

AUTHORISATIONS & NOTIFICATIONS

When is a flood not a flood?

Over the last quarter the ACCC has had to consider, then reconsider, an application for authorisation lodged by the Insurance Council of Australia (“ICA”) that sought to introduce a common definition of “inland flood” that would be adopted by a number of general insurers.

This is an especially interesting application because of a relatively unusual action by the ACCC. On 3 September, it announced its decision to reverse a Draft Determination, made in July, to allow the application.

The problem that the authorisation sought to address arises from reports that have identified consumer confusion about insurance cover for flood. Following several severe flood events, a need emerged to improve consumer understanding of what “inland flood” means and the extent to which a particular policy includes flood cover.

In response ICA developed a definition of inland flood which insurance companies could voluntarily adopt. But an agreement to adopt such a definition would have obvious anti-competitive elements. The industry therefore required the ACCC's authorisation before coming to such an agreement.

The proposed standard definition was:

Inland Flood is the covering of land that is not normally under water by:

- water that overflows or escapes from a naturally occurring or man made inland watercourse (such as a river, creek, canal or storm water channel) or a water pool (such as a lake, pond or dam), whether it is in its original state or it has been modified; or
- water released from a dam whether it be accidentally released or intentionally released to control, mitigate, regulate, or otherwise respond to excess water, or
- water that cannot drain or run off as a result of water that is overflowing or escaping from an inland watercourse or water pool preventing the escape of water.

In its Draft Determination, the ACCC recognised the proposal's potential to result in benefits to consumers, helping them to understand for what damage they are covered. But it set down conditions aimed at improving the transparency of the proposal and strengthening the ICA's proposed consumer education campaign.

Numerous submissions were subsequently lodged, from consumer bodies and others, raising concerns about the proposed definition and about the terminology chosen by the ICA. Some argued that the ICA's definition would in fact increase consumer confusion.

The ACCC was particularly concerned that the ICA definition of flood introduced a range of new concepts whose legal implications may not be clearly understood.

It also appears to have responded to serious doubts about the likely effectiveness of the ICA's proposed communications campaign.

Despite the denial of this application, all parties recognised the need for more certainty in this area. The decision does not prevent the insurance industry from seeking authorisation for a revised proposal in the future.

Councils' waste management

The interim authorisation granted to the Central Queensland Local Government Association (“CQLGA”), reported in our last edition, has now been finalised. The ACCC noted that “waste and recyclables service companies have been reluctant to tender for rural based contracts due to the low volume and the prohibitive transport costs. ... The joint tender is likely to result in the introduction of best practice kerbside recycling in the Council areas. Past experiences indicate that this will significantly improve collection amounts with resulting environmental benefits and cost savings through the diversion of waste from landfill.”

Meanwhile, a similar application by the Inner Sydney Waste Management Group of Councils has reached the Draft Determination stage. If granted, the authorisation will allow ISWMG members to jointly tender and contract for services to transfer, process and dispose of food and garden organic waste and to market and sell any end products in the relevant local government areas.

Once again we would like to remind those clients who plan co-operative action with neighbouring councils – in the waste management market or elsewhere – that such actions could be regarded as having the purpose, effect or likely effect of substantially lessening competition in a market. A successful authorisation application removes all risk of TPA enforcement action; and to this point, all reported applications of this type have been successful.

CN MATTERS

Pelican Point

In June 2008, VCEC published the report of its investigation of a Competitive Neutrality (CN) complaint concerning the operation by a Council of a mixed-use recreational facility called Pelican Point, the primary activity of which (aquatic recreation) is non-commercial. The VCEC report underlines the potential significance of the CN pricing guidelines it issued last year (reported in our Edition 27).

The complaint broadly concerned the Council's alleged failure to ascertain the true extent of the facility's operating

losses and to adjust prices accordingly. The complainant also alleged that Council did not consult with the community in an open and transparent process.

Pelican Park Recreation Centre, opened in 2003. The Council proposed that it should operate for a full financial year in order to establish if full cost reflective pricing was being applied to the business, but in 2006 found that the Centre required a subsidy if it was going to meet its public policy objectives. It then conducted a public interest test process which it believed would satisfy CN requirements.

VCEC noted that throughout this process the Council had adopted the *fully distributed costing* methodology, and had ascertained its notional cost/subsidy in this way. But, VCEC observed that "The *avoidable cost* approach could be used for allocation of costs that are considered fixed. ... Adopting this costing approach would reduce the allocation of some shared costs to commercial activities and thus the extent of their recorded costs, after [CN] adjustments."

This did not prevent an adverse finding against the Council, and recommendations that it review "estimated commercial rents" for the Centre, and the CN costing exercise itself. We note with interest that VCEC's third recommendation – that the Council conduct a public interest test – does not apply until after the first two have been implemented. It may be that after the application of the avoidable cost methodology, the public interest test may not be required after all.

ACCC ENFORCEMENT SNIPPETS – PART IV

Shepparton White Top Taxis

The ACCC has instituted proceedings against Shepparton's White Top Taxis Limited, its directors and a taxi driver. It alleges the three directors and the driver made and gave effect to a series of anti-competitive rostering arrangements, and sought to induce other taxi drivers and operators to abide by the arrangements.

Rostering arrangements are typically introduced by taxi companies with a view to orderly behaviour and "fairness". They are, however, inherently anti-competitive and the ACCC has acted against taxi companies who try to introduce them on numerous occasions in the past. We will report on developments in this matter as it proceeds.

Cement Australia: alleged misuse of market power

The ACCC has alleged two breaches of section 46 TPA (misuse of market power) by Cement Australia Pty Ltd, Pozzolan Enterprises Pty Ltd and two related companies. The allegations concern a contract to acquire flyash from a power station in south east Queensland.

Flyash is a by-product of burning black coal that can be used as a cheap partial substitute for cement in ready-mix concrete. The ACCC alleges that the companies had no commercial need for the flyash, and that their purpose was to prevent entry to and competitive conduct in the relevant concrete-grade flyash market.

ACCC ENFORCEMENT SNIPPETS (continued)

Given the difficulties of proving a relevant illegal purpose in misuse of market power actions, it will be interesting to observe the progress of this matter.

Baxter Healthcare decided

This bulletin has reported extensively on litigation associated with Baxter Healthcare's dealings with State purchasing authorities. The issue of relevance to councils in this matter was whether Crown Shield immunity extended to Baxter because of the involvement of States in the purchase transaction.

The dispute was ultimately decided by the High Court, which held that Baxter was subject to the Act and remitted the matter to the Full Federal Court for further consideration of the substantive issue, which concerned product bundling.

Baxter, the sole supplier of sterile fluids, had required State purchasing authorities to also purchase peritoneal dialysis products if they wished to get significantly lower prices. The court found that Baxter's purpose was to deter or prevent competitors from being competitive in the supply of peritoneal dialysis products, in contravention of section 46 of the Act (misuse of market power).

The court also found that the bundling of all sterile fluids and peritoneal dialysis products into long term exclusive contracts contravened the exclusive dealing provisions of the Act. The matter has now been remitted to a single judge to consider penalties and other relief.

ACCC ENFORCEMENT SNIPPETS – PART V

Consumer Issues in Telecommunications

Over the past quarter, the ACCC has taken enforcement action and issued consumer alerts in relation to various forms of deception in telecommunications marketing. This edition reports the highlights.

Premium Services

Mobile premium phone services – such as ring-tones, information services, wallpapers and the like – have emerged as a serious trap for the modern consumer. On 20 August the ACCC issued an alert in relation to such services, in which ACCC Chairman Graeme Samuel noted that "Television advertisements with small print disclosure and busy or distracting images and magazine advertisements featuring tiny print and confusing clutter mean that many consumers would not appreciate the significant ongoing costs they could incur by simply texting in to the number on the screen or in print. Many consumers have reported to the ACCC that they were not fully aware of the costs of the services until they received their first bill or found that they had used up all their pre-paid credit."

This followed action against the operator of a 'Text and Win' services whose advertisements allegedly failed to adequately disclose the costs and terms associated with the services.

The advertisements offered viewers a chance at winning a prize by texting in a response to a specified number. The ACCC

alleges that these advertisements failed to adequately disclose:

- that to be eligible for the prize, participants were required to pay a \$5 joining fee and respond to a maximum of 10 quiz questions at \$5 each
- participating in the quiz also resulted in the consumer signing up to a subscription quiz consisting of six SMS messages per month at the cost of \$5 each, and
- that prizes could not be awarded to residents of the ACT, Victoria and Queensland even though they would be charged for the service.

"Free" Services

A similar problem arose in relation to a service promoted as "free", ie the Domain mobile phone property listing search service operated by Fairfax Digital Australia and New Zealand Pty Ltd. Banner advertisements stated *Domain Goes mobile! Find your next home on your phone for free* and *Find your next home on your phone for free* when in fact users would incur charges by their telecommunications provider.

The ACCC was also concerned about claims that the service was free in circumstances where users would be charged 55 cents for each SMS alert. The charge was only later disclosed to consumers who visited the website.

Fairfax acknowledged the ACCC's concerns and provided enforceable undertakings to settle the matter.

ACCC ENFORCEMENT SNIPPETS – PART V

Employment Scams

There remain a number of operators in the marketplace who are willing to extract large sums of money from vulnerable work seekers while offering little or nothing in return. Over the past quarter, unscrupulous strategies that target backpackers and small trades businesses have come to ACCC attention.

In July the ACCC launched proceedings against ATS All Trades and Services Pty Ltd, its director and an employee, for allegedly making misleading representations regarding the quality and nature of job opportunities provided to members, the availability of discounts to members and the provision of a webpage that would be displayed after conducting a Google search.

But an action against Mr Richard Alexander Roberson, alleging breaches of a court enforceable undertaking, promises to be even more serious. In May-October 2007, Mr Roberson, trading as Backpacker Employment Services, published advertisements offering fruit picking jobs in New South Wales and Queensland. Mr Roberson represented that he could guarantee supply of such jobs to unemployed persons on condition that they pay a subscription of \$50 for six months' or \$100 for 12 months'.

But Mr Roberson had no reasonable grounds for representing that he could offer the specified fruit picking jobs, or for representing that he could guar-

antee employment for the duration of a subscription period.

To settle this matter, Mr Roberson offered a section 87B Undertaking. The ACCC now alleges that he failed to comply with a number of terms of the undertaking, including that he:

- publish consumer notices in two newspapers
- write to affected consumers offering refunds to them
- attend trade practices compliance training, and
- implement a complaints handling system.

We will report on both these matters in future editions.

Safety/ Information Standards

The ACCC continues to be active in the enforcement of prescribed consumer product safety and information standards, and of accurate labelling generally. The last few months have seen action against:

- Aldo Australia – sunglasses
- Living Momentum P/L and Hercules Iron – bunk beds (*note- Hercules charged with contempt*)
- Ezibuy – fabric labelling
- Xport Investments – child restraints
- Cotton On – lambskin labelling
- Austrimi – calamari
- Raktos – tobacco

“Green” claims

As reported in previous editions, the ACCC is acting on a stated priority in its pursuit of alleged “greenwashing”, ie misleading environmental claims. Federal Court action against

General Motors Holden (“GMH”), the Australian licensee of Saab, in connection with its *Grrrreen* campaign, ended with declarations, cost orders and a GMH promise to plant 12,500 trees.

But in the same area we are delighted to present another spectacular entry in the *What were they thinking?* file. This was the *Racing Green Program* announced by V8 Supercars Australia. The program involved planting 10,000 native trees to fully offset the carbon emissions from the V8 Championship Series, including emissions from the races themselves, transport of the racing teams, air travel to the events and other activities.

Problem? It would take decades for these trees to absorb the emissions from even one year's racing. The matter was settled by way of enforceable undertakings, and the promoters should consider themselves lucky.

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 and VCEC for content in this bulletin.

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