

The Trade Practices Act, competitive neutrality and research costing

Issues for Australian universities

Tania Bezzobs

University of Melbourne

Increasingly universities are becoming commercial enterprises and their core activities of teaching and research subject to business imperatives. This paper reviews the research costing methodologies of 17 Australian universities. Tension between Competition Law and Competitive Neutrality exists which could be resolved through improved costing and pricing transparency for research.

1. Introduction

The traditional perception of universities in Australia was that they were halls of learning, scholarship and research supported primarily by government, operating not in a market-oriented environment, but rather for the public good (Fels 1998). Yet, subsequent waves of government-initiated change have resulted in:

- The steady decline in the proportion of conventional government funding universities receive (Productivity Commission 2002).
- The introduction of Higher Education Contribution Scheme payments for undergraduate courses and full-fee payments for many courses.
- The removal of compulsory student unionism.
- Increased numbers of international students coming into Australia and the expansion of Australian universities into offshore markets.
- Recent deregulation in the cap on full-fee paying places.
- Government funding tied to governance reform.

University activities are now increasingly seen as commercial operations, in their core functions (education

and research) and ancillary services (such as bookshops, food services, child care services, etc.). Universities now transact commercially and contract with individuals (that is, consumers-customers (Bessant 2004)) who gain personal benefit from the delivery of education services in a competitive market environment (Fels 1998). This view has been endorsed by the Australian Competition and Consumer Commission (ACCC).

In this paper I will briefly review the applicability of the *Trade Practices Act 1974* (TPA) and the Competitive Neutrality principles to Australian universities, focussing particularly but not exclusively on research-related activities. A hypothetical costing scenario using information provided by Australian universities has been used, and the tensions between Competition Law and Competitive Neutrality compliance are discussed.

2. Applicability of the Trade Practices Act

Many of the activities universities undertake can be viewed as being 'commercial in character' and will fall under the definition of engaging in trade or com-

merce, thereby being applicable activities under the TPA (for examples, see Clarke 2003). As per *Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission* [2001] FCA 303, the University of Western Australia successfully argued that it was a trading corporation as it engaged in commercial activities from which it derived a substantial proportion of its revenue. In recognition of this changing view of university activities, many institutions have adopted guidelines concerning commercial activities. For example, University of Sydney Guidelines provide that an activity is likely to be commercial in nature if it involves the commercial development or exploitation of any facility, resource or property of the University; or meets the criteria under Competitive Neutrality Principles (see below) or involves the establishment of a joint venture or company; whereas an activity that falls within the core functions of the university and does not carry any significant commercial risk to the university is unlikely to be a commercial activity (University of Sydney 2007).

To date, most scrutiny has been placed on competitive conduct by universities in relation to education or ancillary services in the context of part IV and part V of the Act. The following examples illustrate how universities could be in breach of section IV of the Act under a per se offence or as a consequence of an action resulting in a substantial lessening of competition:

- s45 – market sharing arrangements and price fixing as a result of two or more universities agreeing to collaborate in the provision of joint coursework (e.g. Masters); or where an agreement is reached such that one institution does not offer a particular course; or where there is agreement reached in relation to the marketing or provision of courses on a geographical basis (Fels 1998).
- s47 – exclusive dealing resulting in the substantial lessening of competition. As it relates to universities, such practices could include third line forcing where a university makes it a condition of tuition that a student purchase a service or product from a third party supplier. In relation to this section, many universities have sought authorisation from the ACCC. For example, in 2003 the University of Melbourne sought and received authorisation for third line forcing where overseas students received a discount or waiver of an administration fee provided that they acquired accommodation or other support services from a pre-approved third party provider (see ACCC 2003b). In another example, James Cook

University sought authorisation for the requirement for students to compulsorily join the student union as a condition of enrolment. While the ACCC originally rejected the request, subsequent information provided by James Cook University demonstrating the public benefit resulted in the ACCC reconsidering its original position and allowing the authorisation (ACCC 2003a). This has subsequently been overtaken by changes to the *Higher Education Support Act 2003* which have resulted in the abolition of compulsory student unionism.

- s48 – resale price maintenance, where a university imposes a minimum price on the resale of course materials. Although previously thought to be an area of little concern to universities (Fels 1998), in an increasingly competitive environment, universities are beginning more entrepreneurial in relation to their intellectual property rights in course material.

The common practice in recent years in relation to Part IV of the TPA appears to be for universities to seek authorisation in relation to the proposed activity. Despite the fact that there are 39 public universities in Australia, the number of authorisations is comparably small: since 2000 only six notifications of exclusive dealing have been allowed to stand (with none revoked). This suggests that universities either are compliant but rarely engage in anti-competitive conduct for which they seek authorisation; or potentially anti-competitive conduct is occurring in the absence of authorisation.

Unlike Part IV, the consumer protection provisions of Part V of the TPA have been the subject of greater scrutiny in the context of university activities around misleading or deceptive conduct (s52) and false or misleading representations (ss 53-65A). Both Clarke (2003) and Bessant (2004) provide examples of where students have commenced proceedings against universities using the provisions of the TPA in relation to s52 and s53 (e.g. advertisements stating that a course was accredited or recognised by a professional body when it was not).

3. Competitive Neutrality Principles

While the focus of the TPA is on the prevention of anti-competitive conduct in the market and consumer protection, Competitive Neutrality Principles aim to ensure that government businesses at any level of government do not enjoy a net competitive advantage

because of their public sector ownership (Commonwealth of Australia 2004). Application of the Competitive Neutrality Principles seeks to mitigate or redress such advantages, provided that the costs of administration do not exceed the benefits (Commonwealth of Australia 2004).

There are three initial criteria which determine whether the Competitive Neutrality Principles are applicable, as they define whether the entity is conducting a business activity:

1. There must be a charging for goods or services.
2. There must be actual or potential competitors.
3. The managers of the activity must have a degree of independence in terms of the production or supply of the goods or service and the price at which it is provided (Commonwealth of Australia 2004).

These criteria are generally applicable to universities as they often charge fees, operate competitively in local, state, national and international markets and have discretion in relation to the prices they set (Fels 1998). However, the specific nature of the activity the university undertakes will be critical to determining whether Competitive Neutrality Principles will apply. For example, Competitive Neutrality Principles are likely to be applicable to domestic and international full-fee paying places, and other university activities and services where they may compete with the private sector, including the provision of research services.

Competitive Neutrality policy is primarily concerned with how costs are allocated by government businesses *and* whether the pricing methods employed in relation to goods or services appropriately recognise the cost base. Therefore Competitive Neutrality guidance documents devote significant time to the cost allocation principles which are based on neutrality (i.e. no cost advantage) in relation to taxation, debt, regulation, rate of return and the costing of shared resources (Commonwealth of Australia 2004). This last area is most contentious. As noted by the Commonwealth Competitive Neutrality Complaints Office, the way 'a parent agency allocates costs to its business unit can have a significant impact on the unit's cost base and price levels' (Commonwealth Competitive Neutrality

Complaints Office 1998, p. vii) and be critical as to whether an institution is undercharging in relation to the goods or services it offers.

As the Commonwealth Competitive Neutrality Complaints Office notes, many public sector agencies have interpreted guidance that there should be full cost attribution to mean that a business unit should include

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all corporate overheads and capital costs in its cost base on a pro-rata basis, that is on a Fully Distributed Cost basis. However, this may lead to a cost base in excess of the actual. The Commonwealth Competitive Neutrality Complaints Office advocates that the Avoidable Cost methodology provides better guidance

because the cost base of a business unit is determined by considering all costs which would be avoided by the parent if that business unit was not operating.

3.1 Competitive neutrality in the university sector

The majority, if not all, Australian universities are cognisant of the Competition Policy and Competitive Neutrality Principles and this is reflected in their overarching policy documents. However, there is reasonable variation in the way universities interpret the Competitive Neutrality Principles and apply them in their costing and pricing models. Although ancillary activities such as property services, child care etc are undertaken by universities and are subject to Competitive Neutrality, most attention in relation to Competitive Neutrality in the university domain relates to research related activities, particularly where universities are engaging in contract research, commercial consultancies or tenders and the discussion below focuses on this aspect.

The primary guidance that Australian universities have in relation to Competitive Neutrality originates from Part 3 of the 1996 Australian Vice-Chancellors' Committee (AVCC) 'University Research: Some Issues' (AVCC 1996). The AVCC paper considers that 'universities should be committed to a general policy of full cost recovery for externally funded research undertaken' (AVCC 1996, p. 18) while still allowing universities to price flexibly after the full recovery cost has been determined.

The AVCC provides guidance that research project costs are based on a formula which sums:

- Total Direct Payroll Costs (TDPaC), which includes salary and oncosts for project staff that are not paid out of project funds (also known as salaried or imputed staff costs), as well as staff who are paid out of project funds; and
- Direct Project Costs (consumables, materials); and
- Direct Costs – Specific Services (for secretarial and support staff and hire of outside services); and
- Major Capital Costs (includes building works and major equipment); and
- Infrastructure Costs (see below).

The AVCC paper, which pre-dates the advice of the Commonwealth Competitive Neutrality Office, provides that infrastructure costs are determined on essentially a Fully Distributed Cost basis as it is stated that

‘These [infrastructure] costs relate to the general overheads associated with the functioning of the university and are not easily assigned to individual projects. The costs to be included are general technical support; ... accounting and administration services; amortisation of buildings’. AVCC (1996, p.16).

The 1996 Report uses AVCC ‘current financial data’ to estimate the infrastructure costs, which are determined as a multiple of the Total Direct Payroll Costs and distinguished by whether the activity is laboratory (multiplier of 1.25) or non-laboratory (multiplier of 0.92) based. This advice to universities is still available via the AVCC/ Universities Australia website and has not been updated despite the endorsement of the Commonwealth Competitive Neutrality Complaints Office of an Avoidable Costs approach or the likely lack of currency of ten year old financial data.

3.2 Practices of Australian universities

Seventeen websites of Australian universities were reviewed in relation to their Competitive Neutrality and costing policies and guidelines. The review was limited because of restricted access to university costing spreadsheets (often password protected) or worked examples. The universities were: Curtin University of Technology, Deakin University, the Flinders University of South Australia, Griffith University, La Trobe University, Macquarie University, RMIT University, Swinburne University of Technology, the University of Adelaide, the University of Melbourne, the University of New South Wales, the University of Queensland, the University of Sydney, the University of Technology, Sydney, the

University of Western Australia, Victorian University, and the University of Wollongong.

The universities’ policies and guidelines were applicable to all commercial activities but the most common area of application related to the costing of research projects. There were three common areas of agreement for all universities surveyed:

1. All direct project costs must be recovered.
2. All supported the AVCC principles. Some (e.g. the University of Western Australia) recognised that the AVCC multipliers were out of date but considered that determining a standard indirect cost profile for their institution would take time to develop, and thus continued to adopt the AVCC multipliers or derivations thereof.
3. Discretion should be applied in relation to the final project price and whether this price reflects the total project cost. For all universities, the price of projects where the funder is listed on the Australian Competitive Grants Register (DEST, nd), is priced at or near the direct costs of the project, as the organisations listed (such as the Australian Research Council (ARC) and the National Health and Medical Research Council (NHMRC)) often do not pay overhead costs. That is, in such cases, universities have little discretion to determine pricing and do not meet criterion 3 of the Competitive Neutrality Principles.

This third point is often the source of contention for universities when costing research. Generally speaking, national competitive grants schemes such as those administered by the ARC or the NHMRC never fund the full cost of the project even excluding overhead costs, although the Department of Education, Employment and Workplace Relations (DEEWR) makes block funding allocations (e.g. Institutional Grants Scheme, Research Infrastructure Block Grants Scheme) which provide infrastructure support based on institutional research performance in competitive grants. Nevertheless, the ARC and NHMRC are the primary mechanisms of funding support for academics, and they may be conditioned to costing and pricing at a minimum level and for many academics it is difficult to make the transition to a pricing model which adequately covers costs.

Nevertheless, the surveyed universities distinguished and applied different costing and pricing models in relation to commercial research projects, which include contract research, consultancies and tenders. University costing/pricing models varied with respect to their interpretation of what was included in the

indirect costs of research and the multiplier and formulae used. Accordingly, the universities surveyed can be classified under three main groupings as discussed below.

Group One: Total price/cost charged includes a minimum contribution to indirect cost recovery

This category of universities, which includes Melbourne, Macquarie, Griffith, Queensland, Sydney and RMIT, have adopted a pricing model where:

$$P = (1+Y) \times (\text{Total Direct Project Costs})$$

and Y ranges from 0.15-0.60 and Total Direct Project Costs equal the sum of TDPaC and all other direct costs.

Flexibility in pricing is dependent on the circumstances in which the project will be awarded. For example, the University of Melbourne requires that the minimum price to be charged for a research project is 1.35 times the sum of all direct costs. However, for business and government agencies the goal is to charge 1.45-1.60 on top of direct costs.

Macquarie University's costing rationale appears to be the closest to recognising the issues addressed by the Avoidable Cost method. The university observed that research projects might not necessarily deploy additional infrastructure resources. Nevertheless, as a consequence of research, these resources would wear faster and hence would need to be upgraded or replaced earlier. Therefore a contribution to the costs of using these resources should be made with a minimum infrastructure component of 15-25 per cent of the total costs added to the total costs to form the entire budget.

A variation on this theme is where differential infrastructure charges are made depending on the nature of the direct cost. For example, the University of Sydney adopts an approach where there is an infrastructure charge of 30 per cent of direct salary costs and also a charge of 5 per cent of all non-salary components. The University of Queensland's pricing model is similar with a two-part infrastructure charge where minimum cost recovery is 1.6 x total employment costs (including salaried staff time) plus 1.1 x all other costs.

Of interest is RMIT's costing model, which quite explicitly considers a range of direct costs as well as applying a cost recovery multiplier. RMIT appears to be one of a select group of universities (see also La Trobe University below), which considers whether it is receiving a competitive advantage and applies an

adjustment factor if required. This factor depends on whether significant amounts of university space are to be used.

Group Two: Conservative Application of AVCC/ Competitive Neutrality guidelines

Universities in this group (e.g. Adelaide, Deakin and Western Australia) adopt a conservative approach in which the costing model strongly reflects the original AVCC guidelines, where:

$$P = \text{Total Direct Project Costs} + \text{Total Infrastructure Costs}$$

In principle this approach does not differ significantly from that of Group One, and discretion is also allowed as to whether the project price < project costs. The main differentiating factor appears to be the value of the infrastructure multiplier and how it is applied. For example, in the case of Deakin University, the above model is expanded as such:

$$P = \text{Total Direct Project Costs} + \text{TDPaC} + \text{Infrastructure Cost} \times \text{TDPaC}$$

where Infrastructure Cost (IC) = 1.8 for lab projects and 1.31 for non-lab projects

A similar approach is also adopted by the University of Melbourne when applying a full costing (direct and indirect costs) approach to be used in tenders where the university is competing with private sector, although the multipliers are lower (see Table 1).

La Trobe University appears to adopt the most conservative (or arguably the most compliant) approach of all universities as it makes explicit allowance for Competitive Neutrality principles after determining its costing/pricing structure. This may reflect the fact that in the early days of the Competitive Neutrality regime, it was subject to a Competitive Neutrality complaint (Victorian Competition and Efficiency Commission 1998). In the La Trobe model:

$$\text{Project Cost} = \text{Total Direct Project Costs} + \text{TDPaC} + \text{IC} \times \text{TDPaC} (\text{excl. oncosts})$$

where there are five IC possible values depending on location (Bendigo = 2.27) or faculty (Humanities = 1.9, Science = 2.39)

To the Project Cost an adjustment is made which reflects the 'notional costs for which the University would be liable but for its character as a public institution' (e.g. La Trobe University 2001). A Competitive Advantage Factor of between 0.11 and 0.13 is there-

University	Costing/ Pricing formula Reference website	Lab-based overhead cost multiplier (x Total Direct Payroll Cost)	Non-lab based
University of Western Australia	www.research.uwa.edu.au/welcome/research_services/research_grants/forms_and_guidelines#infrastructure	1.27 (high cost centres) x salaried staff costs or 35% overhead applied to total direct costs.	1.00-114 (low - medium cost centres)
University of Sydney	www.usyd.edu.au/ro/applications/overheads_policy.shtml www.usyd.edu.au/ro/applications/overhead.shtml	30% x TDPaC plus 5% x all non salary costs	Flat rate
Griffith University	www62.gu.edu.au/policylibrary.nsf/azcategory/20321fabdb500dc04a2570530063eda8?opendocument	1.25	
Macquarie University	www.research.mq.edu.au/researchers/funding/documents/Res_Costing_Policy_12_05.pdf	1.25	1.1
University of Melbourne	www.research.unimelb.edu.au/ridg/costing-pricing/#bfrForm	1.26630	0.75590
Curtin University of Technology	www.policies.curtin.edu.au/documents/Research_Costing_and_Pricing.doc	1.5	1.35
RMIT University	www.rmit.edu.au/browse;ID=5p8qv6du71u7;STATUS=A?QRY=competitive%20neutrality&STYPE=ENTIRE www.rmit.edu.au/browse;ID=mvdumaw8uocg1;STATUS=A?QRY=costing%20research&STYPE=ENTIRE	1.255 for science portfolio 1.375 for business portfolio.	1.15% for design portfolio.
University of Queensland	www.uq.edu.au/bupp/index.html?policy=4.50.4 www.uq.edu.au/research/orps/index.html?page=4249	Minimum cost recovery is 1.6 X of TDPaC for all projects plus 1.10 of all other costs.	Flat rate
Deakin University	www.deakin.edu.au/research/admin/grants/costing_res/national_comp.php www.deakin.edu.au/research/admin/grants/forms/index.php	1.8 x TDPaC (nb – no explicit inclusion of salaried staff in TDPC).	1.31
Flinders University	Price = full cost + 10% full costs Full cost = TDPaC plus project expenses plus 1.3xcost of project staff	1.3	Flat rate
La Trobe University	http://www.latrobe.edu.au/techpark/assets/downloads/cost_price_2001.pdf	2.18-2.39 x TDPaC (excluding oncosts)	1.9–2.25

Table 1: Comparative pricing (excl. GST) from selected Australian universities. The pricing assumes a full cost recovery model unless otherwise specified and is consistent with the pricing policies of the selected universities.

fore applied to the cost of academic salaries to arrive at the Competitively Neutral Cost.

Group Three: Attempted real costing of indirect costs

Only one university of those surveyed explicitly provided the basis for the costing. This was Flinders University (2006) where for consulting and contract research:

$$\text{Project Cost} = \text{Total Direct Project Costs} + \text{IC} \times \text{TDPaC (only for staff paid from project funds)}$$

where the IC is fixed at 1.3 and is based on an approximation of the ratio of the annual expenditure of total non-salary expenses from ordinary activities to total academic salaries (excluding oncosts)

and

$$\text{Project Price} = \text{Project Cost} + 10 \text{ per cent margin for reinvestment} \times \text{Project Cost}$$

4. Discussion

4.1 Are Universities complying with Competitive Neutrality Principles?

The preceding analysis suggests that universities are endeavouring to comply with Competitive Neutrality Principles by attempting to adopt a transparent costing methodology which includes a contribution to the cost of university infrastructure in addition to

<i>Final project price/cost</i>	<i>Other comments (spreadsheet used/not used indicates whether that university's own costing template spreadsheet was used)</i>
\$213,500 (using 1.27 multiplier on \$50,000 salaried staff costs). \$202,500 (using 0.35 multiplier on total direct costs and including salaried staff time).	Spreadsheet available but appeared inconsistent with guidelines so not used.
\$247,500 (salaried staff costs included in TDPaC).	Note USyd inclusion of salaried staff into the cost model appears to be optional. No spreadsheet used.
\$250,000 1.25 multiplier used.	
\$250,000 1.25 multiplier used.	No spreadsheet used.
\$270,000 with 35% cost recovery. \$389,945 with full cost recovery (= direct project costs + 126,630 x 1.5 EFT).	Minimum indirect cost level of 0.35x total direct costs but preferably 0.45 to 0.60. Spreadsheet used.
\$275,000	Note – a minimum cost recovery factor of 1.2 (x Total Cost) applies where it is not feasible or desirable to attempt full cost recovery. No spreadsheet used.
\$286,417 (salaried staff costs included) (no contribution margin applied).	Spreadsheet used.
\$295,000 (salaried staff costs also included).	Spreadsheet used.
\$330,000 \$470,000 including salaried staff time.	Spreadsheet used.
\$363,000 n.b. without 10% profit margin, the price would be \$330,000.	Guidelines have some ambiguity, thus the est'd price may not reflect actual uni pricing. University spreadsheet not used.
\$544,844 2.39 multiplier used on direct salaried staff costs including salaried staff costs (includes competitive advantage multiplier).	Indirect cost factors depend on geography as well as faculty/school. Cost factor also split between faculty and a central cost component. Spreadsheet used.

the recovery of direct costs. However in the main, universities are deriving their infrastructure costing methodology from the AVCC principles which reflect a full cost recovery not an Avoidable Cost recovery approach. Notwithstanding that universities are using the AVCC guidelines, there are substantial differences in the translation of these guidelines, as the following hypothetical example illustrates.

I compared the comparative costing/ pricing methodology of nine Australian universities applying a common set of basic cost components. These universities were chosen because they either provided detailed information as to their costing methodology or made publicly available their research costing templates (i.e. Excel files) via their website.

The cost components and assumptions were:

1. \$100,000 for project staff directly employed on the project (including oncosts).
2. \$50,000 for salaried staff already employed by the university and contributed to the project (including oncosts).
3. \$50,000 in direct project expenses (e.g. consumables).
4. There were no major items of depreciable equipment or infrastructure purchased.
5. The project was in the science/ engineering discipline area, that is would employ the highest cost multiplier where applicable.
6. Unless the university prescribed a set profit margin, the cost calculated was equal to the price.

The analysis, summarised in Table 1, shows that for this project example all universities priced above the marginal cost of \$150,000, where marginal cost is determined as the direct cost of new staff employed plus all project expenses. All recognised the cost of salaried staff time being contributed to the project, which when included provided a total direct cost of \$200,000. However, universities differed in how their infrastructure costs contributions affected the final cost/price. Thus a variation of over \$300,000 is observed in the final price charged, from \$213,500 for the University of Western Australia to almost \$545,000 at La Trobe University.

The University of Western Australia's final cost was the lowest (\$213,500) as its overhead multiplier is applied to salaried staff and not to other project staff employed on the project. The University of Sydney followed as a result of the low multiplier applied to TDPaC only. Following on was a grouping of four universities in the first group which used different multipliers and applied them in slightly different ways resulting in the given spread of \$270,000 to \$290,000. The next two institutions were comparable (\$330,000 to \$363,000: Deakin and Flinders) although different methodologies were used. The final institution, La Trobe University had the highest price of \$544,844 reflecting its highly conservative costing policy.

All the universities surveyed appeared to be adopting a Full Cost Distribution method, and it is probable, that as recognised by the Commonwealth Competitive Neutrality Complaints Office, inflation of costs is occurring. The range of infrastructure cost multipliers from 0.76 to 2.39 and the variation within universities based on discipline grouping and in some cases geography, suggests that an attempt may have been made to provide a rational basis for the cost multipliers. However the majority of university policy documents did not explain the origins of the multiplier. Further universities included what are in many cases likely to be fixed or non-avoidable costs in their costing.

An Avoidable Costing approach would see all direct costs being determined in line with the approach described earlier. Infrastructure costs would be determined by firstly considering the 'parent' unit that the project is hosted by (e.g. Faculty, Institute) and then determining its infrastructure burden for those facilities and resources which the project indirectly consumes relative to the parent. Specific corporate overhead services such as maintenance, information technology provision or even legal might still be accrued but on

specific cost multipliers based on project complexity rather than bundled into a generic multiplier. It appears that there is an increasing focus on cost management with up to seven universities adopting partially or in full elements of a Strategic Cost Management or Activity Based Costing into their financial systems (Monash, Murdoch, Charles Sturt, Edith Cowan, RMIT and James Cook universities). However of the universities surveyed for which pricing information was available, only RMIT's research costing methodology appears most transparent and has some basis in an Activity Based Costing approach.

4.2 Is there a tension between Competition Law and Competitive Neutrality Principles?

Competition policy theory suggests that firms act as profit maximisers and in a competitive market, the price of the good or service will be at the marginal cost to firms of supplying that good or service. However, it is questionable whether this theory which was developed in the context of an industrial economy is applicable to the 'knowledge economy' where different models of competition may also occur.

In the knowledge economy, firms may resist pressure towards marginal cost pricing as competition is likely to be based on differentiation related to a firm's skills, capability and reputation (i.e. non-homogenous good/services), with price (value for money) often being a secondary consideration. A high level of knowledge will be embodied in the good or service and it is not in the interests of such firms to price at marginal cost as this commoditises their intellectual capital and does not support the high fixed costs and future knowledge generation or acquisition.

For universities engaging in contract research, consultancy or tender, their competitors are often other universities, large consultancies or firms, or individuals. All will have different overhead cost structures. For competitors such as consultants, the model of business is often to use their knowledge, tools and templates as leverage such that they are re-applied to different customers while still providing a customised product. Marginal cost may be low although not necessarily, but this is not reflected in the pricing approach, although private firms may still adopt discretionary pricing policy structures (i.e. price discrimination/price differentiation).

Further, while there are potentially many competitors, at any one time the actual number of firms (including universities) competing may be few as

supply is not infinite and resources may be committed to other activities (teaching, research, other commercial projects). Additionally, in many situations there is a lack of transparency in the competitive process, e.g. a university may not know who or if indeed there is anyone else its potential client is considering. These factors add to the view that traditional competition models may be limited.

For universities, while Competitive Neutrality policy aims to make them competitive, it often results in a full cost rather than a marginal cost pricing model being employed when competing (potentially) with the private sector. Some price discretion may occur, especially for institutions in the first group, but this appears to often be when there is no immediate or known competition.

There thus appears to be an inherent tension between Competition Law and Competitive Neutrality Principles as the pricing approach of private sector competition and the application of Competitive Neutrality costing by universities results in high prices relative to marginal costs, which are not the expected or desired behaviour in a competitive market according to Competition Law. However, such a tension does not imply a direct statutory conflict with the TPA as s51(1) provides an exemption for things done or approved (i.e. Competitive Neutrality Principles) by Federal, State or Territory legislation.

The solution may be not to change the principles of Competitive Neutrality, but the adoption of a common approach and understanding of the principles underlying full cost pricing across jurisdictions. Applied to universities, this could mean an agreed approach to pricing adjustments universities should make to satisfy Competitive Neutrality. It should be noted that the Commonwealth Department of Education, Employment and Workplace Relations has tried to encourage universities to move to an activity based costing method (Ernst and Young 2000), which would provide for greater costing transparency. However, in the context of a range of higher education reforms this issue does not appear to have had priority.

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Tania Bezzobs is Manager, Research Development at the University of Melbourne, Australia.

References

- ACCC (Australian Competition and Consumer Commission) 2003a, 'ACCC allows JCU to continue enrolment policy' <www.accc.gov.au/content/index.phtml/itemId/347560/fromItemId/378016>, 30 April 2003. See also <www.accc.gov.au/content/index.phtml/itemId/531377>
- ACCC Australian Competition and Consumer Commission, 2003b, 'University of Melbourne - Notification - N91190' <www.accc.gov.au/content/index.phtml/itemId/481082/fromItemId/729976>, 7 October 2003.
- Australian Vice Chancellors' Committee 1996, 'University Research: Some Issues' <www.avcc.edu.au/documents/publications/policy/statements/urissues.pdf>
- Bessant, J 2004, 'Legal Issues in Higher Education and the Trade Practices Act' *Journal of Higher Education Policy and Management*. 26: 251-263.
- Commonwealth Competitive Neutrality Complaints Office 1998, 'Cost Allocation and Pricing' Competitive Neutrality Office Research Paper. Productivity Commission, Canberra, vii.
- Clarke, P 2003, 'University Marketing and the Law: Applying the Trade Practices Act to Universities' marketing and promotional activities' 8 *Deakin Law Review* 304.
- Commonwealth of Australia 2004, 'Australian Government Competitive Neutrality Guidelines for Managers'. Canberra, 1.
- DEST Department of Education, Science and Training, nd, Australian Competitive Grants Register. <www.dest.gov.au/sectors/research_sector/programmes_funding/general_funding/research_infrastructure/competitive_grants_register.htm>
- Ernst and Young 2000, 'A Study to Develop a Costing Methodology for the Higher Education Sector. Final Report'. Ernst and Young, May 2000.
- Fels, A 1998, 'The Impact of Competition Policy and Law on Higher Education in Australia'. Presentation to the Australasian Association for Institutional Research 1998 International Conference, 24 November 1998. <www.accc.gov.au/content/index.phtml/itemId/96894>
- Flinders University 2006, 'Financial accounting, management and control policies and procedures' <www.flinders.edu.au/ppmanual/financial/guidepric.html>
- La Trobe University 2001, 'Costing and Pricing Guidelines' page 7 <www.latrobe.edu.au/commercial/assets/downloads/cost_price_2001.pdf>
- Productivity Commission 2002, 'University Resourcing: Australia in an international context' Research Report, December 2002. <www.pc.gov.au/study/highered/finalreport/index.html>
- Quickenden v Commissioner O'Connor of the Australian Industrial Relations Commission* [2001] FCA 303 23 March 2001.
- University of Sydney 2007, 'Guidelines concerning commercial activities: Section 26B of The University of Sydney Act 1989' <www.usyd.edu.au/senate/policies/CommGuidelines.pdf>
- Victorian Competition and Efficiency Commission 1998, Investigation Report by the Complaints Office re La Trobe University Bendigo campus, Soil and Concrete Laboratory. See <www.vcecc.vic.gov.au/CA256EAF001C7B21/0/F62F31D6E3AA12DCCA256EAC001A8A80?OpenDocument>