



Head Office : 343-355 Thompson Road
North Geelong, 3215

Ph. (03) 5278 6988
Fax. (03) 5278 6768

APCO Service Stations Pty Ltd Submissions

Background:

APCO Service Stations Pty Ltd ("APCO") conducts a business of retailing petroleum products at 17 service stations in Melbourne, Geelong, Ballarat, Bendigo, Wangaratta and Warrnambool. It has franchised the operation of and the right to conduct a convenience store at each of the service stations under the name "Apco Easy Shop" to various franchisees.

The directors of and shareholders in APCO are Ronald Anderson, Peter Anderson and Robert Anderson.

The business was established by Ronald Anderson in 1980. It is now managed by his sons Peter and Robert Anderson.

APCO is based at Geelong, has a turnover of \$140 million and employs 25 staff.

APCO's business has grown to the point where it is now one of the leading independent petroleum retailers in Victoria. This has been achieved as a result of the company progressively opening new service stations at locations where there had previously been limited price competition and introducing discounted fuel prices.

Involvement with ACCC

APCO and its director, Peter Anderson, have been named as respondents in proceedings recently initiated by the ACCC in the Federal Court. The proceedings concern the retail sale of petroleum products in the Ballarat region.

APCO is therefore unable to comment on the substance of the proceedings.

However, APCO wishes to make submissions concerning the manner in which the ACCC has conducted its investigations prior to the initiation of the proceedings.

Conduct of ACCC

1. APCO first became aware that it was the subject of investigation when 2 investigators from ACCC requested an interview with Peter Anderson.
2. Mr. Anderson was only informed that the purpose of the interview was to discuss the sale of petrol in Ballarat.
3. Mr. Anderson was not informed that the investigation concerned possible breaches of the Trade Practices Act by APCO and himself before the interview commenced or at any time during the interview. He was not advised that whatever was said by him may be used against him in subsequent court proceedings or given an opportunity to seek independent legal advice.
4. The interview could be described as a form of ambush as matters were put to Mr. Anderson and serious allegations were made against him without prior warning in the expectation that he would respond immediately. It was learned that the investigators later prepared a record of the interview. This was used in a subsequent Section 155 investigation.
5. Mr. Anderson was subsequently served with a notice issued pursuant to Section 155 of the Act requiring production of telephone and other documents. The notice stated the reason for investigation. This was the first occasion that details of the purpose of the investigation of the ACCC was given to APCO.
6. APCO was required to produce records relating to retail prices and telephone records for a period of 2 years. The consequence of the notice was that APCO had to collate and produce approximately 48,000 pages of documents as the price records were contained in daily multi page reports from each of its sites for the relevant period. The records were not recorded on computer until the latter part of the period inquired after.
7. The ACCC was requested to have regard to the burden placed on APCO as a result of it having to comply with the notice and to limit the scope of the documents required to be produced. APCO did not have the staff, resources or the facilities to comply with the notice in the time allowed. The ACCC agreed to grant a short extension of time but otherwise required strict compliance with the notice.
8. As a result APCO was unable to copy the documents which it was required to produce. It was informed by the ACCC that if access to the documents was required for purposes such as answering enquiries from the Taxation Office or to respond to allegations from the ACCC they would have to be inspected at the offices of the ACCC.

9. Mr Anderson was subsequently served with a notice requiring him to appear for an examination by a Commissioner pursuant to Section 155 of the Act. The notice advised Mr. Anderson that while he was entitled to be accompanied by a legal representative the representative would only have limited rights to raise matters concerning the fairness or clarity of questions and to make a submission at the end of the examination. Mr Anderson was not entitled to consult his legal representative before answering a question.
10. Mr Anderson was advised that he was compelled to answer the questions and that his answers may be used in any subsequent court proceedings. He could not refuse to answer questions even though they may have incriminated him. He was given no prior notice of the scope of the examination or the type of questions that he would be asked.
11. Mr Anderson was expected to immediately answer questions, with no prior warning as to what they would concern, in relation to issues or events that occurred more than two years prior.
12. Although Mr. Anderson only had a limited right of legal representation, he was again ambushed when he found that he was confronted at the examination not only by the Commissioner who was supposed to be conducting the examination, but also a Queens Counsel, two other barristers, a solicitor and one of the investigators. He was informed that they would be conducting the examination on behalf of the Commissioner.
13. It was a further condition of Mr. Anderson's appearance at the examination that he sign a confidentiality agreement that prevented him from discussing the examination with any person (including the other directors of APCO) until such time as proceedings were commenced against the company in court. Mr. Anderson was therefore prevented from seeking further information relating to the subject matter of the inquiry or to inform his fellow directors about the investigations or their consequences for the company.
14. Mr. Anderson was required to attend for a second examination at which another Queens Counsel and a barrister questioned him on behalf of the Commissioner.
15. APCO and Mr. Anderson have been named as respondents in legal proceedings commenced by ACCC in the Federal Court. The proceedings are being defended.
16. On the day that proceedings were commenced in the Federal Court, the Chairman of the ACCC issued a media release to local and national newspapers and conducted a press conference in which he advised of the subject matter of the proceedings and that APCO and Mr. Anderson (and the other

respondents) could be liable to pay substantial penalties if the allegations in the proceedings were found to be proven. (Media release attached)

Effect of conduct of ACCC on APCO

1. APCO has been required to devote a significant amount of time and resources to meeting the requirements of the Commission. It has also incurred substantial legal expense in obtaining advice and representation in respect of the Section 155 notices.
2. It is understood that in other investigations conducted by the ACCC in a similar manner, the ACCC has taken no further action against the companies and individuals who are the subject of its investigations and has announced its decision a long period of time after the investigations were commenced. In that event the companies and individuals are left with continuing uncertainty as to what the ACCC may do in relation to the investigations, with being unable to obtain the documents produced to the ACCC for inspection and with having to pay the expense of participating in the investigations. It is also understood that even if the ACCC does commence legal proceedings, and is unsuccessful in doing so, these expenses cannot be recovered from the ACCC.
3. The publicity arising from the media release and press conference of the Chairman of the ACCC has created adverse publicity for the business of APCO as the principal of "where there is smoke there is fire" has created the impression in the minds of the public, and particularly of APCO's franchisees, that the company is guilty of fixing prices and will be fined a substantial amount of money for doing so. This impression has created concerns about the future of APCO and its ability to continue to conduct its business.
4. The adverse publicity has therefore caused irreversible damage to the reputation of the company.

Submissions

1. ACCC should be regulated by protocols and rules similar to those used in the conduct of criminal investigations by the Police to ensure that the principles of natural justice and procedural fairness regulate the conduct of its investigations.
2. In particular companies or individuals that are the subject of investigations should be informed of the purpose of the inquiries at the outset, advised that whatever is said in interviews will be recorded and may be used against them in any subsequent court proceedings, given the right to obtain legal advice before the interview commences and be entitled to remain silent if they wish to do so.

3. In Section 155 examinations the person being examined should have an equal right of legal representation to that presently enjoyed by the Commissioner in that the legal representative of the person examined should be able to fully participate in the examination by having a right to objection to questions and to cross examine.
4. In section 155 examinations, the companies or individuals, the subject of investigations, should be presided over by an independent Chairperson to ensure that the individual appearing at the examination is treated fairly and the rules for the conduct of the examinations are complied with.
5. In view of the expensive, disruptive and damaging impact of court proceedings on business, there should be a form of committal hearing prior to court proceedings being commenced whereby the individuals or companies under investigation are given the right to respond to claims or allegations and to allow evidence produced by the ACCC to be assessed as to whether it is sufficient to warrant court proceedings.
6. Where a director of a company is being investigated in his capacity as a representative of the company the confidentiality agreement should not extend to disclosure to directors of the company under investigation. If necessary they could also sign a confidentiality agreement.
7. In the event that the Commission discontinues its investigations or is not successful in any subsequent court proceedings, the expense incurred by the person or company under investigation should be financially compensated in full by the Commission.
8. The Commissioner should be restrained from making public comment in relation to investigations or court proceedings until they are concluded. See attached press release by the ACCC.