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Secretary
Trade Practices Act Review
C/- Department of the Treasury
Langton Crescent
PARKES ACT 2600

TRADE PRACTICES ACT REVIEW JAMES COOK UNIVERSITY SUBMISSION

Executive Summary

1. James Cook University operates generally within the market for provision of tertiary education to students both within Australia and overseas.
2. Along with many other obligations and demands, the University must ensure compliance with the *Trade Practices Act 1974* ("the Act") and in this respect has recently made a notification to the ACCC in respect of certain conduct.
3. The University recognises that third line forcing conduct is prohibited per se under the Act regardless of whether it is associated with any anti-competitive effect or purpose.
4. However it is also recognised that third line forcing can often have a neutral effect on competition and in some cases can even benefit competition in a market. In addition, the Act provides no defence for a corporation that engages in third line forcing conduct which does not cause any detrimental effect on competition in the relevant market.
5. The only protection currently available against liability for third line forcing, is through the often expensive and onerous process of obtaining authorisation or immunity via notification.
6. In the circumstances it is submitted that per se liability for third line forcing conduct is unjustified and in need of reform.

Terms of Reference

James Cook University's submission addresses the following terms of reference:

- (a) Whether the competition and authorisation provisions of the Trade Practices Act promote competitive trading which benefits consumers in terms of services and price;
- (b) Whether the competition and authorisation provisions of the Trade Practices Act inappropriately impede the ability of Australian industry to compete locally and internationally; and
- (c) Improvements to the Act, to achieve a more efficient, fair, timely and accessible framework for competition law.

James Cook University

James Cook University ("JCU") is a tertiary institution based in North Queensland, with campuses in Townsville and Cairns. The University competes on a state-wide, national and international level. It is well placed to attract international students, and currently services an international population of over 1000 students.

As a result of its regional position and role as an education provider, JCU considers that it has a social obligation to the students it services as well as to the wider general community. With limited funding, it faces a variety of pressures to perform a community service role¹ and to make social, support and recreational facilities available to students whilst complying with legislative requirements such as the *Trade Practices Act 1974* (Cth).

In addition to the provision of academic courses, tertiary students in Australia and overseas have come to expect that Universities will provide access to a range of social, cultural, sporting and academic support services. Such services are considered to be an integral part of University life and contribute greatly to a student's overall learning experience, growth and character development.

Throughout most Universities across Australia, these services are provided by representative student associations that receive the necessary funding through payment of fees by students either directly to the association or through some arrangement in which the University collects that fee on enrolment. At JCU, payment of association membership fees are an obligation of enrolment, and ensure that students are provided with access to a wide range of flexible services during the entire calendar year by the association. JCU has notified this conduct to the Commission pursuant to section 93(1) of the Act.

Regulation of Competition by the Trade Practices Act

Part IV of the Act is generally designed to regulate anti-competitive conduct and discourage unfair business practices that lead to inefficiencies and inhibit competition². Most of the conduct at which Part IV is aimed, is subject to a "substantial lessening of competition" test and will only contravene the Act if there is an associated anti-competitive purpose, effect or likely effect³.

However Part IV also contains a number of "per se" provisions which prohibit certain conduct absolutely without having consideration to evidence about the effect on competition. Third line forcing conduct is

¹ Nelson, MP, "Higher Education at the Crossroads" *Ministerial Discussion Paper*, April 2002: Canberra, paragraph 73 - 77

² *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) ATPR 40-318 at 43,917; Lipton, JD., "Third Line Forcing in Australia: Current Problems and Future Directions" (1996) 4 *TPLJ* 77 at 77

³ Sections 45(2)(a)(ii) and (b)(ii), 47(10) of the *Trade Practices Act*

the only exclusive dealing provision that attracts this type of per se liability. Essentially, subsections 47(6), (7), (8)(c), and (9)(d) of the Act prohibit a corporation from:

- supplying goods or services on the condition that the purchaser acquires goods or services from another person;
- refusing to supply goods or services to a purchaser for the reason that the person will not acquire goods or services from another person;
- granting or renewing a lease on condition that another party to the lease acquire goods or services from another person; or
- refusing to grant or renew a lease for the reason that another party to the lease will not acquire goods or services from another person.

There is no requirement, as with other types of exclusive dealing, that the conduct have the purpose, or have, or be likely to have the effect of substantially lessening competition in order to contravene the Act⁴. In addition, there exists no defence for a corporation that engages in third line forcing conduct that does not cause any detrimental effect on competition in the relevant market. In the extreme case, it is possible for a corporation to be held liable for breach of section 47 even though the conduct has a positive effect on competition.

This legislative framework is largely the result of an apparent perception that third line forcing is so inherently likely to damage competition that it justifies per se liability⁵. On the contrary, JCU's submission is that absolute liability is unjustified and unfair in the circumstances. It is recognised that third line forcing can often have a neutral effect on competition and in some cases can even benefit a market, for example, by ensuring efficient operation and maintenance of a product, promoting high standards of quality and protecting goodwill⁶.

In JCU's case, the conduct of requiring students to pay an association services fee upon enrolment, allows the association to provide a subsidised range of services and facilities to students all year round (regardless of fluctuating demand). Such services are unlikely to be adequately provided by any private operator. This conduct not only enables the JCU to meet social objectives and pastoral care requirements for students but it allows the University to compete more viably in international markets.

It is widely recognised that International students have a strong need for adequate support services and independent representation at Universities⁷. The inability of Australian Universities to guarantee the availability of such support services may not only damage their reputation overseas but may also place them at a competitive disadvantage when competing with the United Kingdom, Canada and the United States where universal membership to student organisations is widely recognised⁸.

Based on JCU's experience, the rigid and onerous requirements of the Act in relation to third line forcing, have the potential to impede its ability and the ability of the Australian tertiary education industry to compete internationally. This is because the only real protection from liability for third line forcing is through cessation of the conduct (albeit competitively beneficial) or the expensive and onerous process of notification or authorisation.

⁴ Section 47(10) does not apply to third line forcing

⁵ Explanatory Memorandum to the *Competition Policy Reform Act*, 29 March 1995, page 10

⁶ Lipton, JD., "Third Line Forcing in Australia: Current Problems and Future Directions" (1996) 4 *TPLJ* 77 at 78

⁷ Interview with John Byron, President of the Council of Australian Post Graduates Associations Incorporated, 13th November 2001, with Roberts Nehmer McKee Lawyers, Townsville

⁸ Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into the *Higher Education Legislation Amendment Bill 1999* Report, 25 May 1999, Minority Report, para 1.29

Limitations in the Effectiveness of Authorisation and Notification

In order to obtain authorisation and avoid potential fines of up to \$10 million dollars, it is necessary to make detailed submissions to the Australian Competition and Consumer Commission about an extensive range of issues such as relevant market characteristics, how the conduct operates, and resulting public benefits⁹. The process is quite expensive considering inevitable legal fees, consultant charges¹⁰ and application lodgement fees of \$7,500.00 and \$1,000.00 for authorisation and notification respectively. To date, JCU have spent significant time and money associated with lodging its notification, obtaining legal advice, preparing and responding to submissions, liaising with the Commission, and collating information.

Although these mechanisms allow a corporation to obtain immunity from court action for third line forcing, they are based on the ground of net public benefit rather than competition principles. In order to obtain authorisation, it must be shown that a sufficient level of public benefit is created by the conduct to justify allowance¹¹. Similarly, the rule for notification is that immunity can be removed by the Commission if it is satisfied that the likely public benefit of the conduct will not outweigh any likely public detriment¹².

Although the Commission will consider whether such benefit will outweigh any anti-competitive detriment, its determination is not necessarily dependant on competitive effect or purpose. Furthermore, it is possible that even if the conduct has no purpose, effect or likely effect of substantially lessening competition, it may lack sufficient public benefit to justify attainment of authorisation or immunity by notification.

Judicial Consideration

It is evident that Courts are currently restrained from considering the anti-competitive effects of third line forcing conduct because of the rigidity of the per se prohibition and the fact that no relevant defence is available.

In recent times this seems to have lead Courts to take a literal and narrow approach to interpretation of section 47(6)¹³. In *Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd*¹⁴ the High Court determined that Castlemaine did not engage in third line forcing by specifying that beer sold and delivered to its customers had to be delivered by a certain supplier, QRX. Castlemaine acquired the cartage services directly from QRX and on-sold then to its customers. As a result, it was held that the product supplied was not two separate supplies of beer and transport but rather the supply of "delivered beer".

This decision has been criticised for being too literal and for rendering the provision meaningless (by allowing corporations to simply avoid contravention by changing the way they contract with a second product supplier)¹⁵. It has been suggested that the Court has taken this approach to avoid unfair results where third line forcing conduct does not have a detrimental effect on competition¹⁶.

⁹ ACCC, *Guide to Authorisations and Notifications*, p 8

¹⁰ Landrigan, MG. "Vertical Price and Non-Price Restraints in Australia and the US", (1997) 25 *ABLR* 312 at page 325

¹¹ *Trade Practices Act 1974* (Cth) s90(8)

¹² *Trade Practices Act 1974* (Cth) s93(3A)

¹³ Lipton, JD., "Third Line Forcing in Australia: Current Problems and Future Directions" (1996) 4 *TPLJ* 77

¹⁴ (1986) 162 CLR 395

¹⁵ Hurley, A., "The Castlemaine Tooheys Case and the Interpretation of Third Line Forcing" (1987) 61 *ALJ* 415

¹⁶ Lipton, JD., "Third Line Forcing in Australia: Current Problems and Future Directions" (1996) 4 *TPLJ* 77 at 80

Recommendations for Reform

One way to address these problems is to incorporate a defence or exemption into the Act; one that can be relied on by corporations which engage in third line forcing for a legitimate competitive purpose or common commercial practices that are unlikely to harm competition. This will allow corporations to avoid the onerous authorisation and notification procedures without necessarily facing liability.

Another option is to apply the substantial lessening of competition test to third line forcing in line with other exclusive dealing provisions. This would encourage focus on the legislative aims underlying Part IV. Both these options would allow the Courts, as well as the Commission, to balance economic detriments and benefits of vertical restraints¹⁷.

Yours sincerely

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¹⁷ Landrigan, MG. "Vertical Price and Non-Price Restraints in Australia and the US", (1997) 25 *ABLR* 312 at 324