

CANBERRA AFFAIRS

Clarity in Pricing Amendment

On 12 November, Parliament passed an amendment to the TPA relating to the use of component pricing in representations by businesses to consumers. Assistant Treasurer Chris Bowen claimed that "The *Clarity in Pricing* legislation will see an end to the practice of certain retailers who relegate compulsory charges or taxes to the fine print and mislead the consumer on the total price of a product."

Component pricing involves advertising prices as the sum of multiple parts. It can create an impression that a product is being offered for sale at a lower price than it actually is.

In effect this amendment extends the former "full cash price" requirement. It prohibits corporations from using a component price when making a representation as to the price of a good or service without also prominently specifying the single figure price a consumer must pay to obtain the product or service. For this rule to apply, the single figure price must be quantifiable at the time of making the representation.

These limitations on the use of component pricing will not apply to representations made exclusively by businesses to other businesses or governments.

Immunity Arrangements for Cartel Whistleblowers

In preparation for the upcoming criminalisation of cartel conduct in Australia, the ACCC and Commonwealth Director of the Public Prosecutions (CDPP) issued a Memorandum of Understanding (MOU) between the agencies together with a number of documents addressing immunity issues. The MOU and associated documents will come into effect when amendments to the Act receive Royal Assent and before the commencement of the new offences.

The ACCC issued its revised Immunity Policy and Guidelines, while the CDPP issued an Annexure to the *Prosecution Policy of the Commonwealth*. The latter outlines the policy of the CDPP in considering an application for immunity from prosecution by a person implicated in a serious cartel offence. The CDPP will apply the same criteria as the ACCC when considering a recommendation by the ACCC that an applicant be granted immunity.

Under the ACCC Guidelines, a corporation will be eligible for conditional immunity from ACCC initiated civil proceedings where it applies for immunity and satisfies the following conditions:

(i) the corporation is or was a party to a cartel

(ii) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the TPA

(iii) the corporation is the first person to apply for immunity in respect of the cartel under this policy

(iv) the corporation has not coerced others to participate in the cartel and was not the clear leader in the cartel

(v) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel

(vi) the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives)

(vii) the corporation undertakes to provide full disclosure and cooperation to the ACCC and

Similar conditions will apply to an individual applicant. In respect of both individuals and companies, immunity is not available if, at the time of the application, the ACCC has received written legal advice that it has sufficient evidence to commence proceedings in respect of the cartel.

In the case of a corporate applicant, a grant of immunity may extend to providing derivative immunity to its officers and employees.

Cartels and Immunity (continued)

The rules surrounding ACCC immunity grants have come under scrutiny following recent courtroom revelations. The case at issue is the pursuit of criminal penalties against Richard Pratt for his alleged misleading of the ACCC during an investigation of the Visy/Amcors cardboard box cartel. Mr Pratt's lawyers claim that the ACCC has abused its power and not acted in good faith, and that ACCC executives conspired to trap Pratt into making certain admissions to the court and then breached an agreement not to use the admissions against him.

With that in mind it is interesting to review the term "final immunity" as used in the ACCC Immunity Policy, ie:

20. Subject to the individual meeting the requirements of the policy, the ACCC will grant to the applicant final immunity after the resolution of any proceedings against cartel participants for conduct in relation to the cartel. In certain circumstances and at its discretion, the ACCC may grant final immunity at an earlier stage.
21. If, after the conditional immunity or final immunity, the ACCC forms the view on reasonable grounds that the applicant does or did not satisfy the conditions for immunity or conditional immunity referred to in paragraphs 17 and 19, it may revoke the granting of conditional immunity or final immunity.

In other words, "final" means whatever the regulator thinks it should mean – but it certainly doesn't mean "the end". It will be interesting to see what this attitude does to the flow of immunity seekers.

CN MATTERS

VCEC Annual Report

The Victorian Competition and Efficiency Commission released its 2008 Annual Report in October, and its Competitive Neutrality chapter noted that "No new complaints were lodged in 2007-08, making it the first year in which a competitive neutrality complaint had not been lodged following release of the Competitive Neutrality Policy Victoria in 2000."

This does not mean that the CN Unit was idle. The Commission received 14 queries from private businesses and their representatives during 2007-08 – this number was also considerably lower than in previous years.

There are several possible explanations for the diminution of complaints and inquiries. VCEC suggests as possibilities: high levels of compliance with CN policy by government entities; limited awareness of CN policy and complaint processes amongst private businesses; or broader market conditions.

The VCEC Report noted the unique status of the complaint in relation to Pelican Point facility (reported in our previous edition): that the complaint had been lodged by a community organisation, not a competitor.

VCEC noted that "The complainant's interest in pursuing a competitive neutrality complaint was different to that of a private business. The interest of a private business can broadly be thought of as seeking a fair competitive environment with public entities. The interest of the community association was

concerned with council decision-making relating to efficient resource allocation. While the two interests or motivations are different, both are consistent with the objective of competitive neutrality: the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities."

The CN Unit also kept an eye on the implementation of its recommendations by the subjects of previous year complaints, many of them reported in earlier editions of the Update.

AUTHORISATIONS & NOTIFICATIONS

Food & garden waste

As reported in the last Update, the Inner Sydney Waste Management Group of Councils sought authorisation for joint tender and contract arrangements relating to transfer, processing and disposal of food and garden organic waste in its members' areas (ie Ashfield, Auburn, Burwood, Canada Bay, Leichhardt and Strathfield.)

In exploring possibilities for a new alternative waste technology facility in the Inner Sydney region, the group aims to meet the NSW Government's Waste Avoidance and Resource Recovery targets and minimise its landfill disposal fees by diverting waste from landfill.

The ACCC granted the authorisation on 31 October, having identified public benefits (in the form of efficiency gains in the provision of waste management services) that outweighed any ant-competitive detriments.

ACCC ENFORCEMENT SNIPPETS – PART IV

Air Freight Cartel

Over this quarter the ACCC obtained consent orders in respect of two airlines (BA and Qantas), while initiating court action against another (Singapore Airlines). All three cases flow from the exposure of anti-competitive agreements in the market for air freight.

The conduct first became public following coordinated raids of premises located in Europe and the USA in February 2006. Overseas regulators have brought a number of actions while the US Department of Justice has reached settlements with a number of airlines.

Total fines imposed in the USA so far amount to more than \$US1.2 billion. Some examples:

- British Airways – \$US300 million (plus £121.5 million to UK authorities)
- Korean Air Lines – \$US300 million
- Qantas Airways – \$US61 million
- Japan Airlines – \$US110 million

On 11 December, the Federal Court ordered Qantas to pay \$20 million in pecuniary penalties for breaching the price fixing provisions. Qantas admitted making and giving effect to an understanding with other airlines in relation to the imposition of fuel surcharges on air cargo. It was part of repeated assurance exchanges amongst airlines in the implementation of fuel surcharge increases.

Qantas made extensive admissions and joined with the ACCC in making recommendations to the court as to the penalty and other orders. Justice Lindgren also made orders restraining Qantas from engaging in similar conduct for three years.

On the same day, British Airways was ordered to pay \$5 million in penalties for reaching an understanding with Lufthansa in relation to the imposition of fuel surcharges. It admitted arriving at an illegal understanding with Lufthansa providing for the exchange of information relating to a fuel surcharge on international air cargo services.

The conclusion of the ACCC actions does not end the matter for Qantas or British Airways, which face class actions by customers here and abroad.

In February 2007, a class action proceeding was served on seven groups of respondent airlines including Qantas, Lufthansa, Singapore Airlines, Cathay Pacific, Air New Zealand, JAL and British Airways. The measure of damages will be the difference between the prices actually paid over the period of the cartel and the prices that would have been paid in an otherwise competitive market.

Meanwhile, Singapore Airlines has vowed to defend proceedings launched by the ACCC on 22 December. The ACCC alleges that Singapore Airlines Cargo Pte Ltd entered into arrangements or understandings with other cargo carriers that had the purpose or effect of fixing the price of surcharges applied to air cargo carried to and from Australia.

The ACCC seeks declarations, injunctions, penalties, and costs.

Bill Express 3rd line forcing

The ACCC instituted legal proceedings against Bill Express Limited (BXP) and Technology Business International Pty Ltd, both of which are in liquidation, for alleged TPA contraventions in relation to a failed electronic product distribution, promotion, sales and bill payment network.

The companies offered to supply electronic products and services under a Merchant Agreement with BXP, on condition that the businesses acquire different services from Technology Business International. The ACCC considers this to be third line forcing.

Between 3500 and 4500 merchants entered Equipment Rental Agreements as a consequence of the alleged third line forcing. The ACCC also alleges that in the process of signing businesses up as merchants, the companies engaged in misleading or deceptive conduct.

The rights of Technology Business International to receive payment of the monthly rental fee paid by merchants have been assigned to BNY Trust. Although the system is no longer operational, BNY and its agents have continued to demand and debit payment of the equipment rental fee of approximately \$550 per month.

The ACCC's action includes a representative action pursuant to section 87(1B) of the Act on behalf of two merchants. We will follow these proceedings with interest in future editions.

ACCC ENFORCEMENT SNIPPETS – PART V

Made in Australia

Two traders have admitted misleading and deceptive conduct involving claims of Australian origin over the past quarter. Both companies settled their cases with Undertakings including promises to implement trade practices compliance programs.

Creswick Woollen Mills

Creswick Woollen Mills, based near Ballarat, has admitted making false *Australian Made* claims for its premium merino wool blankets for the past three years. The blanket material was spun and woven in China, with only the cutting and sewing done in Australia.

Under the Act, goods can only be described as being of Australian origin if they were substantially transformed in Australia, and at least 50 per cent of the costs of manufacturing the goods were incurred in Australia. The company acknowledged that substantial transformation of its merino wool blankets did not take place in Australia.

Creswick's false claims included use of the official *Australian Made* logo, which is licensed by Australian Made Campaign Limited (AMCL). AMCL requires licensees to fully comply with TPA country of origin requirements when displaying the logo.

Creswick agreed to publish a corrective notice in major daily newspapers and on its website, and to compensate consumers who purchased the blankets.

Jeune International

This cosmetics and therapeutic goods supplier admitted using the *Australian Made* logo without permission from AMCL.

Jeune has since obtained approval from the AMCL to use the logo on its products.

Conman gets 10 months

The Federal Court sentenced Mr Bon Levi, one of Australia's most notorious conmen, to 10 months' imprisonment, with 6 months suspended, after a successful prosecution for five counts of contempt of court.

Mr Levi has a long history of defrauding Australians by setting up bogus franchises and businesses that he sells on the promise of guaranteed future earnings.

After ACCC action in 2005, the Court made orders to protect members of the public. Those orders required Mr Levi to provide written disclosure about his history, past aliases and previous TPA breaches before accepting payment for any business opportunity or franchise.

The contempt of court proceedings relate to businesses sold in defiance of the Federal Court's orders, including Little Joe Snax snack foods, LPG conversions and Bikini Girls Massage businesses. In return for \$36,000 to \$66,000, Mr Levi promised to set up the businesses and pay guaranteed weekly incomes. None of these businesses were ever established and, as a result, consumers lost all their money.

On 13 June 2007, the ACCC commenced action for contempt of court. Mr Levi delayed the proceedings by claiming that he could not afford a lawyer to represent him. Immediately prior to the hearing Mr Levi had committed a further contempt of court by selling a Bikini Girls Massage business for \$66,000.

On 14 February 2008, Justice Siopis dismissed Mr Levi's application and ordered that Mr Levi stand trial in June 2008. A further attempt by Mr Levi to delay the trial was dismissed and described by Justice Siopis as a strategy by Mr Levi to delay the commencement of his trial for as long as possible. Mr Levi pleaded guilty to five contempt counts shortly before the trial was to commence.

Aliases previously used by Mr Levi include: Ronald Frederick Heelan, Ronald Frederick, Roddy Farrow, Brett Wyatt, Ronald White and Randy the Wrecker.

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

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