

CN MATTERS

Echuca Paddlesteamers

A change to a tourism product offering by the Port of Echuca Authority has led to an investigation by the Victorian Competition and Efficiency Commission (VCEC). The Authority is a Committee appointed by the Shire of Campaspe in accordance with Section 86 of the *Local Government Act 1989*.

In December 2006 the Authority adopted a new pricing structure and product mix for its paddlesteamer boat cruise activity. It discontinued its 'boat cruise only' product while retaining its combined 'boat cruise/museum' product. At the same time the Authority reduced the price for its combined boat cruise/museum product. The Authority also retained the museum, with unaltered pricing, as a separate product for people not wishing to go on a river boat cruise.

This effectively reduced the price of the cruise component of the combined boat cruise/museum product. The private operator of a competing boat cruise business considered that following these revisions "the prices charged by the Port of Echuca Authority [did] not accurately reflect the full cost of providing the product/s offered" and complained to VCEC.

The tourist paddlesteamer boat activity has been long established in Echuca. The complainant and the Authority each operate three boats. The one hour river cruise is the mainstay of their boat operations.

The complainant's boats are freely accessible to the general public while the Authority's boats are accessible only by walking through the Authority's museum. The Authority had offered visitors a choice of product: boat cruise, entry to the museum, or combination boat cruise/museum. The complainant believed that the 2006 pricing structure broadly reflected the cost of the products offered by the Authority.

VCEC agreed with the Council's assessment that the Authority's boats operation was a significant business and within the scope of the Government's CN policy. The museum, however, was not a business activity in a CN context because costs associated with its restoration, development and operation were not predominantly met by users.

There are, however, clear CN implications where operations that are subject to CN are mixed with operations that are not subject to CN to offer a combined product. The concern with the combined 'boat cruise/museum' product was that there would be a cross over or subsidisation of

the commercial cruise business by the museum activity.

The adult price for the Authority boat cruise/museum was \$20.00. As the adult ticket price for museum entry was \$11.50, visitors would perceive the cost of the boat cruise to be \$8.50.

The complainant was now at a competitive disadvantage. An adult visitor wishing to purchase a boat cruise from the complainant and visit the Authority operated museum would be required to pay at least \$26.50 – much greater than the Authority's price.

VCEC found that the Council and Authority had overlooked CN implications at the time of undertaking their assessment of the combined product and pricing. This led to a pricing structure that appeared not to comply with CN policy.

VCEC recommended that the Council undertake a CN costing analysis of its boat operation to determine a fully cost reflective price structure. Any future changes to prices should include a CN costing exercise prior to being introduced. VCEC also recommended that Council either provide competitors the opportunity to offer museum entry in their product mix at similar prices and conditions, or cease to offer a bundled boat/museum entry product.

PRICE FIXING AND CARTEL MATTERS

Several high-profile (and very low-profile) price fixing and bid-rigging stories have come to light over the last quarter. We will follow the progress of these proceedings in future editions.

Qantas: alleged involvement in international air freight cartel

Qantas is under scrutiny by the US Department of Justice as part of its investigation into alleged price fixing in air cargo. The ACCC is also investigating these issues.

The investigations became public knowledge after the publication of Qantas full-year results, in which \$47 million was set aside to cover potential fines.

The provision followed a decision by US and British authorities to impose record fines, totalling almost \$1 billion, on British Airways and Korean Air for collusion on fuel surcharges.

Qantas chief executive Geoff Dixon said he was confident that the misconduct had been "limited to a small number of people".

More freight: stevedores

On 24 August, the ACCC instituted legal proceedings against a number of former Patrick companies and former P&O companies, plus Australian Amalgamated Terminals Pty Ltd.

The ACCC's allegations focus on two alleged agreements between P&O and Patrick, in 2001 and 2002.

In the ACCC's view, the 2001 agreement to share motor ve-

hicle wharf facilities and to jointly acquire other facilities had the purpose and likely effect of substantially lessening competition between the companies in a number of markets.

The ACCC further alleges that both agreements sought to fix the prices of P&O and Patrick for the provision of stevedoring services from shared facilities.

The ACCC also instituted legal proceedings against a number of former senior executives of those companies – notably Mr Chris Corrigan, former CEO of Patrick Corporation – for allegedly having been knowingly concerned in the contraventions. Mr Corrigan has since made no secret of his view that "the ACCC is now trying to rebuild their reputation at the expense of mine" and that the case is a reprehensible abuse of power by a regulator he once described as "Flim Flam and the Flakes".

Air conditioning

On 25 July, Justice Nicholson imposed penalties of more than \$9.1 million on 11 companies and 18 individuals for their involvement in bid-rigging and price fixing cartels in commercial air conditioning.

The cartels involved companies tendering for commercial air conditioning and mechanical services projects in Western Australia, who would agree on which company would submit the lowest price for a particular job and therefore be likely to win the tender.

For periods from 1997 to June 2003 cartel members would attend regular weekly meetings of the Air Conditioning and Me-

chanical Contractors' Association of WA at which they discussed upcoming tenders. They would endeavour to agree which tenderer would be designated to submit the lowest price. The companies gave effect to the agreements by providing and accepting 'cover' prices.

The cartels covered contracts as small as \$46,000 and as large as \$9.4 million. Via covert meetings and telephone conversations over many years, the parties rigged the outcome of competitive tenders that totalled about \$129 million.

"The court's decision marks its strong disapproval of such widespread and long running collusive practices within the mechanical services industry in Western Australia," ACCC Chairman, Mr Graeme Samuel, said. "It is a clear message that anyone involved in a cartel will be liable for a substantial pecuniary penalty."

North Queensland pubs

The manager of the Burdekin Hotel in Ayr, North Queensland – about an hour south of Townsville – arranged a meeting with five other Ayr hoteliers in to attempt to reach agreement on the price of various over-the-bar alcoholic beverages. But in the end no agreement was reached.

The company and manager admitted that the conduct constituted an attempted contravention, and have given enforceable undertakings to the ACCC. As Chairman Samuel noted, "Even an attempt to fix prices can be a contravention of the Trade Practices Act ... this case demonstrates that ignorance of the law is not a sufficient excuse."

PRICE FIXING AND CARTEL MATTERS (cont'd)

Funeral celebrants

On 3 August the Federal Court ordered total penalties of \$40,000 against Dally M Publishing and Research Pty Ltd (trading as the International College of Celebrancy) and its director Mr Dally Messenger for attempting to fix prices of funeral ceremonies in the Melbourne metropolitan area.

The price fixing attempt was a proposed arrangement whereby the College of Celebrancy would, on behalf of affiliated celebrants, declare to funeral home operators an increase in the standard fee (to \$440, including GST). It would notify the operators that the fee would thereafter increase annually.

College-affiliated funeral celebrants would increase and then maintain the standard fee charged by them, and would thereafter increase their standard fee annually in line with the CPI upon notification by the college.

Apart from the penalties, the court made Orders including injunctions restraining the company and Mr Messenger from engaging in similar conduct in future, a mandatory trade practices compliance program and contribution to ACCC costs.

ANZ & Mortgage Refunds

On 21 August the ACCC instituted proceedings in the Federal Court of Australia against the ANZ Banking Group Limited.

The ACCC alleges that ANZ, in seeking to limit the level of refund Mortgage Refunds could

provide to customers in respect of ANZ home loans, has breached section 45 TPA.

Mortgage Refunds was a mortgage broker which refunded to its customers a part of the commission it received from lending institutions. The ACCC alleges that the ANZ Bank sought to reach an agreement with Mortgage Refunds to limit its refunds to customers as a condition of it continuing to deal with the bank.

This matter has attracted a high volume of comment, and is a controversial application of the relevant provisions. We will follow the matter with interest.

Medical cartels

1. Cardiothoracic surgeons

The Federal Court imposed penalties of \$110,000 on two Adelaide cardiothoracic surgeons (Ross and Knight) over moves to prevent competition from other cardiothoracic surgeons between 2001 and 2004.

In 2001, the surgeons arranged that they would hinder or prevent a newly qualified surgeon from entering or supplying his services in the market before he had undertaken further surgical training, notwithstanding that he was legally qualified to practise as a cardiothoracic. They gave effect to the arrangement by advising either hospitals at which the surgeon sought to operate, or cardiothoracic surgeons who had been asked to support the surgeon's applications to operate, that the surgeon was insufficiently trained, or had not completed his training, and should not be allowed to operate at those hospitals.

Via separate letters in 2003/4, the two surgeons sought to reach a non-compete arrangement with a second surgeon. Under their proposals, that surgeon would not provide surgical services at Ashford Hospital, while Ross and Knight would not provide surgical services at Wakefield Hospital.

Each surgeon will pay a pecuniary penalty of \$55,000 and make a contribution of \$5,000 to the ACCC's costs.

2. Orthodontists

On 14 September the ACCC launched proceedings against three Tasmanian orthodontists. It alleges that the orthodontists, entered into a series of anti-competitive arrangements which had the purpose of: fixing the price of orthodontic services to consumers in northern Tasmania; restricting their respective supply of orthodontic services to new patients when an orthodontist had more customers than the others; restricting the ability of the orthodontists to supply their respective services from separate premises or work with other orthodontists within 20 kilometres of the existing practices in Launceston, Devonport and Burnie; and stopping another orthodontist from setting up a competing practice in northern Tasmania.

The ACCC is seeking a range of remedies including injunctions restraining the respondents from engaging in the alleged conduct, and declarations and findings of fact by the court regarding the alleged contravening conduct.

ACCC ENFORCEMENT SNIPPETS – PART V

Google, Trading Post and the problem of “clickfraud”

The ACCC has instituted legal proceedings in the Federal Court against Trading Post and Google, alleging misleading and deceptive conduct in relation to sponsored links that appeared on the Google website.

The allegation is that Trading Post contravened the TPA when the business names "Kloster Ford" and "Charlestown Toyota" appeared in the title of Google sponsored links to Trading Post's website. Kloster Ford and Charlestown Toyota are Newcastle car dealerships who compete against Trading Post in automotive sales. The ACCC further alleges that Google – by causing the Kloster Ford and Charlestown Toyota links to be published on its website – also engaged in misleading and deceptive conduct

But the case has much broader implications than this. The ACCC also named STA Travel, eBay, News Ltd's Cars-Guide.com.au and CareerOne.com.au and Microsoft's Xbox gaming arm in documents submitted to the Court. All these parties were accused of placing misleading or deceptive ads on Google's search pages that directed users to the websites of rival businesses.

ACCC spokeswoman Lin Enright said it was not "a matter of making an example" of Trading Post. The ACCC had needed to prosecute at least one example of such conduct to establish that it was unlawful.

"We don't need to prove it over and over again," she said. "We had previously tried to address similar behaviour. It reoccurred so we escalated it."

Dodgy exhibition promoters

Two promoters and their company (Australian Corporate Exhibitions) face ACCC action in relation to the promotion of various industry exhibitions.

The ACCC alleges that the company engaged in misleading or deceptive conduct by representing that particular numbers of visitors and exhibitors would attend MineBox Expo 2006 and the Sydney International Mining & Engineering Expo 2006 (SIMEX 2006), without having reasonable grounds or a reliable basis for so representing.

Further instances of allegedly misleading conduct include representations that: a small number of exhibitor stands were still available at SIMEX 2006 when at all times more exhibitor stands were available; and the former Premier of Western Australia and the Prime Minister of Australia had provided or consented to the publication of messages of support for both exhibitions, when that was not the case.

Dodgy phone coverage

Telstra has withdrawn and amended television advertisements promoting its Next G mobile network after concerns that the advertisements may mislead consumers about the coverage available.

Telstra ran a series of nationwide television advertisements

making bold representations about the coverage that consumers would receive when using the Next G network.

"The ACCC had particular concerns about Telstra's unqualified use of the taglines *Everywhere you need it* and *Get the coverage you need with Telstra's Next G network*, when the whole of Australia is not covered and coverage is not always available where consumers need it," said Chairman Samuel.

The ACCC was also concerned that Telstra's television advertisements conveyed the impression that service quality issues such as call interference and call drop-outs would not happen on the Next G network.

"All traders must ensure that claims about the performance and quality of goods and services can be substantiated," Mr Samuel said.

Please direct queries about items in this publication to your Compliance Officer; or contact Greg d'Arville at [crgESSENTIALS](mailto:greg@essentials.com.au), on 0414 250025.

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