

REDMOND

W

7 June 2002

The General Manager
Adjudication Unit
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

LAWYERS
suite 2/161 robertson street
fortitude valley q 4006

CORRESPONDENCE:
po box 2382
fortitude valley q 4006

tele: 07 3252 2022
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email: redmondlaw@bigpond.com

our ref: JDR:PT:02058
your ref: B2001/806

Dear Sir

**Mooloolaba Yacht Club Ltd ACN 010 100 580 and Mooloolaba Yacht Club
Marina Ltd ACN 010 359 832**

Please find enclosed:

1. Form G Exclusive Dealing Notification;
2. Submissions;
3. Copy correspondence to ACCC dated 10/4/02;
4. Cheque to "Australian Competition and Consumer Commission" in the sum of \$100.00 in payment of fee.

Please acknowledge receipt in due course.

Yours faithfully



JOHN REDMOND

c.c. Iolani Brady
Australian Competition & Consumer Commission
PO Box 10048
Adelaide Street Post Office
BRISBANE QLD 4000

Facsimile Number 3832 0372

Form G

Commonwealth of Australia
Trade Practices Act 1974 ---- Sub-section 93(1)
**EXCLUSIVE DEALING
NOTIFICATION**

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(2), (3), (4), (5), (6) or (7), or paragraph 47 (8) (a), (b) or (c) or (9) (a), (b), (c) or (d) of that Act in which the person giving notice engages or proposes to engage.

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1. (a) Name of person giving notice: **Mooloolaba Yacht Club Marina Pty Ltd ACN 010 359 832**
(See Direction 2 on the back of this form)

(b) Short description of business carried on by that person
Operation of Marina attached to Mooloolaba Yacht Club

(c) Address in Australia for service of documents on that person

2. (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates
Supply (Lease of Marina Berths) to Members

(b) Description of the conduct or proposed conduct
Requirement under terms of Sub-lease (Berth Lease) that Lease Holders must be members of the Mooloolaba Yacht Club

(See Direction 4 on the back of this Form)

3. (a) Class or classes of persons to which the conduct relates
Members (Berth Holders) of Mooloolaba Yacht Club Marina

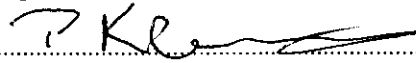
(b) Number of those persons--
(i) At present time
(ii) Estimated within the next year

(c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses

4. Names and address of person authorised by the person giving this notice to provide additional information in relation to this notice
Peter Gourlay - 5 Adaluma Ave, Buddina, Q4575.

Dated 4. June, 2002

Signed by/on behalf of the applicant giving notice


(Signature)

Peter Gourlay
(Full Name)

Chairman
(Description)

DIRECTIONS

1. If there is insufficient space on this form for the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the person giving the notice
2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person giving the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. In item 1(b), describe that part of the business of the person giving the notice in the course of which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in sub-section 47(2), (3), (4), (5), (6), (7), (8) or (9) of the *Trade Practices Act* 1974 have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. In item 3 (a), describe the nature of the business carried on by the persons referred to in that item.
6. In item 3(b) (ii), state an estimate of the highest number of persons with whom the person giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.

NOTICE

If this notification is in respect of conduct of a kind referred to in sub-section 47(6) or (7) or paragraph 47(8)(c) or (9) (d) of the *Trade Practices Act* 1974 ("the Act"), it comes into force at the end of the period prescribed for the purposes of subsection 93(7a) of the Act ("the prescribed period") unless the Commission gives a notice under sub-section 93A(2) of the Act within the prescribed period, or this notification is withdrawn.

The prescribed period is 21 days (if this notification is given on or before 30 June 1996) or 14 days (if this notification is given after 30 June 1996), starting on the day when this notification is given.

If the Commission gives a notice under sub-section 93A(2) of the Act within the prescribed period, this notification will not come into force unless the Commission, after completing the procedures in section 93A of the Act, decides not to give a notice under subsection 93(3A) of the Act. The notification comes into force when that decision is made.

If this notification is in respect of conduct of a kind referred to in subsection 47(2), (3), (4) or (5), or paragraph 47(8)(a) or (b) or (9)(a), (b) or (c), of the Act, it comes into force when it is given.

Submissions attached to Form G
Mooloolaba Yacht Club Marina Pty Ltd ACN 010 359 832

The following submissions are in support of the Form G Exclusive Dealing Notification lodged herewith.

The incidents which may amount to breach of the third line forcing provisions contained in 47(6) of the Trade Practices Act 1974 are:

- ❖ Clauses 19, 20 and 21 of the sub-lease
- ❖ Clause 3 of the Deed of Covenant and Assignment

Essentially these clauses require that a sub-lessee (berth holder) under a sub-lease from Mooloolaba Yacht Club Marina Pty Ltd must be a member of the Mooloolaba Yacht Club.

Relationship between Mooloolaba Yacht Club and Mooloolaba Yacht Club Marina:

MYC was incorporated on 15 October 1979. It is a company limited by guarantee. Its memorandum of association describes it as an "association not for gain". It does not have shareholders. MYC has various classes of membership. Depending upon the category of membership, a member may pay an entrance fee, an annual subscription and a special levy. The members elect the officers who comprise an executive committee. The control of the MYC is vested in the executive committee.

MYC holds tenure over land immediately adjacent to the Mooloolaba Yacht Club Marina (the "**Marina**"). The only convenient land access to the Marina is over land held by the MYC.

Brief History of Formation of Club

In or about 15 June 1967 a group of sailors who wanted to have fun sailing out on the open sea rather than on the Maroochy River met. A constitution for the new club was adopted on 6th July 1967.

By 1968 the Club had 100 members who started to look at the prospectus for Mooloolaba Yacht Club Properties Limited which would develop the club site. The prospectus for Mooloolaba Yacht Club Properties Limited was finally issued at the end of January 1969, with a capital of \$80,000. The first issue offered 100 shares of \$400 each. Two acres of land were offered by Harbours & Marine on a 30 year rental. The constitution was revised to allow for replacement of monthly general meetings to be replaced by executive meetings and eventually a club house was built. The official opening of the club house was 9th May 1970.

By 1973 the Mooloolaba Yacht Club and Mooloolaba Yacht Club Properties Limited were amalgamated, with Mooloolaba Yacht Club Properties' members given life membership of Mooloolaba Yacht Club. The main aim of the club all this time was to develop the sport of sailing in the area.

A new constitution was adopted for Mooloolaba Yacht Club, in line with Memo and Articles of Association of a company, intended to be incorporated and which would qualify under Section 24 of the *Companies Act*.

On 1st July 1980 the club was incorporated as a company. Following this the Mooloolaba Yacht Club Properties Limited disbanded on 31st August 1980 and the assets and shares of this company were transferred to the new company, Mooloolaba Yacht Club Pty Ltd.

The Marina Company was incorporated on 25 March 1982. It is also a company limited by guarantee and has no shareholders. The directors manage the business of the Marina Company. The executive committee of the MYC appoints half of the directors of the Marina Company, including the Chairman. The other half are appointed by the members of the Marina Company at the annual general meeting.

There is an even number of directors of the Marina Company and the Chairman has a casting vote. It follows that the directors appointed by the executive committee of the MYC have the ability to control the board of the Marina Company.

Since 22 March 1983 the Marina Company has been the lessee of an area of the waterway in the Mooloolaba Harbour under a head lease from the Harbours Corporation of Queensland. Within that area the Marina Company has constructed the Marina.

A Brief History of the Formation of the Marina Company

In or about 1981 discussions were had within the Mooloolaba Yacht Club about mooring facilities. Initial suggestions were as piling moorings in front of the club but this eventually developed into a full scale plan for a marina. The final package envisaged the Marina as a separate entity, a sister company for the club, the initial name to be Mooloolaba Yacht Club Marina Limited. By special general meeting on 31st May 1981 it was approved to establish the Mooloolaba Yacht Club Marina Pty Ltd to carry out a feasibility study and construction and management of the marina, with a club shareholding of 51%. It was proposed that the company would sell approximately half of the marina facilities to boat owners and retain the remaining half for the leasing of casual and permanent marina facilities.

The minutes of the AGM of 30th August 1981 of the Mooloolaba Yacht Club stated that the President advised that the club would have over 51% of the Marina and apart from this the control would be that the berths would only be sold to members of Mooloolaba Yacht Club. It was also stated that it was envisaged that the Club would hold the head-lease, giving the sub-lease to Mooloolaba Yacht Club Marina Limited. This did not eventuate as separate leases were given to both the club and the marina.

In practical terms, berth owners:

- (a) cross through club facilities to gain access to their berths
- (b) have the benefit of facilities on club property necessary for the enjoyment of their berths.

In order to control the use of these facilities and the conduct of Marina members on club premises and using the facilities for the better enjoyment of the majority of members, it was deemed necessary that users of these facilities be members of the club.

Once the State Government produces a new single lease to the Club over both the areas presently leased separately to the Club and to the Marina, these covenants relating to the use of the club facilities can be contained in the Lease, Sub-Lease and Sub-Sub-Lease documentation.

The Marina executive has already undertaken (see Redmond Law letter to ACCC dated 10 April 2002) not to press its rights under the clauses referred to under clauses 19, 20 and 21 of the Sub-Lease or Clause 3 of the Deed of Covenant and Assignment.

Should the Commission require any further or other submissions or information, please contact John Redmond of Redmond Law.

COPY

10 April 2002

Ms Libby Darwin
Assistant Manager, Queensland
Australian Competition & Consumer Commission
PO Box 10048
Adelaide Street Post Office
BRISBANE QLD 4000

Attention: Iolani Brady

JDR:PT:00127
B2001/806

Dear Madam

**Complaint against Mooloolaba Yacht Club Ltd ACN 010 100 580 and
Mooloolaba Yacht Club Marina Ltd ACN 010 359 832**

We refer to your letter of 27th March 2002.

Our client notes that you may have some concerns about clauses 19, 20 and 21 of Mooloolaba Yacht Club Marina's sub-leases and clause 3 of the Deed of Covenant and Assignment.

Whilst our client does not agree with your view that these clauses may be in breach of the Trade Practices Act 1974, it is prepared to undertake not to press its rights under those clauses against any members until it has sought the appropriate clearances from you.

Our client and the Mooloolaba Yacht Club are presently negotiating a new Lease from the State Government of the Club and Marina facilities and it will at that time review these clauses and the arrangements between the two entities.

Yours faithfully

JOHN REDMOND