

**AUSTRALASIAN ASSOCIATION FOR INSTITUTIONAL
RESEARCH**

1998 INTERNATIONAL CONFERENCE

***The Impact of Competition Policy and Law on
Higher Education in Australia***

24 November 1998

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Thank you for inviting me here today to discuss with you the impact of the Australian competition laws on the higher education and VET sectors in Australia. My presentation will focus on the extended reach of the competition laws, the issue of whether universities can be said to be operating within the realm of trade or commerce, and the practical application of the competition laws to university activities.

Hilmer and the Competition Policy Reforms

Competition policy should be seen as part of the much broader agenda of micro-economic reform. The aim of micro-economic reform (and of competition policy as part of it) is to improve the efficiency with which resources are used, thus contributing to living standards. An important aspect of competition policy is the removal of legislative obstacles to competition.

In 1991 the Council of Australian Governments (COAG) agreed to examine a national approach to competition policy. The first step in this process was the establishment in the following year of the National Competition Policy Review by a committee chaired by Professor Fred Hilmer.

On completion of the Hilmer Committee's report in August 1993, Commonwealth, State and Territory governments began extensive negotiations on implementation of its recommendations. The recommendations made by the Hilmer committee were generally accepted by COAG in April 1995, and in June 1995, the processes culminated in the *Competition Policy Reform Act 1995*. The main reform elements, to be implemented progressively, are as follows:

- The *Trade Practices Act* was amended so that, with enabling State and Territory legislation, the prohibitions on anti-competitive conduct contained in Part IV apply to all businesses in Australia. Constitutional limitations had previously prevented application of the competitive conduct rules to unincorporated businesses operating solely in intra-State trade.
- A new Part IIIA was added to the *Trade Practices Act*, and came into effect on 6 November 1995, establishing a legislative regime to facilitate access to the services of certain infrastructure facilities of national significance.
- 'Shield of the Crown' immunity for State and Territory Government businesses was removed, with Government Business Enterprises (known as "GBEs") being subject to the Act from 21 July 1996.

This last element is integral to our discussion today.

New sections were inserted in the *Trade Practices Act* clarifying what activities of the Commonwealth, State and territory Governments will not be regarded as 'business' and hence not caught by Part IV. In brief, these activities include:

- the imposition or collection of taxes, levies, or fees for licences;

- a variety of intra-government transactions; and
- the acquisition of primary products by a government body under Commonwealth, State or Territory legislation where such acquisition is non-discretionary.

The reform legislation was complemented by two inter-governmental agreements:

- (1) **The Conduct Code Agreement** This sets out processes for amendments to the competition laws of the Commonwealth, States and Territories.
- (2) **The Competition Principles Agreement** This sets out:
 - the principles that governments will follow in relation to prices oversight of GBEs;
 - structural reform of public monopolies;
 - review of anti-competitive legislation and regulations;
 - access to services provided by significant infrastructure facilities; and
 - the elimination of any competitive advantage or disadvantage experienced by government businesses when they compete with the private sector (competitive neutrality).

Market Characteristics of Higher Education

The question must thus be decided as to whether services provided, and activities undertaken, by universities are commercial in nature. Traditionally universities were seen as providers of education services, in one guise or another, so that their essential characteristics were viewed as non-market in nature. Even many of the commercial activities they did carry out, such as consultancy work and research and development projects, were seen as contributing to, or enhancing, the knowledge base and level of human capital held by the university rather than being carried on for commercial motives. In most OECD countries, the role of universities has changed significantly and governments and industry now see formal education as an arm of economic policy and a part of the social process of commodity production.

The OECD argued in 1990 that there are two opposed economic interpretations of higher education. The first is that universities are essentially service institutions provided by the community for its own good. The second is that they are commercial enterprises selling educational services for the benefit of individuals. This distinction is applicable for both their teaching and research functions. There has, however, been a move away from the concept of teaching and research activities undertaken by universities in the normal course of their work for the benefit of society as a whole, towards the idea that they are something that bring advantages to particular groups and individuals who ought, therefore, to pay for them.

Over the last decade, the Australian higher education sector, in common with many areas of the public sector, has been subject to a number of pressures which are forcing universities to re-evaluate their notions of academic enterprise. These pressures include issues relating to accountability, competition from other education service providers and the internationalisation of higher education, the impact of new information technology, mass participation in higher education, and increasing constraints on public sector expenditure.

The increasingly competitive higher education environment has led, in tandem with moves by government, to ever-increasing attention to quality assurance mechanisms and the repositioning of the student as a customer or client; in short, the commodification of education. With respect to the National Competition Policy, given the implications likely to flow from the establishment of market systems for higher education in general, the critical issue is to determine just what activities undertaken by universities take place within a market framework and are therefore considered as commercial activities, and which activities remain core governmental functions.

In a practical sense, many of the activities engaged in by universities amount to providing goods and services in exchange for reward. This means that universities are engaging in trade or commerce, and are thus subject to, at least, Part IV of the *Act*. In terms of Part V of the *Act*, a university must fall within the definition of either a foreign, financial or trading corporation if it is to be bound by those provisions.

The Commonwealth has pursued, over recent years, an active policy of encouragement and enablement designed to increase the proportion of university income generated from non-Commonwealth sources. Universities, and in some cases the student unions or guilds of those universities, undertake many activities which involve the exchange of goods or services for reward and are conducted in a systematic and regular manner.

Rather than attempt to identify each type of commercial activity which may be undertaken, it is useful to categorise the activities under three broad headings:

- teaching (principally overseas and postgraduate full fee-paying students, non-award and tailored courses and, in some instances, domestic undergraduate students);
- consultancy (including professional services and contract research); and
- trading (including investments and on-campus retail outlets).

Application of Competition Policy to Universities

Some concerns have been expressed in the tertiary education community about the application of competition policy to that sector. The general thrust of the

concerns appeared to be that, because of the special role universities play in Australian economic, social and cultural development, exposing universities to the national Competition Policy was inappropriate and had the potential to have far greater deregulatory impacts than intended. The inevitable outcome would be an unregulated and market-based higher education sector which, when coupled with competitive tendering and outsourcing, would lead to a compromising of professional standards, a lessening of job security and conditions, and a deterioration in the quality of the education provided to students.

It has to be emphasised that a clear distinction needs to be drawn between applying the National Competition Policy to the specific commercial activities of universities and the much wider policy decisions taken by governments on the nature, structure and operations of the university sector. Future developments on issues such as privatisations, competitive tendering and outsourcing, and commercialisation of teaching, while clearly of fundamental importance to the sector, will be decided by governments and the universities.

The intention is clear, therefore, that to the extent that universities undertake commercial activities, those activities should be subject to the provisions of the *Act* and the Competition Principles Agreement.

Competitive Neutrality

Competitive neutrality was identified in the Hilmer report as an important contributor to the competitive process. The objective of competitive neutrality is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities. In short, government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These advantages may occur through such enterprises having, for example, tax exempt status or lower costs of finance. Public enterprises may also have competitive disadvantages through higher accountability requirements. The competitive neutrality provisions therefore relate to *net* competitive advantages enjoyed by the enterprises.

Clause 3 of the Competition Principles Agreement provides two options for governments:

1. A corporatisation model for significant GBEs; and
2. A competitive neutrality pricing regime for agencies, which includes universities, which undertake significant business activities as part of a broader range of functions.

The Commonwealth Government, in its Competitive Neutrality Statement, considered what criteria must be met in determining which activities are business activities. These criteria are that:

- there must be user-charging for goods and services;
- there must be an actual or potential competitor; and
- managers of the activity have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.

The user charging requirement identifies those activities which are essentially commercial. It is not relevant whether the full cost recovery or profits are achieved by the activity; indeed, it is precisely situations of loss, or something less than full cost recovery, which raise the most serious competitive neutrality concerns.

On the basis of the Commonwealth's policy statement it appears that the Commonwealth government, through Treasury, considers that all undergraduate services which involve some user charge, including HECS, will be considered a commercial activity and therefore subject to the competitive neutrality principles. The pricing regime which universities are likely to be requested to introduce will involve any or a combination of the following:

- a price rise to adequately reflect costs and commercial rates of return;
- the elimination of sources of net competitive advantage;
- levying of appropriate charges for benefits received; and
- full compliance with all tax systems and other regulatory requirements.

In assessing what should be included with full costs, Treasury has indicated that the following items will need to be considered:

- cost of capital, including a rate of return on equity and the cost of debt;
- depreciation on plant and equipment and similar non-current assets;
- wage and labour on-costs;
- costs of materials;
- attributable share of common costs;
- State and Commonwealth tax liabilities;
- debt guarantee fee; and
- regulatory costs associated with any regulatory that would apply to the agency if it were not an exempt public sector body.

This notion is perhaps best illustrated by its application to consultancy arrangements existing in Western Australia.

Following concerns raised by the Office of the Auditor General regarding the lack of financial accountability and costing directions for university consultancies, all Western Australian universities have reviewed their respective practices. Indeed, two universities in that State have issued formal guidelines which require all consultancies to be costed on a comparable basis to private consultancy rates. There appears to be a growing trend towards channelling all consultancy work

through a commercial arm. For example, Curtin University recently introduced a new policy which identified Curtin Consultancy Services as the sole approved body for delivery of university consultancy services, and transferred responsibility for fee-for-service contracts from the university administration to the company. The principal activities of the company have been the provision of contract research and consultancy, education and training, testing, human resource management, and marketing and commercial services, including the commercialisation of intellectual property.

Similarly, it is also apparent that Government funding for research which is only available to universities, as well as cross subsidisation within the university system, may give rise to competitive neutrality issues.

The Trade Practices Act 1974 and Higher Education

I now intend to explain a little bit about the *Trade Practices Act* and its implications for the tertiary education sector. The objectives of the *Act* are:

- to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, and resulting in a greater choice for consumers (and business when they are purchasers) in price, quality and service; and
- to safeguard the position of consumers in their dealings with producers and sellers and business in its dealings with other business.

Essentially, the *Act* is divided into the following major parts:

- Part IV, which deals with anti-competitive practices;
- Part IVA, which deals with unconscionable conduct;
- Part V, which deals with unfair trading practices (consumer protection);
- Part VA, which deals with the liability for defective goods; and
- Part IIIA, which deals with access to natural monopolies.

The Competitive Conduct Rules

Broadly speaking, Part IV of the *Act* prohibits the following anti-competitive practices:

- anti-competitive agreements and exclusionary provisions, including price fixing agreements, market sharing arrangements and primary or secondary boycotts (sections 45-45D);
- misuse of market power (section 46);
- exclusive dealing (section 47);
- resale price maintenance (sections 48, 96-100); and
- mergers which would have the effect, or likely effect of substantially lessening competition in a substantial market (sections 50 and 50A).

Part VII of the act contains the authorisation provisions. These provisions give the Commission the power to grant immunity for some arrangements or conduct that might otherwise breach Part IV.

Section 45

I now intend to briefly discuss each of the major provisions that are contained within Part IV of the *Trade Practices Act*. Sections 45 to 45E deal with a variety of prescribed agreements and anticompetitive arrangements between businesses, including:

- Agreements which involve, for example, market sharing or which restrict the supply of goods are prohibited if they have the purpose or effect of substantially lessening competition in a market;
- Agreements that contain an exclusionary provision. Sometimes referred to as a “primary boycott”, these are agreements between persons in competition with each other which exclude or limit dealings with a particular supplier or customer or a particular class of suppliers or customers;
- Agreements that fix prices. This includes agreements which purport to “recommend” prices but which in reality fix prices by agreement; &
- Secondary boycotts, which are prohibited by s.45D.

In relation to the types of non-academic commercial activities undertaken by universities, such as short course provision, consultancies, and trading and investments it is likely that most universities appear to operate in highly competitive markets. Some university officials and staff have, however, traditionally encouraged and engaged in a degree of academic collaboration in relation to teaching services, through, for example, groups such as the Australian Vice-Chancellors Committee and various academic and professional forums. Discussions at these forums aimed at setting or stabilising prices or fees may put the universities at risk of breaching the *Act*. The *Act* is underpinned by an assumption that price is central to competition. Price or fee agreements between competitors, whether formal or informal, are opposed. It is expected that, where universities participate in the market for full fee-paying students, they will do so in accordance with the *Act*.

Another area where universities may face some difficulties is in the area of forming alliances with other universities or providers, often in response to budgetary constraints, to rationalise the range of courses taught. Agreements between businesses to share the market amongst competitors are in breach of the *Act* if such agreements have the purpose, or effect, of substantially lessening

competition in a market in which the businesses operate. Where exclusionary provisions are involved, as outlined in section 4D of the Act, market sharing may well be a *per se* breach. Sharing a market might be achieved in any of the following circumstances: on a product basis - eg, where universities agree not to sell certain courses where those courses are also provided by other institutions; on a customer basis - eg, where universities agree to allocate fee-paying students to each competitor in a market with an understanding not to poach students; on a geographic basis by agreeing not to compete outside a specified area; and on a revenue basis - eg, where universities agree to share a client base or product so that some sales or revenue position may be maintained.

Universities have a number of options open to them in cases where collaborative action or rationalisation, which may be seen as anti-competitive, is contemplated. As much of the conduct prohibited under section 45 can be authorised, one strategy is for the universities to seek authorisations for the proposed conduct on the basis that the conduct is in the public interest and outweighs any anti-competitive detriment.

Section 46 -Misuse of market power

Section 46 basically states that a corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; preventing the entry of a person into that or any other market; or deterring or preventing a person from engaging in competitive conduct in that or any other market.

Whether a corporation is regarded as having a substantial degree of market power depends on the circumstances in each case. The Court will take into account the extent to which the activities of the corporation in its market are constrained by the conduct of its competitors or potential competitors, or by the behaviour of those to whom it supplies or those who supply it, s.46(3). While s.46 prohibits the misuse of substantial market power, it does not prohibit the mere acquisition or possession of such power. Section 46 will only be breached if the corporation in question has used its market power for one of the proscribed purposes.

If the market for higher education services is considered to be national, it is unlikely that any university would be seen to have substantial market power. If the market were state or regional, however, there may well be cases, particularly if mergers and amalgamations were allowed to proceed, where a university could come to possess substantial market power.

Section 47 - Exclusive dealing

Generally speaking, the provisions in section 47 prohibit anti-competitive exclusive dealing which has the purpose of substantially lessening competition in a relevant market. One form of exclusive dealing prohibited outright by the *Act* is third line forcing, ss.47(6) and 47(7) which involves the supply of goods or services on condition that the purchaser also acquire goods or services from a nominated third party or a refusal to supply because the purchaser will not agree to that condition.

Universities, in relation to education services, generally do not acquire services nor do they supply services for re-supply so many of the exclusive dealing provisions may not have specific application to them. There has been some speculation, however, that third line forcing may impact on the ability of universities to prescribe or recommend certain textbooks but this is highly unlikely to be considered a breach unless universities nominate a specific bookseller and make it a *condition* of tuition that students purchase the textbooks from the nominated bookseller. Where universities feel there is some risk of breaching the exclusive dealing provisions, the arrangements (including third line forcing) may be protected from challenge through the authorisation or notification process.

The Commission has also investigated some matters involving alleged third line forcing involving student travel associations and agents. In many cases, this has involved the advertising of travel packages indicating that prospective passengers must take out travel insurance from nominated insurance companies. This type of conduct will breach the third-line forcing provisions of the *Act*. The Commission has issued a number of warnings to these agents, and to the wider travel agency industry generally, against any attempts to third line force products on customers. Travel agents and student travel associations must be very careful to ensure that all of their advertising is accurate. They need to be aware of their obligations and responsibilities to consumers to provide consumers, including students, with accurate information to allow them to make an informed choice.

Section 48 - Resale price maintenance

Section 48 states that a corporation or other person shall not engage in the practice of resale price maintenance. The conduct generally covers situations where a supplier attempts to induce a person not to sell the supplier's products or services at less than a price specified by the supplier; makes it known to a party that the supplier will not supply them unless the party agrees not to sell below the supplier's specified price; or entering into an agreement for the supply of goods or services containing a provision that the purchaser will not sell below the supplier's specified price.

As universities do not generally supply education services for re-supply by other parties, except perhaps in relation to joint courses, there do not appear to be any instances of university-specific activity which might constitute a possible breach of resale price maintenance.

Section 50 - Mergers and acquisitions

Section 50 of the *Act* prohibits acquisitions that would result in a substantial lessening of competition.

With respect to the international market for overseas students, a merger between two or more universities in any state is unlikely to have any impact on competition in the market. With respect to the market for domestic students, the impact a merger between two universities will have on competition depends critically upon the whether the market is judged to national or is more constrained to a state or region. This is an issue which may need to be resolved in the near future as, in the last eighteen months, a number of universities have been reported being as interested in mergers.

Intellectual Property Rights

An area of some significance for all researchers/creators is intellectual property rights. The *Trade Practices Act* makes specific reference to these. Generally innovation is pro competitive. It increases dynamic efficiency by finding new ways of responding to changes in demand conditions. New and better products are developed; new processes are introduced. As one firm in a market benefits from these innovations, others seek ways of countering the competitive advantage thus gained by also seeking to innovate.

However, under some circumstances, intellectual property rights may have anti-competitive purposes. One such purpose may be evident where access to the creation is licensed. Thus, a question arises as to the extent to which competition law should impinge on the *use* of intellectual property rights once granted. As previously mentioned, while one particular IPR may not convey significant market power, the aggregation of a number of rights may do so. Similarly, particular conduct by a rights owner without market power may have no effect on competition, while the same or similar conduct by a rights holder with market power may have a substantial effect on competition.

Section 51(3) of the *Act* currently provides a limited exemption from Part IV of the *Act* for the owners of IPRs. The exemption does not cover s 46 or s 48 and it is limited to conditions of licences and assignments insofar as they 'relate to' the IPR. The effect of the exemption is open to debate and has not been the subject of extensive litigation. Restrictions on licensees' ability to trade in competitors'

products, price fixing between suppliers of competing goods protected by IPRs, refusal to supply for one of the prohibited purposes in s 46 by a rights holder with a substantial degree of market power, or an assignment of rights resulting in a substantial lessening of competition might all breach the Act. Furthermore, the exemption is limited to existing rights and does not extend to an agreement to assign future rights, eg 'grant back' provisions. However, price and output restrictions imposed on licensees and the enforcement of importation rights would seem to 'relate to' the IPRs and hence would be covered by the exceptions in s 51(3).

The exemption by s 51(3) was considered by the Hilmer Review. As part of its submission, the then Trade Practices Commission recommended the removal of s 51(3). It was argued that the use of IPRs should be subject to the same competition rules as any other property, and that arguments regarding offsetting public benefits, such as correcting for market failures or increased efficiencies, could be considered under the authorisation and notification provisions of the *Act*. This recommendation was not adopted.

In Part IIIA to the *Act* which establishes a legal regime to facilitate access to services provided by certain facilities of national significance, "service" is expressly defined to exclude "the use of intellectual property ... except to the extent that it is an integral but subsidiary part of the service". The intellectual property exemption arose due to concerns that Part IIIA might override copyright, patent and other intellectual and industrial property laws. The section is intended to permit a limited use of intellectual property (eg manuals or instructions) which are necessary for access.

As a result of this exception, issues relating to access to intellectual and industrial property must be dealt with on a case by case basis under s 46 of the Act. As discussed in the second paper, this requires that issues of market power, use of that market power versus use of IPRs, and whether its use was for a proscribed purpose are addressed. While the ACCC considers these tests would not be insurmountable in appropriate circumstances, they would certainly be open to extensive legal and economic debate and there have not been any successful cases to date.

The Consumer Protection Provisions

I would now like to turn to a discussion of the consumer protection provisions contained in the *Trade Practices Act* and their relevance to the education sector of the economy.

- **Part V** of the *Act* deals directly with the interests of consumers (and businesses which qualify as consumers in particular transactions). It is a means of promoting fair competition by protecting consumers' rights,

especially the right to full and accurate information when purchasing goods and services. It provides an important safety net in markets where vigorous competition might tempt some businesses to cut corners to gain a competitive advantage - eg by making misleading claims about a product's value, quality, place of origin or impact on the environment.

- **Part V** of the *Act* contains a range of provisions aimed at protecting consumers and businesses that qualify as consumers by:
 - a general prohibition of misleading or deceptive conduct (**s.52**);
 - specific prohibitions for false or misleading representations (**ss. 53-65A**) - e.g:
 - **s.53** - false representations e.g. as to the attributes of thigh reducing cream;
 - **s.56** - bait advertising - offering goods or services at a particular price when, in fact, the corporation is not able to supply those goods or services at that price;
 - **s.61** - Pyramid selling - where a person makes a payment to a corporation in relation to the supply of goods or services to a consumer, or payment by a consumer for goods or services.
 - product safety provisions - The ACCC enforces the mandatory product safety standards and mandatory information standards through complaints brought to its attention, and through marketplace surveys and testing programs to determine whether products comply with the mandatory safety requirements.
 - prohibiting unfair practices (**Division 1**), including:
 - the unconscionable conduct provisions in **Part IVA** that prevent businesses from behaving unconscionably when they supply goods and services to individual consumers (**s.51AB**); and
 - when corporations are engaged in commercial transactions (**s.51AA**);
 - in addition, a new section of the *Act* (**s.51AC**) came into operation on 1 July 1998 and applies to unconscionable conduct in commercial transactions involving small business.

I will now briefly mention a couple of consumer protection matters that the Commission has been involved in that I believe contain important lessons for the tertiary education sector.

Australian Early Childhood College

The Commission took action against a College called the Australian Early Childhood College which offered allegedly accredited courses during 1997. The courses were in child care and related fields and predominantly aimed at young women. The College operated three campuses in Brisbane, Sydney and Melbourne. The courses offered by the College allegedly could facilitate students to gain employment in the child care industry (for example, a position in a child care centre or a nanny in a private home). Numerous complaints were raised with the Brisbane office of the Commission alleging misleading and deceptive conduct in relation to the provision of the above mentioned courses. Students were required to pay tuition fees for these courses, ranging up to \$13,500 for a three year Advanced Diploma course.

On 1 August 1997 the Commission instituted proceedings in the Federal Court in Brisbane seeking interlocutory injunctions against the College and two individual respondents. Subsequently the Commission joined a fourth respondent in these proceedings. The Commission is alleging that the College engaged in the following conduct in breach of the *Trade Practices Act*.

Representations Regarding Accreditation

From late 1996 onwards the College advertised through booklets, brochures and leaflets childcare training courses offered through the College during 1997. The College represented that each of the Courses offered during 1997 were accredited with VETEC (Vocational Education Training and Employment Commission of Queensland); were accredited nationally pursuant to the National framework for the recognition of training agreement; the College qualified for the use of the trade marks or logos relating to VETEC accreditation and National Accreditation in relation to the courses offered during 1997.

Other Representations and Conduct

The Commission alleged in its Statement of Claim that the College engaged in misleading and deceptive and unconscionable conduct in its dealings with certain past and present students.

Upon enrolling at the College, students were required to complete an enrolment form and pay a deposit. The form contained a section requiring the full payment of tuition fees by the student regardless of whether or not they commence their course. A second person was required to sign as a guarantor. The Commission alleges that the legal significance of the enrolment form was not made clear to students and guarantors. It is further alleged that in some instances oral statements were made which were in direct conflict with the legal terms in the enrolment form. These statements were to the effect that students withdrawing from course prior to commencement would suffer only the loss of the deposit. In

fact, students received either a letter from a debt collection agency, or a court summons for payment of the full amount of the tuition fee.

Availability of a Deferred Payment Plan

The College represented the availability of a deferred payment plan for the payment of college tuition fees in 1997. It was advertised in brochures and the 1997 College Handbook. The Commission also alleges that oral representations were made regarding the availability of the scheme from March 1997 and that it was described as a "HECS style scheme". It is alleged that the deferred payment plan in the form described above to students was not provided by the College. After significant delays the College wrote to students advising them that an interest only loan was available from the ANZ Bank, and that students should approach the Bank for such a loan. Students who then approached the Bank were allegedly informed that there was no arrangement with the College, and that since the student was not employed the Bank would not be able to offer them an interest only loan.

In addition, it is alleged that several students agreed to commence paying tuition fees by fortnightly instalment on College advice that if they did so they would be able to switch to the Deferred Payment Scheme when it commenced in March 1997. Those students were subsequently required to continue making fortnightly payments due to the failure of the College to provide the scheme. Students who then defaulted on payments were served with notices from a debt collection agency and/or court summons.

Australian Business College Ltd.

In 1990 two Perth based companies, Australian Business College Ltd and Australian Business Educational Colleges Ltd, gave the Federal Court undertakings not to make false claims about benefits arising from a course offered by the Australian Business College Ltd. The undertakings were given to the Federal Court in Perth following action taken by the former Trade Practices Commission. The undertakings arose from representations made by both companies about college facilities, benefits arising from attendance at the college and benefits arising from successful completion of courses offered by the college.

The Commission action resulted from complaints lodged by about 50 overseas students from Pakistan, India, Sri Lanka and Thailand who had enrolled in college courses. The Commission instituted proceedings in June 1989. The proceedings were based on allegations by four students from India, Pakistan and Sri Lanka. They alleged that the college represented in printed material and in the conduct of overseas agents that college courses provided benefits they did not have. As a result of the Commission's action, the two companies agreed to the payment of a total of \$34,230 comprising compensation to the four students

named in the Commission's application and the payment of the Commission's costs.

The Commission's action in matters of this nature highlights the need for Australian educational institutions seeking to enrol foreign students to ensure that what is represented to the students is true. This includes representations made by foreign agents of the institutions. The Commission has issued a number of warnings in relation to the conduct of institutions operating in this area in recent times.

The provision of educational services to foreign students is a large and expanding industry. Any company which is actively engaged in marketing courses to foreign students is subject to the provisions of the Act and should be aware of this fact. They should ensure that they are fully aware of all of their rights and obligations under the Act. The Commission is keen to ensure compliance with the Act and will enforce the Act vigorously, particularly in relation to developing market segments like the provision of educational services to international students.

Conclusion

In conclusion I would just like to say that effective competition is the key to efficiency and productivity in businesses, including in the tertiary education sector. It is the factor that encourages innovation, cost and production efficiency and enhanced consumer satisfaction by businesses striving to keep ahead of their competitors. However, stiff competition also creates incentives for unethical traders to 'cut corners' to beat their rivals, and this is where the ACCC must step in. Recent trends have shown that a culture of healthy and legal competition between businesses has developed in Australia since the introduction of the *Trade Practices Act*. However the incentives to cheat will always be too much for some businesses to resist, and hence there will always be a need for ACCC type enforcement.

However, in addition to its enforcement role, the ACCC sees itself playing an important part in developing and maintaining industry compliance and awareness of the *Trade Practices Act*. There is increasing awareness by business of the need to educate staff to promote compliance. The ACCC most certainly encourages this attitude of compliance and will continue in the future to assist in the process of deterrence of breaches of the Act. The ACCC is certainly a firm believer in the age old cliché that "prevention is always better than cure".

The higher education sector has been at the forefront of change throughout history and it is appropriate that the sector embrace the change brought about by the National Competition Policy but, as Hilmer has stressed, competition must benefit society as a whole. If universities wish to protect or exempt certain activities from the National Competition Policy, the onus is on them to

demonstrate that competition will not be a constructive force for the betterment of the sector and Australian society generally. If the public interest can only be protected by constraining competition in some way, the exemption processes provide the sector with that opportunity.

Thank you for your attention this morning. Does anybody have any questions or issues they would like to raise?