

## CANBERRA AFFAIRS

### “Biggest TPA Reform in over 20 Years” – Bowen

On 26 June 2008, the Government introduced into Parliament the *Trade Practices Legislation Amendment Bill 2008*, described by the Minister for Competition Policy and Consumer Affairs, Chris Bowen as the “most significant reform of the Trade Practices Act in 22 years”.

The reforms aim to make it easier to prosecute businesses engaging in anti-competitive behaviour, give small business permanent representation on the ACCC, and allow small business to access cheaper and more efficient judicial processes.

#### *Predatory Pricing*

Predatory pricing is a form of misuse of market power, in which a powerful business prices its products below cost with a view to damaging a competitor. While many allegations of such conduct are made by small businesses, it has always been difficult to prove a breach.

Amendments to section 46 TPA will ensure that victims of alleged predatory pricing will not need to prove that the predator has the ability to recoup losses after participating in an anti-competitive below cost pricing strategy. This addresses the diversity of views in High Court cases as to whether recoupment is a necessary element of preda-

tory pricing. The Government wishes to make it clear that, while the ability to recoup losses may be a indicative of whether pricing is predatory, it will not be a necessary or determining factor.

The reforms will also clarify the meaning of the term ‘take advantage’ in section 46, in response to concerns raised by businesses and the ACCC that the present meaning of that term has limited its application.

The reform package will also remove the short-lived “Birdsville amendment”, enacted last year, which introduced a ‘two track’ process for predatory pricing matters. The ACCC said that the dual track process had “caused considerable confusion” because the processes focus on “fundamentally different concepts” of market power and market share.

#### *ACCC powers*

Courts have, in some cases, decided that once the ACCC has commenced proceedings in relation to a matter, it cannot issue a notice directed at investigating the same matter. The Government will amend section 155 TPA to enable the ACCC to use, or continue to use, its powers under that section after applying for an injunction to stop suspected breaches of the Act. It will also clarify that the ACCC may continue to utilise

such powers until it commences substantive proceedings.

#### *Unconscionable Conduct*

The Bill will remove the monetary threshold that applies to allegations of unconscionable conduct in business transactions. The Government considers this will enhance the protection of small business from transactions involving such things as undue influence. The current threshold is \$10 million.

#### *Small Business Representation and Access*

Small business will have a permanent voice in the ACCC, with a requirement for at least one ACCC Deputy Chairperson to have small business expertise. This measure is intended to improve the ACCC’s understanding of the special circumstances confronting small businesses and the difficulties they face in dealing with anti-competitive behaviour by more powerful businesses.

Significant cost savings for small and medium businesses are expected from a new access measure. The Bill will allow cases involving a misuse of market power to be heard in the Federal Magistrates Court rather than in the Federal Court, in appropriate circumstances.

*The Assistant Treasurer will write to the States and Territories seeking their approval for the proposed amendments.*

## AUTHORISATION & NOTIFICATION

### Waste Management in Central Queensland

The ACCC has granted interim authorisation to allow the Central Queensland Local Government Association (“CQLGA”) to run a tender process for the collection and processing of waste and recyclables from all residential premises in the areas of the Rockhampton, Gladstone, Central Highlands and Isaac Regional Councils.

This authorisation application resembles those lodged by six Sydney councils, reported in previous issues of this Update. Interim authorisation allows the parties to prepare tender documentation and invite tenders from interested parties. The protection also extends to evaluation of tenders and the negotiation of contracts, pending a final determination of the application.

The CQLGA considers that combining the catchment area of the four regional councils will create a sufficiently large population base to attract tenders to provide collection and processing services. This is the “public benefit” element of its case for protection against legal action for what would otherwise be anti-competitive conduct.

This application is a timely reminder to all Councils who wish to engage in co-operative action to address shared problems. If that action could be regarded as having the purpose, effect or likely effect of substantially lessening competition in a market, you may need to consider an authorisation application before proceeding.

### Ryobi-Bunnings

The ACCC’s review of exclusive dealing notifications lodged by Techtronic (suppliers of Ryobi power tools) and Bunnings concluded with a decision not to oppose the notifications. Bunnings will exclusively supply Ryobi products in its stores and other hardware stores will not be able to supply Ryobi equipment.

ACCC Chairman, Mr Graeme Samuel, said that ‘While Bunnings is a dominant retailer ... and Ryobi is a brand which a number of retailers have promoted over the years, there is not one power tool or power garden equipment brand which dominates the market. There are also a number of well established brands of power tools and power garden equipment which compete with Ryobi which non-Bunnings retailers’ supply.

## ACCC ENFORCEMENT SNIPPETS – PART IV

### Richard Pratt

On 20 June 2008 the ACCC began criminal proceedings against Mr Richard Pratt for allegedly providing false or misleading evidence in the course of an investigation. The proceedings relate to the ACCC’s investigation into alleged cartel conduct in the corrugated fibre-board packaging industry, and a number of examinations of Visy executives that culminated in civil proceedings against Visy and certain Visy executives.

The civil proceedings were settled with record penalties – see Update 26. In these criminal proceedings, the ACCC alleges

that Mr Pratt knowingly gave false or misleading evidence at his examination.

The decision to launch criminal proceedings against Mr Pratt has generated some controversy, and raises some interesting questions in relation to the ACCC’s case settlement policies and procedures. These issues have even greater relevance given that the Government has developed legislation that will introduce gaol terms as a sentencing option for cartel conduct of this kind.

### CFMEU and its members

In previous editions (23, 26) we reported on ACCC action against the Construction Forestry Mining and Energy Union (CFMEU), Bovis Lend Lease Limited and two individuals for allegedly engaging in conduct leading to a secondary boycott. We also noted the penalty of \$100,000 that Bovis Lend Lease accepted in November 2007 via a statement of agreed facts.

The Federal Court of Australia has now dismissed an application by the ACCC that the CFMEU and two of its members were accessories to the alleged contraventions. Justice Finn was “... not satisfied that the actual decision proposed by [Bovis’ employees] was other than one which resulted from their own evaluation – albeit in pressured circumstances – as to what was the appropriate course to take in the circumstances...” He was not satisfied that Bovis’ conduct towards Bernmar flowed from a contract, arrangement or understanding with the union and so dismissed the ACCC’s application.

## ACCC ENFORCEMENT SNIPPETS – PART V

### The Perils of Pricing

Over the past quarter, the ACCC's key consumer protection priority appears to have been two-price advertising: claims by retailers of savings available for particular purchases, by comparison to (for example) a previous higher price. The seven cases reported in this edition follow previous actions against JB Hi-Fi, Harris Scarfe – and many others. All these cases explore various aspects of "the truth" as it relates to price claims.

#### *Prouds the Jewellers*

The ACCC alleged that the advertising of certain jewellery items in Prouds' mass distribution catalogues published to coincide with Valentine's Day and Mother's Day in 2006 were misleading and deceptive.

The advertising was in the form of price comparisons such as "Was \$199 / Now \$99.50". The case related to the 'Was/Now' price advertising of 17 items.

Justice Moore concluded that the 'Was/Now' advertising conveyed to consumers that the jewellery items had been offered for sale for a reasonable period immediately before the catalogue promotion at the 'Was' price. He found that each of the 17 items had not in fact been offered at the 'Was' price in that period and concluded that the 'Was/Now' advertising of each of the items in both catalogues was misleading.

It is worth noting that although the ACCC was successful on this ground, its case failed on a

number of other grounds it had pleaded. In particular, it failed to satisfy the court that the "was" price should be viewed as the previous *selling* price – as opposed to an *offered* price – or that consumers would believe that a substantial number of sales had been made at the "was" price. The ACCC has decided to appeal against those aspects of the decision.

The Court ordered Prouds to undertake corrective advertising in newspapers and at point of sale, and to pay a proportion of the ACCC's costs. Prouds is appealing the costs decision.

Prouds had previously consented to orders that Prouds implement a trade practices law compliance program.

#### *Laura Ashley*

Between 2005 and 2007, Laura Ashley adopted a promotional strategy based on establishing a 'regular price' for a product line by launching the product in a limited number of stores for a limited time. Subsequent supply to all other stores Australia-wide and subsequent discounts all relied on the 'regular price' as the starting point for any discounts or sales. The reliance on the 'regular price' continued, in some instances, for over 12 months, notwithstanding that the product may not have been offered for sale anywhere in Australia at that price for periods of up to 12 months prior.

The ACCC accepted undertakings from Laura Ashley whereby it will review its pricing practices, undertake corrective advertising, and implement a compliance program.

ACCC Chairman, Mr Graeme Samuel, has reminded businesses that they need to ensure that any comparisons they make about prices are accurate.

"Two-price advertising, or comparison pricing as it is also known, is a very powerful selling technique because of its appeal to bargain-hunting consumers," he said. "Businesses planning to mark down goods need to be able to prove that the discounts being offered are a genuine saving and that the goods were readily available to consumers at the higher price, reasonably recently."

#### *Travelling Rugs*

Terania Pty Ltd and Australian Rug Expos Pty Ltd admitted that the 'was' prices they used for certain products sold at sales conducted at the Darwin Showgrounds and at EPIC, Canberra between 2005 and 2007 were false and misleading.

The two companies also admitted that their television advertising for the sales conducted in Darwin was misleading and deceptive regarding the duration and the clearance nature of the sales. They admitted they did not have reasonable grounds for making certain duration and clearance representations in numerous television advertisements.

The Federal Court found that the two companies engaged in false and misleading conduct. Justice Mansfield noted: 'It was likely to mislead the public ... into the belief that sale prices [for] particular goods will end at a specific time and so induce purchasing at or by that time rather than making a purchasing decision after reflection.'

## ACCC PART V ENFORCEMENT (cont'd)

### *Video Ezy*

In the lead up to Christmas 2007, Video Ezy's television advertising, and a supporting text message campaign, claimed "The cheapest price in Australia - Guaranteed" in relation to the sale of 5 popular DVD titles. Some of the advertising included for a brief period in the fine print "or we'll beat any lower advertised price by \$1". Each of these DVD titles could in fact be purchased elsewhere more cheaply.

The comparison in this case was not with Video Ezy's previous higher price, but with prices elsewhere in the market. Video Ezy acknowledged that consumers may have been misled by their price guarantee advertising, and offered partial refunds to its consumers.

The ACCC has accepted undertakings from Video Ezy, including that it will not make representations of this kind without including the prominent qualification "or we'll beat any lower advertised price by \$1". The company will also send and display corrective notices, ensure that its future national advertising is approved by a compliance officer, and will review and implement necessary changes to its compliance program

### *Urban Rhythm*

Urban Rhythm Furniture operates three retail outlets in Melbourne. Its in-store Christmas promotion priced furniture by reference to a two price structure (e.g. ~~\$2,240~~ \$1795).

The majority of the furniture items were discounted from a previous selling price. However a limited number of directly imported items, never previously sold by Urban Rhythm, were discounted from an estimated price, based on the likely retail price it would have charged consumers for those items had they been purchased from a local wholesale distributor.

The ACCC was concerned that the use of the same two-price representations for those limited items was misleading to consumers and unfair to other traders because the discount was based on an estimated rather than an actual historical selling price and this had not been conveyed to consumers.

### *Shepparton Cars*

Thompson Motor Group ran advertisements on the Prime television network, which showed large numbers of new vehicles parked in an allotment with the following voiceover:

"Here at Thompson Motor Group we have just secured a bulk deal direct from the manufacturers. .... I personally secured this deal and I guarantee it will save you money."

Thompsons had not purchased any Holden Commodore sedans or Holden Astras as part of the bulk deal referred to in the advertisement, so the advertisement was likely to mislead consumers. It gave a false impression that Thompsons had purchased large numbers of vehicles for a discounted price which would allow savings to be passed on to them.

### *Godfreys*

Godfreys is a franchisor and retailer of vacuum cleaners throughout Australia. In February 2007, it promoted a Nilfisk vacuum cleaner which was new to the Australian market and exclusively sold by Godfreys. In a catalogue distributed in Perth, Godfreys made the claim "\$124.50, NILFISK, HALF PRICE!", and displayed signs in stores to the same effect.

Godfreys acknowledged that half-price representations where the product has not previously been offered for sale may be misleading and deceptive. The ACCC accepted undertakings from Godfreys that it will refrain from referring to specific previous prices for goods where those goods have not been available from Godfreys prior to the promotion. It will publish and display corrective notices, and will establish and implement a compliance program.

Please direct queries about items in this publication to your Compliance Officer; or contact Greg d'Arville at *crgESSENTIALS*, on 0414 250025.

Acknowledgment is made to the ACCC for content in this bulletin.

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