

**Agenda for Terminating Termites
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Introduction

Termites (also known as white ants) inhabit a subterranean world of complex social organization. They live in colonies which may contain several hundreds to several millions of them. Each colony comprises workers, soldiers and reproductives which perform different tasks. The workers forage for food and water, construct and repair shelters, feed and groom other termites as well as care for the young. The soldiers' primary function is colony defence whilst a monogamous pair of reproductives generally heads a colony as king and queen. Termites feed on materials which contain cellulose (primarily dead wood and wood by-products) and thrive in a moist environment. They generally infest buildings and wooden structures and are a bane in many households.¹

Termite management can be effected by injecting liquid termiticides into the soil at construction sites and in foundations of buildings and structures to create a toxic barrier to repel termites or manage colonies. The effective termiticides have no odour, smell or taste for termites to detect. One of them is fipronil which has been manufactured by Bayer Environmental Science ("Bayer") and solely distributed by Bentz Jaz Singapore Pte Ltd ("Bentz Jaz"). Both restricted the sale and application of the termiticide in Singapore to a select group of six pest control companies which were obliged to sell the termiticide at a fixed minimum price. The group is collectively known as Agenda Authorised Applicators ("AAAs") and it sold the termiticide in Singapore under the trade mark "Agenda" ("Agenda" product").

Competition Act

Recently, the Competition Commission of Singapore ("CCS") fined every member of this group for engaging in activities which are as thoroughly collective and organized as those of their prey.² The CCS is the statutory body that acts as the watchdog against the development of unhealthy competitive markets in Singapore. Underlying such a role is the thinking that competition spurs businesses to be more efficient, innovative and responsive to consumer needs, which means more effective use of resources and greater productivity gains for the economy. *"The benefits are, in turn, cascaded to consumers, who will generally enjoy more choices, lower prices and better products and services"*, the CCS proclaims.³

¹ Entomologists however disagree. Their research indicates that termites make many positive contributions to the world's ecosystems, particularly in recycling wood and plant materials. Their tunnelling efforts help to ensure that soils are porous, contain nutrients, and are healthy enough to support plant growth. Termites are very important in the Sahara Desert where their activity helps to reclaim soils damaged by drying heat and wind and overgrazing by livestock.

² Case No. CCS 600/008/06.

³ See its website at www.ccs.gov.sg under FAQs. In a speech to the Danish Competition Council in November 1997, the European Competition Commissioner, Karel van Miert, said that

"competition forces companies to run themselves efficiently. It forces them to adjust to changes and it forces them to innovate. Competition leads to lower prices and to higher

The source of the functions and powers of the CCS is the Competition Act (Cap. 50B) (“Act”). This Act, which came into force in various phases since January 2005, seeks to prohibit anti-competitive activities that unduly prevent, restrict or distort competition, namely,

- anti-competitive agreements, decisions and practices;
- abuse of a dominant position; and
- mergers and acquisitions that substantially lessen competition.

The CCS has indicated that in assessing whether an activity is anti-competitive, it will give due consideration to whether the activity promotes innovation, productivity or longer-term economic efficiency and will ensure that innovative and enterprising endeavours are not constrained. Instead of attempting to catch all forms of anti-competitive activities, it will focus on those that have an appreciable adverse effect on competition in Singapore and do not have any net economic benefit. It found the activities of the AAAs to have such an effect under section 34 of the Act in relation to the sale and application of the “Agenda” product (hereinafter referred to as “the *Agenda* case”).

The section prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore (“the section 34 prohibition”). For this purpose, it provides that

“agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they

- (a) *directly or indirectly fix purchase or selling prices or any other trading conditions;*
- (b) *limit or control production, markets, technical development or investment;*
- (c) *share markets or sources of supply....”*

Modelled after Article 81 of the European Community Treaty and Chapter I prohibition of the UK Competition Act 1998,⁴ the section is directed at prohibiting business undertakings in a cartel from colluding and engaging in co-ordinated practices which tend to place competitors at a competitive disadvantage and ultimately harm consumer interests in Singapore. Price fixing, market sharing and bid rigging (or collusive tendering) are mentioned as clear

quality for the consumer. It leads to greater dynamism in industry and perhaps most importantly of all to greater job creation.”

⁴ Hence, cases from these jurisdictions can be useful in assisting the CCS in reaching its decisions.

examples of such prohibited practices. “They will always be regarded as having an appreciable adverse effect on competition”.⁵ As such, they will always be considered void and unenforceable.⁶

Prohibited Practices

Such practices do not require a formal agreement to be in place or that the agreement be legally binding, as long as there is some form of co-ordinated conduct on the part of two or more undertakings. Case law in relation to Article 81 indicates that it is sufficient that the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way. As regards the form in which the joint intention is expressed, the court in *Bayer AG v European Commission*⁷ said that

*“it is sufficient for a stipulation to be the expression of the parties’ intention to behave on the market in accordance with its terms, without its having to constitute a valid and binding contract under national law.... It follows that the concept of an agreement within the meaning of Article [81] ... centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention”.*⁸

A concerted practice amongst undertakings can also be such an expression. In particular, it is unlawful if it constitutes co-ordination between the undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition. In the case of *Sukie Unie and others v European Commission*,⁹ the European Court of Justice (“ECJ”) elaborated this when it held that a group of sugar producers had taken part in concerted practices to support two Dutch producers in their domestic market. The producers denied providing the support because, they claimed, they had not worked out any plan for the support. The ECJ held that it was not necessary to prove that there was an actual plan. It said that the concept of a concerted practice was to be understood in the light of the principle that each undertaking must determine independently the policy which it intends to adopt on the relevant market (including the choice of customers to whom it intends to sell) and that the principle strictly precluded

⁵ CCS Guidelines on the Major Provisions, paragraph 4.7. The guidelines set out some of the factors and circumstances which the CCS may consider in determining whether agreements or practices are anti-competitive. They indicate the manner in which the CCS will interpret and give effect to the provisions of the Act. The CCS has cautioned that the guidelines are not a substitute for the Act and its related regulations and orders. They are also not exhaustive, nor do they set out a limit on the investigation and enforcement activities of the CCS. The CCS applies the guidelines according to the facts and circumstances of each case.

⁶ Section 34(3) of the Act.

⁷ [2000] ECR II-3383.

⁸ *Ibid.*, at [68]-[69]

⁹ [1975] ECR I-1663 at [173]-[174]

*“any direct or indirect contact between such [undertakings], the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market”.*¹⁰

In the *Agenda* case, the offending activities of the AAAs relate to price fixing, collusive tendering and market sharing. Specifically, following a complaint in September 2006 of such activities engaged by three of the AAAs in connection with an invitation to tender for termite treatment for a project, the CCS commenced formal investigations pursuant to section 62 of the Act and conducted surprise visits to the premises of the AAAs. The visits yielded information and documents which implicated the other three AAAs in five other projects as well.¹¹ The CCS discovered that in each of the projects, emails were exchanged between the AAAs concerned as to who was to be awarded in the tenders and the prices to be tendered.¹² The agreement or practice¹³ amongst them was that the AAA who had been providing pest control services or termite treatment to a project or customer should be allowed to continue doing so. It would disclose to the other AAAs its proposed tender price and request the others to support it by submitting token bids or tenders at higher prices. In this connection, it has been held that merely informing a competitor of one’s proposed tender price can amount to a concerted practice. In *Cimenteries v Commission*,¹⁴ the CFI disagreed with the submission by one of the cement producers that merely letting its competitor know of its intentions could not have amounted to a concerted practice. The court stated that

“... the concept of concerted practice does in fact imply the existence of reciprocal contacts.... That condition is met where one competitor discloses its future intentions or

¹⁰ The principle has been applied in numerous subsequent cases by the ECJ and the European Court of First Instance (“CFI”). In *Commission v Anic Partecipazioni* [1999] ECR I-4125, the ECJ said at [108] that the principle was intended

“... to apply to all collusion between undertakings, whatever the form it takes. ..., The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion”.

¹¹ Bayer and Bentz Jaz were not implicated because section 34 does not apply to vertical agreements. A vertical agreement is defined in paragraph 8(2) of the Third Schedule of the Act as

“any agreement entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services....”

¹² The CCS was fortunate. Collusions to fix and tender prices are often conducted in secret and not committed to writing. As the ECJ said in *Aalborg Portland v Commission* [2004] ECR I-0000 at [55], *“it is normal for such activities to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum”.*

¹³ It was unnecessary for the CCS to come to a conclusion as to whether the conduct of the AAAs in fact constituted an agreement and/or a concerted practice for the purposes of the section 34 prohibition, following the ECJ decision in *Hercules Chemicals v Commission* [1991] ECR II-1711 at [264].

¹⁴ [2000] ECR II-491.

*conduct on the market to another when the latter requests it or, at the very least, accepts it.*¹⁵

In the *Agenda* case, one of the requests by an AAA was as follows:

*“Can you support the Agenda quote for [name of project], our existing client. Details are below: For individual units inspection and treatment, please quote above \$50k per unit. Thanks a million.”*¹⁶

Such a request must be clearly and expressly refused, failing which the recipient can be accused of involvement in an unlawful concerted practice. In the *Agenda* case, one of the directors of an AAA claimed that he did not intend to accede to the request for support by an incumbent in one of the projects and had actually intended to compete for the project.¹⁷ The CCS rejected the claim and held that the claim, even if true, did not matter, as an undertaking could still be liable under section 34 even if it had no intention to implement or adhere to the terms and conditions agreed by the cartel. There was no clear and express refusal of the request. In the case of *Trefileurope Sales SARL v Commission*,¹⁸ Trefileurope denied active participation in meetings whose purpose was to fix prices and quotas in order to limit imports of welded steel mesh into France. It also denied having subscribed to the price and quota agreements and said that it was forced to attend the meetings in order to avoid negative reactions and pressure from the French producers. The ECJ however considered that Trefileurope could not rely on the fact that it attended the meetings against its will, stating that it

“could have complained to the competent authorities about the pressure brought to bear on it and lodged a complaint to the Commission under Article 3 of Regulation No. 17 rather than participate in such meetings”.¹⁹

The ECJ concluded that Trefileurope did actively participate in the agreements and was not exculpated by the fact that it did not respect the prices and quotas which were agreed. The court said:

*“In any event, even if it is assumed that the applicant refrained, at least in part, from participating actively in the meetings, the Court considers that, having regard to the manifestly anti-competitive nature of the meetings, ..., the applicant, by taking part **without publicly distancing itself from what occurred at them**, gave the impression to the other*

¹⁵ *Ibid.*, at [1849].

¹⁶ An example of a reply to such a request is as follows: “...want to make sure you get this project and then you can buy me 2 beers at 8 am in the morning.”

¹⁷ The claim was at odds with the fact that his company tendered at a price higher than that of the successful AAA who had requested for support.

¹⁸ [1995] ECR II-791.

¹⁹ *Ibid.*, at [58].

participants that it subscribed to the results of the meetings and would act in conformity with them.²⁰ (emphasis added)

Section 34 of the Act prohibits “agreements between undertakings ... or concerted practices, which have as their object or effect the prevention, restriction or distortion of competition within Singapore”. It is quite clear that the terms “object” and “effect” impose alternative, rather than cumulative, requirements. Thus, as long as an agreement or concerted practice has an anti-competitive object, it is unlawful, regardless of the fact that it has no effect on the relevant market.²¹

In the *Agenda* case, the CCS considered that the conduct of the AAAs in respect of the 6 projects amounted to an agreement or concerted practice which had as its *object* the prevention, restriction or distortion of competition within Singapore of the termite treatment market. The purpose of the conduct was to substitute practical cooperation for the risks of competition and eliminate the uncertainties which each AAA would face as to the conduct of the others in the tender process of each of the projects. It was not necessary for the CCS to also establish that the conduct had anti-competitive effects on the market.²² The CCS said that

“it was not necessary to demonstrate that the agreement and/or concerted practice had manifested itself in conduct on the market or that it had had effects restrictive of competition. ... a concerted practice is made out at a stage prior to consideration of whether the person receiving the price actually puts in a tender.”²³

Penalty

Section 69 of the Act provides that after the CCS has made a decision that an agreement has infringed the section 34 prohibition, it may impose on any party to the agreement a financial penalty not exceeding 10% of the turnover of the business of the party in Singapore for each year of infringement, up to a maximum of 3 years. The imposition may however only

²⁰ *Ibid.*, at [85]. Similarly, a participant who “cheats” by attempting to gain market share at the expense of the other members of a cartel is not absolved: see *Re Polypropylene* [1988] 4 CMLR 347.

²¹ See also *Huls AG v Commission* [1999] ECR I-4287.

²² See also *Trefilunion v Commission* [1995] ECR II-1063 at [79]. The allegation of infringement under section 34 is a serious matter involving penalties. As such, the civil standard of the balance of probabilities is to be applied taking into account the gravity of the allegation: *Napp v Director General of Fair Trading* [2002] CAT 1 at [107]-[109]. In applying the balance, the quality and weight of the evidence must be sufficiently strong to overcome the presumption that the undertaking in question has not engaged in unlawful conduct. The more serious the allegation, the more cogent should be the evidence before it can be concluded that the allegation is established on the preponderance of probabilities: see *JJB and Allsports v Office of Fair Trading* [2004] CAT 17 at [164]-[208].

²³ CCS Decision, paragraph 137.

be made if the CCS is satisfied that the infringement has been committed “intentionally or negligently”.²⁴ This is an important threshold requirement.²⁵

An infringement is committed intentionally for the purposes of the section 34 prohibition if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition.²⁶ It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without having also to show that the undertaking also knew that it was infringing the section 34 prohibition.²⁷ Other circumstances in which the CCS may find that an infringement has been committed intentionally include the fact that the agreement or conduct has as its object the restriction of competition or that the undertaking in question is aware that its conduct will be, or is reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry it out.²⁸ The intention relates to the facts, not the law. Thus, ignorance or a mistake of law (i.e. ignorance that the relevant agreement or conduct is an infringement) is not a bar to a finding of intentional infringement. In establishing whether or not there is intention, the CCS may consider internal documents and may regard any deliberate concealment of an agreement or practice by the parties as strong evidence of an intentional infringement. It may also infer an infringement where the consequences giving rise to the infringement are plainly foreseeable from the pursuit of a particular policy by an undertaking.²⁹

As regards “negligently”, the CCS is likely to find an infringement of the section 34 prohibition to have been committed negligently where the undertaking ought to have known that its agreement or conduct would result in a restriction or distortion of competition.³⁰

In the *Agenda* case, the CCS had no hesitation in holding that the AAAs had committed the infringement intentionally or negligently. It considered collusive tendering to be a serious infringement which has as its object the restriction of competition, and is likely to have been, by its nature, committed intentionally.³¹ It also took the view that by reason of the very nature of the agreements and/or concerted practices involving collusive tendering, each of the AAAs must have been aware that the agreement and/or concerted practices had the object of preventing, restricting or distorting competition.³²

The effect of the decision is that in the case of collusive tendering, it is difficult to avoid a finding of intentional or negligent infringement. The very nature of the conduct invites such a finding, given that the purpose of the tendering process is to ensure competition in the award of projects and collusive tendering would inherently as well as invariably thwart that purpose.

²⁴ Section 69(3).

²⁵ See paragraph 4.3 of the CCS Guidelines on Enforcement.

²⁶ See *Napp v Director General of Fair Trading* [2002] CAT 1 at [456].

²⁷ CCS Guidelines on Enforcement, paragraph 4.7.

²⁸ *Ibid.*

²⁹ *Ibid.*, paragraph 4.9.

³⁰ *Ibid.*, at paragraph 4.10.

³¹ CCS Decision, paragraph 356.

³² *Ibid.*, paragraph 358.

Determination of Penalty

In determining the amount of penalty to be imposed, the CCS would keep in mind the twin objectives of

- * deterring anti-competitive practices; and
- * reflecting the seriousness of the infringement concerned.³³

It has also indicated its intention to impose, where appropriate, *severe* financial penalties in respect of, in particular, agreements between undertakings which fix prices, share markets or collusively tender. Such imposition is aimed at deterring not only the infringing undertakings but also other like-minded undertakings which might be considering similar practices.³⁴ The relevant factors which the CCS would take into consideration in calculating the amount of penalty to be imposed are:

- (1) the seriousness of the infringement;
- (2) the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year;
- (3) the duration of the infringement;
- (4) other relevant factors (e.g. deterrent value); and
- (5) any further aggravating or mitigating factors.

In the *Agenda* case, the CCS adopted an approach similar to those used by its counterparts in Europe and the United Kingdom (namely, the European Commission and the Office of Fair Trading respectively) to determine the appropriate amount of financial penalty to impose. The approach entails first working out the starting point or the basic amount for the penalty. This is done by taking a percentage or proportion of the relevant turnover, followed by applying a multiplier for the duration of infringement and adjusting the figure to take into account such factors as deterrence as well as aggravating and mitigating factors.³⁵

Seriousness of the infringement and turnover

³³ CCS Guidelines on the Appropriate Amount of Penalty, paragraph 1.6.

³⁴ *Ibid.*, at paragraph 1.7.

³⁵ CCS Decision, paragraph 371.

The seriousness in turn depends on the nature of the infringement and how widespread the infringement is.³⁶ In this regard, the CCS will consider such factors as the nature of the product, the structure and condition of the market, the market share(s) of the undertaking(s) involved, entry conditions, the effect on competitors and third parties as well as the impact and effect of the infringement on the market, direct or indirect.³⁷ In assessing the impact and effect, the CCS will further take into account, amongst others, the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year.³⁸

In the *Agenda* case, the CCS considered the relevant turnover of the AAAs to be the turnover for the services within Singapore using the "Agenda" product. This turnover accounted for between 2.6% and 21.9% of the total turnover of the AAAs for the last business year.³⁹ Having regard to this turnover as well as a number of other factors (such as the nature of the product, the market shares of the AAAs and the effect of the infringements on customers, competitors and third parties), the CCS considered that the appropriate starting point or base amount for the financial penalty was 8% of the relevant turnover of each of the AAAs.

Duration of the infringements

Here, the CCS considered the duration of infringement of each of the projects to commence from the date of initial contact between the AAAs (the contact involving one party alerting the others to the project, stating its interest in winning the project and requesting the help of the others in ensuring that they would not win the project) to the date when the final bid was received for the project. On the evidence, it found that the duration did not span more than a year.⁴⁰ Nevertheless, the CCS did not consider it appropriate to make any downward adjustment to the base amount of 8% as it was of the view that the effects of the infringements were irreversible and not restricted to the short duration during which the collusion took place.⁴¹ This is because once a project has been awarded following an anti-competitive tender, the anti-competitive effect was irreversible in relation to the tender. Further, the infringements may have a potential continuing impact on further tendering processes by the same tenderers in that the tenderer who wins the tender pursuant to collusion gains the advantage of incumbency in the contract.⁴²

Other relevant factors

³⁶ CCS Guidelines on the Appropriate Amount of Penalty, at paragraph 2.2.

³⁷ *Ibid.*, at paragraph 2.3.

³⁸ *Ibid.*, at paragraph 2.4. The "last business year" is the business year preceding the date on which the decision of the CCS is taken, or if figures are not available for that business year, the one immediately preceding it: see *ibid.*, at paragraph 2.5. See also Competition (Financial Penalties) Order 2007, paragraph 3.

³⁹ CCS Decision, paragraph 371.

⁴⁰ *Ibid.*, paragraph 348.

⁴¹ *Ibid.*, paragraph 376.

⁴² *Ibid.*, paragraph 349. See also *Apex Asphalt and Paving Co. Ltd v Office of Fair Trading* [2005] CAT 4 at [278].

In applying any of the other relevant factors, the purpose of the CCS is to achieve the primary policy objective of deterring undertakings (including non-infringing undertakings) from engaging in anti-competitive practices, such as collusive tendering. In the *Agenda* case, the CCS specifically expressed its intention “*through its decision to raise awareness of competition issues in the procurement sector*”.⁴³ It added that

“collusive tendering is one of the most serious infringements of the Act, a cartel activity, which, by its secret nature, makes it difficult to detect and prove. Accordingly, it is necessary to effectively deter undertakings from engaging in collusive tendering by imposing an adequately-deterrent penalty that will send the appropriate message”.⁴⁴

In determining the appropriate level of penalty that will send the appropriate message, the CCS may take into consideration the size and financial position of the undertakings in question and any economic or financial benefit derived by the undertakings from the infringements.

In addition, there are aggravating and mitigating factors that the CCS will take into consideration. They include

* aggravating factors such as the role of the infringing undertaking concerned as a leader or an instigator of the infringement, the involvement of directors or senior management and repeated infringements by the same undertaking or other undertakings in the same group; and

* mitigating factors such as the infringing undertaking acting under pressure or duress, genuine uncertainty on the part of the undertaking as regards whether the agreement or conduct constituted an infringement and adequate steps taken to ensure avoidance or recurrence of anti-competitive practices (e.g. existence of any compliance programme).⁴⁵

In the *Agenda* case, the CCS adjusted the base amount upwards due to the direct involvement and knowledge of the directors and senior management of the AAAs as well as the fact that the infringements were repeated in a number of projects. Specifically, the CCS increased the penalty upwards by multiples of 10% for the AAAs which committed 2 or more infringements and by 50% for two of the AAAs which committed infringements in all 6 projects. Thankfully, all of them have their penalty reduced by varying amounts for cooperating with the CCS during the investigations.

⁴³ CCS Decision, paragraph 377.

⁴⁴ *Ibid.*, paragraph 378.

⁴⁵ CCS Guidelines on the Appropriate Amount of Penalty, paragraphs 2.11 and 2.12.

Conclusion

Competition law is a critical component in the Government's drive to create a more competitive market environment for businesses and consumers. The drive is effected through three central prohibitions in the Act:

(1) prohibition on agreements, decisions and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore (section 34(1));

(2) prohibition on abuse of dominant position in any market in Singapore (section 47(1));
and

(3) prohibition on mergers which have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore (section 54(1)).

The *Agenda* case illustrates the dangers of infringing any of these prohibitions, especially as the fines are relatively significant for some of the AAAs. It seems clear that through the case, the CCS has achieved its intention of raising "*awareness of competition issues in the procurement sector*". Its repercussions will be felt in other fields in the coming days.

It is also noticeable that efforts to promote competition and deter anti-competitive practices are gaining momentum in Singapore. There is now greater awareness of the Act and the authority of CCS to impose an open and more competitive environment. As at 31 March 2007, the CCS received 3 notifications for decision, 7 notifications for guidance and 14 complaints. The complaints mainly relate to anti-competitive agreements under section 34 and involved practices such as co-operation agreements between competitors, exclusive contracts, bundling of products and collusive tendering.⁴⁶ Its decisions include excluding the Qantas-British Airways Joint Services Agreement from the section 34 prohibition because of its net economic benefit. Doubtless, competition law is now deeply embedded in the legal landscape in Singapore.

⁴⁶ See CCS' Annual Report 2006/07, at page 15.



Further Information

Should you have any further queries, please do not hesitate to contact the Competition Department, Lee & Lee. The contact person is Tan Tee Jim S.C. at DID: +65 65574615 /email: tanteejim@leenlee.com.sg. You can also reach us by fax at +65 63241638.

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