of recorded music - cessation of supply to parallel importing retailers - alleged misuse of market power - alleged exclusive dealing –

Universal Music Australia Pty Ltd v Australian Competition & Consumer Commission [2003] FCAFC 193 (Wilcox, French and Gyles JJ, 22 August 2003)

CD's - Parallel importing

In July 1998, the *Copyright Amendment Act (No 2) 1998* (Cth) came into operation.. These amendments meant compact disc recordings and other sound recordings could be imported from other countries, provided the manufacture of that stock overseas had not infringed copyright law in the source country.

The situation before the amendments was that you could not import sound recordings into Australia without the consent of Australian copyright owners or their authorized licensees. After the amendments, wholesalers and retailers of CDs were no longer limited to purchasing their CDs from Australian sources.

The alleged conduct complained of

Universal Music Australia Pty Ltd (formerly PolyGram Pty Ltd) (Universal) and Warner Music Australia Pty Ltd (Warner), were two major Australian distributors who made it known that:-

- they might not supply retailers who imported CDs; and
- they might review the terms upon which they dealt those retailers.

The proceeding

The Australian Competition and Consumer Commission (‘ACCC’) instituted proceedings asserting that Universal and Warner contravened the competition law set out in the *Trade Practices Act 1974* (Cth) (the TPA Act) with reference to:-

- s. 45 of the TPA Act relating to contracts, arrangements or understandings that restricted dealings or affect competition;
- s. 46 of the TPA Act relating to misuse of market power;
- s. 47 of the TPA Act relating to exclusive dealing

First instance

The primary judge found that both Universal and Warner had contravened ss. 46 and 47 of the TPA Act by engaging in abuse of their market power and exclusive dealing conduct. In addition he found that some of their executives were knowingly involved in those contraventions.

The primary judge's determination is *Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd* [2001] FCA 1800 (Hill J, 14 December 2001; corrigenda dated 7 March 2002 & 1 October 2002).

Appeal grounds

Universal and Warner appealed against the primary judge's findings relating to abuse of market power (s. 46) and exclusive dealing (s. 47). The ACCC appealed against the penalties imposed on Universal and Warner

Decision

s. 46 of the TPA - abuse of market power

The Full Court determined that the appeal against the primary judge's decision in relation to the contravention of s. 46 should be allowed. It was fundamental in order to make out a contravention of s. 46, that the corporation said to be contravening the section had 'a substantial degree of power in a market'.

In this case, the relevant market was the market for wholesale recorded music in Australia. Since the introduction of the amendments which allowed importation of sound recordings and CD's into Australia, it couldn't be said that Universal and Warner's power in the market was 'substantial' within the meaning of s. 46.

s. 47 of the TPA – engaging in exclusive dealing

The Full Court however dismissed the appeal in relation to s. 47 of the TPA Act. The court agreed with Hill J that both Universal and Warner contravened s. 47 of the *TPA Act*, by engaging in exclusive dealing.

These contraventions arose, the Court said from the actions of the companies in refusing to supply certain retailers for a period and by imposing conditions upon supply.

Even though the traders that had supply stopped were only small traders, it gave a warning to other retailers of the action the companies would take if the retailers chose to exercise their right to import from overseas directly. Such actions would have had a substantial effect upon competition in the market. It was not regarded as a defence that the purpose was not achieved.

The Full Court also agreed that the Universal and Warner executives were knowingly concerned in their respective contraventions.

Penalty

In relation to penalty, the Court determined that the penalty imposed in relation to the exclusive dealing conduct was inadequate and was increased from \$450,000 to \$1 million each. The penalties for the executives were not changed except for the penalty imposed on one executive, which was reduced from \$50,000 to \$45,000 due to a factual error.