

WATERMOVE MARK II VCEC Investigation

Regular readers and participants in PCA training will recall the 2006-07 investigation of *Watermove* – then an internal business unit of the Goulburn-Murray Rural Water Corporation (“G-MW”) – by the Victorian Competition and Efficiency Commission (“VCEC”). The matter raised certain non-pricing issues, and led to recommendations including the corporatisation of the unit.

Despite the implementation of that and other recommendations, issues remain. There have been further complaints against *Watermove Pty Ltd* – the corporatised entity that commenced operations on 1 November 2009 – and a second VCEC investigation. In this instance the complainant initially cited concerns in relation to:

Governance: lack of director independence arising from the Managing Director of G-MW being a Director of *Watermove*.

Access to information: claims that *Watermove* has access to information about licence holders that, due to privacy laws, is unavailable to private third-party competitors.

Secondment of staff: may deliver advantage through the transfer of intellectual property and operational information.

Cross-promotion of Watermove: through G-MW website links to pre-2007 media releases.

Pricing: failure to implement full cost-reflective pricing.

Following the Commission’s draft report, the complainant raised additional concerns about settlement of trades and access to G-MW’s premises by *Watermove* staff.

On the governance question, it is the G-MW Chairman who sits on the *Watermove* Board, and that Board has a majority of independent directors. VCEC saw this as a satisfactory arrangement but said that “governance protocols related to the exchange of information between *Watermove* and G-MW also need to be examined.” The same observation applied to the second issue; but for the most part *Watermove* has no particular advantage in respect of information access.

Staff secondment was in some respects a non-issue because the only seconded staff were those who had been part of the business unit pre-corporatisation. CN and conflict of interest risks might have arisen if seconded staff came from a communal pool of employees that rotate in and out of G-MW, but this was not the case. VCEC did recommend further work on service level agreements and access to G-MW premises in relation to the seconded staff.

G-MW agreed to remove links to pre-2007 media releases that may have promoted *Watermove*, although VCEC acknowledged that a market participant would be unlikely to take any notice of such ancient materials.

The single substantive issue concerned the allegation that the company had failed to implement full cost-reflective pricing, including:

- Costs of software and hardware development
- Legal documentation and legal structure costs
- Commercial insurance costs
- Cost of capital; and
- Staff secondment costs.

VCEC was satisfied that the software, hardware and legal costs had been handled appropriately. But in relation to other issues it requires *Watermove* to:

- Examine whether *Watermove* has access to insurance on similar terms as would be available to a private provider operating in a similar business structure. [If not, a CN advantage adjustment will be required].
- Adjust its cost base and associated pricing model to account for the cost of capital, that is, a commercial return on assets transferred from G-MW at the time of incorporation (and any other assets it holds).
- If *Watermove* seconded staff from G-MW without undertaking a formal vacancy advertising and recruitment selection process, it will need to make a CN advantage adjustment to its cost base to account for its ability to not incur staff recruitment costs.

VCEC will request *Watermove* to provide a summary of actions taken to implement its recommendations within three months from 23 August 2011 (the issue date of the final investigation report).

ACCC ENFORCEMENT – ACL CASES

Google and Trading Post

On 23 September the Federal Court found that Trading Post Australia Pty Ltd had engaged in misleading or deceptive conduct by publishing an advertisement on Google's search engine website that linked searches for the words "Kloster Ford" to Trading Post's website.

But the Court dismissed the ACCC case against Google, in which it alleged that Google's failure to adequately distinguish advertisements from search results amounted to misleading or deceptive conduct.

Google provided a service known as a "sponsored link", which advertised a link to a paying customer's website in response to particular word searches. Trading Post paid Google for a sponsored link to its website for the words "Kloster Ford". [Kloster Ford is a car dealership that competes with Trading Post].

There is no doubt that the Kloster Ford advertisement falsely represented that Trading Post was associated or affiliated with Kloster Ford. Thus Trading Post breached the relevant sections of the Trade Practices Act (now superseded by the Australian Consumer Law).

The ACCC alleged that as a result of Google's significant input into these advertisements, it was not only the advertiser but also Google which made the representations found to have breached the Act. But Justice Nicholas found that Google had **not** engaged in misleading or

deceptive conduct as it had merely communicated the representations made by Trading Post without adopting or endorsing them.

He found that the use of the word "advertisement" or an abbreviation rather than "sponsored links" might eliminate or reduce confusion in the minds of some users. But the presentation of search results did not breach consumer law as most users would have appreciated that "sponsored links" were in fact advertisements.

The ACCC noted that since it instituted the proceedings, Google has changed the description of the advertisements on its search results pages from *Sponsored Links* to *Ads*. It also released a "Business Names Policy" that prohibits advertisers' use of unrelated business names in the first line of ad text, when they are using that name to imply a special relationship with any unrelated third party.

ORIGIN DECEPTIONS

Aldi and Spring Gully

In August the ACCC accepted court enforceable undertakings from Aldi Foods Pty Ltd and Spring Gully Foods Pty Ltd in relation to misleading claims about the composition of Aldi's *Just Organic* honey.

A label affixed to the product between early January 2008 and mid 2010 claimed it was "produced" or "made with honey produced" on Kangaroo Island, which has the only remaining pure population of the Ligurian honeybee in the world. A later label stated that it was a blend of Australian organic certified

honey and honey "produced on Kangaroo Island".

The actual Kangaroo Island honey content during the earlier period was between 0.84% and 50.07% - although one of the batches did contain 100% Kangaroo Island honey. During the latter period it was between 0.076% and 10.13%. Aldi Foods and Spring Gully Foods have undertaken that they will:

- Avoid this type of origin misrepresentation;
- Run corrective notices (on their websites, by Aldi in its stores and by Spring Gully Foods in newspapers); and
- Establish and implement a compliance program.

"King Island" meat

Also in August, the ACCC instituted legal proceedings against two Victorian meat retailers alleging false representations about meat claimed to originate from King Island, Tasmania.

The ACCC alleges that Hooker Meats Pty Ltd, trading as "Peninsula Bulk Meats", misrepresented in newspaper advertisements and on their website that meat they supplied was grown on King Island.

The ACCC also alleges that Kingisland Meatworks & Cellars Pty Ltd and its director, Mr Alexander Mastromanno, misrepresented in newspaper advertisements and on their website that a significant proportion of meat supplied was grown on King Island.

Scheduling conferences will be held in October 2011.

ACL CASES (continued)**PRICE DECEPTIONS****AUSTAR – Pay TV**

AUSTAR Entertainment Pty Ltd has admitted its contracts were likely to mislead consumers and offered a court enforceable undertaking to provide clear and prominent explanations of the costs of its subscription television packages.

The ACCC investigated door-to-door sales by AUSTAR to residents of remote communities in the Northern Territory. AUSTAR offered extra packages of channels for free or at a discounted rate for a short introductory period at the beginning of a minimum-term contract on top of its standard “Starter Pack”.

AUSTAR's sales contracts represented the total minimum cost as that calculated on the cost of the “Starter Pack” for 12 months plus the cost of any additional channels for the introductory period. But they did not reflect the fact that the customer would be charged for the extra channels at the end of the introductory period unless the customer actively opted out.

The result was that the stated minimum price was significantly lower than what was ultimately charged to people who were “some of the most disadvantaged consumers in Australia” according to ACCC deputy chair Peter Kell.

Tank Broker Pty Ltd

Tank Broker has paid three infringement notices totalling \$19,800 and provided a court enforceable undertaking to the

ACCC for failing to prominently state the full price of rainwater tanks.

Advertisements in South Australian newspapers between September 2010 and May 2011 referred to “after rebate” prices for rainwater tanks. By deducting the value of state and federal rebates, Tank Broker failed to state, or did not state in a prominent way, the full price to be paid by consumers.

The company also advertised rainwater tank kits for sale by comparing “Now” prices with “Was” prices when in fact the represented savings between the two prices did not exist and such conduct was likely to mislead customers.

As part of its undertaking, Tank Broker has pledged to ensure that it specifies the price of products as a single figure and in a prominent way, and not to use comparative price representations unless they are genuine.

Energy Watch

Energy Watch (“EW”) provides an energy price comparison service, covering electricity and natural gas provision, to residential and business consumers.

In proceedings launched in August, the ACCC alleged that EW made false or misleading representations through a range of media including television, radio and print advertising, on websites and billboards, and advertising displayed on the Melbourne Cricket Ground scoreboard during AFL games. There were two types of representation:

- that EW compares the rates of all or many of the energy re-

tailers in the relevant geographic area of a consumer; and

- as to the amount consumers have saved, and will save, by using EW services.

The ACCC sought an injunction to restrain EW from making similar representations. In response to this, on September 8 EW provided undertakings it will not make a number of representations in any media until the ACCC's proceedings against it are finalised or until further order of the Court. The representations that it will no longer make are as follows:

- EW will not represent in any media that EW compares the rates of **all** of the energy retailers available in a person's area unless the comparison includes **all** other energy retailers available in the area
- EW will not represent in any media that EW compares the rates of **many** of the energy retailers in a person's area unless the comparison includes a **majority** of energy retailers available in the person's area
- EW will not represent in any media that EW can save persons a specified monetary amount without also stating the number and type of customers who have achieved the savings and the period over which it has been achieved
- EW will remove or cover certain statements which include “save” and a monetary amount on billboards, including billboards in metropolitan Melbourne and in regional and rural areas.

The final orders sought by the ACCC include declarations, final injunctions, pecuniary penalties and the implementation of a compliance program.

ACCC ENFORCEMENT – CARTEL MATTERS

Construction bid rigging in Queensland

The Federal Court in Brisbane has found that three Queensland based construction companies engaged in price fixing and misleading or deceptive conduct in tendering for Queensland public works projects.

The court found that between 2004 and 2007, T.F. Woollam & Son Pty Ltd, J.M. Kelly (Project Builders) Pty Ltd and Carmichael Builders Pty Ltd engaged in “cover pricing” in relation to the tenders for four construction projects.

This practice is allegedly used in situations where a construction company may not have the time, resources or inclination to prepare an accurate tender, but still wants to be seen as tendering for the project. It is a form of bid rigging that involves a tender price being sought by one company from another during a tender process.

Both companies understand the cover price will be high enough to ensure that company A will not win the contract, although it submits the cover price tender as a “genuine” tender. Company B has a better chance of winning because its bid is under the cover price.

The distortion of the competitive tender process by cartel conduct may exclude legitimate competitors and pass on higher costs to customers. New ACCC Chairman Mr Rod Sims said “It is also important to note that the conduct was also found to be misleading or deceptive as each company represented during the tendering processes that they had no knowledge of the price of any other tenderer and had not collaborated with another tenderer on price without the consent of the client.”

The court also found that the managing director of T.F. Woollam & Son and the construction manager of J.M. Kelly were parties to the contraventions.

Question of immunity

Following a recent case, a person or enterprise that has disclosed information to the ACCC and seeks immunity must be aware of a new risk. Cartel respondents may seek, and Australian courts may order, earlier than expected disclosure of information which may prejudice an immunity applicant's position in other jurisdictions.

The question arose in proceedings against three international suppliers of electrical cables and accessories, alleging cartel conduct. One company (and its employee “Mr A”) applied for immunity in respect of the alleged cartel, under the ACCC's Immunity Policy.

The company and Mr A provided information on a confidential basis and were granted conditional immunity from prosecution as a result. Mr A understood that the ACCC would take steps to protect its privileged records and made it known that he was concerned about the risk of overseas prosecution.

Two suppliers have not submitted to the jurisdiction of Australian Courts. In action commenced outside Australia they wished – to simplify a complex set of issues – to discover Mr A's identity.

The ACCC argued that public interest immunity applies. But the burden of establishing the public interest is heavy, requiring the ACCC to establish that there is a “real” rather than merely “some” or “any” detriment to the public interest from disclosure.

Most cases involving disclosure of information involve applications

for disclosure of documents to enable respondents a fair and adequate opportunity to prepare for trial. Even in this case the ACCC acknowledged that the identity of Mr A and documents supplied to it by JPS would eventually be disclosed pre-trial.

The new risk introduced by this case arises from timing: the respondents were not seeking disclosure of the information for the purpose of preparing for trial but for the purpose of challenging whether the ACCC had a prima facie case in the first place.

The Court ordered disclosure. In doing so it acknowledged that its finding may undermine the ACCC's Immunity Policy and the willingness of individuals and companies to approach and assist the ACCC, but this was outweighed by the public interest in favour of disclosure. The Court also found that the risk of prosecution of informants in other jurisdictions as a result of disclosure is not a matter to which the Court should have regard. This decision will not assist the ACCC in its international investigations.

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

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