

Competitive Neutrality (CN)

There has not been much mention of CN in recent times, but it still has to be addressed.

Competitive neutrality is about ensuring that the significant business activities of publicly owned entities compete fairly in the market when it is in the public interest for them to do so.

The Competitive Neutrality Unit (CNU) oversees (CN) issues in government enterprises and its role is to:

- investigate complaints made by any affected person or business about a government business that may not be applying competitive neutrality;
- respond to inquiries from potential complainants about the application of competitive neutrality prior to the lodgement of a formal complaint;
- advise government agencies on how to implement competitive neutrality, for example, by responding to queries and giving presentations to government agencies;
- seek information on compliance with competitive neutrality from agencies within three months of an investigation where a breach of policy has been found; and

report to the Government on compliance within this policy.

Snippets from the Australian Competition and Consumer Commission (ACCC) on recent events

ACCC accepts court enforceable undertakings over misleading termite protection warranty claims

The ACCC has accepted court enforceable undertakings from Leon Enterprises Pty Ltd over misleading claims about its termite protection warranty. An investigation by the ACCC found that, before January 2004, Leon Enterprises Pty Ltd trading as Envirotechnics Pest Management represented in various documents to new homeowners that:

- its 'New Home Termite Protection Warranty' or 'Complete Timber Replacement Warranty' lasted for 10 years when, in fact, it was an annual warranty that could be renewed on payment of a fee
- failure by the homeowner to arrange an annual termite inspection of their home and renewal of the Warranty would void the builders' statutory obligations, and the homeowner would bear all liability

in the event of damage caused by termite attack when, in fact, that was not the case

- its spider treatment did not carry a warranty when, in fact, provision of the treatment was subject to statutory warranties.

Envirotechnics has admitted that it may have contravened sections 52, 53(c), 53(f) and 53(g) of the *Trade Practices Act 1974*, after the ACCC raised concerns about its conduct. 'Consumers have certain rights under the Act which give them a basic guaranteed level of protection for the goods and services they acquire', ACCC Chairman Graeme Samuel said.

'Despite representations which a supplier may make to the contrary, those rights—known as statutory warranties and conditions—cannot be limited in any way. This means, for example, that consumers are entitled to receive services that have been performed with due care and skill, and the services and any materials associated with them must be fit for the purpose for which they are supplied.'

The ACCC acknowledges the cooperation of Envirotechnics that ceased the offending conduct once informed of the ACCC's concerns.

Pursuant to undertakings provided to the ACCC under section 87B of the Act, Envirotechnics placed a corrective ad-

vertisement in 1 January 2005 edition of the West Australian newspaper.

Envirotechnics has also provided court enforceable undertakings that it will write to warranty holders to explain the effect of its conduct and that it will not make the same representations in future.

ACCC institutes in relation to alleged boycott

The ACCC has instituted proceedings in the Federal Court, Melbourne, in respect of an alleged boycott of electrical contractors who did not have a union enterprise agreement.

The ACCC has alleged that in August 2001 Edison Mission Operation and Maintenance Loy Yang Pty Ltd, the operator of a power station in the Latrobe Valley in Victoria, entered into an arrangement with the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia. It is alleged that the arrangement had the purpose of preventing Edison from engaging electrical contractors who did not have an enterprise agreement with the CEPU to perform work at the power station. It is further alleged that Edison gave effect to the arrangement until January 2004.

The ACCC is alleging that by entering into and giving effect to the arrangement Edison contravened sections 45E and 45EA of the *Trade Practices Act 1974*. The ACCC is further alleging that the CEPU procured and induced Edison to contravene the Act.

The ACCC is seeking declarations, injunctions, pecuniary

penalties and costs against Edison and the CEPU.

The matter has been listed for a directions hearing in the Federal Court, Melbourne, on 27 April 2005.

ACCC institutes against garnet firms over alleged market sharing agreement

The ACCC has instituted proceedings in the Federal Court, Melbourne, against three companies for alleged market sharing conduct in relation to the distribution and supply of alluvial garnet in Australia and overseas.

Barton Mines Corporation and Barton International Inc are United States companies involved in the mining and distribution of alluvial garnet, including in Australia. Barton International (Australia) Pty Ltd is an Australian subsidiary of the companies. Alluvial garnet is a mineral used as an abrasive in the preparation of surfaces. The ACCC alleges that two of the companies breached s45 of the *Trade Practices Act 1974* by entering into an agreement, with another, which involved the companies agreeing who would supply alluvial garnet to certain areas in Australia and elsewhere.

It is further alleged that two of the companies gave effect to the agreement by informing distributors of the agreement and referring customers where they fell into the others allocated territory.

The ACCC is seeking declarations and orders including injunctions, pecuniary penalties, findings of fact, trade practice compliance programs and costs against the companies.

A directions hearing has been set down for 8 April 2005 before Justice Gray in the Federal Court, Melbourne.

Snooza Pet Products corrects pet futon claims

The ACCC has accepted a court-enforceable undertaking from Snooza Pet Products Pty Ltd in relation to its pet futon, a mattress for pets, primarily dogs and cats.

Snooza Pet Products supplied the futon labelled on its calico cover as '100% Australian Wool' and 'All Natural Product', when in fact after testing the actual wool content of the product's filling, it was on average 30 per cent, between July 1998 and December 2004 and since then 50 per cent of the total content.

The balance of the filling was, and is, polyester and, accordingly, the futon was not an 'All Natural Product' and the composition of the filling of the product was not '100% Australian Wool'.

The ACCC was concerned the representations on the calico cover of the futon and on [Snooza Pets website](#) and Product Catalogue, that the filling was made solely from wool breached sections 52, 53 and 55 of the *Trade Practices Act 1974*, which prohibit a corporation from engaging in misleading or deceptive conduct or making certain false claims, including representations concerning the composition of goods.

As part of the undertaking given to the ACCC, Snooza Pet Products will refrain from making similar representations about the futon, offer a full refund of the price of the futon to consumers

who believe they have been misled and to implement a trade practices compliance program. Snooza Pet Products has stopped supplying the incorrectly labelled futon and corrected the representations on existing stock, in its product catalogue and on its website. Snooza Pet Products will publish corrective notices on its website and a limited number of corrective notices in daily newspapers in each State and Territory within Australia in which the futon has been sold. Representations made in relation to products supplied in Australia must be correct.

Federal Court orders \$23.3 million in penalties for petrol price-fixing

Pecuniary penalties totalling \$23.305 million were ordered by the Federal Court for price-fixing conduct in the Ballarat petrol market. The ACCC instituted proceedings against 16 respondents alleging a number of competitors in the Ballarat region were part of a long-standing arrangement to fix retail petrol prices. A number of respondents made admissions and proceeded to early penalty hearings before Justice Goldberg. The contesting respondents proceeded to a trial before Justice Merkel. On 17 December 2004, Justice Merkel found the contesting respondents engaged in price-fixing conduct in breach of section 45 of the Trade Practices Act 1974. Today, Justice Merkel ordered the contesting respondents pay pecuniary penalties in the sum of:

- \$1 million against Triton 2001 Pty Ltd and \$100,000 against its Ballarat Area Manager, Mr Anthony Rosenow
- \$3 million against Apco Service Stations Pty Ltd and \$200,000 against its Director, Mr Peter Anderson
- \$4 million against Brumar (Vic) Pty Ltd (in liquidation) and \$100,000 against its Retail Area Manager, Mr Garry Dalton
- \$5 million against Balgee Oil Pty Ltd*

In the reasons for judgment, Justice Merkel said: "The circumstances of the present case suggest that the substantially increase monetary penalties provided for by the legislature in respect of conduct contravening Pt IV of the Act, and the numerous occasions on which the Court has imposed substantial penalties on arrangements and understandings proscribed by Pt IV of the Act, have had little, if any, affect on the parties to the price-fixing understanding."

"It behoves all employees and corporations to take active steps to ensure an awareness of the Trade Practices Act", ACCC Chairman, Mr Graeme Samuel, said. "For employees this may mean requesting trade practices compliance training".

The admitting respondents each submitted a statement jointly with the ACCC detailing their involvement in the conduct and admitting to contraventions of the Act. The ACCC acknowledged in its submissions to the court on penalty, that the admitting respondents had satisfied

the requirements of the ACCC's cooperation policy and accordingly recommended relatively low penalties. The penalties ordered by Justice Goldberg reflect a discount based on cooperation provided to the ACCC. Today, Justice Goldberg ordered the admitting respondents pay pecuniary penalties in the sum of:

- \$2.5 million against J. Chisholm Pty Ltd
- \$3 million against Justco Pty Ltd and \$200,000 against its Director, Mr Justin Bentley
- \$1.5 million against Leahy Petroleum Pty Ltd, \$2.5 million against Leahy Petroleum – Retail Pty Ltd and \$100,000 against their General Manager, Mr Robin Palmer
- \$40,000 against Mr John Gourley (the General Manager of Balgee Oil Pty Ltd*)
- \$40,000 against Mr Peter Muller (Ballarat Operations Manager of Balgee Oil Pty Ltd*)
- \$25,000 against Mr Robert Levick (Ballarat Area Sales Representative of Balgee Oil Pty Ltd*)

ACCC Chairman, Mr Graeme Samuel, said price-fixing was a very serious breach of the law which would not be recognised as such by senior corporate employees and directors until gaol terms are introduced.

"All penalties ordered today clearly reflect the court's disapproval of such conduct." In addition to penalties, the Federal Court also declared the conduct in breach of the Act and

ordered injunctions against the respondents prohibiting them from communicating to or obtaining from competitors the retail price of fuel for a period of four years and ordered that the respondents pay the ACCC's costs.

* formerly Balgee Oil Pty Ltd, now Cavallo Volante Pty Ltd (Subject to Deed of Company Arrangement)

Background

On 21 May 2002 the ACCC instituted proceedings against a total of 14 companies and individuals, alleging a long-standing price-fixing arrangement existed in the market for the supply of petrol in the Ballarat region. On 20 December 2002, the Federal Court granted the ACCC leave to join two further respondents. The legal proceeding was instituted after an extensive investigation by the ACCC which first commenced following allegations by Mr Trevor Oliver, a service station operator in Buangor who was at the time supplied by one of the alleged participants.

The ACCC alleged the companies arranged to increase prices by telephoning each other, communicating the size and approximate time of price rises and then contacting retail sites to implement the rises. The ACCC alleged when a company became aware that a service station had not raised its price, further calls were made to participants in order to have the site raise its prices. The ACCC also

alleged the arrangement involved a number of meetings.

Dubbo taxi settlement: reminder to whole industry on anti-competitive practices

The ACCC has reminded regional taxi companies not to engage in anti-competitive practices after Dubbo Radio Cabs Co-operative Limited provided the ACCC with a court-enforceable undertaking to cease various anti-competitive practices.

The ACCC considered that a Dubbo Radio Cabs system for allocating jobs in excess of 20 kilometres on a value basis in numerical order, least amount first; and its ban on drivers using mobile phones were in breach of the *Trade Practices Act 1974*.

Additionally, there were various other rules which concerned the ACCC and Dubbo deleted these rules from its rules and by-laws. Dubbo Radio Cabs Co-operative Limited has ceased the conduct and provided an undertaking to the ACCC that it will:

- notify all taxi operators of the termination of the value based system for allocating jobs in excess of 20 kilometres
- instruct a solicitor or suitably qualified person to review the rules and by-laws and remove all paragraphs that may be anti-competitive, and

- develop a trade practices compliance program.

"This undertaking reinforces the need for radio network providers in regional areas to check that their rules and by-laws are not in breach of the Trade Practices Act", ACCC Chairman, Mr Graeme Samuel, said.

"Radio network providers who are the sole providers of radio services in a particular region should be aware that if they prevent taxi drivers from engaging in competitive conduct they also may be illegally misusing their market power.

"Taxi operators are an important part of the small business community and they are entitled to reward for vigorous competition, including competition to provide a timely, clean and efficient taxi service to consumers".

Any queries on items in this Bulletin may be made to your Compliance Officer or Positive Compliance Action on 0408 765 125

Acknowledgment is made to the Victorian Government & ACCC Website for content in this bulletin.

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