

Local Government Improvement Incentive Program (LGIIP)

Its that time again when Councils will need to complete the LGIIP Statement for 2004/05 to be eligible for their competition payments.

The Department of Victorian Communities forwarded the reporting guidelines and proformas for 2004/05 to Councils in September 2004.

So find those forms and complete the statement and ensure it is submitted to the Minister for Local Government no later than 30 September 2005. Enquiries should be made to Lorna Heiman at Local Government Victoria on tel 9208 3596

Unconscionable conduct law explained

A new small business guide to unconscionable conduct law has been launched by the ACCC.

Addressing the ACCC's Small Business Advisory Group* in Canberra, ACCC Chairman Mr Samuel said the new guide formed an important part of a suite of educative material developed specifically for small businesses.

"This guide explains this complex area of law clearly and concisely", he said. "Small businesses make an important contribution to the Australian economy and the ACCC is keen to ensure vigorous—but fair—competition between all. "The unconscionable conduct provisions of the *Trade Practices Act 1974* do not try to stop competition between businesses, particularly when negotiating with each other.

These provisions will not apply when one party is merely driving a hard bargain, nor do they require a business to put the interests of another party ahead of its own". The guide contains simple English explanations of unconscionable conduct law, and how it might apply to common business situations. It also contains examples of the difference between hard bargaining and unconscionable conduct, and seeks to educate small businesses on this key element of the law. "This guide adds to our existing small business information about the Act and its application to small businesses". The guide is available free of charge from ACCC offices in all capital cities or from the ACCC Infocentre on 1300 302 502.

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

ACCC allows Sydney councils to collectively tender with waste management providers

The ACCC has issued a decision authorising a group of councils to collectively tender and contract for the provision of waste management services, ACCC Chairman, Mr Graeme Samuel, said. A group of councils in the Southern region of Sydney have sought authorisation to collectively tender for contractors to receive and dispose of residual waste. "The ACCC considers that any anti-competitive detriment that may flow from the

proposed arrangements is likely to be minimal.

"The ACCC sees benefits in allowing these councils to collectively tender with waste service providers", Mr Samuel said. "The ACCC considers that a co-ordinated approach to the council's waste management services will result in service efficiencies which will be reflected in a lower domestic waste management charge to ratepayers. "In addition, competition for the relevant services in the Southern Sydney region is currently limited and it is anticipated that the arrangements may provide an incentive for new providers to compete to supply these services to the participating councils".

The councils covered by the decision are: Botany City Council, Canterbury City Council, Hurstville City Council, Kogarah Council, Marrickville Council, Randwick City Council, Rockdale City Council, Sutherland Shire Council, Waverley Council and Woollahra Council.

Solarium safety claims found to be misleading

Claims that solarium treatments were 'safe', or 'the safe alternative to Tassie's sun', were false and misleading, the Federal Court has found. The declarations follow ACCC action. The claims appeared between November 2004 and January 2005 in newspaper advertisements placed by Launceston business, Honeybank Corporation Proprietary Limited, trading as Aquarius Roman Baths.

Justice Peter Heerey found the claims to be false and misleading after being presented with medical research linking the ultraviolet light emitted by solariums* with an increased risk of skin cancer, melanoma, premature skin aging, eye damage and suppression of the immune system.

The court issued a five year injunction restraining Aquarius Roman Baths from making safety claims regarding its solarium service, and ordered that it publish at its own expense a series of corrective advertisements, display a corrective notice at its salon and institute a trade practices compliance training program for its staff. Aquarius Roman Baths was also ordered to pay the ACCC's costs in the matter.

The court made the orders following its consideration of the facts of the matter and the suggested remedies submitted jointly by the ACCC and Aquarius Roman Baths. ACCC Chairman, Mr Graeme Samuel, welcomed the Federal Court's decision and said: "It is essential that businesses do not make safety claims without first ensuring that those claims are positively supported by appropriate research".

Background

*Modern solariums and sunbeds predominantly emit wavelengths from a part of the ultraviolet spectrum known as UV-A. Older equipment also emit the more harmful UV-B part of the spectrum.

NB: Action in this case was taken under sections 52 and 53 (c) of the *Trade Practices Act 1974*. No monetary penalties are possible under these sections.

Wizard compensates mobile lending manager for misleading conduct

Wizard Home Loans Pty Ltd will compensate a candidate for a Mobile Lending Manager position after admitting that it engaged in misleading conduct, following ACCC action. The Federal Court has ordered Wizard, by consent, to compensate Mr David Cassar who responded to an advertisement and accepted the position.

Wizard has admitted that it breached section 52 of the *Trade Practices Act 1974* by making representations to Mr Cassar, in an interview, about a level of commission that a good performing mobile lending manager may earn when there were not reasonable grounds to do so.

Following proceedings taken by the ACCC, including a representative action seeking compensation on behalf of Mr Cassar, Wizard has reviewed its recruitment practices. The court proceeding settlement provides for:

- a declaration that Wizard misled Mr Cassar in an interview for a position as a mobile lending manager with Wizard
- a compensation order for Wizard to pay a confidential sum to Mr Cassar representing lost earning opportunity, and
- costs.

In addition Wizard has agreed to give a section 87B undertaking to the ACCC that it will not, for a three year period, make representations to any mobile lending manager candidate about the annual commission that person may earn unless there are reasonable grounds, after considering:

- the average annual commissions earned by mobile lending managers at that time
- the average annual commissions earned by mobile

lending managers engaged in the geographical area where that mobile lending manager will be or is engaged

- the level of residential sales and sale prices in the geographical area where that mobile lending manager will be or is engaged, and
- the number of mobile lending managers engaged at that time and to be engaged during the next 12 months in the same geographical area.

As part of this undertaking, Wizard will implement and maintain a trade practices compliance program for a period of three years designed to make Wizard personnel aware of their responsibilities and obligations with respect to section 52 of the Act in connection with the recruitment of mobile lending managers.

"Not only has the ACCC successfully obtained compensation for an individual who suffered significant financial loss as a result of Wizard's unlawful conduct, in addition the resolution is one which provides for an outcome that involves Wizard reviewing its practices and procedures so as to address the concerns raised by the ACCC", ACCC Chairman, Mr Graeme Samuel, said.

"Companies should exercise real care when discussing potential remuneration given the importance that element may have to persons in terms of career changes and choices.

"Consumers generally need to be aware that extreme care should be taken to understand and verify the basis of any representations made about the potential to earn future remuneration which depends upon a commission or bonus scheme, especially in circumstances where no base salary is on offer".

Background

On 22 September 2004 the ACCC instituted proceedings in the Federal Court, Melbourne, against Wizard Home Loans Pty Ltd, alleging breaches of the misleading and deceptive conduct provisions of the *Trade Practices Act*.

The ACCC alleged Wizard breached section 52 of the Act by placing advertisements for Mobile Lending Managers in newspapers in New South Wales, Victoria and Queensland which were liable to mislead people into believing the positions were employed positions when they were self-employment opportunities.

The ACCC further alleged that annual remuneration figures provided to the managers were likely to mislead.

The ACCC also took representative action seeking compensation on behalf of an individual who responded to an advertisement and accepted one of the positions.

Whilst in resolving this matter the ACCC has not pursued all its claims against Wizard, the ACCC is satisfied that the combined effect of the court outcome which provided for a declaration and a compensation order, together with a section 87B undertaking by Wizard and other changes made by Wizard to its recruitment practices, provide measures for enhanced future compliance by Wizard. In particular, the advertisement for the mobile lending managers' position now expressly states that the remuneration on offer is by commission only, which addresses one of the ACCC's key concerns.

This is the second occasion Wizard has been involved in conduct in breach of the *Trade Practices Act*. In October 2002 the Federal Court found that Wizard Mortgage Corporation Limited had engaged in misleading or deceptive conduct in respect of a television advertisement for its home loan products and the court made an order to re-

strain Wizard from publishing misleading advertisements for 18 months.

IT Warehouse undertakes to improve its catalogue advertising

Computer and electronics retailer IT Warehouse Pty Ltd has signed court-enforceable undertakings with the ACCC to improve its catalogue advertising and its trade practices law compliance.

IT Warehouse is a partially franchised electronics retailer with 16 retail stores, mainly in South Australia and Victoria. Several editions of its promotional catalogues, particularly those of April and July 2004, advertised a number of Nikon digital cameras as being available for sale from its stores. However, many IT Warehouse stores had stock levels which were inadequate, or non-existent, and in any event were disproportionate to the discounted price and the level of the promotion.

The ACCC believed the representations in the catalogues were misleading and deceptive or likely to mislead or deceive customers, in breach of section 52 of the *Trade Practices Act 1974*.

"The ACCC was concerned that consumers would be misled into believing that IT Warehouse had stock of several models of specially discounted digital cameras available for immediate purchase, when this was not the case for many stores", ACCC Chairman, Mr Graeme Samuel, said. "This was likely to be misleading because the catalogues inferred that IT Warehouse stores could readily supply items at the advertised prices, when they could not.

"This case should alert retailers who customarily do not have stock in hand or readily available, or where that is hardly ever the case, that they must tell consumers about the situation, especially when they

promote the items in an attempt to gain a competitive advantage.

"The IT Warehouse catalogues inferred that the store could readily supply items at the advertised prices, when they had not yet got supply from wholesalers. In addition to potential consumer inconvenience, this advertising practice placed other retailers at an unfair competitive disadvantage with IT Warehouse".

IT Warehouse acknowledges that it may have contravened the Act. IT Warehouse has provided court-enforceable undertakings to:

- cease engaging in the alleged misleading and deceptive conduct
- inform all franchisees so that they are also made aware of the issues, and
- institute a trade practices law compliance program, including training for all its staff.

Federal Court penalises Liquorland \$4.75 million for anti-competitive liquor deals

Liquorland (Australia) Pty Ltd has been penalised \$4.75 million by the Federal Court after the company admitted that it entered into illegal agreements with a number of applicants for liquor licences in New South Wales.

"This is a significant penalty for a contravention of Part IV of the Trade Practices Act which should serve as a warning to other companies which may try to prevent new entrants to markets from being able to compete effectively", ACCC Chairman, Mr Graeme Samuel, said.

The ACCC instituted legal proceedings in the Federal Court against Liquorland and Woolworths Limited on 30 June 2000. The case against the second respondent Woolworths is continuing before Justice Allsop.

Liquorland, a subsidiary of Coles Myer Ltd, admitted to five contraventions of the exclusionary (primary boycott) provisions of the Act. In determining the appropriate penalty to recommend to the court, the ACCC welcomed Liquorland's cooperation in resolving the case prior to the commencement of a lengthy and expensive trial.

"Following the ACCC first raising the issue with Coles Myer the company ceased entering into similar agreements", Mr Samuel noted. "The ACCC also recognises that Coles Myer has in recent years made a substantial investment in trade practices law compliance training and strategies throughout the company".

Liquorland has conceded that it had entered into five agreements with liquor licence applicants for the substantial purpose of restricting and preventing those businesses from competing with its own Liquorland stores in the supply of takeaway liquor.

The ACCC had alleged that the conduct arose in circumstances where Liquorland objected to certain liquor licence applications and then proposed restrictive agreements in return for withdrawing their objections. The restrictive agreements contained one or more conditions to the following effect:

- preventing liquor licence applicants from selling packaged takeaway liquor from their premises
- preventing liquor licence applicants opening a dedicated bottleshop
- restricting and preventing liquor licence applicants from establishing a separate drive-through bottleshop
- restricting and preventing liquor licence applicants from advertising or conducting promotions for the sale of packaged takeaway

liquor over the counter to consumers

- preventing liquor licence applicants from being able to offer home delivery services for packaged takeaway liquor to consumers
- preventing liquor licence applicants from expanding the size of their licensed premises to meet potential increased consumer demand
- limiting the amount of packaged takeaway liquor which liquor licence applicants can keep on their premises in order to meet consumer demand.

The ACCC agreed to discontinue a number of its claims against Liquorland in order to settle the matter.

Justice Gyles today ordered Liquorland pay pecuniary penalties of \$950,000 for each of the contraventions (\$4.75 million in total) as follows:

- Ettamogah Bar & Restaurant, Campbelltown;
- Dry Dock Bottleshop, Tweed Heads;
- Global Beer Importers, Tweed Heads;
- Jin Ro Australia, Arncliffe;
- Henry Kendall Family Bistro and Tavern, West Gosford.

When imposing the penalty of \$4.75 million against Liquorland, Justice Gyles noted that: "each of the deeds in question constituted a significant restriction upon the business of the third party compared with the position that would have pertained had the party obtained an unrestricted licence.... It is also obvious that consumers lost the choice and competition between outlets that otherwise would have been available in the event a third party did obtain an unrestricted licence.

"It follows that there would have been significant loss or damage to

those parties and a significant gain to Liquorland by reason of the contravening conduct".

In addition Justice Gyles ordered injunctions against Liquorland preventing it for a period of three years from engaging in similar conduct in the future or giving effect to any existing deeds which had legal effect independently of proceedings in the Licensing Court in respect of a liquor licence application and which was made for the purpose of preventing, restricting or limiting the supply of takeaway liquor. He also ordered that Liquorland make a contribution to the ACCC's costs of \$250,000.

This is the last bulletin from Positive Compliance Action as it has ceased to trade. Future bulletins will be prepared by Greg d'Arville from Neill Buck & Associates. Trade Practices compliance services will still be available through Neill Buck & Associates – Contact Greg d'Arville on 0414 250 025 and Competitive Neutrality services through Campbell Duncan & Associates on 0400 887 272

Any queries on items in this Bulletin may be made to your Compliance Officer or John de la Rue on 0408 765 125

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

Competition & Compliance Update is a bulletin prepared by Positive Compliance Action on National Competition Policy and current issues. It is for the information of clients and to form part of a Trade Practices compliance program The information is of general nature and readers should seek legal advice before acting on the information in this newsletter

