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Submission to the Review of the Competition Provisions of the Trade Practices Act

Fitness Victoria requests that:

1. In relation to tests of whether action damaging to competition has been taken, that the test of "*purpose*" should be changed to a test of "*effect*". That is, instead of seeking to prove the *purpose*, aggrieved parties should only have to prove the *effect*.

2. Action be taken to facilitate and assist small businesses in bringing Trade Practice Act actions against larger organisations and companies. The experience of affected health and fitness centre clearly shows that smaller businesses have difficulty bringing actions and, when they do, virtually no relief is provided.

Fitness Victoria's concern relates to the unfair competition that private health and fitness centre operators are increasingly facing from newly developed local government owned recreation facilities. Also of concern is the situation where Councils offer the use of a range of recreational opportunities such as golf, gymnasium and swimming pools for less than private enterprise can offer just a gymnasium.

The specific problem emerges when in a community where one or more private health and fitness centres are already operating; the local Council decides to build (or redevelop) a swimming pool. These swimming pools generally meet an unmet local need, are not competing against any existing private facilities, and are therefore a welcome addition to the community's recreational infrastructure and in line with the Council's community service obligations.

However, given the enormous cost of building a community swimming pool, combined with the fact that they generally run at a significant loss, more and more local Councils are seeking to offset the cost by adding revenue-generating facilities to the swimming pool. These facilities usually include gyms, aerobic facilities, squash courts etc. It is these facilities that are often in direct competition with privately owned facilities already established in the area.

There are numerous circumstances in which these Council facilities have an unfair advantage over private operators:

- when legitimate ratepayer subsidies to the loss-making pool are merged into the overall accounts of the recreation facility, enabling far lower gym memberships or squash court fees than are commercially viable and able to be offered by private operators;
- when the gym facility, by virtue of it being Council-owned or housed in the new Council recreation facility, has access to lower than commercial rates of interest on borrowings, or rent;
- when local Councils use mail-outs to ratepayers and Council publications to attract new gym memberships, without offering the same access to existing private operators; and
- a number of other unfair advantages, purely by virtue of being local government owned.

The Victorian Government's Competitive Neutrality Complaints Unit homepage even cites as a case study the very scenario of a council-owned recreation centre. The investigation into this complaint – which is virtually identical to the scenario outlined above and which is currently happening in many locations across Victoria – found that the principles of competitive neutrality were not being correctly applied. (http://www.dtf.vic.gov.au/ncp/cn_cases.htm)

An appendix contains the case history of complaints filed by health and fitness centre owners in Victoria. Admittedly, not all involved a breach of competitive neutrality policy but the fact also is that no centre owner has been provided with any relief where there has been a breach.

The following text of a letter that the Association sent to Professor Alan Fels, Chairman of the Australian Competition and Consumer Commission sets out Fitness Victoria concerns on this issue.

Dear Professor Fels

Health and fitness centres and competitive neutrality

The purpose of this letter is to seek a meeting with you to explore ways in which some relief can be found for owners of health and fitness centres, adversely affected by unfair competition from nearby centres supported by municipal councils.

The fundamental issue is this: Over the past years, legislation and agreements between the States, have been established to ensure that competition is fair and based on the so-called level playing field. Currently, several health and fitness centre operators are facing unfair competition from nearby municipal councils. Despite the obvious validity of some of these cases, any assistance dangles frustratingly out of their reach. The law is on our side but the private owners cannot get a firm enough grasp on remedial action to have any effect. As one health and fitness centre suffers and eventually closes under the pressure and the owner gives up on obtaining legal or legislative relief, another health and fitness centre in another part of the State starts to face the same problems.

....

Following a conference with Minter Ellison Lawyers, it appears that there are two streams of legal principle. The first is competitive neutrality, but this seems to embody mere principles which are held together through the will of the States. Clearly the implementation of competitive neutrality depends on the work of an under-resourced unit and has only provided extremely slow and superficial assistance to health and fitness centres owners who have sought assistance.

The second stream is Section 46 of the Federal Trade Practices Act. In the case of a municipal council, we understand there would need to be an detailed analysis of the market power and the impact of the use of that power. This is easier to substantiate in a smaller community like a country town.

The aggrieved owners of health and fitness centres appear to be faced with several options. They include:

- *Fitness Victoria could argue to the State Government that it should properly implement the competition guidelines. This is a faint hope at best.*
- *It could be argued that the National Competition Policy needs to be codified into law or otherwise given some teeth, but this is tall order in the circumstances.*
- *It might be possible to encourage the Treasury to review the fitness industry arrangements as part of the audit of competition policy.*
- *The case of a carefully selected health and fitness centre owner who has suffered a clear misuse of market power could be presented to the ACCC. This could be a case of where a Council centre pushes prices down below that charged by a competitor with the purpose of causing damage. We have been advised that in these cases, the best source of evidence is a "mole" or disaffected former employee of a Council. It would be an individual case that needs to be presented.*

We understand that the ACCC has argued that the test of "purpose" should be changed to a test of "effect". That is, instead of seeking to prove the purpose, aggrieved parties should only have to prove the effect. We would support such a change but many health and fitness centres could be crippled before any change in legislated.

To say some health and fitness centres are at their "wits end" is not an understatement and a discussion with you of appropriate directions would be very much appreciated.

The ACCC subsequently replied and this response further highlights the difficulties faced by small businesses bringing Trade Practice Act actions.

The letter stated:

"Thank you for you letter of 24 April 2002 in which you request a meeting with Professor Fels to discuss possible relief for owners of health and fitness centres affected by what you consider to be unfair competition from nearby centres supported by municipal councils. I have been asked to respond on behalf of Professor Fels.

"You are concerned that several health and fitness centres, which your organisation represents, are facing unfair competition from operators linked to municipal councils. You indicate that you have discussed this matter with a number of people, including the Hon. Roger Hallam, who suggested that you seek assistance from this office. Furthermore, you met with Minter Ellison Lawyers who advised that there are two aspects to this matter: competitive neutrality and section 46 of the Trade Practices Act 1974 (the "Act").

"You concerns in respect of the impact of centres supported by municipal councils on your members' businesses raise more competitive neutrality type and policy issues (that are outside the jurisdiction of this office) rather than issues for consideration under the Act. The

Council of Australian Governments has agreed to the principles governments will follow in relation to the consideration of any net competitive advantage enjoyed by government businesses when they compete with the private sector. That is, government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.

"The Victorian government has established a Competitive Neutrality Complaints Unit (CNCU) within its Department of Treasury and Finance. You may wish to contact them about your concerns. You may also wish to contact the National Competition Council, which may be able to provide assistance with the implementation of competitive neutrality principles.

"There are instances where conduct by a government or government affiliated business with a substantial degree of market power may raise concerns under section 46 of the Act as well as competitive neutrality concerns.

"Section 46 of the Act prohibits a corporation that has a substantial degree of power in a market from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into any market or deterring or preventing a person from engaging in competitive conduct in any market (for your information, there is no indication at this time if or when an 'effects' test will be included in section 46).

"In order for this office to assess the section 46 aspect further, you will need to provide case specific information that would support the various elements of section 46 in substantiation of a potential breach.

"Should you have such information, I would be prepared to consider the matter further in the course of a meeting with you. In the meantime, I suggest you pursue the competitive neutrality principles aspect of your complaint with the above mentioned authorities."

In further discussion with Tom Fahy, Regional Director of the ACCC, Fitness Victoria was advised that:

- Parts of the Trade Practices Act are currently being reviewed. At present an action has to prove that the "*purpose*" of the Council was anti-competitive behaviour. Without information being provided by an insider, this is very difficult to obtain. One part of the review is to consider whether action could be taken on the "*effect*" of anti-competitive activity. It could be worthwhile making representations to this review.
- In preparing a case for the ACCC under Section 46, there are four key elements that need to be considered:
  - The definition of the market. This is why Minter's suggested that we should look at a case in the rural and regional Victoria where there are no overlapping markets.
  - The Council has to have had access to a substantial degree of market power and this must be defined.
  - It needs to be shown that the purpose of the Council's action was to act in a prescribed manner, ie, a manner prescribed in the Act as being illegal.
  - It needs to be shown that the Council took advantage of its market power for a prescribed purpose.

It was expected that a considerable amount of work would have to be put into gathering the required information and Minter Ellison indicated that their involvement in a case would cost in the order of

$20,000. Clearly a small business, already adversely affected by damaging competition, could not afford to fund the time and cost of this significant amount of work. In such cases, the adversely affected party gains no relief and the perpetrator is not held accountable for their actions. There is no justice in this outcome.

At previously indicated, Fitness Victoria requests that:

1. In relation to tests of whether action damaging to competition has been taken, that the test of "*purpose*" should be changed to a test of "*effect*". That is, instead of seeking to prove the *purpose*, aggrieved parties should only have to prove the *effect*.

2. Action be taken to facilitate and assist small businesses in bringing Trade Practice Act actions against larger organisations and companies. The experience of affected health and fitness centre clearly shows that smaller businesses have difficulty bringing actions under the Trade Practices Act. Even when they have competitive neutrality assessments conducted, and the Council is proven to be in breach, virtually no relief is provided.

Fitness Victoria
2 August, 2002

Competitive Neutrality Case History in relation to health and fitness centres in Victoria

Note that in each case, no relief has been provided to owner of the private centre.

Complainant and complaint	CNCU conclusion	Relief provided to owner of private centre
Complaint by Actop (Action Leisure Centre) against Warrnambool Council	It was too early in the development of the aquatic centre to determine if the Council would be in breach of CN Policy. CNCU to follow up further	**Nil**
Private leisure centre owner against Mildura Waves which is owned by Mildura Council	Council was in breach of CN Policy.	**Nil**. Council required to make changes necessary to abide by CN Policy
Private leisure centre owner against Coburg and Fawkner Leisure Centres which are owned by Moreland Council.	Council not in breach of CN Policy. (The private centre owner notes that the Council has been found to be in breach of CN policy for each of the last 3 years.)	**Nil**. Suggested that Council make changes to more clearly abide by CN Policy
Private leisure centre owner against Mill Park and Thomastown centre which are owned by Whittlesea Council	Council was in breach of CN Policy.	**Nil**. Council required to make changes necessary to abide by CN Policy
Private leisure centre owner against Melbourne Sports and Aquatic Centre.	No breach of CN Policy was established although the centre was advised that its costing and pricing should be more transparent.	**Nil**. Suggested that Council make changes to more clearly abide by CN Policy

CNCU: Competitive Neutrality Complaints Unit
CU: Competitive Neutrality
Source: Competitive Neutrality Complaint Investigations - Summary of findings. Victorian Department of Treasury and Finance website.