

Our ref: PRH 0405926/003 SYK
Your ref: A30244 - A30245



27 October 2006

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By email: Margaret.Abou-Rizk@accc.gov.au

Dear Ms Abou-Rizk

The Municipal Association of Victoria - Application for Authorisation Response to interested party submissions

- 1 We refer to your letter dated 19 October 2006 and the submissions you received from interested parties in relation the applications for authorisation. Our client's response follows below. Please note that all capitalised terms not defined in this letter take the meaning they have in the submission.
- 2 Please note that our response is limited to those submissions where clarification or correction is required, and concerns have been raised, and thus we consider further information will assist the ACCC in considering the applications.

Submission from Manningham City Council dated 1 August 2006

- 3 The City of Manningham made the comment that its assessment of the draft Memorandum of Understanding (MoU) forwarded to Councils was that it appeared to be very restrictive in terms of shelter availability, shelter design and colours.
- 4 An early draft of the MoU was submitted to MAV by the Victorian Department of Infrastructure (Dol), and it seems likely that the City of Manningham has not had the benefit of reviewing subsequent materials. We confirm that this early draft of the MoU has been superseded and has not been reissued.
- 5 The draft MoU has been superseded by a letter which the Director proposes to send to Councils on the grant of an interim authorisation concerning the MoU. The letter was provided to the ACCC on 17 October 2006 on a confidential basis and subject to a claim of privilege. It is anticipated that the MoU may be the subject of discussion and negotiation. MAV will assist in the coordination of the process by representing the Councils in the negotiation of the MoU with the Director and Dol.

Please notify us if this communication has been sent to you by mistake. If it has been, any client legal privilege is not waived or lost and you are not entitled to use it in any way.

- 6 We confirm that the conduct subject of the authorisation application will not restrict shelter availability. It is proposed that Councils agree to retain the location and number of existing bus shelters, and additionally DoI and the Director will support growth in bus shelter numbers generally to improve overall amenity and complement Government improvements to bus services. DoI and the Director have stated that it is likely that consideration of the number and location of new bus shelters will take into account the existing number of bus shelters within a municipality and the usage of bus stops within that municipality.
- 7 In relation to shelter designs or colours, the Director has stated a preference for a consistent design, including colour, for all bus shelters in metropolitan Melbourne. However, no decision has yet been made on design or colour and this also would be subject to consultation and negotiation.
- 8 We consider that it is likely that, if exclusive rights to advertise can be granted within Council municipalities, the Contractor will generate higher advertising revenue than that which could be generated in circumstances where rights to advertise are limited to shelters owned by the State of Victoria (the State). The ability to generate higher advertising revenue would, more than likely, result in higher licence fees payable to the Director. This would enable the Director to invest the licence fees in additional bus shelters and improve bus shelter amenity within Council municipalities. Further, the Director and DoI would assume responsibility for the replacement of outdated or obsolete shelters in a particular municipality. Therefore it is our view that the proposed MoU will result in greater, not reduced, bus shelter availability.
- 9 The City of Manningham also made the comment that:
- "... Councils should retain the rights to enter into contracts with suppliers for the supply installation, maintenance and cleaning of shelters and in return, receive a percentage of the advertising revenue."
- 10 We are uncertain of what is meant by this comment. It either reflects Manningham's view that councils should choose not to enter into the MoU, or that Manningham is of the view that entering into the MoU is compulsory if a separate contract is not held. As to the first possible interpretation, it is evident from at least the submissions from the City of Maribyrnong and City of Whittlesea that not all Councils have the capacity and/or resources for contract management and see significant benefit in the MoU arrangement.
- 11 The confidential draft letter provided to the ACCC contains reference to the proposal that, whilst the Director would receive licence fees; he would assume responsibility for managing the tender process, constructing, installing and marketing shelters and managing the Contract. The Director and DoI would take over the responsibility of managing a Contract with the Contractor in relation to the supply, installation and maintenance of bus shelters in a particular municipality. Rate payers in the municipalities will benefit, as the Councils will no longer need to fund the installation and maintenance of bus shelters. Further, there would be an improved overall amenity from a growth in the number and location of bus shelters.

- 12 As to the second possible interpretation, for the purposes of addressing any misunderstanding that may have arisen, we confirm that:
- 12.1 entry into the MoU is not compulsory for any Council;
 - 12.2 Councils are free to negotiate individually for the installation and supply of advertising bus shelters without MAV's or Dol's involvement; and
 - 12.3 Councils can grant approvals for the installation and advertising on bus shelters in their municipality.
- 13 Interim authorisation will not affect the position of any Council. They will continue to perform the activities set out in paragraph 3.11 of the submission.

Submission from Australian Association of National Advertisers (AANA) dated 18 October 2006

- 14 We note that the AANA does not consider it would be appropriate for the Commission to grant MAV's request for interim authorisation for the following reasons:
- 14.1 The application does not establish that interim authorisation is necessary for MAV and the Councils to proceed with the proposed conduct in the intended time frame;
 - 14.2 The application does not provide any reasons why the tender must be let by March 2007;
 - 14.3 The application does not establish why it was not realistically possible for the applications to have been lodged earlier (so as to avoid the need for interim authorisation);
 - 14.4 Necessary pre-tender work could be agreed subject to authorisation by the Commission; and
 - 14.5 The absence of any other special circumstances.
- 15 Our response to these statements is contained at paragraph 23 and the following paragraphs.
- 16 The AANA has expressed concern that granting the authorisation will limit competition and diversity in advertising, and that this will result in an increase in advertising rates.
- 17 We note that there is no substantiating facts or materials provided by the AANA in relation to these assertions. However we submit that if authorisation is granted and exclusive rights to advertise on bus shelters within Council municipalities are granted to a Contractor, then it is likely that the Contractor will be able to generate higher advertising revenue than in circumstances where exclusive advertising rights are limited to shelters owned by the State. This generation of higher advertising revenue would however be due to the improved coverage that the Contractor could

offer and in our view will have negligible, if any, impact on overall outdoor advertising rates.

- 18 Further, we repeat the contents of paragraph 7 of the submission regarding the likely impact on competition. The conduct would only impact a small portion of the potential sites for advertising.

Submission from Outdoor Media Association (OMA) dated 20 October 2006

- 19 We note that the OMA does not consider that the Commission should grant the MAV's application for interim authorisation for the following reasons:

- 19.1 It is not able to find any reason for the grant of an interim authorisation;
- 19.2 It does not believe that special circumstances have been demonstrated to the standard required;
- 19.3 The grant of an interim authorisation would be a serious departure from anti-competition principles; and
- 19.4 The grant of an interim authorisation would set a problematical precedent for the industry.

- 20 Our response to these statements is contained at paragraph 23 and the following paragraphs.

- 21 We note the OMA's view that there are factual errors in the submission. However, in the absence of any further information from the OMA as to the errors and the "correct" facts, we are not in a position to consider the assertions raised and do not agree with those assertions. We repeat our opinion on the market definition as set out in the submissions.

Submission from JCDecaux dated 23 October 2006

- 22 We note that JCDecaux supports the position of the AANA and the OMA in opposing the grant of the MAV's application for interim authorisation, and we respond below.

Response to the submissions from the AANA, the OMA and JCDecaux

- 23 We note that the issues raised by the AANA, the OMA and JCDecaux in objecting to the grant of an interim authorisation are not legal requirements under section 91(2) of the *Trade Practices Act 1974* (C'th), but are factors that may relate to the exercise of the Commission's discretion whether to grant an interim authorisation.

- 24 We note in reply that:

- 24.1 The arrangements that are the subject of the authorisation application are not highly anti-competitive.
- 24.2 Recent parliamentary activity and legislative amendments should weigh in favour of the grant of an interim authorisation, those being:

- 24.2.1 First, schedule 10 of the *Trade Practices Legislation Amendment Bill* (No. 1) 2005 (C'th), which limits the application of Part IV insofar as it relates to local government bodies, passed both Houses of Parliament without amendment on 19 October 2006. The full text of the amendment is contained in Schedule 1. It was reported in the *Australian Financial Review* on 24 October 2006 that the Bill will take effect in January 2007¹. It is evident that Parliament's intention is to limit the application of the Trade Practices Act to local government activities to when they are "carrying on a business". By way of analogy we refer to the decisions of the Federal Court and the Full Federal Court in *ACCC v Baxter Healthcare*², where it was held that the acquisition of goods by the State purchasing authorities by way of tender was not carrying on a business.
- 24.2.2 Secondly, the *Road Safety (Projects and Road Safety) Act 2006* (Vic) came into effect on 11 October 2006. Section 54 of that Act amended section 15 of the *Road Management Act 2004* (Vic) (RMA), which deals with arrangements transferring road management functions between infrastructure managers. Parliament's intent is to enable transfer arrangements between road authorities and utilities so that a utility, defined in the RMA as including a provider of public transport, could take responsibility for the road infrastructure of the road authority, which is defined in the RMA as including a municipal council. The full text of section 15(1) of the *Road Management Act 2004* (Vic) and the relevant interpretive provisions are contained in Schedule 1. We also refer to our comments in paragraphs 4.10 to 4.18 of the submission.
- 24.3 The granting of an interim authorisation will not permanently alter the state of the market, nor inhibit it from returning to its pre-interim authorisation state if authorisation is not granted. We submit that interim authorisation will not alter the status quo in the market. We confirm that any exclusive advertising rights offered under the Director's tender, should an interim authorisation be granted to MAV, will be subject to the condition that exclusivity in particular Council municipalities may be revoked if the authorisation to MAV is not granted in final form. Any proposed Contract from the Director's tender process will only grant exclusive advertising rights in particular Council municipalities subject to final authorisation. However, if authorisation is granted prior to signing a Contract, then the Contract will grant the exclusive advertising rights in particular Council municipalities described in the submission.

¹ "Regulator bulks up to make raids", *Australian Financial Review*, 24 October 2006, page 4.

² *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2005] FC 581; [2006] FCAFC 128.

- 24.4 The grant of an interim authorisation is unlikely to harm any party. In particular, we note that the grant will not harm the AANA, the OMA or JCDecaux.
- 24.5 MAV is not aware of any third party stating or otherwise indicating that it intends to commence legal proceedings in relation to matters concerning the applications.
- 25 Further in reply to the submission from the AANA and JCDecaux:
- 25.1 We note that the PTC Agreement for the provision of tram and bus shelters, which commenced in July 1991, was to expire in 2006, but has been extended until July 2007. The State published its most recent plan "Meeting our Transport Challenges - Connecting Victorian Communities" on 17 May 2006. The Director has been working throughout 2006 to determine the best way to proceed with the provision of bus shelters that would be consistent with Victorian government policy.
- 25.2 In order to have suitable arrangements in place by July 2007, it is necessary to commence the Director's tender process in about November 2006.
- 25.3 In this regard we also **enclose** copies of:
- 25.3.1 The Victorian Government Purchasing Board's (VGPB) policy for the conduct of commercial engagements; and
- 25.3.2 The draft VGPB policy on the conduct of commercial engagements.
- These demonstrate that, in addition to processes that may be followed in tender processes run by private enterprise, there are additional obligations to comply with state legislation on public administration, state policies, statutory directions and other state guidelines and standards, as well as the obligation to conduct tenders in a transparent and fair manner.
- 25.4 Additional time has been required in this pre-tender process due to mechanics of dealing with separate levels of government at the state and municipal level. Engaging with the 30 councils within the metropolitan Melbourne region concerning the proposed process has taken time, as well as the time required for councils to consider whether they would consent, or would be able, to be a part of the proposed process.
- 25.5 Interim authorisation is necessary for MAV and the Councils to proceed with the proposed conduct in the intended time frame because there is no statutory time limit for the consideration of non-merger applications for authorisation. At present, it is technically possible for a decision on the application to be handed down outside the 6 month timeframe the ACCC intends to process such applications. This would create unnecessary uncertainty in the RFT process and the pricing offered by potential

suppliers, and could have a detrimental effect on the integrity of the Victorian government's commercial engagement process. Without the interim authorisation, the Director's request for tender will not include reference to exclusivity of advertising in particular municipalities and therefore the benefits in paragraphs 10 and 11 of the submission will not be realised. For the same reasons, it is not possible for necessary pre-tender work to be agreed subject to authorisation by the Commission.

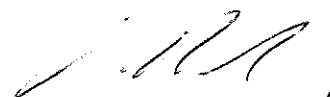
25.6 It is preferable that the tender be let by March 2007 if not sooner as the PTC Agreement will expire in July 2007. It cannot be extended. The Director and the relevant Councils are keen to proceed with the proposed MoU as soon as possible. The Director is keen to proceed with the tender with the knowledge that an interim authorisation has been granted.

25.7 It is incorrect to assert that necessary pre-tender work could be agreed subject to authorisation by the ACCC. This suggests that Councils should engage in conduct, that is, agree to participate in the Director's proposed MoU, including the decision not to use a Contractor other than the one selected by the Director, where there is a potential for liability. Such conduct would not be capable of being authorised if it is not authorised within 14 days of any such contract between MAV and Councils being made [see section 45 (9)(b) of Trade Practices Act]. In order for a tender by the Director to proceed which includes reference to exclusivity of advertising in particular council municipalities it is therefore first necessary to have this preparatory conduct exempted from potential liability, hence the interim authorisation application is both necessary and urgent.

26 In reply to the submission from the OMA we state that we do not agree that the grant of an interim authorisation would be a serious departure from anti-competition principles nor that it would set a problematical precedent. We submit that there are sound reasons for the grant of the interim authorisation as contained in the submission and this letter.

We would be grateful if you could let us know whether any further submissions are sent to you, and please call us if you have any questions about our response or require any further information.

Yours sincerely >



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Encl.

Schedule 1

Schedule 10 of the *Trade Practices Legislation Amendment Bill (No. 1) 2005*

Local government bodies

1 After section 2B

Insert:

2BA Application of Part IV to local government bodies

(1) Part IV applies in relation to a local government body only to the extent that it carries on a business, either directly or by an incorporated company in which it has a controlling interest.

(2) In this section:

local government body means a body established by or under a law of a State or Territory for the purposes of local government, other than a body established solely or primarily for the purposes of providing a particular service, such as the supply of electricity or water.

2 Subsection 2C(1)

Omit "sections 2A and 2B", substitute "sections 2A, 2B and 2BA".

3 At the end of paragraph 2C(1)(c)

Add:

or (viii) only persons who are all acting for the same local government body (within the meaning of section 2BA) or for the same incorporated company in which such a body has a controlling interest;

4 Subsection 2C(2)

Omit "sections 2A and 2B", substitute "sections 2A, 2B and 2BA".

5 Section 2D

Repeal the section.

.....
Section 15 of the *Road Management Act 2004 (Vic)*.

Arrangements to transfer road management functions

(1) A road authority may enter into an arrangement with another road authority or a utility to transfer a road management function of the road authority that would

otherwise apply under section 36 or 37 with respect to a road to the other road authority or to the utility.

- (1A) A road authority may enter into an arrangement with a utility to transfer a road management function of the utility to the road authority.
- (2) If a road authority has entered into an arrangement under this section in respect of a public road, the road authority must include the details of the arrangement in its register of public roads.
- (3) While an arrangement is in force under this section, the road management functions of each party to the arrangement have effect subject to the arrangement.

Example

Specified road management functions in respect of a section of a road or a particular piece of infrastructure may be transferred by agreement from VicRoads to a municipal council or from a municipal council to VicRoads. If this occurs, the road authority to which the road management function is transferred becomes the road authority for the purposes of this Act according to the tenor of the arrangement.

Section 3 of the *Road Management Act 2004* (Vic)

"road authority" means a person or body specified in or under section 37;

"utility" means—

- (a) an entity (whether publicly or privately owned) which provides, or intends to provide, water, sewerage, drainage, gas, electricity, telephone, telecommunication or other like services under the authority of an Act of Victoria or the Commonwealth;
- (b) any person who under the *Pipelines Act 1967* is—
 - (i) permitted to own or use a pipeline; or
 - (ii) licensed to construct or operate a pipeline;
- (c) a provider of public transport;

Section 37 of the *Road Management Act 2004* (Vic)

Which road authority is the responsible road authority?

- (1) Subject to sections 15 and 16 and sub-sections (1A) and (2), the responsible road authority is—

- (a) if the road is a freeway, for the whole of the road reserve, VicRoads;
- (b) if the road is an arterial road—
 - (i) for the part of the roadway used by through traffic, VicRoads; and
 - (ii) for any part of the roadway not used by through traffic, the municipal council of the municipal district in which that part is located; and
 - (iii) for any service road, the municipal council of the municipal district in which the service road is located; and
 - (iv) for the median strip between the roadway and the service road, the municipal council of the municipal district in which the median strip is located; and
 - (v) for any pathway, other than a pathway on a freeway road reserve, the municipal council of the municipal district in which the pathway is located; and
 - (vi) for the roadside in an urban area, the municipal council of the municipal district in which the road is located; and
 - (vii) for the roadside in an area that is not an urban area, VicRoads; and
 - (viii) which is not located in a municipal district, the person or body specified for the purposes of sub-paragraphs (ii) to (vi) by the Minister in a notice published in the Government Gazette;
- (c) if the road is a non-arterial State road, the person or body prescribed in respect of the non-arterial State road or in respect of a class of roads in which the non-arterial State road is included; or
- (d) if the road is a non-arterial State road and no person or body is prescribed in respect of the non-arterial State road—
 - (i) if VicRoads declares by a notice published in the Government Gazette that VicRoads is the responsible road authority in respect of the non-arterial State road, VicRoads; or
 - (ii) if the non-arterial State road is on land administered under the *Crown Land (Reserves) Act 1978*, the *Forests Act 1958*, the *Land Act 1958*, the *National Parks Act 1975* or the *Alpine Resorts (Management) Act 1997*, the person or body specified in or in accordance with that Act in respect of the non-arterial State road; or
 - (iii) if sub-paragraphs (i) and (ii) do not apply, the Crown;

- (e) if the road is a municipal road, the municipal council of the municipal district in which the road or part of the road is situated;
 - (f) if the area is an ancillary area of a road, the responsible road authority for the road of which the area is an ancillary area.
- (1A) The EastLink Corporation is the responsible road authority for EastLink.
- (2) In relation to road-related infrastructure on a road, the responsible road authority is—
- (a) subject to paragraph (b), the responsible road authority for the roadway or pathway to which the road-related infrastructure relates; or
 - (b) if a road authority other than the responsible road authority specified in paragraph (a) has responsibility under any other Act for the road-related infrastructure, that road authority.

Example

VicRoads would be the responsible road authority for speed signs and traffic lights on an arterial road even though the speed signs are located on a roadside for which the municipal council would be the responsible road authority. However, a municipal council would be the responsible road authority for a parking meter installed on the arterial road in the exercise of powers under the Local Government Act 1989.

- (3) A Code of Practice may include guidelines relating to principles for ascertaining—
 - (a) which road authority is responsible where parts of a road which are allocated to different road authorities abut; and
 - (b) which matters are the responsibility of which road authority where different parts of a road are allocated to different road authorities and there are areas between those parts.
- (4) A declaration for the purposes of sub-section (1)(d)(i) may be included in the notice under which a declaration under section 11 or 14 is made.