

CN MATTERS

Competitive Neutrality in Food Safety Training

The Victorian Competition and Efficiency Council (VCEC) has recently considered the application of competitive neutrality principles to food safety training services provided by the City of Melbourne.

The City of Melbourne (the Council) is responsible for the implementation of the *Food Act 1984* for food businesses within the municipality. The complainant alleged that the Council was using its position as a regulatory authority to promote its own food safety training service which operates as a business in a competitive market.

VCEC determined that the provision of food safety training services was a significant business. The services are provided for a fee and the size of the business activities are [sic] large relative to the size of businesses in the relevant market.

VCEC found that the Council had attempted to apply competitive neutrality principles. However, it also found that some material produced in order to convey regulatory information might inadvertently promote the Council's food safety training business. This in turn could advantage the Council's the training business over private providers

The Council had implemented a range of measures to ensure separation between the business activities of the Training Unit and the regulatory activities of the Health Unit:

- The Training Unit has a separate cost centre with its own budget, staff, resources and operating procedures
- Public information and material issued from the Health and Training units are prepared separately.
- Regulatory based communications are sent out on Council letterhead or on fact sheets titled 'How to Run a Healthy Business' by the Health Unit.
- Food safety training and consulting business promotional material has its own branding. It is issued by the Training Unit.
- Regulatory and training information is accessed from different menus from the Council's website.
- Food businesses that contact the Health Unit seeking advice on training are referred to either the Department of Human Services or the yellow pages. They are not referred to the Training Unit.

Despite these attempts at functional separation, some documents produced by the Health Unit may have had an inadvertent promotional impact. In particular, three fliers from the

Health Unit – *Food Handlers Food Safety Trainin'*, *Food Safety Supervisors*, and *About Food Safety Programs* – were assessed. All three provided the Council's 'business' contact details but did not inform the reader where they may obtain a list of other training providers

VCEC has found that the information in these fliers did unduly promote and/or favour the Council's service over other providers. This is not consistent with competitive neutrality policy, and corrective recommendations were made.

NOTIFICATION REVOKED

ABF strikes out

The linkage between baseball and local government may not be obvious, but they do have one thing in common: preferred suppliers. The ABF is a national baseball body, which supplies services to state and territory baseball associations, clubs etc on condition that they acquire uniforms and baseballs from licensed third party suppliers. They have done so under the protection of a Notification lodged in March 2001.

That protection has now been withdrawn, with the ACCC noting that "benefits do not outweigh the likely detriment generated by the [licensing] program.

ACCC IN THE MARKETPLACE

Over the last quarter the ACCC has become involved in two markets of great interest to the local government sector: child care and livestock saleyards. Councils were not directly involved in either of these issues, but should note the ACCC's interest and keep an eye on developments.

Child care

ABC Learning Centres Limited, the operator of 755 child care centres in Australia, sought to acquire Kids Campus Limited (which owns or manages a further 91 child care centres).

Given the likely impact of such an acquisition on competition in the market, it recognised that the ACCC would have some concerns. Since the acquisition of long day child care centres can affect competition on a local basis, the focus was on those local areas where child care centres were being acquired.

To secure ACCC approval for its acquisition, the company provided a court-enforceable undertaking to divest five child care centres in regional areas.

The ACCC was satisfied that the undertaking would ensure that prices for long day child care services in these areas would not rise and that parents in regional areas would continue to have a choice of long day child care services for their children.

A *Public Competition Assessment* will be published on the ACCC website, and we will provide you with a summary of that document when it appears.

Livestock saleyards

The recent acquisition of the Sale and Korumburra saleyard businesses by Victorian Livestock Exchange Ltd (VLE) has attracted ACCC interest.

On 15 June it issued a *Statement of Issues* and sought information and comment on the provision of saleyards and saleyard services in the Gippsland region and across Victoria".

VLE already owns and/or operates saleyards at Pakenham, Leongatha, Traralgon and Yarram and provides other livestock services throughout Gippsland and neighbouring regions.

ACCC Chairman, Mr Graeme Samuel said:

"In particular, the Statement of Issues seeks more detail on the nature of the markets and methods used for the sale of livestock, the height of barriers to entry, the existence and possible use of countervailing power by saleyard users and the likely response of users to any adverse change in the prices or levels of service offered by the VLE saleyards in Gippsland, should the acquisitions proceed".

The closing date for comments was 30 June 2006. The ACCC expects to make a final decision on the acquisitions in July 2006, and we will report that decision in the next *Update*.

ACCC ENFORCEMENT SNIPPETS

Juicer squeezed

In another case that demonstrates the principle that even the whole truth may not be

enough, the Just Squeezed Group will stop manufacturing fruit juice under the brand name *Just Squeezed*.

The Group manufactures and supplies fruit juice products to most States and Territories. Of these products, only its orange juice contains fresh juice, ranging from 25 per cent to 75 per cent, depending on seasonal factors. The rest of the range contains only reconstituted juice.

The prominence of the words "just squeezed" on the labels, together with images of fruit and other words', created – in the ACCC's view – an overall impression that each product was made directly from the fruit shown on the labels and did not contain reconstituted juice.

ACCC Chairman, Mr Graeme Samuel said "Although the ingredients on the just Squeezed product labels listed reconstituted juice, the ACCC believed that in each case, it was not prominent enough to overcome the alleged misrepresentation".

The company has undertaken to cease manufacturing fruit juice products under the offending brand name, adopting a new brand name *just Delicious* to replace it.

"You pay what we pay"

Another case involving fine print disclaimers concerned Holden's high-profile *You Pay What We Pay* advertising campaign, which ran from October to December 2005.

An ACCC investigation revealed that GM Holden employees received discounts that were not available to the general

public. These included discounts on factory fitted options and accessories as well as a discounted dealer delivery fee.

At the beginning of the campaign a further special discount was also available to employees, but not the general public, for selected vehicles. This meant that some consumers would, at the commencement of the promotion, have paid \$4,729 more to purchase a particular car model than a Holden employee buying the same car.

Fine print qualifications regarding options, accessories and dealer delivery fee appeared in the advertisements; the company's intention, it seems, was to limit the offer to the baseline price of the vehicle.

But in the ACCC's view the headline statement "You Pay What We Pay" was so powerful that no qualification in fine print could undo the message it conveyed to consumers.

GM Holden has undertaken to provide full refunds to affected customers (up to 300 in all) who request this remedy.

Jason Mazda

This Western Australian car dealer's conduct was more low-key than the Holden promotion discussed above, but just as misleading. It illustrates the Commission's continuing interest in car sales strategies.

In an advertisement on a single page leaflet for various Mazda motor vehicles inserted in the 28 February 2006 *Western Suburbs Weekly Community Newspaper*, Jason Mazda failed to include dealer delivery charges

that were payable in addition to the advertised purchase price.

Jason Mazda immediately took action to ensure such omissions would not occur again, and gave the ACCC court-enforceable undertakings to this effect.

ACCC enforcement action in the motor vehicle retail market follows the publication of its *Guidelines for Pricing in the Motor Vehicle Industry* in 2003, and its concern that some industry members have failed to take note of these rules.

ACCC ENFORCEMENT SNIPPETS

Debt collection

The latest of several enforcement actions involving debt collectors was settled by way of court-enforceable undertakings on 15 June.

Fox Symes & Associates Pty Ltd and its directors have provided undertakings to the Federal Court that they:

- will not make certain statements to customers or potential customers in respect of debt agreement proposals and debt agreements;
- will use [their] best endeavours to inform customers and potential customers that details of a debt agreement proposal or debt agreement are highly likely to be recorded on a person's credit report as maintained by credit reporting agencies;
- will explain the nature and effect of all documents provided to customers and potential customers by Fox Symes; and

- will bring to the attention of customers and potential customers the amount of all fees payable in respect of a debt agreement.

Council officers involved in debt collection should be aware off the ACCC's ongoing interest in this area, an interest shared by many State agencies. They must ensure that they avoid coercive and/or unconscionable conduct, and give complete and accurate information to debtors.

Price fixing: Training

This case illustrates how dangerous ignorance of the law can be, and reminds us that a failed attempt to fix prices is – in the eyes of the law and the ACCC – as much of a breach as a successful one.

In December 2005 a director of the Northern Rivers Gestalt Institute allegedly sent an email to the directors of eight other Gestalt institutes seeking their agreement to collectively raise fees for Gestalt counselling training services.

Such an agreement would contravene s.45 TPA, which prohibits price fixing. It was not alleged that any agreement was actually reached to raise prices. But as noted above, the attempt alone is a contravention.

The ACCC accepted court-enforceable undertakings from the Northern Rivers Gestalt Institute in settlement of the matter. The Institute has undertaken that it will:

- not enter into, or attempt to enter into any agreements with its competitors about the prices to be charged for the

provision of Gestalt training services

- write to all parties who received the email in which the attempted price fix was communicated to retract its contents, and
- implement a trade practices compliance program in which the director of the Northern Rivers Gestalt Institute who sent the email will attend trade practices compliance training.

Liquor Wars

We have covered the ACCC's actions against Liquorland and Woolworths, concerning alleged anti-competitive conduct in the liquor market, a number of times in this publication. Here is the latest news, together with a summary of the story so far.

On 30 June 2003, the ACCC instituted legal proceedings in the Federal Court against Woolworths Limited and Liquorland (Australia) Pty Ltd, a subsidiary of Coles Myer Ltd.

The ACCC alleged that the companies' conduct contravened the exclusionary (primary boycott) provisions of the TPA and was engaged in for the purpose of substantially lessening competition in packaged takeaway liquor markets.

Broadly, the companies were accused of using NSW liquor licensing laws to suppress competition. Applicants for liquor licences were allegedly forced to accept conditions on these licences or face objections that would add to the time and expense of the process. Two ex-

amples of these alleged conditions were:

- Boutique beer retailer Global Beer, allegedly forced to ensure it did not stock the same brands as the supermarket; and
- Ettamogah Pub, allegedly forced not to sell packaged takeaway liquor other than the Ettamogah brand.

The two companies have adopted vastly different strategies in relation to these allegations. Liquorland settled the matter swiftly. In May 2005, by consent, the Federal Court ordered Liquorland to pay pecuniary penalties of \$4.75 million after it admitted to five contraventions of the TPA's exclusionary agreement provisions. But Woolworths was not part of that settlement and the case against Woolworths proceeded to a full hearing over 34 days.

Justice Allsop handed down a summary of his judgment on 30 June. He found that Woolworths contravened the TPA's exclusionary provisions in respect of its dealings with the Ettamogah Hotel at Campbelltown and Global Beer at Tweed Heads. He also found that Woolworths had contravened the Act by entering into deeds with applicants for liquor licences for the purpose of substantially lessening competition in packaged liquor markets in the geographic areas of Campbelltown, Tweed Heads and Arncliffe/Rockdale.

Woolworths appears to have taken the view that it was doing not only what the law allowed, but what it required. Chief Ex-

ecutive Roger Corbett stated that "We respect the court's decision but we were both surprised and disappointed because this has been part of the ... process of the licensing court of NSW. We believe we were acting both correctly and completely within the law."

"This decision, fundamentally, challenges a process that's been going on in NSW, to my knowledge, for 50 years. Whilst respecting the decision of the court we will certainly be considering the question of an appeal," Mr Corbett said.

This case is especially interesting because of the unusual spectacle of one defendant settling and the other fighting on. But from a council perspective, the most relevant aspect may be the interaction of State laws – which may have anti-competitive aspects – and the *Trade Practices Act*.

Queries about items in this publication may be made to your Compliance Officer; or contact Greg d'Arville at **crgESSENTIALS**, on 0414 250025.

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

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