SUPPLEMENTARY SUBMISSION BY

CSR LIMITED

TO THE COMMITTEE OF REVIEW
OF THE COMPETITON AND AUTHORISATION PROVISIONS
OF THE TRADE PRACTICES ACT

18 July 2002

SUMMARY

This submission supplements CSR Limited's original submission dated 12 July 2002 (designated No. 097 by the Committee).

It provides examples and further comment in support of CSR's contention that third line forcing should be made subject to a substantial lessening of competition test.

While some of the examples may appear complex and esoteric, they are of real practical and commercial significance not only to CSR and its competitors in the building industry but also to companies in other industries.

THIRD LINE FORCING

In its original submission CSR stated that,

- in its experience, the prohibition against third line forcing is not well understood in the marketplace and is often ignored (to CSR's competitive disadvantage because of its policy to observe the law),
- almost invariably, the prohibited conduct does not have any adverse anti-competitive effect and can be circumvented (but at considerable administrative cost and inconvenience),
- other provisions of the Trade Practices Act adequately safeguard competition and consumers against harmful third line forcing, such that the offence does not need to be a *per se* one and
- the authorisation procedure for third line forcing is expensive and impractical.

The following are some examples of circumstances where the existing third line forcing provisions are technical or unfairly favour some companies:

1. CSR has observed that many small builders do not appreciate that it is illegal for them to require that contractors use a specified product, which can only be acquired from a single supplier. For example, a builder cannot specify that a concrete layer must supply and lay CSR's Readymix® concrete, because it can only be purchased from CSR. However, the builder can specify that a contractor supply and install CSR's Gyprock® plasterboard, since it can be purchased from CSR and from independent distributors.
2. There are many examples of home and building owners who enter into building contracts and require their builder to use nominated sub-contractors (eg a plumber or painter) for part of the work.
3. It is unfair that third line forcing is per se illegal, but a supplier is permitted to tie or bundle its own products and services (subject to sections 45 and 46). This advantages the larger supplier, which is more likely to have other products or services that it can require a customer to purchase as a precondition of supply.
4. It is frustrating to CSR that it is not permitted to specify that some of its products, such as Readymix® concrete, be used in the construction by a builder of a building for CSR on CSR's land.

Third line forcing can be avoided in the above examples by the following arrangements:

- In examples 1 and 4, the builder and CSR respectively can supply the particular product themselves and engage the other party merely to install it.
- In example 2, the building or home owner can employ the tradesman for the particular task and the builder for the balance of the work.
- In example 3, the smaller supplier can acquire the products from the other supplier and on-sell them to the customer.

The economic outcome of these avoidance arrangements is the same as if there had been third line forcing. However, those solutions are impractical. They cause considerable administrative cost and inconvenience and, in examples 2 and 4, require that the supplier become involved in management of the construction project.

The judgements of the Full Federal Court in *Queensland Aggregates Pty Ltd v Trade Practices Commission* [1981] FLR 314 and *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* [2001] FCA 1075 illustrate the difficulties in the practical application of the third line forcing provisions. This is largely due to the very broad definitions of "services" and "supply" in section 4 of the Act.

If third line forcing is not amended to be made subject to a competition test, CSR submits that the definitions of "services" and "supply" in section 4 of the Act should be amended so that third line forcing does not prohibit situations like those in the above examples (where the "service" is no more than the conferring of a (financial) benefit). So, by way of illustration, in example 2, the award of the building contract by the homeowner would no longer amount to the supply by the homeowner of a service, within the meaning of section 47(6) of the Act, to the builder.

Examples 1, 2 and 4 give rise to practical difficulties for CSR in having the third line forcing authorised — while the conduct is in CSR's interest, it cannot apply for an authorisation of it. CSR cannot notify because there would be no contravention of section 47 by it (although it would be encouraging the builder's contravention of that section).

Further, the system for third line forcing notifications is costly, unwieldy and inefficient. Many builders would be involved in the situations envisaged above and each of those builders would have to separately notify the third line forcing conduct for each contract.

In addition, there is the time and expense of preparing a notification. The current filing fees for third line forcing are $100 for an individual or a proprietary company and $1,000 in all other cases (eg public companies such as CSR). The $1,000 fee can be reduced to $200 for related additional notifications. However, in order to be a related additional notification the additional notification must be related to conduct in the same market (or a closely related market) and must be filed within 14 days of the first (full fee) notification.

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