



The Hon Mark Vaile MP

Minister for Trade

Deputy Leader of The Nationals

17 November 2004

The Honourable Robert B Zoellick
United States Trade Representative
600 17th Street NW
WASHINGTON DC 20508

Dear Ambassador Zoellick

With the Coalition Government now re-elected, my highest priority is to ensure that the Australia-United States Free Trade Agreement can enter into force on 1 January 2005 and to confirm that understanding with you.

This Agreement stands to enhance greatly our bilateral relationship and our trade and economic integration. It offers key sectors in both our economies very real and substantial benefits.

I set out in this letter further information regarding Australia's implementation of our obligations under the Agreement. As you are aware, the Australian Parliament passed legislation to implement Australia's obligations under the Agreement. This legislation is a good faith implementation of the commitments we undertook during the negotiation of the Agreement.

In addition to Australia's existing implementing legislation, I wish to advise you of further areas where my Government will introduce legislative change or regulations. I have also provided, by way of attachment to this letter, further information on how Australia's implementing legislation will operate in several areas of interest to the United States. In relation to the specific issues:

1. Criminal Offence Provisions

We will introduce legislation to correct the unintended narrowing of criminal offence provisions by requiring that an infringer be shown to have acted 'by

way of trade *or* with the intention of obtaining a commercial advantage or profit', rather than '*and* with the intention of obtaining a commercial advantage or profit.' This correction will be made in all provisions which contain the new commercial advantage or profit clause.

2. Temporary/Incidental Reproductions

We will introduce legislation to clarify the scope of the incidental reproduction exception by inserting the terms 'temporary' and 'necessary' so that the exception only applies to a temporary reproduction incidentally made as a necessary part of a technical process of using a copy of copyright material.

The exception will be further limited so that it will not apply:

- if the reproduction is made from an infringing copy
- if the copy from which the reproduction is made was made in another country, but would be an infringing copy if it had been made in Australia; or
- if the act of using the copyright material that resulted in the making of the temporary reproduction was itself an infringement of the copyright in that material.

This means the exception will only cover incidental temporary reproductions such as those made in the random access memory of digital devices (such as computers, DVD players and CD players) for normal legal use of legal copies of a copyright product. It will not cover temporary reproductions made while using pirated copies of copyright product or while using legal copies of copyright product in a manner that infringes the copyright in that product.

The Government will also introduce an additional clarification to specify that the exception does not cover any subsequent use of the temporary reproduction outside the original technical process in which it was made. These changes ensure that the exception cannot be used for the subsequent distribution of reproductions of copyright product.

3. Copyright Term Transitional Provisions

We will amend the copyright term extension transitional scheme by introducing a limit on the transitional period within which the use of material which would otherwise have come out of copyright is allowed, unless blocked by the copyright owner. The amendment will place a limit of two years from entry into force during which uses of works under agreements finalised before 16 August 2004 are protected and, if blocked by the copyright owner, attract an obligation to pay compensation to the user. Any such use outside this two year period will not be protected and refusal to license such use will not attract an obligation to pay compensation.

Further, the amendment will clarify that, where a user is prevented from continuing the use of copyright material during the transition period, any compensation payable is confined to restitution for costs incurred.

4. ISP Liability Provisions – Knowledge Requirement and Expeditious Takedown

We will introduce legislation to clarify that ISPs will be required to expeditiously takedown material if they have actual or constructive knowledge of infringements. Under our existing implementing legislation ISPs will be denied access to the safeharbours if they control, initiate, or direct infringements.

The amendment will also remove the current definitions of ‘directly attributable’ and ‘financial benefit’. The legislation will state that, in the event of legal action, in determining whether a financial benefit is directly attributable to the infringing activity, a court must consider whether the ISP’s activities were outside normal industry practice or whether the financial benefit was greater than that which would usually result from charging in accordance with accepted industry practice. If it finds the financial benefit is directly attributable the ISP will be denied access to the safeharbours.

The Regulations relating to the ISP liability will include a regime for notice and expeditious takedown.

5. End-user piracy

We assure you that Australia’s criminal provisions cover all acts of infringement on a ‘commercial scale’. We will introduce a further legislative amendment to make clear that the making of an article for commercial advantage or profit, where that person knew or ought reasonably to have known that the article is an infringing copy of a work, would be a criminal offence.

6. Pharmaceutical patent notification

We have further explained how the new notification process fits into the arrangements for the Therapeutic Goods Administration and Pharmaceutical Benefits Scheme listing processes already in place. We assure you that, through the operation of these arrangements now and in the future, the advance notification required by section 26B(1)(b) of the Therapeutic Goods Act will be given prior to entry into the marketplace to allow patent holders sufficient opportunities to apply to a court for injunctive relief to prevent the entry into the marketplace of potentially infringing products.

7. Encoded satellite signals

We have provided further details in an attachment to this letter explaining the scope and strong deterrent ability of our new civil remedies for reception of

pirated pay TV signals in the home – and our comprehensive criminal sanctions for any further use of such pirated signals.

I am also able to inform you the Government will introduce legislation to provide that criminal penalties will apply where an encoded broadcast has been decoded without the authorisation of the broadcaster and a person receives the decoded broadcast and uses, or authorises the use of, the broadcast either by way of trade or with the intention of obtaining a commercial advantage or profit.

As a result of approaches from Australian stakeholders, the Government will shortly undertake, as a separate exercise, a review of our domestic policy relating to criminalisation of all forms of satellite signal piracy, including unauthorised distribution or receipt of signals by commercial establishments and within the home, that shall conclude no later than 1 July 2005.

Drafts of the legislative amendments are attached. The Government intends to introduce these amendments into the Parliament before the end of 2004.

In addition to these further legislative changes, the Government will submit the regulations relating to ISP liability to Executive Council in December 2004 and they will be gazetted soon after. Regulations dealing with the liberalisation of Australia's foreign investment screening policies and allowing foreign life insurers to operate in Australia through branches were approved on 4 November.

I also note the concerns you have raised regarding amendments relating to actions to enforce patents, that were made to the *Therapeutic Goods Act*, at the time that the *US Free Trade Agreement Implementation Act 2004* was being debated in the Australian Parliament and that you have reserved your rights in relation to those provisions.

Our Governments have the common objective of fully and faithfully implementing our respective commitments under the Agreement, recognizing that reasonable differences may exist over interpretation of those commitments. Thus, bringing the Agreement into effect is without prejudice to any future dispute that may arise regarding compliance of our respective laws and other measures with the Agreement, including the laws and other measures referenced in this letter.

On the basis of the further information provided in this letter, I seek your agreement to proceed to exchange notes setting out our mutual agreement to bring the Agreement into force on 1 January 2005.

Yours sincerely



MARK VAILE