



**Australian  
Competition &  
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Commission**

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29 January 2009

Mr Graeme Gibson,  
Deputy Chairman,  
Hunter Bulga Gas Action Group Inc  
PO BOX 120,  
BROKE NSW 2033

Dear Mr Gibson,

I refer to your letter of 18 November 2008, my letter of 18 December 2008 and your further letter of 9 January 2009 regarding statements by Sydney Gas Ltd in its 2008 Annual Report and on its website that:

- (i) *Coal Seam Methane natural gas is a clean burning and "green form" of energy*
- (ii) *"Coal seam natural gas produces half the greenhouse gas emissions of burning coal.";* and
- (iii) *"Coal seam natural gas..... produces almost half the greenhouse gas of burning coal ..."*.

As you are no doubt aware, the Commission is a Federal body that administers the *Trade Practices Act 1974* ('the Act'). The Act contains a range of provisions designed to promote competition, protect consumers and prevent corporations from engaging in restrictive trade practices. Part V of the Act prohibits misleading or deceptive conduct by corporations and the making of false or misleading representations to consumers.

I have considered the issues you have raised and appreciate your concerns. In relation to the statement in paragraph (i) above. In my view, this statement is not misleading or deceptive, I consider that Sydney Gas, by placing the words "*green form*" in inverted commas, is saying that in comparison to burning coal, burning coal seam methane gas is the greener option.

On the other hand, the conduct described in paragraphs (ii) and (iii) above *may* constitute contraventions of sections 52 and 53(c) of the Act. Section 52 of the Act prohibits corporations from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. Section 53(c) of the Act prohibits corporations from making false or



misleading representations that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have.

Conduct will only breach sections 52 and 53 of the Act where it occurs in "trade or commerce". In the matter of *Re Ku-ring-gai Co-operative Building Society (No12) Ltd* (1978) 36 FLR 134 the court stated that the term describes "*all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprised commercial arrangements.*"

Further, the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 made it clear that there is an essential difference between in trade or commerce and conduct more broadly in respect of, or incidental to, trade or commerce. In this matter, their Honours stated:

*"...the reference to conduct "in trade or commerce" in s.52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed ... the words "in trade or commerce" refer to "the central conception" of trade or commerce and not to the "immense field of activities" in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.*

As an example, in a matter where representations were made by an airport owner to the relevant authority concerning future noise patterns at its airport, the Court found that it was not conduct in trade or commerce: *Village Building Co Pty Ltd v Canberra International Airport Pty Ltd* [2004] FCAFC 240.

The threshold question is then whether the claims made by Sydney Gas concerning the greenhouse gas emissions of burning coal seam natural gas were made in trade or commerce or merely in relation to trade or commerce. If the response is that it is merely in relation to trade or commerce then this issue may fall outside the jurisdiction of the Commission.

Notwithstanding the jurisdictional issue that may arise, I have written to Sydney Gas and requested that it amend its website.

I trust this is of assistance to you.

Yours sincerely



Roslyn McMaster  
Assistant Director  
Enforcement/Compliance