



## *Express law* fast track information for clients

24 January 2007

### **Penalty judgment under secondary boycott provisions of the Trade Practices Act**

This is the first penalty judgment obtained by the ACCC under sections 45E and 45EA (secondary boycott provisions relating to agreements with a union) of the *Trade Practices Act 1974 (Cth)*. Young J of the Federal Court imposed a pecuniary penalty of \$125,000 against the CEPU and also made orders for declarations and injunctions. The CEPU has also been ordered to pay the ACCC's costs, agreed in the sum of \$200,000.

This is not only the first penalty judgment obtained against a union in respect of such conduct, but is also the highest penalty imposed upon a union for a single course of conduct constituting a contravention of the Trade Practices Act.

### ***Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd (No 2)***

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[2007] FCA 11, 16 January 2007

The proceeding concerns claims made under sections 45E and 45EA of the Trade Practices Act, which prohibit the making and giving effect to a contract, arrangement or understanding, with a union, which prevents or hinders the supply or acquisition of goods or services. Relevantly for this proceeding, the ACCC alleged that Edison Mission Operation and Maintenance Pty Ltd, the operator of the Loy Yang B power plant in Victoria, made and gave effect to an agreement with the CEPU containing a provision that was included for the purpose of preventing Edison from acquiring goods or services from a third person. In this case Edison had been accustomed to acquire goods or services from the third person.

The ACCC alleged that the CEPU had induced the making of and giving effect to the agreement by Edison.

By this decision, Young J delivered judgment in relation to penalty and made final orders relating to the CEPU.

### ***Background***

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Edison (now known as IPM Operation and Maintenance Loy Yang Pty Ltd) operates the Loy Yang B power station in Victoria. Valley Power, a company related to Edison, contracted with the State of Victoria to construct a new gas-fired power station on land adjoining the Loy Yang B power station. This was known as the peaker project, established to provide electricity at times of high demand. Valley Power contracted to complete the project within an extremely short period of time.

The ACCC alleged that in August 2001 the CEPU informed Edison that it would sign a construction site agreement for the peaker project only if Edison agreed to engage electrical contractors at Loy Yang B who had an enterprise agreement with the CEPU.

Because of the urgent need to progress the peaker project, Edison agreed to the union's demand. This had the consequence that DJN Electrical and Instrumentation, whom Edison had previously regularly contracted with to perform electrical work, was no longer engaged by Edison. The arrangement continued in effect until late 2003, when the ACCC wrote to Edison about the arrangement.

### ***CEPU***

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On 19 December 2006 Young J handed down judgment in respect of the CEPU (see [\[2006\] FCA 1777](#)). The court found that the CEPU was an accessory to Edison's making and giving effect to the proscribed arrangement.

Submissions on penalty and costs in respect of the CEPU were heard on 22 December. The ACCC had sought a penalty in the range of \$210,000 to \$250,000. This was based on the contention that there had been two separate contraventions – both the making and giving effect to the arrangement. The union submitted that both contraventions were based on the same conduct and therefore it was liable to only one penalty. Young J agreed with the CEPU.

The union submitted that the appropriate penalty was in the order of \$20,000.

His Honour found that the penalty proposed by the CEPU did not properly reflect the nature and seriousness of the union's conduct and was inadequate to deter both the CEPU and other potential offenders from similar conduct. His Honour noted that the CEPU had been the instigator of the conduct and determined that 'the appropriate level of penalty which reflects the deliberate and serious nature of the contravention, the requirement of deterrence, and the other factors which I have mentioned is \$125,000.'

### ***Edison***

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Edison admitted the contraventions early in the proceedings. The hearing of the application against Edison was deferred until after the trial of the application against the union (see [\[2006\] FCA 853](#)). The penalty hearing has been fixed for 9 February 2007 before Tracey J. Young J considered it appropriate that another judge deal with the company given his findings against the CEPU. (His Honour is stepping down from the bench this month.)

*Text of the decision is available at:*

[http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2007/11.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/11.html)

AGS Senior Executive Lawyer, Graham Thorley with Alice Crowe, Senior Lawyer and Matthew Crowley, Lawyer acted on behalf of the ACCC in the conduct of the proceedings.

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