

TRADE PRACTICES ACT 1974

**UNDERTAKINGS TO THE AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION PURSUANT TO S.87B OF THE TRADE PRACTICES ACT**

By

AUTOMATED POSITIONING SYSTEMS PTY LTD

MACHINE GUIDANCE TECHNOLOGY PTY LTD

MGT HOLDING CO PTY LTD

SURVEY AND MACHINE CONTROL PTY LTD

Person giving the undertaking

1. This undertaking is given to the Australian Competition and Consumer Commission (“ACCC”) by:
 - (a) Automated Positioning Systems Pty Ltd (“APS”) of Unit 1, 36 Achievement Crescent, Acacia Ridge, Queensland;
 - (b) MGT Holding Co Pty Ltd (“MGT Holding Co”) of Unit 1, 36 Achievement Crescent, Acacia Ridge, Queensland;
 - (c) Machine Guidance Technology Pty Ltd (“MGT”) of Unit 1, 36 Achievement Crescent, Acacia Ridge, Queensland and
 - (d) Survey and Machine Control Pty Ltd (“ABC”) of 17 Learoyd Road, Acacia Ridge, Queensland; previously Mike Forrest Group Pty Ltd t/as ABC Laserspursuant to section 87B of the Trade Practices Act (1974) (“the Act”).
2. For the purposes of this undertaking, APS, MGT Holding Co and MGT will be collectively referred to as the APS/MGT Group to acknowledge the merger in March 2004.

Background

3. APS is a company incorporated under the *Corporations Act 2001* and is registered in the State of Queensland.
4. On July 1st 2002, APS purchased all Business and Intellectual Property rights to Machine Guidance products developed by ABC. ABC had developed these Machine Guidance Products in response to tenders and queries from mining contractors – specifically the Roche Thiess Linfox Joint Venture at the Yallourn Mine in Victoria and the Roche Eltin Joint Venture at the Century Zinc Mine in Queensland. The development of these products was necessary because the Machine Guidance and Machine Control products manufactured by Topcon and re-sold by ABC under a franchise arrangement were unsuitable for the mining market.
5. APS manufactures, markets, installs and services high precision GPS machine guidance systems on mining and earthmoving equipment. Products have been sold to mining

companies in Queensland, Victoria, New South Wales, Western Australia, Wyoming, Alaska, Mississippi, and Illinois. The vast majority of these sales have been further developments of the products developed by ABC and purchased by APS in 2002. While the majority of sales have been to customers using products for mining applications, some sales have been made to customers using products for civil construction applications.

6. MGT is a company incorporated under the *Corporations Act* 2001 and is registered in the State of Queensland.
7. MGT owns the exclusive licence to commercialise the “ExactaTrak” software, including the exclusive access to the patents underlying this software.
8. MGT Holding Co is a company incorporated under the *Corporations Act* 2001 and is registered in the State of Queensland.
9. On 10th December 2003, APS and MGT Holding Co entered into merger negotiations.
10. After some negotiation, APS, APS Worldwide, MGT Holding Co, Mike Forrest, Christopher Seymour, Ewan Flamsteed, David Hall and Ernest Hellmuth entered into a Share Sale Agreement, which provided for the merging of the respective businesses of APS and MGT Holding Co.
11. The merger was effected in March 2004, with MGT Holding Co purchasing the issued shares in the capital of APS and APS Worldwide Pty Ltd. The first board meeting following the merger was held on 24 March 2004.
12. As of 25 March 2004, APS and MGT are wholly owned subsidiaries of MGT Holding Co. MGT Holding Co is in the process of changing its name to APS Consolidated.
13. ABC is a company incorporated under the *Corporations Act* 2001 and is registered in the State of Queensland.
14. ABC supplies survey and laser equipment, including Topcon machine control products to Queensland markets as well as some neighbouring territories. ABC customers include contracting and survey companies. ABC’s principal business is selling Topcon products into the Queensland market under their resellers’ agreement from Topcon.
15. ABC was previously known as Mike Forrest Group Pty Ltd and changed its name to better reflect the business.

Conduct

16. As part of the merger negotiations, but prior to the Share Sale Agreement being entered into, APS and MGT Holding Co entered into a heads of agreement (“the Heads of Agreement”).
17. The Heads of Agreement, dated 22 January 2004, relevantly states:

APS agrees to sell machine guidance and control products into the civil market in Queensland, Northern Rivers and Vanuatu through ABC Lasers on a reseller agreement to be negotiated. ABC Lasers agrees not to sell products that would directly compete with the products offered by the Merged Entity in the mining market.

18. The Heads of Agreement was superseded by the Share Sale Agreement referred to in paragraph 10 above.
19. The ACCC is concerned that the Heads of Agreement reflected an arrangement or understanding which had been made or arrived at between APS, MGT, MGT Holding Co and ABC. The ACCC considers such conduct to be a breach of section 45 of the *Trade Practices Act 1974* (“the Act”) particularly given the operation of ss.4D and 45 of the Act. These sections state:

Section 45(2) – A corporation shall not:

- (a) Make a contract or arrangement, or arrive at an understanding if:
- (i) The proposed contract, arrangement or understanding contains an exclusionary provision; or
 - (ii) A provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
- (b) Give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
- (i) is an exclusionary provision; or
 - (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

Section 4D(1) – A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:

- (a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and
- (b) the provision has the purpose of preventing, restricting or limiting:
- (i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
 - (ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.

20. The APS/MGT Group and ABC Lasers accept that they made or arrived at an arrangement or understanding to the effect of the provision of the Heads of Agreement referred to above.

21. The ACCC acknowledges that the APS/MGT Group and ABC did not deliberately breach the Act. The ACCC further acknowledges that the APS/MGT Group and ABC have co-operated in resolving this matter and taken steps to address the ACCC's concerns, including the engagement of professional advisers to assist in the development of a trade practices compliance program.
22. In response to the ACCC's concerns, the APS/MGT Group and ABC have offered the following undertakings to the ACCC pursuant to s.87B of the Act.

Commencement of Undertaking

23. This Undertaking comes into effect when:
 - (a) The Undertaking is executed by the APS/MGT Group and ABC; and
 - (b) The ACCC accepts and signs the Undertaking so executed.

The APS/MGT Group's Undertakings

Refrain from Conduct

24. For the purpose of s.87B of the Act, each of the companies comprising the APS/MGT Group hereby undertakes that it will not take any steps in furtherance of, or purport to enforce the provision of the Heads of Agreement referred to in paragraph 17 herein, or to any arrangement or understanding to that effect.
25. For the purpose of s.87B of the Act, each of the companies comprising the APS/MGT Group hereby undertakes that it will not make or give effect or attempt to make or give effect to any contract, arrangement, or understanding, with any supplier or likely supplier of machine guidance or machine control products or systems ("the Second Person"), containing a provision or provisions to the effect that:
 - (a) Any party to the contract, arrangement or understanding will not supply goods or services to:
 - (i) persons in a particular geographic location;
 - (ii) persons carrying on business in a particular industry or ;
 - (iii) persons who are, have been or would be customers of any other party to the contract, arrangement or understanding.
26. Nothing in these Undertakings shall be construed as preventing any company in the APS/MGT Group from making, or giving effect to, or attempting to make or give effect to any contract, arrangement or understanding:
 - (a) Providing for the supply of goods or services to, or the acquisition of goods or services from, the Second Person for the purpose of resupply; or
 - (b) The only parties to which are, or would be, related bodies corporate;

Public Disclosure

27. For the purpose of s 87B of the Act, APS hereby undertakes, within 14 days from the date on which this Undertaking comes into effect, to publish a public disclosure notice on the

website of APS, being www.apssystem.com.au, in the form prescribed in Annexure A, which unless otherwise agreed with the ACCC is to be hosted for a period of one month.

Trade Practices Compliance Program

28. For the purpose of s.87B of the Act, each of the companies comprising the APS/MGT Group hereby undertakes that it will:
- (a) Establish and implement a Trade Practices Compliance Program in accordance with the requirements set out in Annexure B, for the employees or other persons involved in its business, being a program designed to minimise its of future breaches of Part IV of the Act and to ensure its awareness of the responsibilities and obligations in relation to the requirements of Part IV of the Act within 3 months of this Undertaking coming into effect;
 - (b) Maintain and continue to implement the Trade Practices Compliance Program for a period of 3 years from the date of this Undertaking coming into effect;
 - (c) Provide, at its own expense, a copy of any documents required by the Commission in accordance with Annexure B.

Survey and Machine Control's Undertakings

Refrain from Conduct

29. For the purpose of s.87B of the Act, ABC hereby undertakes to the Commission that it will not take any steps in furtherance of, or purport to enforce the provision of the Heads of Agreement referred to in paragraph 17 herein, or to any arrangement or understanding to that effect.
30. For the purpose of s.87B of the Act, ABC hereby undertakes that it will not make or give effect or attempt to make or give effect to any contract, arrangement, or understanding, with any supplier or likely supplier of machine guidance or machine control products or systems ("the Second Person"), containing a provision or provisions to the effect that:
- (a) Any party to the contract, arrangement or understanding will not supply goods or services to:
 - (i) persons in a particular geographic location;
 - (ii) persons carrying on business in a particular industry or ;
 - (iii) persons who are, have been or would be customers of any other party to the contract, arrangement or understanding.
31. Nothing in these Undertakings shall be construed as preventing ABC from making, or giving effect to, or attempting to make or give effect to any contract, arrangement or understanding:
- (a) Providing for the supply of goods or services to, or the acquisition of goods or services from, the Second Person for the purpose of resupply; or
 - (b) The only parties to which are, or would be, related bodies corporate.

Trade Practices Compliance Program

32. For the purpose of s.87B of the Act, ABC hereby undertakes to the Commission that it will:
- (a) Establish and implement a Trade Practices Compliance Program in accordance with the requirements set out in Annexure C, for the employees or other persons involved in ABC's business, being a program designed to minimise ABC's risk of future breaches of Part IV of the Act and to ensure its awareness of the responsibilities and obligations in relation to the requirements of Part IV of the Act within 3 months of this Undertaking coming into effect;
 - (b) Maintain and continue to implement the Trade Practices Compliance Program for a period of 3 years from the date of this Undertaking coming into effect;
 - (c) Provide, at its own expense, a copy of any documents required by the Commission in accordance with Annexure C.

Acknowledgments

33. The APS/MGT Group and ABC acknowledge that the Commission will make this Undertaking available for public inspection.
34. The APS/MGT Group and ABC further acknowledge that the Commission will from time to time publicly refer to this Undertaking.
35. The APS/MGT Group and ABC further acknowledge that this Undertaking in no way derogates from the rights or remedies available to any other person arising from the alleged conduct.

EXECUTED by **AUTOMATED**)
POSITIONING SYSTEMS ACN 098 359)
301 in accordance with section 127(1) of the)
Corporations Act 2001)

Chris Seymour
.....
Director

Date 11/09/2007

Name (printed)

Christopher Seymour

Chris Schuck
.....

~~Director~~/Secretary

Date 11/9/2007

Name (printed)

CHRISTOPHER SCHUCK

EXECUTED by **MACHINE GUIDANCE**)
TECHNOLOGY PTY LTD ACN 090 848)
721 in accordance with section 127(1) of the)
Corporations Act 2001)

Chris Seymour
.....
Director

Date 11/09/2007

Name (printed)

Christopher Seymour

Chris Schuck
.....

~~Director~~/Secretary

Date 11/9/2007

Name (printed)

CHRISTOPHER SCHUCK

EXECUTED by **MGT HOLDING CO PTY**)
LTD ACN 090 848 721 in accordance with)
section 127(1) of the *Corporations Act 2001*)

Chris Seymour
.....
Director

Date 11/09/2007

Name (printed)

Christopher Seymour

Chris Schuck
.....

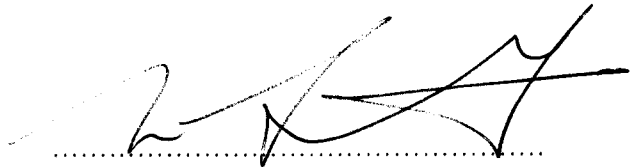
~~Director~~/Secretary

Date 11/9/2007

Name (printed)

CHRISTOPHER SCHUCK

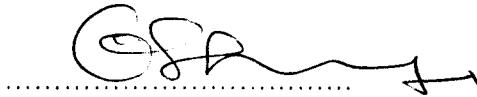
EXECUTED by SURVEY AND MACHINE)
CONTROL PTY LTD ACN 010 548 777 in)
accordance with section 127(1) of the)
Corporations Act 2001)



Director
Date 23/08/07
Name (printed) M. J. FORREST

.....
Director/Secretary
Date / /
Name (printed)

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
PURSUANT TO S.87B OF THE TRADE PRACTICES ACT 1974:



Graeme Samuel
Chairman
This 20th day of ~~August~~ ^{September} 2007.

Annexure A

Public Notice

[Automated Positioning Systems Logo] [Machine Guidance Technology Logo]

The Australian Competition and Consumer Commission (the ACCC) has accepted Court-enforceable Undertakings from MGT Holding Co Pty Ltd and its subsidiaries which trade as Automated Positioning Systems and Machine Guidance Technology (APS/MGT) in relation to an agreement between APS/MGT and ABC Lasers.

The ACCC had concerns that APS/MGT and ABC Lasers had reached an agreement whereby:

- Automated Positioning Systems and Machine Guidance Technology agreed to supply machine guidance products to customers in the civil construction industry in Queensland, Northern Rivers and Vanuatu through ABC Lasers; and
- ABC Lasers agreed not to supply machine guidance products to customers in the mining industry.

Section 45 of the *Trade Practices Act 1974* prohibits agreements between competitors which allocate particular customers or markets between them or otherwise prevent or limit dealings with particular customers or classes of customers.

Further information on this topic is available in the ACCC publication *Refusal to Deal* which available on the ACCC website: www.accc.gov.au

The Undertakings given by the companies may also be viewed at the ACCC's website.

[Commonwealth Coat of Arms] [ACCC Logo]

This notice has been placed by Automated Positioning Systems and Machine Guidance Technology pursuant to an Undertaking given to the ACCC in accordance with section 87B of the *Trade Practices Act 1974*.

Notes:

The words "PUBLIC NOTICE" are to be a size not smaller than 11 point font

All other text is to be a size not smaller than 8 point font

All logos are to be no smaller than 20mm across

The Commonwealth coat of arms is to be no smaller than 20mm across

Annexure B

TRADE PRACTICES COMPLIANCE PROGRAM

Each of the companies comprising the APS/MGT Group will establish a Trade Practices Compliance Program (**the Compliance Program**) that complies with each of the following requirements:

Appointments

1. Within one month of the date of the Undertaking coming into effect the company shall appoint a Director or a Senior Officer of the business, whose responsibilities are to include the development, implementation and maintenance of the Compliance Program, and who reports directly to the company Board or governing body (**the Compliance Officer**).
2. The company shall appoint a qualified, internal or external compliance professional with expertise in trade practices issues (**the Compliance Advisor**) within 2 months of the Undertaking coming into effect, for the purposes set out in paragraph 3.
3. The company shall instruct the Compliance Advisor to conduct a Trade Practices Act risk assessment (**the Risk Assessment**) in accordance with 3.1 – 3.4 below:
 - 3.1. identify the areas where the APS/MGT Group is at risk of breaching Part IV of the Act;
 - 3.2. assess the likelihood of these risks occurring and the consequences of the risks to the business operations of the APS/MGT Group should they occur;
 - 3.3. identify where there may be gaps in the APS/MGT Group's existing procedures for managing these risks; and
 - 3.4. provide recommendations for action having regard to that assessment

Compliance Policy

4. The company will, within one month of the date of the Undertaking coming into effect issue a policy statement outlining the company's commitment to trade practices compliance (**the Compliance Policy**). The company will ensure the Compliance Policy:
 - 4.1. is written in plain language;
 - 4.2. contains a statement of commitment to compliance with the Trade Practices Act 1974;
 - 4.3. contains a requirement for all staff to report any compliance related issues and trade practices compliance concerns to the designated officer (**Compliance Officer**); and
 - 4.4. contains a clear statement that the company will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the Trade Practices Act and will not indemnify them.

Complaints Handling System

5. The company will ensure the Compliance Program includes a complaint handling system capable of identifying, classifying, storing and where necessary, referring internal and external trade practices complaints.

Training

6. The company will ensure that the Compliance Program includes a requirement for regular (at least once a year) and practical trade practices training for all employees whose duties could result in them being concerned with conduct that may contravene Part IV of the Act. The training program will be designed to ensure the employees' awareness of the responsibilities and obligations in relation to Part IV. The company must ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law.
7. The company will ensure that the Compliance Program includes a requirement that awareness of trade practices compliance issues forms part of the induction of all new employees the company whose duties could result in them being concerned with conduct that may contravene Part IV.

Reports to Senior Management

8. The company will ensure that the Compliance Officer reports to the Board and/or senior management meetings every 6 months on the continuing effectiveness of the Compliance Program.

Supply of Compliance Program Documentation to the Commission

9. The company shall, at its own expense, within 3 months of the date of this Undertaking coming into effect, cause to be produced and provided to the Commission copies of each of the documents constituting the Compliance Program and will implement promptly and with due diligence any recommendations the Commission may make that are reasonably necessary to ensure that the APS/MGT Group maintains and continues to implement the Compliance Program in accordance with these Undertakings.

Annexure C

TRADE PRACTICES COMPLIANCE PROGRAM

ABC will establish a Trade Practices Compliance Program (**the Compliance Program**) that complies with each of the following requirements:

Appointments

1. Within one month of the date of the Undertaking coming into effect ABC will appoint a Director or a Senior Officer of the business, whose responsibilities are to include the development, implementation and maintenance of the Compliance Program, and who reports directly to the company Board or governing body (**the Compliance Officer**).
2. ABC shall appoint a qualified, internal or external compliance professional with expertise in trade practices issues (**the Compliance Advisor**) within 2 months of the Undertaking coming into effect, for the purposes set out in paragraph 3.
3. ABC shall instruct the Compliance Advisor to conduct a Trade Practices Act risk assessment (**the Risk Assessment**) in accordance with 3.1 – 3.4 below:
 - 3.1. identify the areas where ABC is at risk of breaching Part IV of the Act;
 - 3.2. assess the likelihood of these risks occurring and the consequences of the risks to the business operations of ABC should they occur;
 - 3.3. identify where there may be gaps in ABC's existing procedures for managing these risks; and
 - 3.4. provide recommendations for action having regard to that assessment

Compliance Policy

4. ABC will, within one month of the date of the Undertaking coming into effect issue a policy statement outlining ABC's commitment to trade practices compliance (**the Compliance Policy**). ABC will ensure the Compliance Policy:
 - 4.1. is written in plain language;
 - 4.2. contains a statement of commitment to compliance with the Trade Practices Act 1974;
 - 4.3. contains a requirement for all staff to report any compliance related issues and trade practices compliance concerns to the designated officer (**Compliance Officer**); and
 - 4.4. contains a clear statement that ABC will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the Trade Practices Act and will not indemnify them.

Complaints Handling System

5. ABC will ensure the Compliance Program includes a complaint handling system capable of identifying, classifying, storing and where necessary, referring internal and external trade practices complaints.

Training

6. ABC will ensure that the Compliance Program includes a requirement for regular (at least once a year) and practical trade practices training for all employees of ABC, whose duties could result in them being concerned with conduct that may contravene Part IV of the Act. The training program will be designed to ensure the employees' awareness of the responsibilities and obligations in relation to Part IV. ABC must ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law.
7. ABC will ensure that the Compliance Program includes a requirement that awareness of trade practices compliance issues forms part of the induction of all new employees whose duties could result in them being concerned with conduct that may contravene Part IV.

Reports to Senior Management

8. ABC will ensure that the Compliance Officer reports to the Board and/or senior management meetings every 6 months on the continuing effectiveness of the Compliance Program.

Supply of Compliance Program Documentation to the Commission

9. ABC shall, at its own expense, within 3 months of the date of this Undertaking coming into effect, cause to be produced and provided to the Commission copies of each of the documents constituting the Compliance Program. ABC will implement promptly and with due diligence any recommendations the Commission may make that are reasonably necessary to ensure that ABC maintains and continues to implement the Compliance Program in accordance with these Undertakings.