

# FEDERAL COURT OF AUSTRALIA

## Australian Competition and Consumer Commission v Global Green Plan Ltd

[2010] FCA 1057

Citation:	Australian Competition and Consumer Commission v Global Green Plan Ltd [2010] FCA 1057
Parties:	<b>AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v GLOBAL GREEN PLAN LTD ACN 109 417 825</b>
File number:	NSD 624 of 2010
Judge:	<b>BENNETT J</b>
Date of judgment:	29 September 2010
Catchwords:	<b>TRADE PRACTICES</b> – practice and procedure – breach of undertaking under s 87B <i>Trade Practices Act 1974</i> (Cth) – orders previously made – whether declaration should be made – role of ACCC in administration of the Act
Legislation:	<i>Trade Practices Act 1974</i> (Cth) s 87B
Cases cited:	<i>Ainsworth v Criminal Justice Commission</i> (1992) 175 CLR 564 cited <i>Australian Competition and Consumer Commission v Alvaton Holdings Pty Ltd</i> [2010] FCA 760 applied <i>Australian Competition and Consumer Commission v Goldy Motors Pty Ltd</i> [2000] FCA 1885 cited
Date of hearing:	8 September 2010
Date of last submissions:	15 September 2010
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	13
Counsel for the Applicant:	Mr S Free

Solicitor for the Applicant:	Australian Government Solicitor
Solicitor for the Respondent:	Mr B Fried, The Law Offices of Barry Fried

<b>IN THE FEDERAL COURT OF AUSTRALIA</b>	
<b>NEW SOUTH WALES DISTRICT REGISTRY</b>	
<b>GENERAL DIVISION</b>	<b>NSD 624 of 2010</b>

<b>BETWEEN:</b>	<b>AUSTRALIAN COMPETITION AND CONSUMER COMMISSION</b> <b>Applicant</b>
<b>AND:</b>	<b>GLOBAL GREEN PLAN LTD ACN 109 417 825</b> <b>Respondent</b>

<b>JUDGE:</b>	<b>BENNETT J</b>
<b>DATE OF ORDER:</b>	<b>29 SEPTEMBER 2010</b>
<b>WHERE MADE:</b>	<b>SYDNEY</b>

**THE COURT DECLARES:**

1. That the Respondent (**GGP**) breached paragraph 14 of the undertaking pursuant to section 87B of the *Trade Practices Act 1974* (Cth) given by GGP, and accepted by the Applicant (**Commission**) on 24 December 2009 (**the Undertaking**), by failing, within three months of the Undertaking:
  - 1.1 to purchase, at its own expense, a total of 4,137 Renewable Energy Certificates (**RECS**) from one or more Greenpower generators accredited to supply RECS under the National Greenpower Accreditation Program (**Purchased RECS**);
  - 1.2 to arrange for the immediate surrender of the Purchased RECS to the National Greenpower Accreditation Program; and
  - 1.3 to provide documents to the Commission recording and evidencing such purchase and surrender of RECS.

**BY CONSENT, THE COURT ORDERS:**

2. GGP to pay the Commission's costs as taxed or agreed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

The text of entered orders can be located using Federal Law Search on the Court's website.

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<b>JUDGE:</b>	<b>BENNETT J</b>
<b>DATE:</b>	<b>30 SEPTEMBER 2010</b>
<b>PLACE:</b>	<b>SYDNEY</b>

### REASONS FOR JUDGMENT

1 On 2 June 2010 the applicant (**Commission**) filed a fast track application in the Court (**the application**) seeking declarations and other orders in respect of breaches by the respondent (**GGP**) of an undertaking given to the Commission by GGP on 24 December 2009 (**the undertaking**) pursuant to s 87B of the *Trade Practices Act 1974* (Cth) (**the Act**). The application was supported by a fast track statement, also filed on 2 June 2010, setting out the contentions on which the Commission relied. On 28 July 2010 GGP filed a response admitting the essential contentions.

2 On 24 August 2010 orders were made by consent (**the orders**). The Commission now seeks, with GGP's consent, a declaration that GGP breached the undertaking it gave to the Commission (**the declaration**). The issue for the Court is whether the declaration should be made.

### THE APPLICATION

3 The factual background to the application, including the relevant parts of the undertaking, is set out in a statement of agreed facts signed by the parties on 31 August 2010.

Those agreed facts are:

1. During the period from about May 2006 to November 2008 (**relevant period**) GGP carried on a retail business known as GreenSwitch.
2. During the relevant period GGP offered for retail sale a renewable energy service involving the purchase and surrender of Renewable Energy Certificates (**RECS**).
3. RECS are certificates which represent units of energy generated using renewable energy (also known as “green power” or “GreenPower”).
4. During the relevant period, GGP, through its GreenSwitch business, engaged in certain conduct, including making representations to customers and prospective customers that it would purchase and surrender (that is, extinguish) on behalf of its customers RECS corresponding to the renewable energy sales which it had made to customers under the National GreenPower Accreditation Program (**NGAP**) .
5. During the relevant period GGP:
  - 5.1 entered into agreements with customers with the overall effect that GGP agreed to purchase and surrender a total of 11,300 RECS; and
  - 5.2 purchased and surrendered 7,163 RECS.
6. By reason of the conduct referred to in paragraph 5 above, during the relevant period there was a shortfall of 4,137 RECS which GGP had agreed to purchase and surrender but which it had not purchased and surrendered.
7. On 24 December 2009 the Commission accepted the undertaking given by GGP (as well as by its directors, Henry Clement Hewett and Donald Raymond Hewett) concerning the conduct of GreenSwitch.
8. Paragraph 14 of the undertaking provides (noting that Greenpower Program is a shorthand reference for the NGAP, as per paragraph 3 of the undertaking):

*GGP undertakes for the purpose of section 87B of the Act that it will, within three months of the date of the undertaking:*

- (a) *at its own expense, purchase a total of 4,137 RECS from one or more Greenpower generators accredited to supply RECS under the Greenpower*

*Program (Purchased RECS);*

*(b) arrange for the immediate surrender of the Purchased RECS to the Greenpower Program; and*

*(c) provide documents to the Commission recording and evidencing such purchase and surrender of RECS.*

9. GGP did not, within three months of the date of the undertaking, purchase 4,137 RECS from an accredited GreenPower generator and surrender such RECS under the NGAP, as required by sub-paragraphs 14(a) and 14(b) of the undertaking.
10. GGP did not, within three months of the date of the undertaking, provide to the Commission evidence of the purchase and surrender of 4,137 RECS, as required by sub-paragraph 14(c) of the undertaking.
11. By reason of the matters in paragraphs 9 and 10 above, GGP breached paragraph 14 of the undertaking.

## **THE ORDERS**

4 The orders as made on 24 August 2010 were:

1. *[The Court] [o]rders GGP:*

*1.1 to purchase, by 30 November 2010, a total of 4,137 RECS from one or more Greenpower generators accredited to supply RECS under the NGAP;*

*1.2 to arrange for the immediate surrender of the Purchased RECS; and*

*1.3 to provide documents to the Commission recording and evidencing the purchase and surrender of RECS in accordance with 1.1 and 1.2.*

## **THE DECLARATION**

5 At the Commission's request, the Court listed the matter for a short hearing on 8 September 2010 for the purposes of determining whether it was also appropriate to make the declaration. The adjournment between the making of the orders and the hearing was considered necessary for the parties to prepare evidence in support of the application for declaratory relief.

6 The declaration, as sought by the Commission, is:

1. *The Court declares that GGP breached the undertaking, by failing within three months of the undertaking:*

1.1 *to purchase, at its own expense, a total of 4,137 RECS from one or more Greenpower generators accredited to supply RECS under the National Greenpower accreditation program;*

1.2 *to arrange for the immediate surrender of the Purchased RECS to the NGAP;*  
*and*

1.3 *to provide documents to the Commission recording and evidencing such purchase and surrender of RECS.*

## **PRINCIPLES**

7 The principles and authorities governing declarations of this kind and relevant discretionary factors have been considered by Gilmour J in *Australian Competition and Consumer Commission v Alvaton Holdings Pty Ltd* [2010] FCA 760 at [29]–[37]. As relevant to this case, his Honour observed:

- An application for declaratory relief should be based on evidence rather than on the parties' admissions (at [35]).
- A declaration must be directed to the determination of controversies and not to answering abstract or hypothetical questions (at [29]).
- The Court's power to make declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth) extends to making declarations that a party has engaged in conduct in contravention of the Act (at [30]).
- Regard should be had to the public interest nature of proceedings instituted by the Commission and the Commission's public interest role in enforcing the Act (at [31]).
- Declarations serve to record the Court's disapproval of the contravening conduct, vindicate the Commission's claim in relation to such contraventions and assist the Commission in the future discharge of its functions under the Act (at [31](a)–(c)).

- The public interest may be advanced by a declaration in circumstances where conduct affected a large number of people over a period of time (at [32]).
- Declarations have an educative function by informing the community and market participants of the kind of conduct that may contravene the Act (at [33]).
- Declarations promote general deterrence and community-wide compliance with the Act (at [33] and [36]).
- The public interest outcomes delivered by declarations may not be provided by other remedies (at [34]).

### COMMISSION'S SUBMISSIONS

8           Section 87B of the Act provides for the acceptance and enforcement of undertakings given to the Commission. Although the orders direct GGP to comply with the terms of the undertaking, the Commission submits that it is in the public interest that the declaration also be made pursuant to s 87B(4)(d), which states that *'if the Court is satisfied that the person has breached a term of the undertaking, the Court may make... any order that the Court considers appropriate'*.

9           The Commission contends that the procedure for the acceptance and enforcement of undertakings under s 87B is an important part of the machinery of the Act. The Commission submits that the declaration provides the basis for the orders and explains the contravention, that is, that the undertaking has been breached. This will, the Commission says, assist in maintaining the integrity of the process of the giving and acceptance of undertakings, make it clear to the public that the Commission will take action if an undertaking is breached and reinforce the Commission's authority in accepting and enforcing undertakings. The Commission submits that the declaration is appropriate in the circumstances of the case and is in the public interest, having regard to the principles in *Alvaton*.

10           The Commission contends that the orders, while important, do not serve these public interest objectives in the same way as would the declaration. The orders are prospective in operation and require GGP to take steps to rectify the underlying conduct (that

is, the failure to purchase and surrender RECS). The declaration is addressed to a different matter, being the past breach of the undertaking by GGP. Declaring that a breach has occurred will indicate to the community (including past and future consumers as well as market participants) that undertakings accepted under s 87B of the Act are solemn and enforceable and that the Commission will take enforcement action in the event of non-compliance with an undertaking.

11 The Commission also submits that, given the proceedings have been resolved by admissions and consent orders, the declaration will provide a clear record of the basis for the orders.

## CONCLUSION

12 I am satisfied that the statement of agreed facts provides a sufficient evidentiary basis for the declaration. I am satisfied that the Commission, as the public body charged with enforcing the Act, has a real interest in seeking the declaration (*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at [38], *Australian Competition & Consumer Commission v Goldy Motors Pty Ltd* [2000] FCA 1885 at [30]) despite the fact that it relates to past conduct. I am satisfied that it is appropriate to make the declaration in the public interest for the reasons advanced by the Commission, which are consistent with the reasons in *Alvaton*.

13 The Commission does not press for other orders sought in the application save for an order for costs, to which GGP consents.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bennett.
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Associate:

Dated: 29 September 2010

