

National Competition Council

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Office of
Council President

25 June 1996

The Hon Peter Costello, MP
Treasurer
Parliament House
Canberra ACT

Dear Treasurer

The Council has received an application under section 44F of the Trade Practices Act 1974 ("the Act") for the Council to recommend under section 44G that a particular service be declared.

The application has been made by the Australian Union of Students ("AUS") seeking access to a service described by it as the "Austudy Payroll Deduction Service". AUS identifies the facility to provide the 'service' as the Department of Education, Employment, Training and Youth Affairs' computer network. A copy of the application received by the Council is attached to the Council's recommendations.

Section 44H(1) requires you, as the designated Minister, to declare the service or decide not to declare it. In reaching a decision, you must consider whether it would be economical for anyone to develop another facility that could provide part of the service. Under section 44H(4), you cannot declare a service unless satisfied of all the factors listed in section 44H(4).

Section 44H(7) requires you to publish the declaration or your decision not to declare the service. At the same time, the reasons for the decision and a copy of the declaration recommendation must be sent to the provider and to the person who applied for the declaration recommendation. If you do not publish a decision within 60 days of receiving the declaration recommendation, section 44H(9) determines that you are taken to have decided not to declare the service and to have published that decision not to declare the service.

The Council adopted an expedited process for this matter. It has consulted with both the applicant and the provider of the service before making a recommendation on the application. The Council will usually adopt a public process for considering access applications. However, in this case, the Council considered that a public process would provide little additional relevant information.

2.

The Council recommended on 19 June 1996 that the service not be declared. In reaching this recommendation, the Council considered it was not satisfied that the service met the criteria outlined in subsections 44G(2)(b), (c), and (f). A copy of the Council's recommendation and statement of reasons is attached.

I have attached a press release for your consideration. I propose that you use this to publish your decision, should you accept the Council's recommendation. The press release indicates that a copy of the Council's recommendation and statement of reasons is available from the Council's office in Melbourne. While the Act does not require you to publish these reasons, the Council considers that its full recommendation should be made available.

Yours sincerely



A. B. Daniels
President

STATEMENT OF REASONS FOR COUNCIL'S RECOMMENDATION UNDER SECTION 44F OF THE TRADE PRACTICES ACT 1974

The Council has received an application under section 44F of the Trade Practices Act 1974 ("the Act") asking the Council to recommend under section 44G of the Act that a particular service be declared.

The application has been made in writing and complies with the requirements of the Regulation 6A of the Act. The application has been made by Mr Geoff Bird, as President of the Australian Union of Students ("AUS") for access to the service described by him as the "Austudy Payroll Deduction Service". Mr Bird has provided a detailed definition of the service in his application.

Mr Bird describes the provider of the service as the Commonwealth Department of Education, Employment, Training and Youth Affairs ("DEETYA"). He states that the "facility used to provide the service is the Department's computer network."

1. GOOD FAITH

Section 44F(3) of the Act provides:

"That if the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if the Council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the service not be declared."

DEETYA submitted to the Council that the application was not made in good faith. In support of this submission it relied on statements made by Mr Bird in his application.

In his application Mr Bird states:

"I am writing on behalf of the Australian Union of Students which is a trade union representing students, apprentices and trainees." (AUS application, p1)

DEETYA argued that AUS is not a trade union though admits that AUS has an application pending in Victoria for registration as a trade union.

DEETYA further submitted that the claim made on the AUS letterhead, that AUS is incorporated with limited liability, is untrue. DEETYA claims that AUS is not incorporated, but that the Australian Union of Students is a registered business name in Victoria.

Mr Bird informed officers from the Secretariat that AUS was incorporated overseas. Mr Bird subsequently provided documentary evidence that AUS was incorporated in the US State of Delaware.

The Council does not accept DEETYA's submission that the application has not been made in good faith. The Council is of the view that Mr Bird has made the application in a genuine attempt to gain access to the service he has defined as the "Austudy Payroll Deduction Service". Mr Bird has, in the past, requested DEETYA to provide his organisation with access to this service.

The Council does not think that Mr Bird's application was not made in good faith.

2. SECTION 44 CRITERIA

Section 44G(2) of the Act provides:

“The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:

- (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
- (b) that it would be uneconomical for anyone to develop another facility to provide the service;
- (c) that the facility is of national significance, having regard to:
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy;
- (d) that access to the service can be provided without undue risk to human health or safety;
- (e) that access to the service is not already the subject of an effective access regime;
- (f) that access (or increased access) to the services would not be contrary to the public interest.

2.1 Promote competition in at least one market

In his application Mr Bird states that:

“Access to the ‘Austudy Payroll Deduction Service’ would promote competition in the market for the ‘Student Representation Service’. This is the market in which student associations compete to sign members. When a student association signs up a member, this is the same as the student association selling its service to the member. The ‘Student Representation Service’ involves making representations to educational institutions and governments on behalf of students. Access to the ‘Austudy Payroll Deduction Service’ would promote competition in the market for the ‘Student Representation Service’ by lowering the barrier to entry into the ‘Student Representation Service’ Industry.” (AUS application, p3)

The Council accepts that there is a market in which student representative associations compete for members. This market is currently made up of, at least, AUS, the National Union of Students (“NUS”) and tertiary campus based student unions. Individual students cannot become members of NUS currently. NUS membership is made up of affiliated tertiary campus based student unions. Mr Bird claims that NUS currently has a monopoly in “Student Representation Service” market.

Mr Bird claims that access to the “Austudy Payroll Deduction Service” will allow his organisation, AUS, to compete with NUS to provide student representation. He claims that the high costs of entry into the market such as the costs that new student associations have to incur in signing up members are a barrier to entry. Access to the service would enable full entry of AUS into the student services market by reducing costs.

Mr Bird claims that through access to the service his organisation could attract 100,000 student members within two months, thus enabling AUS to compete with NUS.

The Council is satisfied that access to the “Austudy Payroll Deduction Service” would promote competition in the “Student Representation Service” market.

2.2 Uneconomical for anyone to develop another facility to provide the service

Mr Bird has identified the DEETYA computer network as the facility that provides the “Austudy Payroll Deduction Service”.

Mr Bird has identified ‘three key attributes’ that a facility to provide the service would need to have:

“...a database of the names and addresses of students who receive Austudy, access to funds belonging to those students, and the bargaining power to require that students complete payroll deduction forms. These attributes are physical attributes of the facility, as they arise because of information stored in the facility in physical form.” (AUS application, p4)

However, many aspects of the service defined by Mr Bird as the “Austudy Payroll Deduction Service”, are not currently, and could not be provided by DEETYA’s computer network. To provide access to the service, DEETYA would need to introduce new rules for Austudy recipients, either through delegated legislation or policy, that required those recipients to answer questions on their Austudy application forms on whether or not they wanted to have fees, such as for AUS membership, automatically deducted from their Austudy payment. AUS has also defined the service to require DEETYA to make upfront loans to students so that AUS’s fees could be paid in one instalment. Neither of these services are presently provided by the facility defined.

Mr Bird argued that the facility would need to have a coercive element ie, students would have to complete payroll deduction forms or risk losing their Austudy. Mr Bird further argued that essential elements of the facility are the names and addresses of all Austudy recipients and the ability to access the funds belonging to those students. This, as well as the coercive element, goes beyond the ordinary meaning of ‘facility’.

Section 44F(4) of the Act provides:

“In deciding what recommendation to make, the Council must consider whether it would be uneconomical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.”

The Council is of the view that other facilities currently exist that could provide parts of the service. For example, Mr Bird in his application, states that:

“These student associations [NUS and its affiliated student associations] of course sign up members using the enrolment system at universities, which is provided to them free of charge.” (AUS application, p 4)

In supplementary correspondence he admits:

“Obviously a university could provide a similar service which would be quite useful, but this service is not the Austudy Payroll Deduction Service”. (AUS supplementary, p3)

Further, many financial institutions provide direct deduction services. Austudy payments are made into the recipients’ bank accounts. It is therefore possible for AUS, or any other organisation, to

arrange for direct deduction from their members' bank accounts. This method of fee payment is used by similar organisations, such as trade unions.

Mr Bird argues that no other provider could economically develop a facility to provide the "Austudy Payroll Deduction Service" because AUS has defined the service:

"...in such a way so that a university would not be able to provide it". (AUS supplement, p4)

The Council does not accept this argument. The essential elements of the service that would enable AUS to compete in the "Student Representation Service" market are currently provided through other facilities to other student representative associations.

The Council is of the view that the other elements of the service that AUS requests access to, such as the compulsion element and the requirement that DEETYA lend students money to cover their union fees, are not capable of being provided by any "facility", in the normal sense of the word.

The Council is not satisfied that it would be uneconomical for anyone to develop another facility to provide the service.

2.3 That the facility is of national significance

Mr Bird in his application argued that a *facility* should be considered to be of national significance if a corresponding access *regime* would be of national significance. The Council does not accept this argument.

It is difficult to see how the criteria that a facility is of national significance because of its size might be applied in a meaningful way to a facility such as a computer network. A computer network does not have the same sort of physical dimensions as other types of facilities such as gas pipelines or electricity grids. If the criteria is to have relevance for a computer network it may be more appropriate to consider 'size' in relation to the amount of information stored by the system. In this case, the Austudy database run by the DEETYA computer network is one of many hundreds of national databases and is used in the provision of Austudy to approximately 485,000 secondary and tertiary students. It is not a particularly large database. Many other national databases of comparable or greater size exist within both the government and private sector. The Council is not of the view that the DEETYA computer network is nationally significant having regard to its size.

Austudy is a service provided by the Commonwealth Government to supplement the living allowance of full-time students who have very low family incomes. While receiving Austudy is important to individual students, it has no impact on constitutional trade and commerce. Therefore, the Council is of the view that the facility that is used to provide Austudy, the computer system, is not nationally significant having regard to the importance of the facility to constitutional trade or commerce.

For similar reasons, the Council is of the view that the facility is not of national significance having regard to the importance of the facility to the national economy. Even accepting Mr Bird's claims that access to the facility would provide AUS with an additional 100,000 members, given average student union fees of approximately \$2-\$3 per student still results in an annual budget for AUS of less than \$300,000. If every student on Austudy (approximately 485,000) was a member of a student union, access would still only be worth less than \$1.5 million annually.

The Council is not satisfied that the facility is of national significance.

2.4 Without undue risk to human health or safety

The Council is satisfied that access to the service can be provided without undue risk to human health or safety.

2.5 Not already the subject of an effective access regime

The Council is satisfied that access to the service is not already the subject of an effective access regime.

2.6 Not contrary to the public interest

The Council has considered the potential benefits from declaration of the service as submitted by AUS:

- Access will allow AUS to provide a better service to Australian students, apprentices and trainees by attracting more members, and hence increased revenues and the provision for more services, and greater bargaining power.
- Access to the Austudy Payroll Deduction Service would promote competition in the market for the student representation service by lowering barriers to entry into the student representation service industry.

The Council has also considered the potential costs of declaration of the service:

- It is contrary to the public interest to require DEETYA to compel all Austudy recipients to complete questions on whether those recipients want to have monies automatically deducted from their Austudy payments. For DEETYA to compel students to do this could result in students, who were otherwise eligible for Austudy, being refused Austudy on grounds that having nothing to do with their level of income or status of study (currently the determinants of a student's eligibility).
- The Council has concerns that a proposed general levy on all Austudy recipients to pay for AUS access raises fundamental equity concerns. AUS, in defining the service it seeks declared, includes that the organisation seeking access to the service should not have to bear the costs of access to the service; rather, this should be paid for by all Austudy recipients. This would mean that students who do not use the payroll deduction service would be paying for the provision of the service. Further this would reduce the total amount of Austudy available for students.
- AUS defines the service as including the requirement that DEETYA distribute information on any organisation that is provided with access to the payroll deduction service, so as to enable students to make a decision about whether they should join the organisation. This could mean that a Commonwealth Department would be in the position of having to distribute information about organisations they have nothing to do with. It is possible that students may believe that these organisations have the support of, or are endorsed by, the Commonwealth Government.

In weighing considerations of public costs and benefits, the Council is of the view that access to the service would be contrary to the public interest.

3. CONCLUSION

The Council is not satisfied of all the matters in section 44G(2) and therefore recommends that the "Austudy Payroll Deduction Service" not be declared.

National Competition Council
19 June 1996