

CANBERRA AFFAIRS

Major Inquiries: Petrol and Groceries

The ACCC's report on the pricing of unleaded petrol was submitted to the Assistant Treasurer last December. Soon after, the new Government announced another major Inquiry drawing on the ACCC's prices surveillance powers: this time the subject is the retail grocery market, and the causes of recent food price inflation. We look at both Inquiries in this issue.

Petrol Report

The ACCC's *Report into Unleaded Petrol Prices* was released on December 18 2007 after six months of research and 25 public hearings throughout Australia. Its findings in relation to allegations of collusion in the service station market are not surprising, ie "that the unleaded petrol industry in Australia is fundamentally competitive with no obvious evidence of price fixing or collusion."

At the refining level, however, the ACCC found that there was "a comfortable oligopoly" with "significant barriers to entry for new refining operations". One consequence of this is that competition at the wholesale level is not effective.

Another finding is perhaps more surprising. Evidence brought before the ACCC indicated that the entry of major supermarket chains to the petrol market had not led to any increase in the rate of disappearance, or the rate of exit from industry of the smaller independents. In fact, independent chains

(eg United, Liberty, Newman, Matilda) have been growing in size and increasing market share.

The Government agreed to act on a number of recommendations in the Report, including:

- formal price monitoring powers – ACCC to report annually on petrol prices (report to be made public);
- more detailed assessment of buy-sell agreements between oil companies, to ensure these arrangements do not reduce competition; and
- audit of terminals suitable for importing refined petrol, to facilitate increased competition in the market.

Importantly, the Report notes that the competition enhancements proposed would only cut the price of petrol by a few cents per litre at best.

On February 16 2008, the Government fulfilled its promise to appoint a Petrol Commissioner. Mr Pat Walker, formerly the WA Commissioner for Consumer Protection and Prices Commissioner, will be responsible for overseeing the ACCC's monitoring of fuel prices and providing an annual report.

The Government asked the ACCC and the new commissioner to commence a renewed focus on LPG and diesel prices and to advise whether any further powers for the ACCC are necessary or desirable.

Retail Grocery Inquiry

The ACCC initiated a public inquiry into the competitiveness of retail prices for standard groceries on January 22 2008. Some of the matters to be taken into consideration are:

- the current structure of the grocery industry;
- the nature of competition at the supply, wholesale, and retail levels; and
- the competitive position of small and independent retailers.

An Issues Paper, issued on 11 February, is available from the ACCC website. One of the issues it raises has already generated some public discussion: *Would unit pricing (a requirement that the price per kilogram or per 100 grams etc is displayed on the supermarket shelf or product) improve the ability for customers to compare prices? Should unit pricing be made compulsory? Would unit pricing lower the cost of shopping for customers?*

This is only one of 83 issues canvassed in the paper. Another is: *Are major shopping centre landlords willing to offer sufficient space to a new supermarket chain? Are there any restrictions (contractual or otherwise) that may limit the ability of landlords to offer such space?*

We urge readers with an insight or opinion in relation to such issues to make a submission to the ACCC or participate in the upcoming series of public hearings.

ACCC ENFORCEMENT SNIPPETS – PART IV

Korean Connections

There is, of course, no direct connection between the two reports that follow. They simply illustrate the point that trade practices principles are not always obvious to people and businesses from different cultural backgrounds.

KITOCA

In April 2007, the Korean Inbound Tour Operator Council of Australia (KITOCA) launched a voluntary Code of Conduct for Korean inbound tour operators. This code sets out a code of ethics in relation to pricing, factual itineraries, complaint handling, disclosure of shopping arrangements including commission payments and appropriate licensing requirements.

But in May, the ACCC became concerned that KITOCA and some of its members had reached agreements to: not deal with certain Korean tour operators unless fees paid to Australian tour operators increased; arrange for certain duty free stores and restaurants in Australia to not allow entry to Korean tourists on tours operated by those Korean tour operators, and impose sanctions via financial fines and boycotts on KITOCA members who refused to be part of these agreements. There were clear price fixing and boycott risks associated with these agreements.

KITOCA has agreed to cease the conduct. It now understands that the code is voluntary and ultimately it is up to individual businesses to decide with whom they will do business.

Education Consultants

The Federal Court in Perth has imposed penalties totalling \$125,000 on a number of educational services agents for fixing the price of placement services to students of Korean origin.

The education agents advised prospective students about educational institutions in which they could enrol and arranged the enrolment and payment of tuition for these students. The education agents would be paid commissions by the educational institutions for these services.

The ACCC alleged that the parties made and put into effect oral and written agreements in 2004 and 2005 that they would not offer or accept discounted tuition fees from students.

The Federal Court also made orders restraining the companies and individuals from engaging in similar conduct in the future and required the companies to implement appropriate compliance measures.

ACCC Chairman, Mr Graeme Samuel, said "The penalties imposed by the court will impact on the respondents' financial position and should serve as a deterrent to all businesses which seek to gain an illegal advantage through price fixing."

Although penalties have been handed down against the majority of the parties in the action, the case is continuing as the court considers further orders, including declarations, and the imposition of penalties against the remaining parties.

ACCC ENFORCEMENT SNIPPETS – PART V

Fuel pricing: Kleenheat

While the inquiry into unleaded petrol prices went on, action was required in connection with another kind of fuel: bulk LPG.

Wesfarmers Kleenheat Gas supplies bulk LPG to commercial and industrial customers including restaurants, cafes, laundromats and sporting clubs. Customers typically enter into three to five year supply contracts. Kleenheat told these customers that the price for bulk LPG would vary according to movements in actual costs of supply, by reference to an external measure or benchmark.

But Kleenheat failed to mention its 'Managed Monthly Account' and 'Quickhit' practices, which were the actual basis for some price variations. These practices aimed to increase returns from certain customers' accounts, and resulted in some customers paying more than they otherwise would have paid.

In respect of customers selected as 'Managed Monthly Accounts', the court found that Kleenheat Gas did not have a reasonable basis for making the representations because it intended, at the time these representations were made, to increase the customer's pricing to a pre-determined higher price within six months.

Three-year injunctions now restrain Kleenheat from representing to customers that their price will be calculated in a particular way unless it intends to supply in accordance with those terms.

ACCC PART V ENFORCEMENT (cont'd)

Kleenheat also provided undertakings to the ACCC, covering refunds to 'Managed Monthly Account' and/or 'Quickhit' customers, website pricing information, procedural improvement, and an upgraded trade practices compliance program.

The Green Scene

The ACCC drive to stamp out misleading environmental benefit claims continues with the issue of a new Guide and some important enforcement actions.

GMH-Saab*

Saab made statements in a number of newspaper and magazine advertisements to promote the green credentials of its motor vehicles. Examples: *Every Saab is green*, *Switch to carbon neutral motoring*. The advertisements also stated that, Saab would plant 17 native trees in the first year following a Saab vehicle purchase as a carbon offset.

The ACCC alleges that the advertisements represented to consumers that the net amount of carbon dioxide released into the atmosphere by any Saab vehicle, over the life of that vehicle, would be zero, and that planting 17 native trees would offset carbon dioxide emissions for the life of the vehicle. In fact, there would be a net release of carbon dioxide into the atmosphere by the operation of any motor vehicle in the Saab range; and planting 17 native trees would not provide a carbon dioxide offset for any period beyond a single year's operation.

Woolworths

Concerns were raised regarding environmental claims made on the packaging of Woolworths Select tissue products. They related to the sustainability of fibre used in the products and the environmental management record of the producers.

The matters involved international certification issues and overseas practices. Despite expert assistance from Australian Government and international non-government organisations, the ACCC was unable to form a concluded view as to the accuracy of the representations.

Woolworths placed stickers over the representations as a transitional measure before rolling out new packaging without the representations. Woolworths agreed to review its trade practices compliance program to ensure it deals with these issues in the future.

Green Guide

On February 11 the ACCC issued *Green marketing and the Trade Practices Act* in response to the increasing use of green claims in advertising. The publication aims to educate businesses and to assist manufacturers, suppliers, advertisers and others to assess the strength of any green claims they make. This will help to improve the accuracy and usefulness to consumers of labelling, packaging and advertising.

Rural dating services

The ACCC showed an unusual interest in the "introductions" market over the last quarter, with two similar cases generat-

ing similar outcomes – except for the level of compensation.

Country Contracts International

In the first matter former members of an introduction agency will receive refunds totalling \$11,510 from Country Contracts International Pty Ltd and its director, Ms Voula Saris.

CCI published advertisements depicting a woman who was available to meet men in a local area. The descriptions were often untrue, and it was unknown whether the woman was available to meet men in the particular area. Further complaints alleged that CCI induced male customers to pay additional administration fees and fees that had already been paid or were not required to be paid.

CCI and Ms Saris have undertaken to provide refunds to former members, only use images and descriptions of women in advertisements if the woman has given written consent, and not represent that fees are due when it knows this not to be the case or has no reason to believe it is the case

Rural Network

On 4 March, thirty-five members of another introduction agency were awarded refunds of nearly \$120,000 under a court-enforceable undertaking.

The ACCC also obtained declarations against the agency and injunctions against the agency and its director, Ms Leanne McDonald.

In making his orders, Justice Spender described the conduct of Rural Network Pty Ltd as "not only serious but calculated and quite callous."

ACCC PART V ENFORCEMENT (cont'd)

Rural Network used fabricated descriptions of women when promoting its services in regional newspaper advertisements. It induced potential members to join by making misrepresentations regarding compatibility checks, and falsely represented that a "compatible person" had expressed a desire to meet a potential member and would be introduced once membership fees were paid.

Other strategies involved: misrepresenting that a suitable woman would be introduced to the member when they paid an additional sum; misrepresenting that a member would be given access to a special section of the website by paying an additional sum; misrepresenting that a liability had been incurred and withholding further introduction services until it was paid; misrepresenting that a discount on the membership fee given to the member when they joined was given in error; and so on.

The court imposed injunctions on Rural Network and Ms McDonald, including a seven year restraint on the way in which Rural Network and Ms McDonald advertise and supply introduction services. It also ordered costs of \$60,000 be paid to the ACCC.

"This was predatory conduct whereby Rural Network staff would determine a member's assets and income and seek to 'upgrade' his membership in order to maximize revenues," ACCC Chairman, Mr Graeme Samuel, said.

CN MATTERS

New Guidelines

VCEC issued two Guidance Notes in 2007, to assist councils in the conduct of Competitive Neutrality reviews. We believe that the CN status of some major activities may be altered by these Notes, so we take the opportunity to report on them here

Cost Allocation Methodology

This note reminds us that there are two costing methodologies to be considered when undertaking a competitive neutrality costing exercise: the fully distributed cost approach and the avoidable cost approach.

The *CN Guide to Implementation* stated that 'In most cases, agencies will be required to adopt the Fully Distributed Cost ("FDC") approach to costing outputs'. VCEC has now determined that some councils have adopted a FDC approach when they might have considered the avoidable cost ("AC") method.

The guidance note states that the AC method is acceptable where business activities are associated with non-commercial activities. The example it uses is a Leisure Centre, where the primary use of its aquatic component is non-commercial (recreational use) although the facility is also put to commercial use (learn to swim programs).

The application of AC methodology in this example shows the commercial activity does not enjoy a subsidy, where FDC would have shown otherwise. Thus the Council would be relieved of its obligation to document a public interest argument.

Return on Capital

The *CN Guide to Implementation* states that when developing cost estimates for the purpose of setting CN-consistent prices, the appropriate cost of capital should be a real (before tax) rate of 8 per cent – this includes a risk premium.

VCEC has, however, always allowed some flexibility in the application of the return on capital used for competitive neutrality adjustments. It has recognised that, in practice, the required commercial rate of return would differ depending on the riskiness of the business.

Consistent with this past approach the VCEC will continue to assess agencies that apply a real (before tax) rate of 8 per cent (or the equivalent nominal rate) as meeting their competitive neutrality obligations. But it will also accept variations on this rate if a different rate can be justified as appropriate.

Please direct queries about items in this publication to your Compliance Officer; or contact Greg d'Arville at *crgESSENTIALS*, on 0414 250025.

Acknowledgment is made to the ACCC and VCEC for content in this bulletin.

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