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LAWYERS

TO	Tim Grimwade, ACCC	DATE	13 April 2004
cc	Louise Sylvan, Jennifer McNeill, John Martin	FROM	Luke Woodward
FACSIMILE	02 6243 1211 / 1122	PAGES	8

Dear Tim

CAMS AUSTRALIAN RALLY CHAMPIONSHIP (ARC) CONTROL FUEL NOTIFICATION

We enclose a submission requesting that the Commission issue a draft notice revoking notification prior to 16 April 2004, when the CAMS notification comes into effect. We note that:

- Allowing the CAMS notification to stand at this time will effectively preclude the use of ET 102 racing fuel in the ARC event on 8 and 9 May 2004.
- ET Racing Fuels is a local producer of racing fuels which comply with Australian standards. Elf WRF racing fuel does not comply with Australian standards.
- ET 102 fuel is a high quality race fuel that complies with relevant FIA specifications.
- The selection of Elf WRF fuel as a "control fuel" was not done in an open tender process.
- CAMS can specify a fuel standard, however under its own National Competition Rules (cl 68) it cannot limit the brand of fuel that can be used at CAMS meetings (eg the ARC).
- The cost of Elf WRF fuel is actually some 25% higher than ET 102 fuel.
- There can be no real prejudice to CAMS, contestants or Elf from issuing a draft notice:
 - CAMS accepted that ET 102 could be used in the ARC event on 27 and 28 March 2004, without any penalty (including as to the accumulation of points);
 - competitors will obtain a right to choose a lower cost, domestically produced fuel which does not have prohibited MTBE levels;
 - Elf can still sell its fuel.
- CAMS should not benefit from a late notification, which precludes a full consideration of this matter prior to the next ARC event in May.

Luke Woodward/Graeme Edgerton

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Page 1



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13 April 2004

BY FACSIMILE: (02) 6243 1211

The General Manager
Adjudication Department
Australian Competition and Consumer Commission
470 Northbourne Ave
DICKSON ACT 2602

Dear Mr Grimwade

**EXCLUSIVE DEALING NOTIFICATION N40702
CONFEDERATION OF AUSTRALIAN MOTOR SPORT LIMITED**

We refer to your letter dated 8 April 2004 and our letter dated 8 April 2004.

ET Racing Fuels is concerned that the "proposed conduct" set out in the exclusive dealing notification (**Notification**) lodged by CAMS with the Commission on 2 April 2004 will result in significant public detriment and would result in no public benefit. In addition, ET Racing is concerned that the proposed conduct will result in an anti-competitive detriment in the market for high octane racing fuel as it will significantly reduce the ability of ET Racing Fuels to compete in this market.

We respond below to the specific issues raised by CAMS in its Notification and to the questions set out in your letter of 8 April 2004.

Notified conduct

The "proposed conduct" set out by CAMS in its Notification is in the following terms:

"CAMS proposes to require that competitors registered to compete using turbo/super charged four-wheel drive vehicles in Australian Rally Championship events use Elf WRF fuel if such competitors wish to accrue 'points' which are used in the calculations of placings and awards in the Australian Rally Championship. Competitors who do not use this fuel will still be able to compete in the events in every other respect save for the accrual of championship points".

CAMS has suggested that it has notified this conduct to the Commission because "it has been suggested by another fuel supplier that the proposed conduct would fall within sections 47(6) and 47(7) of the Trade Practices Act 1974 (TPA)".

On instructions from ET Racing Fuels, we wrote to CAMS on 24 March 2004 setting out conduct which appeared to be in breach of sub-sections 47(6) and (7) of the TPA. This conduct involved the requirement on competitors entering turbocharged or supercharged 4WD vehicles in the ARC to purchase Elf WRF and the refusal of the right to participate in the ARC for such competitors if they did not purchase Elf WRF. Details of this conduct are set out in the letter of 24 March.

The conduct previously complained of by ET Racing Fuels was conduct which on its face went beyond the "proposed conduct". However, the proposed conduct is likely to have the same effect as the conduct previously complained of.

All competitors in the ARC want the opportunity to accrue championship points. This is particularly true in relation to entrants of turbocharged and supercharged vehicles, who typically spend more money on their cars and in particular on their engines.

A requirement on competitors to purchase Elf WRF if they wish to accrue championship points will cause significant loss and damage to ET Racing Fuels as it is likely that most, if not all, competitors will purchase the fuel which allows them the opportunity of accruing championship points.

For the reasons set out below, there is no public interest in linking the accrual of points to the purchase of a particular brand of fuel.

Alleged public benefits**1. Fairness and competitiveness of ARC events**

Two issues are raised by CAMS in relation to fairness and competitiveness of the ARC events:

- (a) Requiring competitors to purchase Elf WRF will give each competitor a better chance of competing on a 'level playing field'.
- (b) Requiring competitors to purchase Elf WRF will reduce the costs on competitors and thereby encourage persons to compete in the ARC.

In relation to point (a), it is possible to specify the characteristics for fuel to be used in a particular event in order to encourage fairness between competitors without specifying the brand of fuel that must be purchased. For example, Schedule G to the CAMS 2004 Manual of Motor Sport sets out a number of types of fuel in clauses 2 to 6. Clause 1 of Schedule G provides that:

"Upon request from Sporting Commissions of CAMS, Category Managers or persons recognised by CAMS as representing particular Groups of vehicles, certain Categories or Groups of vehicles may be restricted by CAMS to any one or more of the types of fuels as specified in Articles 2 to 6 following"

Clause 9 provides that:

"A 'Control Fuel' may be specified for a particular series or competition. Where such Control Fuel is specified, such fuel must either meet the requirements of Articles 2 to 6 (above) or otherwise be specifically approved by CAMS."

Clearly it would be open to CAMS to specify, for example, that all turbocharged and supercharged 4WD vehicles may only use "FIA Fuels" as defined in clause 6 of Schedule G. This would set the parameters for the fuel to be used and provide a level playing field without causing a corresponding anti-competitive detriment.

We note that clause 68 of the National Competition Rules (NCR) published by CAMS provides:

"No limitation on the brand of fuel at meetings shall be permissible, and any Supplementary Regulation purporting to limit competitors or drivers to fuel of any one brand shall be null and void."

We consider that clause 68 of the NCR recognises the anti-competitive detriment caused by specifying one brand of fuel, rather than fuels with particular characteristics. This clause also appears to accord with the object of CAMS in clause 5A(i) of the NCR to:

“ensure that the conduct and promotion of motor sport in Australia is carried on in a manner which secures and enhances the safety of participants, officials, referees and spectators and which allows the sport to be competitive and fair.”

In relation to point (b), we note that ET 102 racing fuel sells at the pump for \$3.85 per litre and in 20L and 200L drums at \$4.40 per litre. A charge of \$5 for the drum is added to orders for 20L drums. This price is significantly cheaper than the \$5.50 per litre charged for Elf WRF. We are instructed that competitors in an event such as the ARC are likely to purchase at least 200L of fuel. On the basis of the purchase of one 200L drum of fuel, competitors would save \$220 if they purchased ET 102 rather than Elf WRF.

Contrary to the submissions made by CAMS, a requirement that competitors purchase Elf WRF may increase the potential costs of participation in the ARC and discourage such participation.

2. Cost of competing in events

As noted above, the cost saving for competitors purchasing ET 102 is likely to be at least \$220.

There is no substance to the claim that the overall costs to competitors will be less due to the provision by the distributor of Elf WRF of medical services and a claimed reduction in the entry fee of \$200. It appears that the cost of providing these services has been built into the price of the fuel.

CAMS appears to be suggesting that the distributor of Elf WRF would not provide these services unless the accrual of competition points is linked with the purchase of Elf WRF fuel. A strong inference can be drawn from this that competitors entering turbocharged and supercharged 4WD vehicles would choose to purchase Elf WRF if that was the only way in which they could accrue competition points.

We are instructed that competitors in the recent ARC event in Western Australia were charged a cartage fee of up to \$300 per 200L drum to have Elf WRF fuel taken to WA for the race. In circumstances where there is no other competitive fuel, competitors in the ARC may find it difficult to avoid extra fees of this nature.

3. Quality and safety

As noted in relation to paragraph 1 above, a consistent quality of fuel can be assured by specifying the characteristics of the fuel to be used, rather than the brand of fuel.

In any event, in light of the fact that CAMS asserts that other fuel can be used, provided competitors do not wish to accrue competition points, this submission loses much of its force.

We note that Elf WRF fuel does not comply with the requirements of the Fuel Standard (Petrol) Determination 2001 (**Petrol Determination**) and it has been necessary for Elf Lubricants Australia Pty Ltd to obtain a grant of approval under section 13 of the *Fuel Quality Standards Act 2000* (Cth) (**FQS Act**) in order for Elf WRF to be used in motor sport. An approval was granted by the Minister for the Environment and Heritage on 12 March 2004 (**Approval**). The Approval contained a number of conditions including limitations on the supply of Elf WRF to certain persons, restrictions on its storage, and requirements of written information relating to the safe handling of the fuel on the basis that "*persons engaged in the use of these fuels may be exposed to relatively high levels of toxics [sic]*".

We note that Elf WRF exceeded the ordinarily prescribed level of Methyl tertiary-butyl ether (**MTBE**). The level of MTBE is regulated by the Petrol Determination because it has the potential to contaminate surface and groundwater, rendering it unpotable.

On the basis of the Approval, it appears that Elf WRF also exceeded the ordinarily prescribed level of Aromatics. The Approval notes that "*combustion of aromatics can lead to the formation of toxic benzene in exhaust gas. Benzene is a proven human carcinogen that can cause fatal acute myeloblastic leukaemia in exposed persons*".

ET 102 complies with the requirements of the Petrol Determination, does not contain any MTBE and contains a level of benzene of less than 1% by volume.

ET 102 is an "FIA Fuel" in that it complies with Article 252.9.1 of Appendix J to the FIA International Sporting Code. This was the quality standard specified by CAMS when it asked for expressions of interest for supply of fuel for the 2002 ARC.

There can be no basis for suggesting that allowing competitors to use ET 102 would compromise either the quality or the safety of the fuel used in the ARC.

Anti-competitive detriment

We are instructed that there are a limited number of manufacturers of high octane racing fuel of a type suitable for use in turbocharged and supercharged cars.

A restriction on the ability of entrants of turbocharged and supercharged cars in the ARC to use ET 102 will impact significantly on sale of ET Racing Fuels to those competitors.

CAMS is the peak body for motor racing in Australia and there are hundreds of affiliated clubs throughout the country. A decision by CAMS to exclude or restrict the purchase of ET 102 in the ARC is likely to have a detrimental effect on the ability of ET Racing Fuels to sell ET 102 to these affiliated clubs or to competitors in events run by these clubs.

Draft notice

As noted in our letter of 8 April 2004, we consider that the concerns raised by ET Racing Fuels are serious enough to warrant the Commission issuing a draft notice in relation to the proposed conduct notified by CAMS, prior to the expiration of the prescribed period referred to in section 93(7A). We request that the Commission issue a draft notice prior to 16 April 2004.

In this regard, we request that this matter be brought to the attention of the Commission as a matter of urgency at the next meeting of the Commission, which we understand is on 14 April 2004.

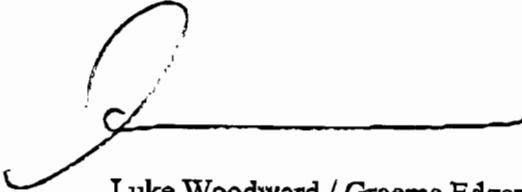
The issuing of a draft notice prior to 16 April 2004 cannot cause detriment to Elf given that CAMS envisages that other fuels could be used by competitors entering turbocharged and supercharged 4WD vehicles in the ARC. Moreover, there can be no issue about competitors using ET 102 and obtaining competition points in upcoming events, given that CAMS confirmed in its letter of 26 March 2004 that competitors in the ARC event on 27 and 28 March could use compliant fuels other than Elf WRF without penalty in that event.

For the reasons set out in our letter of 8 April 2004, we consider that CAMS should not be given the statutory benefit accorded by section 93(7)(b) of the TPA.

If you have any questions in relation to this request, please contact Graeme Edgerton on (02) 9263 4206.

Yours faithfully

GILBERT + TOBIN

A handwritten signature in black ink, consisting of a large, stylized initial 'L' followed by a long horizontal line.

Luke Woodward / Graeme Edgerton