

## CN MATTERS

### On the road(s) again

*by Campbell Duncan*

A fact of life for those in local government who provide road construction services is that private contractors will watch their activities very closely. This is particularly the case when Councils compete for external work, such as maintenance of VicRoads roads.

A recent investigation by Victorian Competition and Efficiency Commission (VCEC) related to the Shire of Moyne Road Construction Unit.

The complainant was a private contractor. The complaint raised a number of concerns, centring on the assertion that the Council's tenders for external work that were consistently below tenders submitted by its competitors. Other allegations included:

- possible underpricing of input materials (crushed rock);
- cross subsidy;
- failure to fully cost its tender bids;
- failure to comply with the requirements of the Local Government Act. VCEC noted, correctly, that it did not have jurisdiction to investigate this issue, although it did

make some brief comment on adequacy of the Council's "Chinese walls" – that is, its measures to ensure confidentiality of information where other parts of the Council had possession of relevant information on behalf of VicRoads. VCEC noted that the Council conducted internal audit reviews of the adequacy of this function.

The complaint was not upheld. The conclusion reached by VCEC was that the Council complied with the Victorian Government's competitive neutrality policy by applying full cost reflective pricing principles to its Road Construction Unit.

In reaching its conclusion, VCEC took into consideration the processes which the Council had set up well before the complaint was received. The Council had reviewed its activities and concluded that the Road Construction Unit was a significant business activity. A subsequent review by an external consulting firm supported that assessment. The Council used a template, prepared by an independent consultant, to identify and calculate competitive neutrality cost adjustment.

Further, the Council was able to demonstrate that a number of the concerns raised by the com-

plainant were not factually correct.

As part of its investigation VCEC compared four recent Council bids for external (VicRoads) work to ascertain whether there was a pattern to the pricing, which would be evidence that the Council's cost estimates may not have been sufficiently "robust". Of course, this would not be conclusive evidence – low pricing by a Council may be evidence only that the Council's business operation operates more efficiently than its competitors. In any event, the VCEC analysis found no evidence of "systematically" lower pricing by the Council – one bid was higher than that of competitors and two others were only slightly lower.

This investigation shows the importance of establishing appropriate systems and record keeping, so that the Council is in a good position to respond to a complaint if made.

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## ACCC IN THE MARKETPLACE

### *Livestock saleyards*

Our last edition reported the ACCC's interest in recent saleyard business acquisitions by Victorian Livestock Exchange Ltd (VLE). VLE operates saleyards at Pakenham, Koonwarra (Leongatha), Traralgon and Yarram and provides

other livestock services throughout Gippsland and neighbouring regions.

On 23 August the ACCC announced that it would not oppose these acquisitions. Its market enquiries had confirmed that regular users of saleyard services, including agents, buyers and some sellers, are able to exercise countervailing power in their dealings with VLE.

Other responses indicated that consolidation in the industry, along with a higher standard of service, would be likely to attract more livestock buyers and sellers, making the auction system more competitive.

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### CROWN IMMUNITY & TPA: HOW FAR?

*Government purchasing authorities – High Court appeal*

Recent litigation has thrown the spotlight on the extent to which Crown Immunity – insofar as it may apply to the Trade Practices Act – has survived the introduction of a National Competition Policy (“NCP”) in 1995.

The litigation concerns an ACCC allegation that Baxter Healthcare Pty Ltd entered into long term, exclusive, bundled contracts of between three and five years with State and Territory purchasing authorities.

These contracts tied the supply of sterile fluids to the supply of peritoneal dialysis products which are used by patients with kidney failure. Each purchasing authority acquires these products for supply to publicly funded health facilities, including public hospitals.

On 16 May 2005 Justice Allsop found one contravention of section 46 of the Act and a number of contraventions of section 47 and held that this conduct was likely to hinder competition. However, he dismissed the ACCC's application on the basis that applying the principles of Crown immunity or derivative Crown immunity, the Act did not apply in the circumstances of the case.

After unsuccessfully appealing this aspect of the decision, the ACCC has now sought special leave to appeal to the High Court.

The Act generally applies to governments when those governments are carrying on a business. The Full Court concurred with the findings of the trial judge that because Baxter was supplying state purchasing authorities **which were not carrying on a business and therefore entitled to Crown immunity** (*emphasis added*), the Crown immunity extended to protect Baxter.

The case raises significant issues from a local government perspective. The central question is *what is a business activity?* If the broad aim of the NCP was to apply trade practices rules to all business activities, is there a basis for exempting government purchasing authorities and those who supply such authorities?

In deciding to seek special leave to appeal from the decision of the Full Federal Court, the ACCC aims to clarify whether all transactions by businesses in Australia are subject to prohibitions in the Act against anti-competitive conduct.

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### ACCC ENFORCEMENT SNIPPETS

#### *Hard sell in waste industry*

Aggressive sales tactics have led to a Federal Court declaration that BIS Cleanaway Limited, formerly Brambles Australia Limited, engaged in both misleading and unconscionable conduct relating to waste collection services in Rockhampton.

Cleanaway engaged in misleading and deceptive conduct when an agent:

- visited customers for a seemingly appropriate purpose – eg to gauge satisfaction or check equipment
- requested the customer sign a Service Agreement form to acknowledge the visit
- did not disclose that the Service Agreement would comprise a contract between the customer and Cleanaway
- did not disclose any of the terms of the agreement
- did not give the customer an opportunity to determine independently the nature of the Service Agreement form, and
- did not inquire whether the representative of the customer had authority to sign a contract on behalf of the customer.

Since unfair tactics were used and Cleanaway did not act in good faith, the tactics also amounted to unconscionable

conduct in contravention of section 51AC of the Act.

Cleanaway's agent engaged in further unconscionable conduct by insisting on the performance of the Service Agreement, informing the customer that they were not entitled to terminate the Service Agreement, and threatening legal action if they did not act in accordance with the Service Agreement.

The company consented to an order offer customers the opportunity to lodge a complaint and/or to make a claim for compensation.

ACCC Chairman, Mr Graeme Samuel, described the case as "a reminder for those in the business community, particularly those in strong bargaining positions, that they should ensure that in their business dealings they adhere to the necessary standards of honesty and fair dealing."

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### ***Take care with giveaways***

A product safety case involving Hagemeyer Asia Pacific Pty Limited is a valuable reminder that those who give away products – as prizes, incentives or in consumer promotions – are as subject to product safety laws as the companies that make and sell the products.

Hagemeyer is a major electrical distributor which operates the *Lawrence & Hanson* and *Auslec* stores. It supplied about 800 Lawrence & Hanson branded mountain bicycles throughout Australia as part of a promotional offer.

Customers meeting the terms of the offer were supplied with a

free bicycle, which was supplied unassembled.

The ACCC believed the bicycles' supply was likely to have breached section 65C TPA, which prohibits goods being supplied to consumers which do not meet a prescribed mandatory product standard.

The bicycles did not comply with the mandatory standard in a number of ways:

- no warning that the bicycle was not designed for off-road use or stunting
- no warning on the packaging recommending assembly by a skilled bicycle mechanic
- no bicycle was supplied with adequate instructions for its assembly, maintenance and use, and
- the handbrakes were located on the wrong sides of the handlebar.

Hagemeyer will:

- recall the bicycles and provide customers in return with a bicycle of equivalent value and which complies with the standard
- not supply bicycles which do not comply with the standard, and
- implement procedures to ensure products it supplies which are subject to a mandatory product safety or information standard comply with the standard.

ACCC Chairman, Mr Graeme Samuel, noted that the goods were not a part of Hagemeyer's

core business, and said that the matter reinforced the need for businesses to take care when dealing with consumer goods.

"Consumer safety is of paramount importance and the ACCC will act promptly against suppliers when consumers are placed at risk through non-compliance with mandatory safety standards", he said.

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### ***Fine print in petrol***

Cases involving the use and misuse of *fine print disclaimers* appear regularly in these pages, and the main issue is always the *overall impression on the target audience*.

The latest example concerns signage displayed by BP Australia Pty Ltd. The company has now altered signs displayed at petrol stations after concerns consumers may have been confused about the offer's nature.

New signage recently appeared above some of BP's roadside petrol price displays. It promoted a *5% Off Petrol* and *5% Off Everything* offer to consumers who obtain a BP Citibank Mastercard. At the foot of the signage was a notice that conditions applied, including that consumers must obtain a BP Citibank Mastercard before being entitled to the 5% discount.

The ACCC raised concerns with BP about the small size of the print that referred consumers to the terms and conditions. According to the ACCC BP responded promptly and has adopted larger font in its advertisement to ensure that consumers are not confused.

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## ENVIRONMENTAL CLAIMS IN FOCUS

### *LG Electronics*

The ACCC's focus on environmental marketing continues, as shown by the settlement on 28 September of a matter involving LG Electronics Australia.

The company will pay up to \$3.1 million in rebates to eligible consumers who bought five popular LG Electronics Australia Pty Ltd air conditioner models that did not comply with the energy efficiency values claimed on rating labels.

The ACCC investigation followed a complaint by the Australian Greenhouse Office. Check tests conducted on behalf of the Department of Energy, Utilities and Sustainability in New South Wales, and Energy Safe Victoria, found that:

- a) the actual cooling output of a number of models was less than 90 per cent of the rated output
- b) the energy consumption of some of the affected models was more than the rated power consumption, and
- c) the energy efficiency ratings of the affected models were lower than that claimed by LG, and that of one model was lower than that required by the relevant Minimum Energy Performance Standards (MEPS).

As a result, it is likely that the five air conditioner models use

more electricity and, accordingly, cost more to run than would be the case if those air conditioners complied with the values stated on the relevant energy labels. The ACCC and LG have agreed an estimate of the potential difference in operating costs that may be experienced in respect of each of the five models. LG will compensate purchasers of affected models for the potential increase in operating costs.

### *EnviroCare Cosmetics*

EnviroCare cosmetics are marketed through promotional material and a website to be free of harmful chemicals and to have environmental benefits, including being biodegradable. They are sold by local distributors and through health stores in all States, except Tasmania.

But some EnviroCare cosmetics contained ingredients not listed on the labelling, such as foaming agents, preservatives and emulsifiers.

Environmental Marketing Pty Ltd, has admitted to the ACCC that ingredients listed on the packaging of some of its *EnviroCare* brand products were incomplete and incorrect, and did not comply with the mandatory product information standards.

### *Construction: Alleged Secondary Boycott*

A directions hearing was set down for 19 September in the ACCC's proceedings against Construction Forestry Mining and Energy Union (CFMEU), Bovis Lend Lease Limited and two individuals associated with

the CFMEU for allegedly engaging in conduct leading to a secondary boycott.

The ACCC has alleged that an agreement between CFMEU and Bovis affected Bovis' acquisition of plasterboard services from a contractor, Bernmar Projects Pty Ltd, during the construction of medium density apartments in a development known as "Landmark" in the ACT. It alleges that the agreement contravened s45E TPA and resulted in the termination of Bernmar's contract (prohibited under s 45EA).

The ACCC is seeking pecuniary penalties against the CFMEU and Bovis, declarations against the CFMEU and individuals and injunctions and costs against all respondents. The progress of this case will be of interest to all those involved in property development and construction, or with an interest in the industrial relations aspects of the matter.

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

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