

Our ref: PRH 0405926/003 SYK

29 September 2006

Mr Scott Gregson
General Manager, Authorisations
C/- Australian Competition and Consumer Commission
Level 7, Angel Place
123 Pitt Street
SYDNEY NSW 2000
By hand

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Dear Mr Gregson

**Application for Authorisation:
Municipal Association of Victoria on behalf of certain councils**

- 1 We refer to your meeting with Paul Holm on 22 August 2006 and now enclose the following documents:
 - 1.1 Form A Exclusionary Provisions: Application for Authorisation; **A30244**
 - 1.2 Form B Agreements Affecting Competition: Application for Authorisation; **A30245**
 - 1.3 Submission in relation to the authorisation applications; and
 - 1.4 Cheque in the sum of \$9,000.
- 2 We submit that the application for the authorisation of the exclusionary provisions and the application for the authorisation of the agreement affecting competition relate to conduct in closely related markets, so that the additional related authorisation application fee of \$1500 applies, rather than the lodgement fee of \$7500. Please note our client also seeks interim Authorisation of the conduct described.
- 3 Please call us if you have any questions concerning the applications.

Yours sincerely

Paul Holm
Partner
Direct +61 2 9286 8035
Email paul.holm@phillipsfox.com
115650086 \ 0405926 \ SZY01



Form A

A30244

Commonwealth of Australia

Trade Practices Act 1974 — Sub-section 88(1)

EXCLUSIONARY PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section

- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.
- (Strike out whichever is not applicable).

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

- 1 (a) Name of Applicant: **The Municipal Association of Victoria, on behalf of Councils listed in Schedule 1 of the supporting submission**

(See Direction 2 on the back of this Form)

(b) Short description of business carried on by applicant: **Representing Councils in Victoria**

(c) Address in Australia for service of documents on the applicant: **c/- Phillips Fox, 201 Elizabeth Street Sydney NSW 2000 att. Paul Holm, partner**
- 2 (a) Brief description of contract, arrangement or understanding and, where already made, its date:

See supporting submission

(b) Brief description of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions:

See supporting submission

(See Direction 4 on the back of this Form)

(c) Names and addresses of other parties or proposed parties to contract, arrangement or understanding:

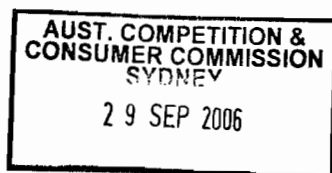
See supporting submission
- 3 Names and addresses (where known) of parties and other persons on whose behalf application is made:

See schedule 1 to the supporting submission

- 4 (a) Grounds for grant of authorisation:
- See supporting submission**
- (b) Facts and contentions relied upon in support of those ground:
- See supporting submission**
- (See Notice 1 on the back of this Form)
- 5 This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the above-mentioned contract, arrangement or understanding.
- (a) Is this application to be so expressed: **Yes**
- (b) If so, the following information is to be furnished:
- (i) the names of the parties to each other contract, arrangement or understanding: **Monash City Council, City of Port Phillip, Banyule City Council, Moreland City Council, Manningham Council, City of Glen Eira, City of Moonee Valley, Casey City Council and City of Greater Dandenong.**
- (ii) the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application: **See response to 5(b)(i)**
- (See Direction 5 and Notice 2 on the back of this Form)
- 6 (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Trade Practices Act 1974*)
- No.**
- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?
- N/A**
- (c) If so, by whom or on whose behalf are those other applications being made?
- N/A**
- 7 Name and address of person authorised by the applicant to provide additional information in relation to this application:
- Paul Holm, partner, Phillips Fox, 201 Elizabeth Street, Sydney NSW 2000**

Dated *29 September* 2006

Signed by/on behalf of the applicant



A handwritten signature in black ink, appearing to read "P. R. Holm", written over a horizontal line.

(Signature)

Paul Rutherford Holm

(Full Name)

Partner, Phillips Fox

(Description)

DIRECTIONS

- 1 Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
- 2 Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
- 3 In item 1(b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
- 4 Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished:
 - (a) in so far as the particulars of any of them have been reduced to writing — by lodging a true copy of the writing; and
 - (b) in so far as the particulars or any of them have not been reduced to writing — by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced to writing.
- 5 Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

NOTICES

- 1 In relation to item 4, your attention is drawn to sub-section 90(8) of the *Trade Practices Act 1974* which provides as follows:

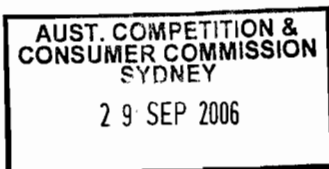
'(8) The Commission shall not

 - (a) make a determination granting:
 - (i) an authorisation under sub-section 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorisation under sub-section 88(7) or (7A) in respect of proposed conduct; or
 - (iii) an authorisation under sub-section 88(8) in respect of proposed conduct to which sub-section 41(6) or (7) applies; or
 - (iv) an authorisation under sub-section 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorisation under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.'

- 2 If an authorisation is granted in respect of a proposed contract, arrangement or understanding the names of the parties to which are not known at the date of the application, the authorisation shall, by sub-section 88(14) of the *Trade Practices Act* 1974, be deemed to be expressed to be subject to a condition that any party to the contract, arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.



Form B

A30245

Commonwealth of Australia

Trade Practices Act 1974 — Sub-section 88(1)

AGREEMENTS AFFECTING COMPETITION: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the *Trade Practices Act 1974* for an authorisation under that sub-section

- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- (Strike out whichever is not applicable)

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

- 1 (a) Name of Applicant: **Municipal Association of Victoria, on behalf of the Councils listed in Schedule 1 to the supporting submission.**
(See Direction 2 on the back of this Form)
- (b) Short description of business carried on by applicant: **Representing Councils in Victoria.**
- (c) Address in Australia for service of documents on the applicant: **c/- Phillips Fox, 201 Elizabeth Street Sydney NSW 2000 att. Paul Holm.**
- 2 (a) Brief description of contract, arrangement or understanding and, where already made, its date

See supporting submission
- (b) Names and addresses of other parties or proposed parties to contract, arrangement or understanding

See supporting submission
(See Direction 4 on the back of this Form)
- 3 Names and addresses (where known) of parties and other persons on whose behalf application is made

See Schedule 1 to the supporting submission
- 4 (a) Grounds for grant of authorisation

See supporting submission
- (b) Facts and contentions relied upon in support of those grounds

See supporting submission

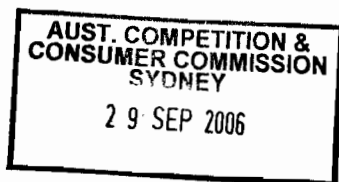
(See Notice 1 on the back of this Form)

- 5 This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the above mentioned contract, arrangement or understanding.
- (a) Is this application to be so expressed? **Yes**
- (b) If so, the following information is to be furnished:
- (i) the names of the parties to each other contract, arrangement or understanding: **Monash City Council, City of Port Phillip, Banyule City Council, Moreland City Council, Manningham Council, City of Glen Eira, City of Moonee Valley, Casey City Council and City of Greater Dandenong.**
- (ii) the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application: **See response to 5(b)(i)**
- (See Direction 5 and Notice 2 on the back of this Form)
- 6 (a) Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974)
- No.**
- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture
- N/A**
- (c) If so, by whom or on whose behalf are those other applications being made
- N/A**
- 7 Name and address of person authorised by the applicant to provide additional information in relation to this application

Paul Holm, partner, Phillips Fox, 201 Elizabeth Street, Sydney NSW 2000

Dated *29 September* 2006

Signed by/on behalf of the applicant



(Signature)

Paul Rutherford Holm

(Full Name)

Partner, Phillips Fox

(Description)

DIRECTIONS

- 1 Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
- 2 Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1(a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
- 3 In item 1(b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
- 4 Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished
 - (a) in so far as the particulars or any of them have been reduced to writing — by lodging a true copy of the writing; and
 - (b) in so far as the particulars or any of them not been reduced to writing — by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced to writing.
- 5 Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the matter in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

NOTICES

- 1 In relation to item 4, your attention is drawn to sub-sections 90(6) and (7) of the Trade Practices Act 1974 which provide as follows:
 - (6) The commission shall not make a determination granting an authorisation under sub-sections 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct, unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if
 - (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
 - (b) the proposed covenant were given, and were complied with; or

(c) the proposed conduct were engaged in, as the case may be.

'(7) The Commission shall not make a determination granting an authorisation under sub-section 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding, or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.'

2 If an authorisation is granted in respect of a proposed contract, arrangement or understanding the names of the parties to which are not known at the date of this application, the authorisation shall, by sub-section 88(14) of the *Trade Practices Act* 1974, be deemed to be expressed to be subject to a condition that any party to the contract arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.



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Submission in relation to authorisation applications
Applicant: Municipal Association of Victoria on behalf of
certain councils
Re: Bus shelters and related services; exclusive licensing
of bus shelter advertising rights

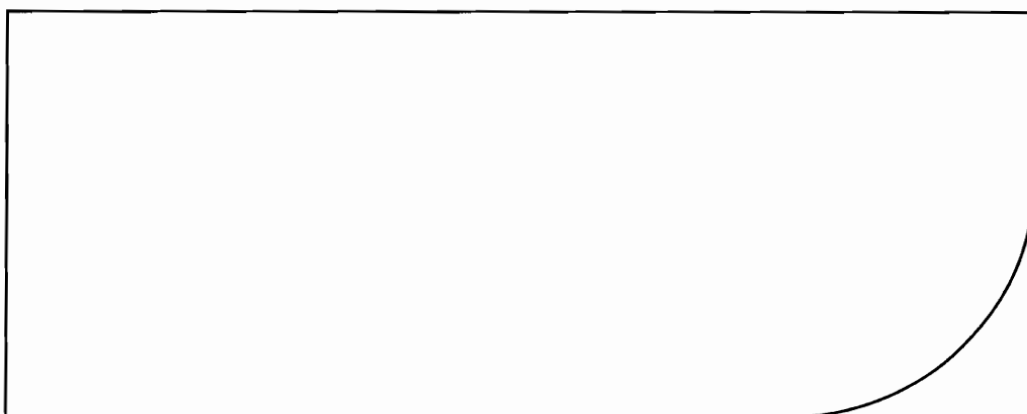


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1 Introduction

1.1 This submission is in support of the Municipal Association of Victoria's (**MAV**) application for interim authorisation, and authorisation, to make an arrangement that:

1.1.1 contains an exclusionary provision; and

1.1.2 may substantially lessen competition in a market

pursuant to section 88(1) of the *Trade Practices Act 1974* (C'th) (**TPA**). MAV is making this submission for and behalf of its member councils as listed in Schedule 1 to this submission (**Councils**).

1.2 The purpose of the application is to seek authorisation for MAV, on behalf of its member Councils that do not have an exclusive installation and maintenance contract for bus shelters, to facilitate arrangements between those Councils concerning the provision of bus shelters within municipalities administered by those member Councils and the Director of Public Transport (**the Director**).

1.3 The proposed arrangement is that:

Installation of shelters by the Victorian Department of Infrastructure (DoI)

1.3.1 bus shelters in Council municipalities would be installed, and some existing bus shelters and new shelters would be maintained, by a supplier engaged by the Director at the Director's expense.

Councils agree not to procure other shelters

1.3.2 Councils would not procure themselves shelters on Bus Routes (as defined in the *Public Transport Competition Act 1995* (Vic)) in their municipalities, or permit anyone else to do so, for an initial term of 10 years from March 2007, with options to extend up to a maximum of 16 years.

Councils agree not to issue tender for other shelters

1.3.3 those Councils would also agree not to issue any tender in respect of the supply, installation or maintenance of bus shelters within the Council's municipality during the term of a contract which is made after a tender process by the Director.

1.4 Those Councils who wish to participate in this process would agree to do so by execution of a Memorandum of Understanding (**MoU**) with the Director. Alternatively, if this can be achieved following proposed amendments to the *Road Management Act 2004*, Councils will agree to each transfer powers to the Director to allow the appointment by the Director of an exclusive provider of such services. This option is detailed further at paragraphs 4.10 – 4.18 of this submission.

1.5 The reason for the application is that member municipal Councils that do not have an exclusive installation and maintenance contract for bus shelters, will be engaging in

discussions between themselves and through MAV, concerning the terms of the MoU and their decision whether to sign the MoU with the Director. They may also be entering into discussions as to whether they will collectively utilise a legislative power to transfer such powers to the Director. Each council will determine independently whether or not to participate in the process. However, the discussions between the Councils and through MAV concerning participation in the proposed arrangement may give rise to issues under the TPA, which are the subject of the application.

Role of MAV

- 1.6 MAV is assisting in the coordination of this process by representing the Councils in the negotiation of the MoU with the Director and DoI.

DoI Tender for bus shelters

- 1.7 The tender process to award the contract for the supply, installation and maintenance of bus shelters on Bus Routes on the Melbourne Metropolitan Bus Network (**Contract**) will be conducted by the Director.
- 1.8 The Contract will deal with the maintenance (including replacement where required) of about 1600 existing bus shelters installed on Bus Routes on the Melbourne Metropolitan Bus Network and the supply, installation and maintenance of additional bus shelters on Bus Routes on the Melbourne Metropolitan Bus Network.

Exclusive rights to successful tenderer

- 1.9 As revenue can be earned from advertising placed upon bus shelters, it is intended to offer the successful tenderer an exclusive licence to place such advertising on any bus shelters that it has installed and any bus shelters it is maintaining under the Contract on which advertising is permitted for a licence fee of a fixed amount payable to the Director. The revenues derived from such licence fees will then be applied to offset the costs of replacement and installation of new improved bus shelters and the ongoing maintenance of bus shelters.
- 1.10 Authorisation is sought from the date of the application for a period of 10 years from March 2007 with an option period of a further 6 years to extend the term up to a maximum of 16 years.
- 1.11 The authorisation is to apply to any Councils who may wish to utilise the agreements in the future.

Public benefits

- 1.12 Limited funding for infrastructure spending for capital works and maintenance means a greater need for partnerships between Local and State governments to develop infrastructure, such as bus shelters, on a long term and sustainable basis. This also meets growing community demand for best value service delivery.
- 1.13 More generally, we submit that it is beyond doubt that the promotion of public transport as a sustainable form of transport is a significant public benefit. Bus shelters improve amenity to public transport users and make public transport more

attractive. Bus shelters afford protection from weather and enable the provision of information such as bus timetables. They enhance service delivery and encourage an increase in patronage numbers. This is because increasing public transport patronage usually requires an increase in service quality. An increase in public service patronage would also reduce traffic congestion, improve public safety and reduce air and noise pollution.

2 Background

- 2.1 The licensing of rights to use bus shelters for advertising space in exchange for their installation, maintenance and cleaning has been used for over 15 years in Victoria and is currently in place in other Australian states. It allows bus shelters to be provided at reduced cost to the State, Councils, the transport operators and the community. It is a practice which is adopted throughout the world including in England, the USA and France.
- 2.2 The impetus for the present bus shelter proposal arises from the expiry of an agreement made between the Public Transport Corporation, a predecessor to the Secretary of DoI and Australian Posters Pty Ltd, a predecessor to Adshel Street Furniture Pty Ltd (**Adshel**), in 1991 for the manufacture, supply, installation and maintenance of tram and bus shelters in metropolitan Melbourne, consequent to a tender process (**PTC Agreement**). The agreement was to expire in July 2006. However, it has been extended for 12 months to now expire in July 2007.

Metropolitan transport congestion

- 2.3 DoI developed a Metropolitan Transport Plan in 2004 to address transport congestion in inner and established suburbs in Melbourne. Part of that plan included the provision of better facilities at bus stops to make existing public transport systems more user friendly. The most recent transport plan is entitled "Meeting our Transport Challenges – Connecting Victorian Communities".
- 2.4 A review was conducted by the Victorian Competition and Efficiency Commission in 2005 into the management of traffic congestion in Victoria, upon the direction of the Victorian Treasurer (**VCEC report**). The draft report was issued in April 2006, and a final report is due in September 2006 after further community consultation and input. Inquiry participants in the VCEC report stated that improved stop facilities would improve the attractiveness of public transport. In particular, the VCEC report stated:

"Maroondah City Council considered that bus improvements appeared to be 'one of the best short term solutions to reduce congestion' ... and identified bus stop infrastructure as one of five critical transport challenges facing the council. The council suggested municipal councils could assist in addressing this challenge through continuing to improve bus stops and install shelters where needs are identified ...".

3 The parties to the conduct

Department of Infrastructure

- 3.1 Dol is the lead provider of essential infrastructure in Victoria, with responsibility for transport, ports and marine, freight, information and communication technology, major development, energy and security. It has the responsibility for integrating transport planning.
- 3.2 The objects of the Dol under the *Transport Act* 1983 (Vic) (**Act**) include:
- 3.2.1 to improve the efficiency and effectiveness of transport facilities and networks to meet the needs of the community; and
- 3.2.2 to ensure a public transport system is provided in Victoria that is efficient, effective, safe and reliable and has due recognition for the needs and interests of the users of that system and the tax payers.
- 3.3 The functions of Dol include -
- 3.3.1 developing, improving and co-ordinating the provision of transport services (section 4(2)(b) of the Act); and
- 3.3.2 assisting public and private bodies to construct or improve transport facilities and to provide services ancillary to those facilities (section 4(2)(m) of the Act).
- 3.4 The Director and the Secretary of Dol are appointed pursuant to the provisions of the Act. Both the Secretary and Director's functions and powers are also prescribed by the Act.
- 3.5 The Director's objective is to provide safe, necessary and high quality amenity for public transport users and councils. Specifically, the Director seeks to enhance the bus amenity for public transport users by installing new bus shelters and improving safety through better lighting at bus stops.
- 3.6 As we have stated, the tender process to award the contract for the supply, installation and maintenance of metropolitan bus shelters within Councils' municipalities would be conducted by the Director and the contract with the successful supplier will be made with the Director and managed by the Public Transport Division of Dol.

Municipal Associations of Victoria

- 3.7 MAV was incorporated by the *Municipal Association Act* 1907 (Vic). Its objects are to promote the efficient operation of municipal government throughout Victoria, and to supervise and protect the interests, rights and privileges of municipal corporations. MAV represents and advocates the interests of local government in Victoria.

Victorian councils

- 3.8 There are 33 councils in metropolitan Melbourne. The councils that are party to this application are listed in Schedule 1 to this submission.

Responsibility for bus shelters

- 3.9 Under section 28 of the *Road Management Act* 2004 (Vic), the Victorian Minister for Transport can provide practical guidance to road authorities, works and infrastructure managers by making codes of practice. The Code of Practice for Operational Responsibility for Public Roads (**Code**) provides guidance on the allocation of responsibility among road authorities for parts of the road reserve, and how boundaries between roadways, pathways or shoulders are determined.
- 3.10 In particular, clause 18 of the Code states that VicRoads is not responsible for bus shelters and associated passenger facilities. These shelters and facilities are the responsibility of the relevant municipal council, public transport operators, DoI or a private company.
- 3.11 Councils currently:
- 3.11.1 install bus stops and associated passenger facilities within their municipal boundaries;
 - 3.11.2 procure the supply and installation of bus shelters within their municipal boundaries; and
 - 3.11.3 grant approvals for the installation and advertising on bus shelters.
- 3.12 Since about 1999, eight councils have entered into separate agreements with JCDecaux Pty Ltd (**JCDecaux**) or Adshel for the installation of bus shelters.
- The following councils have separate agreements with JCDecaux:
- 3.12.1 Monash City Council;
 - 3.12.2 City of Port Phillip;
 - 3.12.3 Banyule City Council; and
 - 3.12.4 Moreland City Council.
- The following councils have arrangements with Adshel:
- 3.12.5 Manningham Council;
 - 3.12.6 City of Glen Eira;
 - 3.12.7 City of Moonee Valley; and
 - 3.12.8 City of Greater Dandenong.

Number of bus shelters

- 3.13 There are currently about 4,500 bus shelters in metropolitan Melbourne which fit into three categories:
- 3.13.1 approximately 1600 bus shelters installed by Adshel under the PTC agreement;

- 3.13.2 approximately 1700 Council owned bus shelters; and
 - 3.13.3 approximately 1200 bus shelters installed by JC Decaux or Adshel under agreements with councils.
 - 3.14 The number of bus shelters is expected to grow.
- Cost of bus shelters*
- 3.15 The following costs are estimated for the provision of shelters at bus stops:
 - 3.15.1 capital cost of \$15,000 - \$20,000 for a Council designed shelter with additional vertical weather protection on side and rear;
 - 3.15.2 installation costs of \$3,000 - \$5,000, depending on whether there is a pre-existing power connection to the site; and
 - 3.15.3 maintenance costs (including vandalism and repairs) per shelter of \$2,000 - \$4,000 per annum.
 - 3.16 Based on comments made by various councils in their Road Asset Management Plans, prepared in response to the introduction of the *Road Management Act 2004* (Vic) that were available from council websites, bus shelters generally last for about 15 – 20 years barring vandalism. The incidence of vandalism is generally high.

Responsibility for bus routes, and the potential need for new bus shelters

- 3.17 We are instructed that there are 24 bus operators in Victoria, and each has been granted exclusive operating rights within a defined franchise area. Bus operators who wish to provide and charge for a bus service travelling regularly over a fixed route must be accredited and have a service contract with the Victorian Government. The arrangements for accreditation and service contracts are contained within the *Public Transport Competition Act 1995* (Vic). DoI manages these contracts.
- 3.18 A bus operator who seeks to change its timetabled service or route must re-negotiate the terms of its contract with DoI. New bus routes may also be developed after consultation with potential users and service suppliers. These bus routes may also require new bus shelters.

4 How the conduct is likely to operate in practice

MoU

- 4.1 The MoU is between the Director and the Councils that do not already have an installation and maintenance contract for bus shelters. Under that MoU, councils would agree not to:
 - 4.1.1 procure or install bus shelters in their municipality;
 - 4.1.2 issue any tender for the supply, installation or maintenance of bus shelters within their municipality; and

4.1.3 permit advertising on bus shelters in their municipality

by any person other than the successful tenderer for the contract for the supply, installation and maintenance of metropolitan bus shelters (**Contractor**).

- 4.2 The MoU will not deal with any other shelters, such as tram shelters, installed in municipalities or any other street furniture, although the Contractor may install street furniture on a non-exclusive basis.

Proposed Bus Shelter Agreement between the Director and the bus shelter supplier

- 4.3 The form of the proposed Bus Shelter Agreement is still to be determined. Its form will be influenced by a market testing exercise that is currently being undertaken by DoI. In general terms, it is intended that the proposed Bus Shelter Agreement will deal with:

4.3.1 the maintenance (including replacement) of the existing 1600 Adshel installed shelters on the Melbourne Metropolitan Bus Network; and

4.3.2 the supply, installation and maintenance of additional bus shelters on the Melbourne Metropolitan Bus Network.

- 4.4 It may also deal with replacement of Council owned shelters. The Bus Shelter Agreement will not deal with any other shelters installed in municipalities that are covered by existing agreements between a Council and a supplier of shelters. Upon any such arrangements terminating, these bus shelters may also be included under the terms of the Bus Shelter Agreement.

- 4.5 The Bus Shelter Agreement will be awarded to a Contractor after a competitive tender process with "open eligibility criteria". It is likely to be for a period of 10 years with options to extend up to a maximum term of 16 years. Ultimately, the term will depend on the best value for money outcome for the State, as determined through the tender process.

- 4.6 It is currently proposed that the Director will pay for the replacement and relocation of existing Adshel shelters or new bus shelters if funding is obtained. If such funding is obtained, the Contractor will not be required to fund the installation of replacement Adshel bus shelters or new bus shelters. The Director will own the bus shelters.

- 4.7 Subject to the issue of appropriate advertising permits, the Contractor will have the right to advertise on:

4.7.1 bus shelters it maintains; and

4.7.2 new shelters it has installed on Bus Routes in the Melbourne metropolitan area.

- 4.8 Save for those municipalities where there are already arrangements in place with providers of shelters, the Contractor will also be granted the exclusive right to install additional bus shelters throughout metropolitan Melbourne on Bus Routes operated by the Director.

Advertising contracts between the street furniture advertising supplier and the advertiser

- 4.9 Based on a review of the Adshel website and rate card attached in Schedule 2, it is our understanding that street furniture advertising suppliers enter into short term contracts for the supply of advertising space with advertisers or advertising agencies on behalf of advertisers on a sub-licensing basis, such as two week periods, with or without additional media products.

Possible Amendment to the Road Management Act

- 4.10 An amendment to the *Road Management Act 2004 (Vic)* is currently under consideration by the Victorian Parliament (in the Road Legislation (Projects and Road Safety) Bill 2006) to amend section 15 of that Act to provide that a road authority may transfer a road management function to a *utility* as well as to another road authority. This may provide a statutory mechanism for Councils to transfer their statutory functions with respect to bus shelters to the Director. If this occurs then this may remove the need for the proposed MoU.
- 4.11 The *Road Management Act 2004* establishes a framework for the management of public roads throughout Victoria. Under the Act, each municipal Council is a 'responsible road authority' with respect to local roads in the municipality, and also with respect to footpaths and roadsides of arterial roads in the metropolitan area.
- 4.12 The functions of responsible road authorities include the provision, installation, maintenance and operation of non-road infrastructure that they own or install. 'Non-road infrastructure' is defined so as to include bus shelters. Hence, the primary source of Council functions with respect to the installation, maintenance and operation of bus shelters within the municipality is the Council's function as a road authority under the *Road Management Act*.
- 4.13 Section 15 of the *Road Management Act 2004* makes provision for a road authority to enter into an arrangement with another road authority to transfer a road management function. Where a transfer is effected under this section, the road authority to which the road management function is transferred becomes the road authority for the purposes of the *Road Management Act* according to the tenor of the arrangement. In its present form, the provision would allow a Council to transfer all responsibilities for the installation, maintenance and operation of bus shelters to the Roads Corporation (VicRoads).
- 4.14 If the proposed amendment is enacted such a transfer could be made to a 'utility'. 'Utility' is defined for the purposes of the Act to include 'a provider of public transport'.
- 4.15 If the Director of Public Transport were 'a provider of public transport' within the meaning of the *Road Management Act*, the new provisions when enacted would enable Councils to transfer their functions with respect to the installation, maintenance and operation of bus shelters throughout the municipality to the Director.
- 4.16 In respect of many of his functions, the Director is likely to be a provider of public transport for the purposes of the *Road Management Act*. However, this is not free of doubt. 'Provider of Public Transport' is defined for the purposes of the *Road*

Management Act to include a number of entities that operate passenger services or conduct rail operations or provide rail infrastructure but the Director of Public Transport is not explicitly mentioned. Hence, it also is arguable that the Director is not a provider of public transport and therefore is not a utility.

- 4.17 However, if this amendment is enacted and the Director is a 'utility' then section 15 could be used to give to the Director of Public Transport exclusive power to install, maintain and operate bus shelters on the roads within a municipality. This could then be used as a mechanism for the transfer of the power from Council's to the Director.
- 4.18 As it remains uncertain as to whether the Director will be a 'utility' for the purposes of this proposed enactment, and as this revised process will not necessarily remove the need for co-ordination or agreements between Councils to utilise such a power, it is still considered necessary to seek authorisation of the Councils' conduct in this regard.

5 Relevant market characteristics

General comments on the proposed tender

- 5.1 In terms of the Contract, the transaction involves the Director acquiring, and the Contractor supplying:
- 5.1.1 bus shelters;
 - 5.1.2 bus shelter installation, maintenance and cleaning services; and
 - 5.1.3 licensing fees.
- 5.2 Consequently, the Director will supply, and the Contractor will acquire, the following:
- 5.2.1 payment for the installation, maintenance and cleaning of the bus shelters, which may be offset from the licensing fees payable; and
 - 5.2.2 subject to the issue of appropriate permits by Councils, the exclusive right to advertise on the advertising bus shelters it maintains or bus shelters installed by it.
- 5.3 We submit that the relevant markets which are the subject of this application are twofold:
- 5.3.1 a national market for the supply and maintenance of street furniture; and
 - 5.3.2 a national market for advertising services, or alternatively the national outdoor advertising market which is significantly constrained by other media, particularly television.

Market for the supply and acquisition of street furniture in Australia

- 5.4 The businesses that may supply bus shelters include, for example, ASF, which is a division of Adshel Street Furniture. The other major national supplier of street furniture such as bus shelters is JCDecaux.

Supply of street furniture

- 5.5 From a supply perspective, street furniture suppliers' product portfolio typically includes shelters such as bus shelters, walkways, ticket booths, news stands, rest shelters, smoking shelters, awnings, security shelters, kiosks, wind breaks, seats, bike racks and bollards.
- 5.6 We are instructed that it is possible for manufacturers such as metal workers to manufacture street furniture such as bus shelters, once they are given the design and specifications. It is also possible for bus shelters to be imported.

Acquisition of street furniture

- 5.7 Acquirers of street furniture include councils, governments, developers, universities, schools, hospitals, transport interchanges, shopping centres, sports grounds, leisure centres, parks and gardens, wharves, airports, residential estates and racing clubs.
- 5.8 From a customer's perspective, street furniture can be funded by licence fees from the sale of advertising rights, or paid for directly by the customer.

Comments on market definition

- 5.9 In 2004, a market for the supply of street furniture was identified by The French Competition Council when dealing with a complaint made against JCDecaux in 1998¹. It was alleged that JCDecaux abused its dominant position by preventing a competitor from commercially exploiting its successful tender for the supply of advertising-funded street furniture in the municipality of Rennes. The French Competition Council held that there was a market for local authority advertising-funded street furniture in which JCDecaux was dominant and had abused its position².
- 5.10 The French Competition Council noted that local and regional administrations need to install equipment to protect public transport users against bad weather and to display municipal and local information. To this end, they call on the service of companies that specialise in installing and maintaining this equipment, most often free of charge. In exchange, the companies are granted exclusive rights to display advertisements on a certain portion of the equipment's surface area.
- 5.11 No assistance in defining the street furniture market can be obtained from Australian court decisions. Federal Court proceedings numbered V139 of 2000 between

¹ Republique Francaise Conseil de la Concurrence Decision No. 04-D-32 of 8 July 2004 relative to the referral by the company More group France regarding practices by the Decaux Group

² This decision was upheld on appeal. Paris Court of Appeal NOR ECOCO500073X as published in the *Bulletin Officiel de la Concurrence, de la Consommation et de la Repression de Fraudes* no. 2005 – 2006.

JCDecaux v Adshel and the Public Transport Corporation were disposed of prior to delivery of judgement, without a determination on the relevant market.

Market for advertising space and time in Australia

Market definition

- 5.12 The relevant product and functional dimensions of this market involve the supply of advertising space for a specified duration to advertisers, mainly through advertising agencies or media buying houses.
- 5.13 In 1996, the Australian advertising industry was reviewed by the Australian Competition Tribunal (**Tribunal**) in *Re Media Council of Australia & Ors*³ (*re Media Council of Australia*), which concerned consideration of the accreditation system for advertising agencies. As part of its consideration, it reviewed the Australian advertising industry.
- 5.14 It identified two markets in that application, which were:
 - 5.14.1 the market for advertising space and time in Australia, including direct advertising, letter box drops and new media such as the internet and pay-TV, as well as the traditional main media; and
 - 5.14.2 the market for advertising agency services (including placement of advertising) to advertisers in Australia.
- 5.15 Within the market for advertising space and time in Australia, it identified three separate markets, namely:
 - 5.15.1 the market for the supply of advertising messages;
 - 5.15.2 the markets for the supply of advertised products; and
 - 5.15.3 the markets for the supply of media products.

Market participants

- 5.16 The Tribunal identified the main participants in these markets as:
 - 5.16.1 the advertisers;
 - 5.16.2 the media; and
 - 5.16.3 the advertising agencies.

Role of advertisers

- 5.17 Advertisers play both supply and acquisition roles in the market, in so far as:
 - 5.17.1 advertisers supply the advertised products and the advertising messages to consumers; and

³ (1996) ATPR 41-497

5.17.2 advertisers purchase services from advertising agents, and space and time from the media.

5.18 The Tribunal stated in *Re Media Council of Australia* that media that distributed their product to consumers *gratis*, such as outdoor advertising companies, earn effectively all their revenue from the provision of advertising services to advertisers, unlike magazines for which it is a second stream of revenue⁴.

5.19 Advertisement places are bought either directly by an advertiser or through an agent. It is usually larger advertisers who buy space and time directly.

Role of the media

5.20 For the commercial media, the supply of space and time for advertising is its chief source of revenue.

Advertising agencies

5.21 Advertising agencies traditionally perform the following tasks on behalf of clients:

5.21.1 artwork;

5.21.2 booking the advertisement;

5.21.3 negotiating placement;

5.21.4 getting the artwork to publication; and

5.21.5 paying the suppliers of space and time on behalf of clients.

5.22 There is some differentiation in the work done by different advertising agencies. The Tribunal noted the tendency of agencies to specialise, which has resulted in the existence of the following sorts of agencies:

5.22.1 full service agencies;

5.22.2 creative agencies, which focus on the creation and production of advertisements; and

5.22.3 media buying houses, which focus on media research, planning and placement.

5.23 The Tribunal stated in *Re Media Council of Australia* that cost effectiveness in advertising required the advantageous placement of the advertisement in such media or, such a combination of media as will best reach the desired audience of potential buyers. This sort of opinion or judgment is often sought from advertising agencies, media specialists and production houses by advertisers.

⁴ (1996) ATPR p. 42, 243.

5.24 The Advertising Federation of Australia, which represents companies in advertising and marketing communications, states that the top 10 advertising agencies in Australia are:

RANK	AGENCY	STAFF	CLAIMED INCOME (\$'000)	CLAIMED BILLINGS (\$'000)
1	CLEMENGER BBDO ¹	759	118,587	741,168#
2	YOUNG & RUBICAM	420*	-	-
3	PUBLICIS MOJO	354	-	-
4	MCCANN ERICKSON	281	-	-
5	GEORGE PATTERSON PARTNERS	240*	-	-
6	SINGLETON, OGILVY & MATHER	230*	-	
7	M&C SAATCHI	220	39,050	244,062#
8	TMP WORLDWIDE	208	14,200	96,000
9	DDB	194	-	-
10	ADCORP	192	31,700	157,200

*Estimated. #Capitalised

Supply of advertising space and time

Modes of supplying advertising space and time

5.25 The Tribunal stated in *Re Media Council of Australia* that media advertising is displayed through a variety of commercial media, namely:

5.25.1 Electronic media, such as

- (a) radio;
- (b) television, both free-to-air and pay TV; and

- (c) internet and mobile telephony.
- 5.25.2 Print media, such as
 - (a) daily and local newspapers;
 - (b) weekly publications; and
 - (c) specialist publications and magazines.
- 5.25.3 Cinema and outdoor advertising, such as signs and billboards⁵.
- 5.26 The following categories of goods and services are considered outdoor advertising:
 - (a) large format – static and mobile billboards, twenty-four sheet posters, spectaculars, corporate sky signs and supersites;
 - (b) transit – bus, tram, taxi, airport; and
 - (c) street furniture, including bus and tram shelters, kiosks, telephone booths, internal displays in shopping centres, at shopping centre entries, rail foyers and rail platforms⁶.
- 5.27 A spectacular has a display area of over 42m². A supersite is a billboard with a display area of around 42m². A twenty-four sheet poster has a display area of about 18m². Street furniture generally incorporates 2 sheet posters, which have a display area of around 1m x 1.5m. Major participants in outdoor advertising are identified at Schedule 3 to this submission.
- 5.28 The Tribunal stated in *Re Media Council of Australia* that media advertising was only one of the communication devices that may be used to sell products. Specified alternatives were:
 - 5.28.1 posting notices in public places;
 - 5.28.2 distributing pamphlets or catalogues door to door;
 - 5.28.3 direct mail; or
 - 5.28.4 sponsorship of a public event.

Relevance of audience and regulations

- 5.29 In the Productivity Commission's Inquiry into Broadcasting on 3 March 2000 (**PC Report**), the Productivity Commission (**PC**) stated that the media operators' supply of

⁵ (1996) ATPR p. 42, 241.

⁶ Such as defined by Outdoor Media Association Inc in its media release 14 July 2006 (on revenue breakdowns) and by the Advertising Federation of Australia in its *Outdoor Advertising Advisory Paper and Checklist*.

advertising space and time to national advertisers and advertising agencies depended on a number of factors, including:

- 5.29.1 audience response to advertisements;
 - 5.29.2 the degree of targeting possible; and
 - 5.29.3 regulations restricting access to space and time.
- 5.30 Commercial media operators have an incentive to target the particular groups that advertisers wish to reach in offering to supply advertising space and time. However, they have to seek a balance between the cost of, and revenue generated from, targeting smaller niche audiences and those generated from attracting large, more diffuse audiences⁷.
- 5.31 As stated by the Tribunal in *Re Media Council of Australia*, the market for the supply of advertising messages functions differently in some respects to traditional markets because of the additional interaction between advertisers and potential consumers that affects the particular advertiser's decision to acquire advertising space and time from a particular supplier. Such differences include the following:
- 5.31.1 the advertising message is supplied via a non-personalised broadcast. One person's "consumption" of the message does not detract from its availability to others;
 - 5.31.2 there is no "charge" for the message at the point of consumption; and
 - 5.31.3 consumers are not excluded from consumption by the imposition of a price, nor called upon to decide whether the expected utility of an advertising message would justify the cost of purchase. Therefore, not only are advertising messages "free", its consumption is subsidised through the contribution that advertising revenues make to recovering the costs of the non-advertising content of the media.

Acquisition of advertising space and time

Advertisers

- 5.32 The Tribunal stated in *Re Media Council of Australia* that it heard no credible estimate of the number of advertisers in the market. It was agreed in evidence that it would number many thousands⁸.
- 5.33 The Sydney Morning Herald has reported that advertisers in the outdoor sector included alcohol suppliers, fashion, telecommunications, fast moving consumer goods, and motor vehicles⁹.

⁷ The PC Report, p. 136.

⁸ (1996) ATPR p. 42, 242.

⁹ *Sydney Morning Herald*, "Crowds draw more outdoor advertising", 27 November 2003.

Acquisition decisions

5.34 What an advertiser hopes to achieve and the size of its budget determines when and where it places its advertisements and how often. Typical advertising campaigns include:

5.34.1 brand awareness campaigns;

5.34.2 "Teaser" campaigns;

5.34.3 information campaigns; and

5.34.4 sales campaigns.

Demand for advertising space by advertisers

5.35 The PC Report stated that advertisers' demands for advertising space in the media depends on a number of factors, including:

5.35.1 the expected size of the audience;

5.35.2 the likely demographic composition and interests of the audience;

5.35.3 the expected effectiveness of the advertising; and

5.35.4 the price and relative effectiveness of alternative forms of advertising in terms of frequency, the length of the campaign and reach.¹⁰

5.36 Some media operators, such as major commercial television stations, radio stations, and major daily newspapers, attempt to attract a large audience, which will include many groups sought by the advertisers. While this approach allows advertisers to reach mass audiences, it is difficult for them to target specific groups. Other media operators, such as magazine publishers, attempt to target their audience and provide a product that will appeal to a particular group.

Bus shelters and other street furniture

5.37 Unique characteristics of bus shelter advertising, from a demand perspective, are that:

5.37.1 it is highly visible and cannot be "turned off";

5.37.2 it can be seen by people in private cars as well as public transport users; and

5.37.3 it can be seen 24 hours a day with illumination seven days a week.

Historic market definitions, and changes in market behaviour

5.38 The ACCC adopts the view that outdoor advertising in Australia may constitute a separate market for the purposes of section 50 of the TPA. This is apparent from its

¹⁰ The PC Report, p. 135-136.

consideration of the acquisition of Australian Posters by Australian Provincial Newspapers in 1997 and further reflected by its review of the Ten Network's purchase of a majority stake in Eye Corp in 2000.

- 5.39 However, we submit that the relevant market is wider than outdoor advertising and is defined by the total advertising opportunities across space and time available to advertisers. This view is based on recent comments made by market participants concerning the desire for advertising packages that spread across communication platforms.¹¹ A recent media article stated:

*"The role of the media agencies is moving into the areas of communications planning rather than being restricted to media planning ... The impact of technology and the internet, plus the growing trend for things like ambient media and event management to be considered media channels alongside traditional things such as television, has meant that the options available are enormous."*¹²

- 5.40 The Australia Council for the Arts has also specifically commented on how outdoor advertising functions as part of an overall campaign rather than as a separate campaign from a demand perspective:

*"Outdoor advertising on its own is usually not sufficient to promote sales. It provides invaluable support for your overall campaign, and is probably at its most effective when it is used to sustain awareness of a company, a long running show or a major event such as a festival."*¹³

- 5.41 We also submit that the convergence of media markets due to technological and societal change has moved the traditional market boundaries away from the characterisation of its traditional physical structures to a consideration of the total advertising opportunities available to advertisers.

Media convergence

- 5.42 In the PC Report, the PC stated that the main advertising media competed with other forms of advertising, such as direct marketing, promotions and sponsorship of sport, for advertising revenue. It also commented that, with convergence and technological advances, the boundaries of the advertising market will expand as advertisers find new ways of reaching their customers, and that different forms of media and different media operators will gain a share of this expenditure depending on how effective they are in reaching the target audience of advertisers¹⁴.

¹¹ "There is no medium in the bigger picture", **The Australian Financial Review**, 10 August 2006.

¹² Quoted from "Co-ordinated approach pays dividends for clients", **The Australian Financial Review**, 10 August 2006.

¹³ Australia Council for the Arts, **Sauce – Hot Tips for Effective Arts Promotion**, page 78: www.fuel4arts.com

¹⁴ The PC Report, p. 129.

- 5.43 The concept of converging media markets has been discussed by the Chairman of the ACCC, Graeme Samuel, and ACCC Commissioner Ed Willett¹⁵ in 2006. Most recently, Graeme Samuel said:

"In the past, the ACCC has regarded the media as four distinct products – free-to-air television, pay television, radio and print. Those products have been thought of as having little overlap in content or advertising.

We can no longer simply take that view in light of technological convergence in the media sector.

Moreover, as traditional media boundaries blur, focus may shift from the way information is delivered to the actual products media companies offer. In this regard, there are three main categories the ACCC will consider as part of its assessment:

- *The supply of advertising opportunities to advertisers*
- *The supply of content to consumers*
- *The acquisition of content from content providers.¹⁶*

- 5.44 Commissioner Ed Willett has also made the following comments:

"Increasingly, different types of content are becoming interchangeable as a result of digitisation and the development of new platforms for delivery ... it is far more likely over time that content will be delivered by multiple platforms to consumers ... Traditional "silos" of print, radio, free-to-air TV and pay TV may not remain in separate markets".¹⁷

- 5.45 Our view is that the relevant market is the market for the supply of advertising space and time in Australia to advertisers and advertising agencies.
- 5.46 We consider transactions relating to the supply and acquisition of outdoor advertising services are a sector of that broader market, but not a separate market.

¹⁵ G Samuel: "Grandad, What's a Newspaper? The Next Media Revolution", Media Ownership Reform The 3Cs – Convergence, Competition and Consolidation, 19 May 2006; G Samuel: "Australia's changing communications and media landscape", La Trobe Media Studies Lecture, 14 August 2006; E Willett: "Convergence, Media and the ACCC", Address to Analysts, Morgan Stanley, 1 May 2006..

¹⁶ G Samuel: "Australia's changing communications and media landscape", La Trobe Media Studies Lecture, 14 August 2006.

¹⁷ E Willett: "Convergence, Media and the ACCC", Address to Analysts, Morgan Stanley, 1 May 2006.

Geographic dimensions of the market for advertising space and time

- 5.47 The Tribunal stated in *Re Media Council of Australia* that the geographic scope of markets for advertising space and time was largely national. However, it noted that demand in regional and local sectors may be different.
- 5.48 The PC Report also stated that advertising can also be classified, from a demand perspective, into national and non-national sectors¹⁸.
- 5.49 The PC Report stated that national advertising usually sells products or services that are generally available throughout Australia, whereas non-national advertising generally has a more local focus. By way of example, the PC Report stated that advertising for brands of motor vehicles tends to be national, while advertising by a local car dealer is more likely to be non-national.
- 5.50 While we have considered whether the geographic boundaries of the market may be Melbourne based or Victorian based, we submit that the conduct of market participants indicates a national market. For example, the attached Adshel Rate Card and Buying Guide for 2006 contained in Schedule 2 has rates for national campaigns as well as for the eastern seaboard and major capital cities.

Barriers to entry to the market for the supply of advertising space and time

- 5.51 While advertisers and media are dependent on each other, the barriers to entry for advertisers have been traditionally lower than for prospective media entrants.

Electronic media

- 5.52 Restrictions exist on the amount of advertising that can be broadcast over television and radio, the content of advertising and restrictions on entry into the television and radio markets. These barriers include licensing, cross media ownership rules and regional aggregation rules in television.

Print media

- 5.53 Barriers to entry include scale economies in the circulation and distribution of newspapers and magazines.

Outdoor advertising

- 5.54 Regulatory restrictions such as local government and state regulations on planning and preservation of heritage areas. For example, the NSW State Environment Planning Policy No. 64 (**SEPP64**) regulates advertising and signage, which aims to ensure that signage is compatible with the desired amenity and visual character of an area. Signage over 45m² is effectively prohibited unless it falls within the conditions for an exempt development. This limits the development of new supersites and spectaculars.
- 5.55 SEPP64 also prohibits the display of advertising on land within the following zones:

¹⁸ The PC Report, p. 131.

- 5.55.1 environmentally sensitive areas;
 - 5.55.2 heritage areas;
 - 5.55.3 natural or other conservation areas;
 - 5.55.4 open space;
 - 5.55.5 waterways;
 - 5.55.6 residential areas;
 - 5.55.7 scenic protection areas;
 - 5.55.8 national parks; and
 - 5.55.9 nature reserves.
- 5.56 There are also a limited number of available outdoor advertising sites, in terms of the absolute number of such things as shelters, buses and taxis. Furthermore, the number of advertising bus shelters that a Council may seek to have constructed in any particular municipality is not at the total discretion of the relevant Council. It is determined by reference to the need for stops on an existing or new route, which is determined in consultation with DoI, as discussed previously.

Prices for advertising

- 5.57 In the PC Report, the PC stated that the amount an advertiser was willing to pay for access to this audience depended on:
- 5.57.1 the expected size of the audience;
 - 5.57.2 the demographic composition and interests of the audience;
 - 5.57.3 the price of advertising on alternative media; and
 - 5.57.4 the expected effectiveness of the advertising.
- 5.58 While the PC noted that the various forms of media competed with each other for advertising revenue, they also had different characteristics that made them more or less attractive to particular advertisers¹⁹.
- 5.59 The PC Report stated that advertising rates are largely set by negotiation between media operators and advertisers. The negotiations are usually based on so-called "carded" rates offered by media operators and the final rates paid by advertisers incorporating incentives and discounts²⁰. More recently we understand that there

¹⁹ The PC Report, p. 133.

²⁰ The PC Report, p. 134.

have been moves to negotiate rates paid in accordance with performance measurements.

- 5.60 Examples of pricing are in Adshel's Rate Card and Buying Guide for 2006, together with an explanation of the campaigns contained in the Rate Card, contained in Schedule 3.

6 Market shares

Size of advertising market by sales

- 6.1 Based on figures published by the Australian Federation of Advertisers (**AFA**) for advertising expenditure in Australia for the six months to June 2005, outdoor advertising made up \$154 million of the total \$4.5 billion spent on advertising in mainstream media in that six month period. This amounted to approximately 3.42% of advertising in mainstream media.
- 6.2 If the AFA figure for online advertising of \$263 million is taken into account, this reduces the percentage of outdoor advertising to the total advertising spend to 3.23%.
- 6.3 Based on a mainstream media advertising spend in Australia of \$11.5 billion²¹ in 2005 and extrapolating the figure for outdoor advertising by a similar proportion, the share of the market attributed to activities in outdoor advertising amounted to approximately 3.42% in 2005.

²¹ Quoted in "Surfing the net the catch the second ad wave", **The Australian Financial Review**, 10 August 2006 from figures released by the Commercial Economic Advisory Service of Australia for 2005.

Outdoor advertising by revenue

- 6.4 In a media release by the Outdoor Media Association dated 14 July 2006, it stated that outdoor media delivered a 12% net revenue increase for the second quarter of 2006, attracting \$89.3 million and bringing total net revenue to \$374 million for the past 12 months. This was obtained from figures independently compiled by KPMG from revenue results obtained from media display operators who are members of the Outdoor Media Association.

	1 st ¼, 2006	2 nd ¼, 2006	% increase	% decrease
Street furniture	\$25.5m	\$34.9m	36.9%	
Posters	\$6.2m	\$7.0m	12.9%	
Large format	\$28.6m	\$28.4m		0.7%
Transit	\$19.4m	\$19.0m		2.1%
Total revenue	\$79.7m	\$89.3m		

7 How the conduct affects the ability of the parties and other market participants to behave competitively

Exclusionary conduct

- 7.1 The MoU provides that a Council will not acquire, install or maintain shelters in its municipality from any person for the period of the Contract. This means that a Council will not issue a competitive tender, enter into its own contracts with suppliers of bus shelters or take advantage of any new forces or innovations that may emerge over the term of the contract.
- 7.2 If the Councils were to collectively determine to each exercise a power to transfer functions to the Director under an amended Road Management Act 2004, this would potentially be with the purpose of similarly preventing, restricting or limiting the acquisition of goods or services from particular persons or classes of persons in particular circumstances or on particular conditions.

Exclusive licence

- 7.3 The restrictions on advertisers gaining access to the bus shelters may have an effect on:
- 7.3.1 acquirers of advertising space and time;
 - 7.3.2 competitors in the supply of advertising space and time; and
 - 7.3.3 competitors in the supply of street furniture.
- 7.4 This is because access will only be available on the terms and pricing offered by the Contractor. The exclusive licence will restrict the ability of other advertising suppliers

to supply bus shelters to the Councils, and will restrict their ability to offer bus shelter advertising to advertisers.

- 7.5 No single Council has a critical volume of sites that would be attractive to national advertising suppliers. There are many viable points of entry.
- 7.6 We confirm our view that the conduct only impacts a small portion of the total potential sites for outdoor advertising. In particular, billboard sites, advertising on public transport vehicles, tram shelters and other street furniture within affected municipal areas, will still be available to competing outdoor advertising suppliers. Further, the conduct will only have limited impact on the broader national advertising services market.

8 The market characteristics that would develop with the conduct

Exclusionary conduct

Councils

- 8.1 The conduct may limit innovation on the part of the Contractor and therefore prevent Councils from acquiring 'state of the art' bus shelters. However a bus shelter is not a product that is particularly complex being one that ultimately has a simple purpose. We therefore consider this not to be a significant risk and one that will be addressed in the Contract with the provider.

Suppliers of street furniture

- 8.2 The Contractor will be insulated from competitive pressure in relation to the revenue to be derived from the installation, maintenance and cleaning of advertising bus shelters for the term of the Contract.
- 8.3 However, the tender for the Contract will be open and the tender process creates competition for the opportunity to supply the services. Therefore, competitive outcomes can arise from the bidding process rather than through the operation of market forces during the term of the Contract.

Exclusive licence

Suppliers of advertising space and time

- 8.4 The conduct will prevent the suppliers of advertising space and time from acquiring access to the advertising bus shelters that are the subject of the Contract over the term of the authorisation other than through the Contractor. This could lead to fewer sites being available to these suppliers, depending on the price at which they are able to obtain access.
- 8.5 The Contractor will be insulated from competitive pressures in relation to the revenue to be derived from the sub-licensing of the advertising space on the bus shelters. However, the affected bus shelters represent a small number of the total potential sites for outdoor advertising and the bus shelters will not themselves, be sufficient to base an advertising business.
- 8.6 The open tender process will create competition for the opportunity for the exclusive right to advertise and competitive outcomes can arise from that tender process.

Advertisers

- 8.7 The conduct will restrict access to those advertising bus shelters that are the subject of the Contract over the term of the authorisation to the Contractor.
- 8.8 As the Contractor will be insulated from competitive pressures in relation to the revenue to be derived from the licensing of the advertising space on the bus shelters, this could lead to an increase in the price of advertising services on these bus shelters.
- 8.9 However, this only impacts a small portion of the total potential sites for outdoor advertising and an even smaller percentage of the total sites in the market for advertising space and time in Australia. The Contractor therefore will continue to be constrained by competitive forces.

9 The market characteristics that would develop without the conduct

Exclusionary conduct

Councils

- 9.1 The status quo would be maintained. Each Council will separately negotiate with bus shelter providers, when they choose to acquire bus shelters. This would increase transaction costs. This is because Councils are required to go to a competitive tender for works over a value of \$100,000 under the *Local Government Act 1989* (Vic). They would individually have less bargaining power with what are large sophisticated commercial entities, as well as reducing amenity for users of buses.
- 9.2 Councils may choose not to acquire new bus shelters. They may not maintain the location and number of existing bus shelters. This would depend on the funding available to a Council, the negotiations with a supplier on the terms of supply, the price of supply and the amount payable to Councils in licence fees for the right to advertise. A reduced number of shelters may reduce patronage on buses and increase traffic congestion and pollution as well as reducing amenity for users of buses.

Suppliers of street furniture

- 9.3 Suppliers may charge a higher price per shelter installation and maintenance to an individual Council if the number of shelters to be installed or maintained does not lead to an economy of scale.

Exclusive licence

Suppliers of street furniture and advertising space and time

- 9.4 The exclusive advertising rights are more attractive commercially than the exclusive rights to install and maintain bus shelters. Consequently, a potential supplier may trade off revenue from the installation and maintenance of bus shelters if an exclusive licence is offered. Without such an exclusive right, suppliers may charge a higher price for shelter installation and maintenance. More bus shelter advertising sites might be available, but the rights may be less valuable if a "critical mass", in terms of number and/or location, is not reached. This would increase the costs to be borne by a Council's rate payers.

Advertisers

- 9.5 Advertisers could potentially have access to a greater number of bus shelter advertising sites without such exclusive rights, which could reduce the amount payable for such sites. However, if access to a "critical mass" number of sites can only be achieved through negotiations with several suppliers, then that would increase the transaction costs for advertisers.

10 Nature of the public benefits that are likely to result from the conduct

- 10.1 The conduct would provide for better co-ordination and integration in the roles and priorities of Local and State governments in road and transport management, land use and transportation objectives. This would lead to more efficient and cost effective governance, especially in urban development.
- 10.2 The Director would have greater bargaining power than individual Councils and therefore would be able to negotiate a lower fee and better levels of service, by being able to offer a greater access to advertising bus shelter sites. The benefit of any such cost savings, including any increased advertising revenue, would be passed on to bus commuters in increased amenity and to rate payers through avoiding the requirement for Councils to fund these assets and their up-keep (to the extent that any such funding requirements exceed advertising revenues).
- 10.3 Councils will avoid the transaction costs and administrative costs they currently incur in acquiring and coordinating these goods and services. In particular the need to publicly tender for such services where the contract value exceeds \$100,000. These resources can then be dedicated to other local government functions, resulting in improved public amenity and value to rate payers.
- 10.4 The improved quality and increase in the number of bus shelters will encourage greater use of public transport and give rise to related environmental benefits through reduced emissions.
- 10.5 The authorisation will not increase barriers to entry as it will only foreclose access to a small portion of the potential sites for outdoor advertising in Australia (and an even smaller portion of advertising sites generally) and only for the duration of the Contract.
- 10.6 The exclusivity to advertise on the bus shelters facilitates a greater return on infrastructure cost, in that the value of the exclusive licence can be offset or amortised against the cost of the installation and maintenance of the advertising bus shelter, resulting in less spending of public funds. It also facilitates higher levels of maintenance and service for bus shelters than could be provided by Councils based on present funding and priorities.

11 Who are the beneficiaries of the conduct? How are the benefits to be distributed?

Exclusionary conduct

- 11.1 Councils participating in the conduct, in terms of:
 - 11.1.1 a transfer of responsibility from Councils to the Director and DoI to manage bus shelters in a municipality;
 - 11.1.2 DoI taking over the responsibility for managing a Contract with the Contractor in relation to the supply, installation and maintenance of bus shelters in a municipality; and
 - 11.1.3 the replacement of outdated or obsolete shelters in the municipality.
- 11.2 Rate payers in the relevant municipalities, from:
 - 11.2.1 the removal of the need to fund bus shelters; and
 - 11.2.2 improved overall amenity from a growth in the number and location of bus shelters.
- 11.3 DoI, in terms of:
 - 11.3.1 its management and support of the growth in bus shelters generally to improve overall amenity and to complement Government improvements to bus services; and
 - 11.3.2 the development of an integrated approach for bus shelters in metropolitan Melbourne.
- 11.4 Commuters, in terms of the benefits of greater numbers of better quality bus shelters.

Exclusive licence

- 11.5 The Contractor, through having exclusive access to advertising on bus shelters in the participating Council municipalities.
- 11.6 DoI, in terms of the revenues earned from the right to advertise which will then be applied to offset the costs of replacement and installation of new shelters and ongoing maintenance of bus shelters.
- 11.7 Participating Councils, no longer having to fund the installation and maintenance of bus shelters in their municipality.

12 The period for which authorisation is sought

- 12.1 From the date of this application to 16 years from the date of the contract.

13 Why the nominated period is appropriate

- 13.1 The nominated period covers the period leading to the tender and 16 years from the date of the Contract. This is appropriate as it covers the maximum period of the Contract.

14 The need for an interim authorisation

- 14.1 While the risk of contravention is low and Councils may benefit from derivative crown immunity in relation to this conduct, all parties seek the benefit of certainty in relation to the proposed MoU. It is considered that the trade practices risk arises in relation to the conduct of Councils in agreeing to this course of action with DoI. As it is intended that this conduct be approved prior to the tender being lodged, interim authorisation is sought as a matter of urgency to cover the conduct of MAV and Councils from the date of this Application.
- 14.2 We consider that granting this authorisation is unlikely to result in any conduct that cannot easily be reversed. The tender itself is unlikely to be let before March 2007 and therefore the substantive decision of the ACCC on this Application is likely to have been provided well before any exclusive contract is let.

Schedule 1 - Details of Councils that have agreed to participate

COUNCIL	NAME	TITLE	ADDRESS	FAX
BOROONDARA CITY COUNCIL	JIM HONDRAKIS	TRANSPORT MANAGEMENT TEAM LEADER	PRIVATE BAG 1 CAMBERWELL 3124	9278 4466
CARDINIA SHIRE COUNCIL	MICHAEL ELLIS	ASSETS & SERVICES GENERAL MANAGER	PO Box 7 PAKENHAM 3810	5941 3784
CASEY CITY COUNCIL	STEVE DALTON	ACTING CHIEF EXECUTIVE OFFICER	MAGID DRIVE PO Box 1000 NARRE WARREN Vic 3805	(03) 9704 9544
GLEN EIRA CITY COUNCIL	ANDREW NEWTON	CEO	PO Box 42 CAULFIELD 3162	9523 0339
HOBSONS BAY CITY COUNCIL	BILL JABOOR	CEO	PO Box 21 ALTONA 3018	9932 1039
HUME CITY COUNCIL	JOHN MONAGHAN	TRAFFIC & CIVIC DESIGN MANAGER	PO Box 119 BROADMEADOWS 3047	9309 0109
MARIBYRNONG CITY COUNCIL	NICK FOA	ACTING CEO	PO Box 58 FOOTSCRAY 3011	9687 7793
MAROONDAH CITY COUNCIL	MICHAEL MARASCO	CEO	PO Box 156 RINGWOOD 3134	9298 4345
MORNINGTON PENINSULA SHIRE COUNCIL	DR MICHAEL KENNEDY	CEO	PRIVATE BAG 1000 ROSEBUD 3939	5986 6696
WHITEHORSE CITY COUNCIL	TOM EVANS	ACTING CEO	LOCKED BAG 2 NUNAWADING MAIL CENTRE 3110	9262 6490
WHITTLESEA CITY COUNCIL	GRAEME BRENNAN	CEO	LOCKED BAG 1 BUNDOORA 3083	9217 2111
WYNDHAM CITY COUNCIL	IAN ROBBINS	CEO	PO Box 197 WERRIBEE 3030	9741 6237

YARRA CITY COUNCIL	CRAIG KENNY	ACTING CEO	PO Box 168 RICHMOND 3121	8417 6666
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Schedule 2 – Adshel Rate Card and Buying Guide for 2006

Schedule 3 – Other persons who may be interested in the application

Advertising Federation of Australia

Australian Association of National Advertisers

Suppliers of outdoor advertising products, including the following:

APN News and Media Ltd, through:

Adshel in street furniture

Tribe, in posters

Cody Outdoor, in supersites and spectaculars

Buspak and Taximedia, in transit

Australian Posters, in 24 sheet posters

WA Billboards

General Outdoor Advertising, in supersites and billboards

MetroSpace, in supersites

Captive Media, in mobile billboards

Russell Ads, in supersites

JCDecaux, which states that it is the second largest outdoor advertising specialist in the world through street furniture, billboard and transport advertising.

The Ten Network, owner of Eye Corporation (formerly NLD Outdoor) which owns:

Sports and Outdoor Media International

Manboom

Outdoor Network Australia Pty Ltd (ONA) represents about 30 independent suppliers of outdoor advertising, including:

Outdoor Plus

Independent Outdoor Melbourne

Bailey Outdoor

Buckle Outdoor

Claude Outdoor, which supplies illuminated light box advertising signs called "Identilites",

Paradise Outdoor in Townsville, that supplies regional Queensland

Savage Outdoor in Brisbane.



Panel rate per 2 weeks excluding GST

METRO CITY PURCHASE	WEIGHT	PANEL RATE	CAMPAIGN PRICE
Eastern Seaboard	470	\$550	\$258,500
Sydney	200	\$580	\$116,000
Melbourne	170	\$575	\$97,750
Brisbane	100	\$550	\$55,000
Adelaide	80	\$505	\$40,400
Perth	120	\$505	\$60,600

RECOMMENDED WEIGHTS	MEDIUM	HEAVY
Sydney	200	290
Melbourne	170	270
Brisbane	100	150
Adelaide	80	120
Perth	120	170
National	670	1000

Panel Weights

Indicative only and represent the recommended panel numbers for Adshel Campaigns.

Installation

Rates include an initial campaign installation of \$25 plus GST per panel. Any bonus panels, further copy changes or installations outside of Adshel posting dates will incur additional charges at this rate.

Production

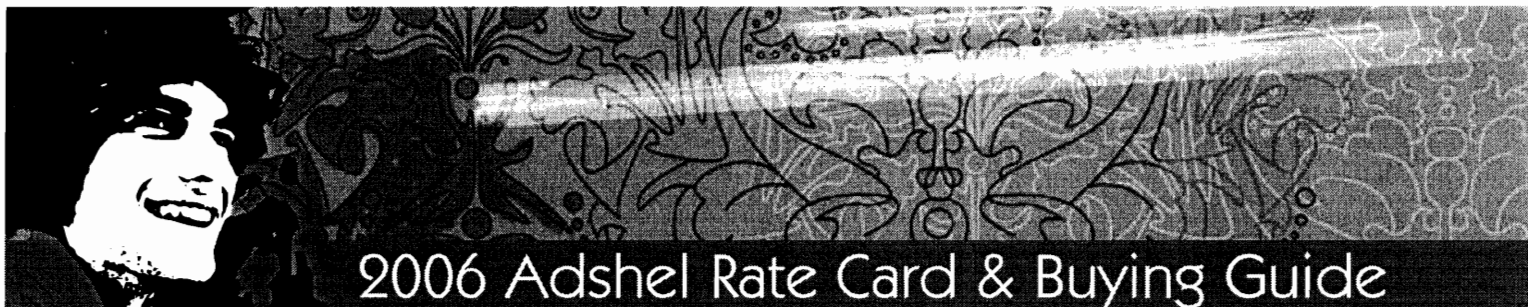
Rates exclude production costs. Production can be arranged through Adshel or our preferred suppliers. Visit www.adshel.com.au for production specifications and details.

Please Note

Rates include a guarantee of 95% illumination at all times and a provision for 24 hour repair on all vandalised or damaged sites after first being reported.

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2006 Adshel Rate Card & Buying Guide

Panel rate per 2 weeks excluding GST

NATIONAL CAMPAIGNS	WEIGHT	PANEL RATE	CAMPAIGN PRICE
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Broadcast

Broadcast (Metro City)	670	\$500	\$335,000
Broadcast (National)	1000	\$425	\$425,000
24/7 (7 days)	1000	\$275	\$275,000

Shopping

FMCG Broadcast	670	\$540	\$361,800
FMCG Targeted	670	\$580	\$388,600
Route Trade	410	\$580	\$237,800
Urban Shopper	410	\$540	\$221,400
Shopping Centre	50	\$580	\$29,000

Premium

Workbound	670	\$540	\$361,800
Homebound	670	\$540	\$361,800
Rail Broadcast (Sydney only*)	100	\$650	\$65,000
Rail CBD & Inner Suburbs (Sydney only*)	40	\$750	\$30,000

*Adshel rail coverage also available in Melbourne.

Bespoke

25% skewed	\$535
50% skewed	\$550
75%+ skewed	\$580
Tactical buy (hand selected)	\$620
CBD / Inner Suburbs (subject to approval by Adshel)	\$1,200

Wraps (in conjunction with a medium weight campaign only)

Wraps (inclusive of production)	< 10 \$3,500 per site	> 10 \$3,000 per site
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For more information on Wraps and other **Adshel Create** initiatives contact Adshel's Production Department on 02 8425 7200 or visit www.adshel.com.au.

ADSHEL
About life.

Planning & Buying



ADSHEL CAMPAIGNS
CAMPAIGN PERIODS
RATE CARD

ADSHEL CAMPAIGNS

Adshel's Broadcast, Shopping, Premium and Bespoke Campaigns have been developed using key insights from our Research and Insights Program to meet the strategic needs of advertisers.



BROADCAST CAMPAIGNS

- ✓ METRO CITY
- ✓ NATIONAL
- ✓ 24/7 CAMPAIGN

SHOPPING CAMPAIGNS

- ✓ FMCG BROADCAST
- ✓ FMCG TARGETED
- ✓ ROUTE TRADE
- ✓ URBAN SHOPPER
- ✓ SHOPPING CENTRE

PREMIUM CAMPAIGNS

- ✓ WORKBOUND
- ✓ HOMEBOUND
- ✓ RAIL
- ✓ BESPOKE

BROADCAST CAMPAIGNS

Designed to deliver maximum reach and reinforce your message in prime locations in each capital city, Adshel's Broadcast Campaigns provide an opportunity to build your brand's profile and increase awareness.

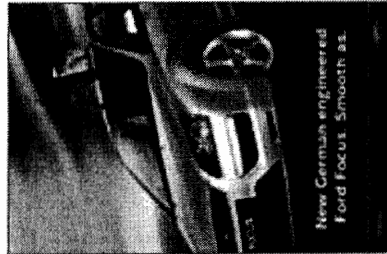
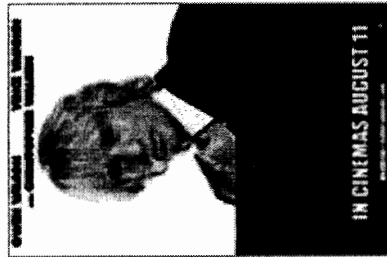
METRO CITY

- Provides distribution of sites across clearly defined geographic areas in Sydney, Melbourne, Brisbane, Adelaide and Perth



NATIONAL

- Includes coverage in key regional markets

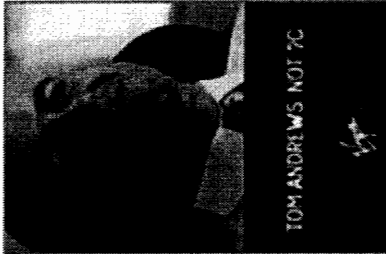
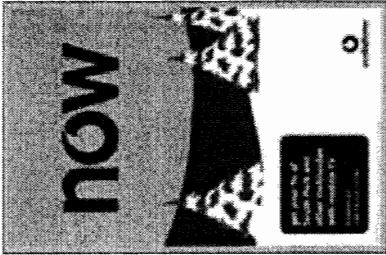


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24/7 CAMPAIGN

UNDERSTANDING THE NEED FOR FLEXIBILITY TO DELIVER YOUR
MESSAGE – 24 HOURS A DAY 7 DAYS A WEEK

- Delivers immediate impact and reinforces your message over a one week posting period
- Saturates your market to achieve high share of voice
- Ideal for product, movie and media launches and time sensitive copy
- Coverage includes main arterial and suburban roads as well as rail and shopping centre locations



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SHOPPING CAMPAIGNS

Adshell's Shopping Campaigns are highly effective in reaching busy shoppers on the path to purchase through the selection of panels within or en route to retail environments, influencing consumers when they have spending on their minds.

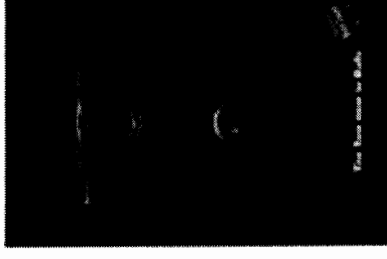
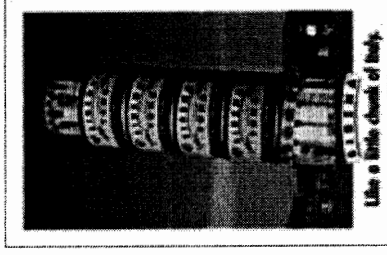
Adshell has shopping covered, with campaign options targeting consumers whether they are doing the weekly grocery shop, picking up extra items on a top-up shop or retail browsing.

FMCG BROADCAST

- Reaches grocery buyers as they go about their daily lives with sites in proximity (within 500m) to shopping centres, retail precincts and supermarkets

FMCG TARGETED

- Targets grocery buyers close to the point of purchase with 85% of panels selected en route (within 250m) to shopping centres, retail precincts and supermarkets

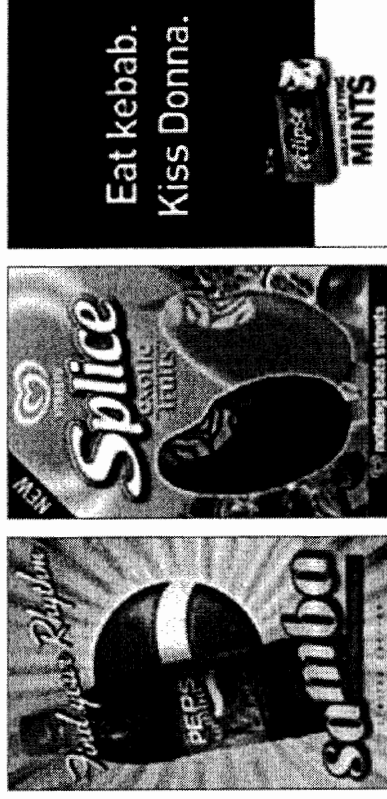


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ROUTE TRADE TARGETING CONSUMERS AND THEIR IMPULSE BUYING BEHAVIOUR

- Supports Route Trade activity by maximising exposure in proximity to impulse purchases and top-up shops
- The number of convenience stores has tripled in the last 10 years* providing a dynamic and growing retail segment for key products and brands
- 85% of panels selected for this campaign are en route (within 200m) to or directly in front of petrol stations and convenience stores on major arterial and suburban roads in the metropolitan cities

*Source: Australian Association of Convenience Stores, State of the Industry Survey Dec 04



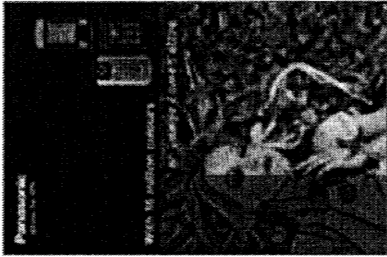
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URBAN SHOPPER CAMPAIGN

REACHING FASHIONABLE URBAN AUDIENCES IN RETAIL AREAS

- Targets media elusive shoppers with a passion for brands
- Panel distribution is skewed to major retail focus points in the metropolitan cities and includes rail coverage

Available April 2006. [Contact your Adshel representative](#) for more information.

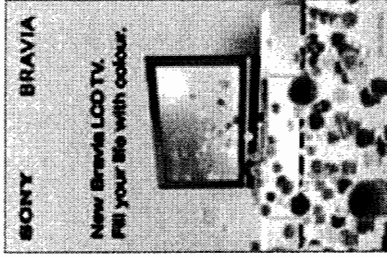
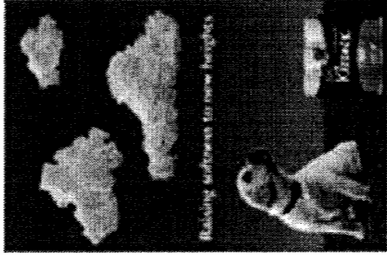
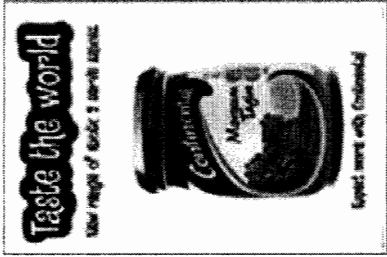


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SHOPPING CENTRE CAMPAIGN

IMPACTING CONSUMERS IN A SHOPPING CENTRE ENVIRONMENT

- Influences purchase behaviour with relaxed and receptive consumers in a spending frame of mind
- There are over 5 million visits to Adshel Shopping Centres fortnightly, panels can be bought as a stand-alone campaign or to add a dedicated focus to other Adshel Campaigns



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PREMIUM CAMPAIGNS

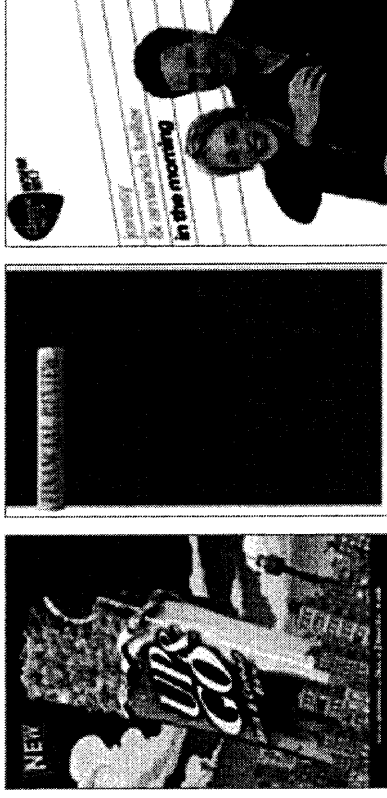
Adshel's Premium Campaigns provide a unique audience with little time to consume traditional media. Panels in Workbound, Homebound and Rail Campaigns are selected due to their strategic locations, reaching people traveling to and from the major business districts and suburban locations across the country.

To develop these campaigns Adshel worked with Pathfinder Solutions to identify the key journey to work destinations in each capital city as defined by the Australian Bureau of Statistics.

WORKBOUND CAMPAIGN

TARGETING CONSUMERS' MORNING FRAME OF MIND

- Workbound Campaigns capitalise on morning routines
- Coverage includes major arterial roads en route to CBD locations and the key journey to work destinations across Sydney, Melbourne, Brisbane, Adelaide and Perth
- Supported by coverage in key Sydney and Melbourne rail locations



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HOMEBOUND TAKING ADVANTAGE OF OPPORTUNITIES LATER IN THE DAY CAMPAIGNS

- Homebound Campaigns target consumers on their journey home
- Coverage includes designated sites leading out of the busiest work destinations across the 5 capital cities including Sydney and Melbourne rail locations
- Illuminated advertising panels ensure high visibility in the evening and help create an effective platform to remind consumers and influence purchase decisions



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RAIL CAMPAIGNS

ACCESSING THE BUSY RAIL COMMUTER

- Focuses exclusively on the rail audience through a dedicated rail campaign
- Provides access to a concentration of habitual train travellers including time-poor professionals on their way to and from work, in key business and suburban locations

BESPOKE CAMPAIGNS

TAILORING A CAMPAIGN TO REACH A SPECIFIC AUDIENCE

- Investing in extensive research into the environment of site locations, Adshel can tailor a campaign to best complement your brief
- Using panels labelled on the basis of demographic and proximity analysis by leading data company, Pathfinder Solutions the campaign planning team can build a campaign to meet your advertising needs

- Add a bespoke element to your campaign to maximise frequency for your audience in specific environments including bank branches, schools, universities, shopping strips, pubs and clubs, entertainment districts and more

[Contact your Adshel representative](#) for more information.

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