



**Australian
Competition &
Consumer
Commission**

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18 July 2014

Mr Noel Downs
Chief Executive Officer
Wanaruah Local Aboriginal Lands Council
PO Box 127
Muswellbrook NSW 2333

By post and email: wanarua@bigpond.net.au

Dear Mr Downs

**Re: Supply of Aboriginal cultural heritage field services in the context of the
*Competition and Consumer Act 2010 (Cth)***

I am writing to you on behalf of the Australian Competition and Consumer Commission (ACCC) in relation to allegations of cartel conduct in the supply of paid Aboriginal cultural heritage field services to mining companies in the Hunter Valley, NSW.

The purpose of this letter is to bring to the attention of the Wanaruah Local Aboriginal Land Council (WLALC), which I understand is a regional representative body, the ACCC's concerns in this matter and seek your assistance to bring the contents of this letter to the attention of the local Aboriginal community members.

The ACCC

The ACCC is an independent Australian Commonwealth authority responsible for administering the *Competition and Consumer Act 2010 (Cth)* (CCA), formerly the *Trade Practices Act 1974 (Cth)* (TPA). The CCA contains a range of provisions to promote competition, protect consumers and prevent corporations from engaging in anti-competitive conduct, including cartel conduct.

Relevant provisions of the CCA

The CCA includes the 'cartel provisions' which prohibit a party from making or giving effect to a contract or arrangement, or arriving at an understanding which contains a **cartel provision** (ss. 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK). A cartel provision is defined by section 44ZZRD to mean a provision in a contract, arrangement or understanding between parties (at least two of which are in competition with each other) which satisfies the

purpose or purpose/effect conditions specified in that section. Relevantly, this includes where the provision has:

- the purpose or the effect, or likely effect, of, directly or indirectly, fixing, controlling or maintaining the price of goods or services supplied or acquired by any of the parties to the contract, arrangement or understanding; or
- the purpose of directly or indirectly allocating between any or all of the parties to the contract, arrangement or understanding, the persons or class of persons who are likely to supply services to any of the parties to the contract, agreement or understanding.

A breach of the cartel provisions may give rise to civil or criminal liability. In particular, sections 44ZZRF and 44ZZRG involve criminal liability and apply where the required fault elements are established.

The cartel provisions above apply to conduct engaged in since 24 July 2009. For conduct engaged in prior to that date, section 45 of the CCA, formerly the TPA, prohibits a party from making, or giving effect to, a contract, arrangement, or understanding that contains an exclusionary provision or which has the purpose or effect of substantially lessening competition. A provision having the purpose or effect of fixing, controlling or maintaining the price for goods or services supplied or acquired by parties to the contract, arrangement or understanding, or any of them, in competition with each other, was deemed for the purposes of section 45 of the TPA to have the purpose or effect of substantially lessening competition (see section 45A of the TPA).

A court finding that a person has breached sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK or 45 of the CCA may result in significant penalties or fines for corporations and/or individuals found to have been involved in the conduct. A breach of sections 44ZZRF/G is a criminal offence which can result in a term of imprisonment for individuals. The ACCC may also seek injunctions and other orders from the Federal Court of Australia.

Conduct of concern

Background

The ACCC understands that representatives of the Hunter Valley Aboriginal community groups, parties registered for consultation as Registered Aboriginal Parties (RAPs), and representatives of the mining industry meet periodically in consultative forums to discuss matters pertaining to cultural heritage associated with mining operations in the Hunter Valley region. Some of the consultative forums include the Ashton Community Consultation Forum and the Coal and Allied Upper Hunter Valley Aboriginal Cultural Heritage Working Group. The ACCC also understands that WLALC representatives may from time to time attend these meetings or become involved in discussions with mining industry representatives to represent the interests of local Aboriginal community groups.

Further, the ACCC understands that from time to time, mining companies employ RAPs to provide paid cultural heritage field services including archaeological field surveys and/or artefact salvage and management services (**Field Services**).

Allegations

The ACCC has become aware of allegations regarding certain practices relating to the supply of Field Services to Rio Tinto Coal Australia, Ashton Coal and NuCoal Resources mining operations in the Hunter Valley, whereby:

- a) separate work rosters are maintained by these corporations to select which RAP(s) will be engaged to provide Field Services. It has been alleged that only RAPs listed on the work roster will be selected; and
- b) all RAPs engaged to provide Field Services for a project are paid the same fixed rate. It has been alleged that at separate consultative meetings, the RAPs present, some or all of whom were competitors in the market for the supply of Field Services to mining companies in the Hunter Valley, agreed amongst themselves and with representatives of the mining corporation, that the Field Services would be rendered by the RAPs at a fixed rate.

ACCC's concerns

The ACCC is concerned that, if it can be established that the practices described above in relation to the supply of Field Services to mining companies have been agreed to or adopted by RAPs, such conduct may raise concerns under sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK or 45 of the CCA as the RAPs may have entered into contracts or arrangements or may have arrived at understandings and/or given effect to contracts, arrangements or understandings which contain a provision:

1. fixing, controlling or maintaining the prices at which the competing RAPs supply Field Services to the mining corporations referred to above (price fixing);
2. allocating between the competing RAPs which of them would on any occasion supply Field Services to the mining corporations referred to above (market sharing); and/or
3. which has the purpose or effect of substantially lessening competition in the market for the supply of Field Services in the Hunter Valley region.

Next steps

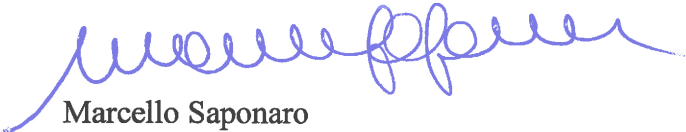
The purpose of this letter is to bring to the WLALC's attention the ACCC's concerns in this matter. Given the serious nature of the allegations, the ACCC would appreciate WLALC's assistance and commitment in bringing the contents of this letter to the attention of the local Aboriginal community members.

The ACCC has determined that it will not take any further action in this matter at this stage. However, the ACCC would expect that the interested parties will carefully consider the matters raised in this letter and review business practices to comply with the requirements of the CCA, obtaining legal advice if necessary.

The ACCC will continue monitoring the market and may consider further action without further notice should further allegations be brought to its attention.

If you have any questions about this letter, or would like to discuss this matter further, please contact me on (02) 9230 9124 or Mr Niels Stecher on (02) 9230 3831.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Marcello Saponaro', with a stylized, cursive script.

Marcello Saponaro
Assistant Director
Enforcement Operations - NSW