Arch Bevis MP
Federal Member for Brisbane
Chairperson Joint Committee on Intelligence and Security
Chairperson Joint Defence Sub-Committee

21st May, 2010

Mr David Hatfield,
Australian Competition and Consumer Commission
David.hatfield@accc.gov.au

Dear Mr Hatfield,

I refer to the submissions from Football Queensland (FQ) dated 22nd and 27th April in relation to the third line forcing immunity provided to FQ.

I note Mr. Foster's comment in his letter of 22nd April that he is happy to make personal contact with me. As always, I am very willing to meet with him. I think we share a genuine interest in sport, football and a desire to see football in Queensland develop. It would seem though, that we have a different view when it comes to the issues at the heart of this matter.

I accept Mr Foster's response in relation to undergarments. Whatever the merits of that issue, I accept that it does not fall within the third line immunity.

Regrettably, FQ have not responded to many of the issues raised in my earlier correspondence. More importantly, they have failed to substantiate a case that could reasonably meet the requirements of the Act for the granting of immunity.

Their letter of 22nd confirms that in 2008 when the immunity was granted and today, only Victoria operates a similar scheme. They advise that other states may be planning to make a submission for immunity on similar terms as FQ. At this time, that is irrelevant. Moreover, any application must be assessed on its merits against the requirements of the law. Each application will stand or fall on the basis of the facts surrounding it, not an application from another state.

I made reference to FQ and Victoria being the only states to adopt this practice in the context of the financial viability of the sport. It is clear that all other states are successful without restricting trade and competition.

I would expect that any application in the future will be subject to thorough scrutiny.

The FQ letter of the 22nd also confirms that there is less competition and less choice now then when the immunity was granted. Their reference to some legal impediment to expanding the list of suppliers is puzzling, and not explained.

It does raise some questions though. Is FQ saying there is a cap on the number of suppliers? If so what is it? How does such a cap, if it exists, comply with the law?

Are they saying that some agreement exists between FQ and the licensed suppliers guaranteeing that no new suppliers will be admitted?

If the answer to any of these questions is 'yes' I believe there would be even stronger grounds to revoke the immunity.

In relation to the safety of goal keeper clothing, there will be an element of subjectivity. However, some aspects are clear enough. No licensed shorts provide any padding or protection of the tailbone. None of the licensed keeper shirts have elbow and forearm protection of a quality and to the extent of some non licensed shirts.

This should not come as a surprise to Mr Foster. When I emailed him in 2008, I gave him details of a non licensed keeper jersey and invited him to let me know of any licensed shirt of comparable or better standard. I did not receive a response to that request.

Whilst the comments on the football forum website about this topic (which I attached to my earlier submission) reflect the views of players, coaches and parents and are not official or scientific, they are none the less legitimate views that deserve consideration.

Mr Foster refers to the fact that Australian keeper Mark Schwartzer uses Uhlsport brand equipment in support of the clothing provided under license. That is like saying Mark Skaiffe drives a Holden or Ricky Stewart uses a Kookaburra bat. As elite athletes they have tailor made equipment. Mark Schwartzer's playing shirt is not a FQ licensed product. Also, Mark Schwartzer plays on fields that are typically much better quality that the average Queensland suburban field.

The difference in quality within a single brand was made in my earlier submission when I made clear that the licensed Adidas range was very restricted and excluded many of the better quality Adidas products, something not contested by Mr Foster in his replies. This point was also acknowledged in one of the contributions to the web football forum attached to my earlier submission.

The licensed keeper clothing may well be suitable for some players and some conditions. It is nowhere near the best available. Any experienced keeper will confirm that, as will those suppliers who market a range of keeper products and brands.

The FQ letter of 27th April asserts that they do not charge clubs a fee for using the FQ logo. As Mr Foster is well aware, the fee is charged to licensed suppliers who simply pass the charge on to clubs.

The comment that this scheme 'helps to make the club officials decisions easier' is an insult to club officials. I have made reference to this in an earlier submission so will not expand further in this letter.

As to penalties, the comment that to date no penalties have been imposed totally misses the point. Whether the penalties are excessive or unreasonable is based on what they are in relation to the offence and also the impact they have on an offender. Mr Foster makes no case to substantiate the penalties as being fair and reasonable. I do not imagine he is saying they would never be used, only that they have not been used to date. I maintain the view that they are excessive and unreasonable. They have the appearance of being overly punitive to enforce an otherwise unpopular and unenforceable policy.

The question remains, if the FQ's policy is so beneficial to the sport and helpful to clubs, why are such excessive punitive penalties required?

A review of the entire file on this confirms that the central if not sole reason for this restriction on trade is to generate money for FQ with a minimum of effort or accountability on the part of FQ.

The figures included in Mr Foster's letter of 27th April shed some light on this.

It says that the program netted approximately $230,000. I assume that is over the three seasons from 2008 to 2010 inclusive.

The letter also informs us that there are 70,000 registered players this year. **That means the program has netted about $1.10 per player per year over the period of the contract.** An increase in registration fees of just $2 per player per year would therefore produce much more income for the game. With player registration costs of $350 - $550, a one or two dollar increase would not be significant.

As I said in my earlier submission: ' A small increase in players' registration fees would generate similar income without adopting restrictive trade practices. Of course, there are a range of other sponsorship and commercial schemes that could generate similar income without any increase in player fees.'

The following issues raised in my earlier submissions remain unaddressed:

1. Players and clubs are forbidden from using a range of alternative brands of equipment of equal or better standard and value.
2. The special circumstances of goal keepers. - The fit of a jersey, or shorts, whether it has padding, where that padding is located, the quality of padding and the strength of the material all contribute to goalkeepers avoiding injury. Only keepers need upper body, arm, hip, tailbone, thigh and knee protection. The restrictions imposed by FQ deny all keepers the right to choose the protection that best suits their body type, playing conditions and style of play. In addition, it prevents them from wearing a number of specialty keeper brands that are widely regarded as superior to other general sports clothes suppliers. They are certainly superior to the basic keeper clothes typically provided by most approved brands which seem to be made for a price point rather than design or safety features.
3. FQ assert;' *Licensed products include: Playing shirts, Playing shorts, Team tracksuits, Training shirts, All representative team clothing, Playing socks and footballs'.*[1] ACCC reference to *'during FQ competition'* is apparently defined by FQ as

[1] http://www.footballqueensland.com.au/index.php?display=cat&id=49

applying to team tracksuits and training shirts. That is inappropriate and I submit in breach of the terms of the immunity.

4. The rationale advanced by FQ in support of their restriction on trade and competition could equally be applied to football boots, keeper gloves or any other equipment. Yet such a situation would be unthinkable to those who play football.
5. FQ set no performance standard or specifications. Rather they simply require the licensee to warrant that the garments are good quality etc. without definition or explanation of what constitutes, for example, 'good quality'. In any event, ensuring minimum quality or performance standards is quite separate from the exclusive licensing arrangement that FQ has established. If indeed FQ's purpose is to establish minimum standards, it could do this without embarking on an exclusive, anti-competitive marketing strategy.
6. The second purpose stated by FQ in their application for the scheme is:

   ii) Ensure that the logos, club names, symbols, emblems and designs and other indicia and trademarks owned by Football Queensland are protected. If the image is protected and promoted, the development of the game is promoted.

   FQ are effectively arguing that firstly, they demand their logo be displayed, and then having required it to be displayed, they have to protect it by charging a fee and restricting trade.

   FQ has not produced any information to show that they have encountered improper use of their logo that could be detrimental to either FQ or the game.

7. In their original application under a heading about 'Image of the game and promotion of the FQ brand', FQ refer to protecting their "Q" logo. They confuse their legitimate right to protect their name and logo with their actual policy that demands use of their logo, and then restricting its use to a select list of suppliers, all for a fee.

Most importantly, the statutory requirements for the granting of immunity have simply not been met by FQ. As outlined in my earlier submissions, in considering whether to grant immunity, the ACCC needs to be satisfied that the likely public detriment will not outweigh the likely public benefit from the conduct. A guide to determining public benefit involves consideration of the following;

- *economic development, such as encouragement of research and capital investment*
- *fostering business efficiency, particularly where it results in improved international competitiveness*
- *industrial rationalisation, resulting in more efficient allocation of resources and in lower or contained unit production costs*
- *expansion of employment or prevent of unemployment in efficient industries*
- *employment growth in particular regions*
- *industrial harmony*
- *assistance to efficient small business, such as guidance on costing and pricing or marketing initiatives which promote competitiveness*

- *improvement in the quality and safety of goods and services and expansion of consumer choice*
- *supply of better information to consumers and businesses to permit informed choices in their dealings*
- *promotion of equitable dealings in the market*
- *promotion of industry cost savings, resulting in contained or lower prices at all levels in the supply chain*
- *development of import replacements*

  growth in export markets, and
- *steps to protect the environment.*

The ACCC has published a Guide to Exclusive Dealing Notifications.[2] According to the Guide:

> *The ACCC has accepted the following public benefits in assessing third line forcing notifications:*
>
> - *fostering business efficiency,*
> - *improving product quality, and*
> - *promoting competition in relevant markets*

Not one of these accepted guides is met by the immunity granted to FQ. Indeed, FQ's restriction on trade and competition directly contravenes a number of these considerations.

Unless FQ can demonstrate they meet a sufficient number of these criteria, they cannot be granted immunity. They have not, nor do I believe they can.

Many of the criteria for immunity refer to industry support and competition matters. It is instructive that this key point has not even been addressed by FQ. That is perhaps not surprising given that they have previously stated "football apparel does not constitute a market in its own right". I addressed this in an earlier submission so will not repeat those points here, although they remain relevant.

Since last writing to you I have been contacted by others involved in this third line forcing who share my concerns. One supplier with whom I have met is deeply concerned by the restrictive practices followed by FQ and some other sporting organizations, informing me that they believe these schemes are detrimental to sport. They are also unfair to the companies.

Unfortunately, as small and medium size firms with limited potential buyers, they are not in a position to comfortably make public criticisms of those who run the sport.

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2. *Guide to Exclusive Dealing Notifications*, viewed on 16 March 2010, http://www.accc.gov.au/content/item.phtml?itemId=776051&nodeId=2a380a216d0d6026cf2ef53979712ee0&fn=Guide%20to%20exclusive%20dealing%20notifications.pdf

Those few individuals who administer a sporting code can have a significant effect on their sport and those businesses that rely on the sport. For sport clothing and equipment suppliers, the prospect of losing contracts if they take a public stand contrary to the wishes of administrators could be financially disastrous. Those concerns are felt, whether with just cause or not. These are the companies that make up the very market which FQ assert does not even exist.

The ACCC should take advantage of any opportunity it has to obtain information from these firms, even if that is required to be done confidentially.

Sporting organizations like FQ effectively operate in an oligopoly relationship with commercial suppliers and as a monopoly in relation to the clubs and players in their sport. To a certain extent that is unavoidable. Short of a Super League breakaway or a World Series Cricket split, sports administrators have a monopoly hold over those who wish to participate in any way, whether that is as a player, club or spectator. For those who supply team sporting clothes and equipment, the number of customers is very limited.

To overlay on that, immunity from the normal provisions of competition and trade is a step that should not be approved lightly.

I believe the ACCC has erred in the past by granting such immunities which I again request be revoked in the case of FQ.

I look forward to your consideration of this issue.

Yours Sincerely,

The Hon Arch Bevis MP