

TPA REFORMS IN FORCE

The long-promised “Dawson reforms” to the Trade Practices Act have been enacted, with an operative date of January 1 2007. Of particular interest to the local government sector is the introduction of section 2BA, “Application of Part IV to local government bodies”, which aims to clarify the issue of which council activities are subject to the competitive conduct rules.

Local government application

Sub-section 2BA(1) reads as follows: “Part IV applies in relation to a local government body only to the extent that it carries on a business, either directly or by an incorporated company in which it has a controlling interest.”

This change may be seen as a restatement in more positive form of an established principle. The previous formulation, in the now-repealed section 2D, stated that “Part IV does not apply to:

- (a) the refusal to grant, or the granting, suspension or variation of, licences (whether or not they are subject to conditions) by a local government body; or
- (b) a transaction involving only persons who are acting for the same local government body”.

The risk, presumably, was that any activity that did not match the above conditions would be

regarded as a business activity subject to Part IV. The new definition gives primacy to the ordinary meaning of “business”.

Our view – and it is important to remind readers at this point that we do not purport to offer legal advice – is that there has been no substantive change to the risk exposure of any council as a result of this amendment.

In simple terms, if a council activity is a business activity it remains subject to the TPA; if it is a significant business activity it is also subject to the competitive neutrality regime.

Moreover, readers should note that nothing in this amendment prevents an officer of a council being regarded as “knowingly concerned” in a TPA breach by another enterprise or group of enterprises.

Other amendments

The amending Act introduces higher penalties for contraventions of the TPA as a means of better deterring corporations or individuals from engaging in anti-competitive behaviour.

The maximum corporate penalty of \$10 million is raised to be the greater of \$10 million or three times the gain from the contravention or, where the gain cannot be readily ascertained, 10 percent of the turnover of the body corporate and any related bodies corporate.

The Act also increases the powers of the ACCC. While the ACCC already had the power to enter premises and inspect documents without a warrant, the amendment gives the ACCC the ability to search premises and seize evidence, when backed by a warrant.

The Act includes a new *notification* system for collective bargaining for small business, making this process simpler and less costly than the authorisation procedure. The notification procedure is subject to a \$3 million transaction threshold.

The Government has acknowledged that some small businesses require a higher transaction limit as they have high turnover and small profit margins: for example car retailers, petrol station retailers and farm equipment retailers. The issue of thresholds will be addressed via regulations. The Office of Small Business and Treasury will issue a draft thresholds paper, and the regulations will be put in place within 6 months.

Proposed reforms to the misuse of market power and unconscionable conduct provisions were not included in this Act. The Government says it will act quickly on these matters after further consultation with stakeholders.

ACCC AUTHORISATIONS

In this quarter two applications for authorisation have been lodged by local government bodies. Each seeks ACCC approval, on public benefit grounds, of collective bargaining arrangements in the waste management and bus shelter markets respectively.

Before reporting on them we note that neither scenario would fit under the \$3 million threshold set down for the new notification regime (see previous article). Should there be a different threshold – or no threshold at all – when the proposed arrangement involves local government bodies, acting presumably in the interests of their communities? We would be interested to hear your views on this.

Metropolitan bus shelters

This application, lodged by the Municipal Association of Victoria on behalf of a number of metropolitan councils, will be familiar to many of our readers who either provided submissions or are among the initial beneficiaries of the proposed arrangement. If successful, the authorisation will allow the councils to collectively tender for bus shelter installation and maintenance services, including offering an advertising licence.

The tender process would be conducted by the Director of Public Transport. Councils wishing to participate in the collective tender process would do so by entering into a memorandum of understanding (“MOU”) with the Director. Eleven councils have agreed to participate in the tender process, while other councils may also elect to par-

ticipate as their existing contracts with bus shelter providers expire.

Interim authorisation was granted on 6 November, to permit the signing of MOUs. On 22 December the ACCC issued a Draft Determination, in which it proposed to grant the authorisation. ACCC Chairman, Mr Graeme Samuel, stated that “any anti-competitive detriment that may flow from the proposed arrangements is likely to be small”, and went on to list the public benefits expected to flow from the arrangements.

“The ACCC sees benefit in the supply and maintenance of bus shelters to a number of councils being negotiated and provided through a single process. This may enable the successful tenderer to provide these services at a lower cost than would otherwise be the case. Similarly, the arrangements are also likely to result in transaction cost savings for councils in negotiating with prospective street furniture suppliers. These cost savings are likely to be reflected in lower rates and improved quality of services for ratepayers”.

Whether this progresses to a Final Determination depends on the submissions interested parties choose to lodge, and the ACCC’s response to those submissions.

A number of submissions (from potential shelter suppliers and their industry association) opposed the granting of an Interim Authorisation, simply on the basis that there were no “special circumstances” to warrant it. They did not, however, articulate any substantive objection. It would be reasonable to pre-

dict further objections now being raised by those parties.

Some concerns were also expressed in submissions from councils, in relation to potential loss of control and/or revenue. It should be noted in this context that participation in the collective bargaining arrangement will not be mandatory; councils that wish to continue “going it alone” will be able to do so.

Waste management

In previous issues we reported on the successful application by a number of Sydney councils to tender collectively for the provision of waste management services for waste collected during “Council Clean Ups”.

Three of the councils involved in that application have now taken the process a step further. On 24 November the ACCC granted interim authorisation to the St George Region of Councils – comprising Hurstville City Council, Kogarah Municipal Council and Rockdale City Council – to allow them to begin a joint tender process for **all** kerbside waste and recycling collection services in their local government areas.

Interim authorisation was requested so that a tender process could be commenced while the ACCC considered the substantive application. The granting of interim authorisation in no way binds the ACCC in its consideration of the substantive application for authorisation.

The application cites a wide range of alleged public benefits (listed overleaf) and involves a substantial number of households and dollars. Clearly its

progress will be of interest to all metropolitan councils.

The following excerpt is from the Executive Summary of the application:

“This application to the ACCC presents ... an opportunity to provide significant financial, social and environmental benefits to the communities ...:

- reduction in collection costs due to the increased number of services collected
- efficiencies of vehicle servicing runs across boundaries
- optimizing fleet productivity
- fleet productivity savings
- joint education programmes
- consistency of collection patterns and starting times, and
- maintaining a high level of service quality”

The councils have also identified likely operational cost savings in excess of \$2.5 million per annum, and indicated that the arrangement will enhance their ability to meet landfill diversion objectives.

A joint waste contract, if authorised, will affect a combined population of nearly 230,000 persons and 85,580 residential properties – making it the fifth largest in Australia. We will include a detailed report on the outcome of this application in our next Update.

ACCC ENFORCEMENT SNIPPETS

Product safety

The last quarter saw the ACCC deal with an unusually high number of consumer product safety issues, the majority of which involved failure to meet mandatory standards. Those which may be of special interest to councils are covered below.

Basketball rings & backboards

Following a survey, the ACCC described the level of non-compliance with a new Consumer Product Safety Standard for basketball rings and backboards as "alarming".

All basketball rings and backboards must have a safety warning that 'improper installation or swinging on the ring may cause serious injury or death'.

Chairman Samuel said that "a number of rings and backboards offered for sale in sports and department stores throughout Australia failed to meet the safety warning requirements. In some instances, the rings and backboards used incorrect colouring on the warning or were too small. In others, the product was not accompanied by any safety warning.”

Although there is no TPA obligation to do so, it may now be prudent for councils to check rings and backboards for compliance with the new standard.

Baby walkers and cots

In another case a specialist nursery retailer was fined \$860,000, convicted of breaching a mandatory consumer product safety standard for baby walkers and convicted of mis-

representing the cot's compliance with the Australian standard.

Charges against Skippy Australia were laid in respect of baby walkers and a model of cot. The company was also charged with having displayed a no refund sign that misled consumers as to their statutory rights.

Two of the company's baby walkers did not have the required automatic braking mechanism to prevent the baby walkers from falling down steps or stairs. The walkers also lacked any of the prescribed warning labels which serve to inform parents of the dangers of using such products. The company was fined \$500,000 for these breaches.

The *Mahogany Finish Baby Cot* presented limb entrapment hazards, protrusions presenting potential head injury hazards and a lack of prescribed informative/warning labelling associated with the proper use of the cot. The company was fined \$350,000 for this offence. The no refund sign offence attracted a fine of \$10,000.

Glittering prices

The ACCC's enforcement team has revisited the sector that is so often accused of misleading two-price advertising, launching two proceedings for ... misleading two-price advertising.

Prouds Jewellers

The ACCC investigated the bona fides of Prouds' "Was/Now" pricing of 17 items appearing in both its February 2006 *Summer of Love* catalogue

and its May 2006 *Love You Mum* catalogue. It alleges that the "Was/Now" comparisons made by Prouds for these 17 items were false or misleading.

The basic proposition of a "Was/Now" comparison is that customers will save the difference between the Was and Now price compared to customers who purchased the items before the promotion. The ACCC alleges that this was not the case as Prouds usually sold the items for less than the Was price.

Zamel's

Zamel's, a family owned retail jeweller, took a slightly different approach to two-price advertising - the "strikethrough" - when distributing 2.6 million of its across Australia.

In respect of 11 jewellery items taken from the catalogue, Zamel's falsely represented that the purchase of the items would result in a saving to the purchaser of the difference between a strikethrough price and a lower sale price; or that Zamel's had sold the items at the strike-through price for a reasonable period prior to the sale.

A directions hearing for this matter is listed for 17 January.

Penalties imposed in two major Part IV matters

Wrapping up two stories from previous editions of this Update:

On 13 December the Federal Court imposed penalties totalling \$100 000 against the State and Federal branches of the CFMEU for engaging in secondary boycott conduct.

On 22 December Justice Allsop of the Federal Court imposed pecuniary penalties totalling \$7million on Woolworths Limited for entering into and giving effect to illegal anticompetitive agreements with small business liquor licence applicants.

In respect of the Woolworths matter, it should be noted that the ACCC sought penalties of \$16 million. Another interesting speculation is how high a penalty it **might** have sought under the new penalty regime: 10% of Woolworths' Australian turnover is?

PRIVATE ACTION

eBay's Big Day Win

An attempt by Creative Festival Entertainment, promoters of the Big Day Out series of concerts, to prevent "scalping" of tickets has ended in a finding of misleading and deceptive conduct after successful Federal Court action by eBay.

Creative printed festival tickets with a condition on the back stating that *. Should this ticket be re-sold for profit it will be cancelled and the holder will be refused entry. This condition specifically prohibits ticket resale through online market or auction sites.*

eBay contended that this condition falsely represented that: (1) every ticket that is resold for profit will be cancelled; (2) the holder of any such ticket will be refused entry to the Big Day Out; (3) Creative has the means available to it of detecting tickets subject to such resale

with sufficient frequency to warrant an assertion of inevitability; (4) Creative has the means to cancel each and every such ticket so sold and to refuse the ticket holder entry to the festival; (5) the provision is enforceable as a condition of the ticket in all cases.

The Court upheld this contention for a number of reasons, of which the most important was the failure of the promoter to draw the condition to purchasers' attention at the time of their online purchase.

The case is an important reminder to councils (as promoters and suppliers of ticketed services) that a condition or exclusion cannot be relied on if it is not drawn to the attention of purchasers at the time of purchase – and that any attempt to do so may be regarded as misleading and deceptive conduct.

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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