

CANBERRA AFFAIRS

An Australian Consumer Law

Following a Productivity Commission review of Australia's consumer policy framework, the Council of Australian Governments (COAG) agreed to a new consumer policy framework. It consists of a single national consumer law and streamlined enforcement arrangements.

On 17 February, Treasury released a Consultation Paper to inform the public about the reform process and about the detail of COAG's agreed reforms. The paper also outlines suggestions as to how the TPA could be augmented by incorporating additional provisions based on agreed best practice from state and territory legislation.

Interested parties were invited to submit comments, and 84 submissions have been received. Many submissions were critical of certain aspects, especially proposals for the expansion of the ACCC's enforcement powers. But it is clear that the Government intends to "fast-track" this reform; it aims to have the scheme in operation by 31 December 2010.

In this edition we provide a short summary of the key proposals. The full paper and all non-confidential submissions can be found at

www.treasury.gov.au

The new law

A new national consumer law, to be called the *Australian Consumer Law*, will be implemented based on the existing consumer protection provisions of the TPA. It will be enacted via an "application law" scheme: the Australian Government acts as lead legislator and other jurisdictions apply the national consumer law as part of their own laws. The new law will apply to all consumer transactions, including financial services, with ASIC retaining its role as primary financial services regulator.

New provisions

While the new law will be based on existing TPA provisions, the government also aims to "explore options for augmentations and modifications to existing generic consumer protections which are based on best practice in existing state and territory laws." COAG has already signed off on one such augmentation, ie to include a national prohibition of unfair contract terms along the lines of Victoria's existing prohibition.

While COAG appears united on this issue, it is very controversial with a number of submissions strongly opposed.

Another provision that has been agreed is really a transfer of powers: responsibility for en-

forcing the consumer product safety provisions in all jurisdictions will be transferred to the Australian Government and undertaken by the ACCC.

Powers and penalties

The new law would incorporate a range of new enforcement powers and remedies, including:

- civil pecuniary penalties
- disqualification orders
- substantiation notices
- infringement notices
- public warning ('naming and shaming') powers
- redress for non-parties.

Civil pecuniary penalties are seen as desirable in order to fill a perceived gap. Currently, criminal sanctions act as a deterrent against the most serious misconduct, and civil remedies achieve timely outcomes for consumers; but there is a wide range of conduct which could be more proportionately penalised through civil penalties.

Disqualification orders restrict participation in specific activities for specific periods of time, eg managing corporations or undertaking specific business conduct. They would provide a serious deterrent without the graver consequences of a criminal conviction.

An Australian Consumer Law (continued)

The power to issue a *substantiation notice* allows a regulator to require a supplier to provide a basis for representations that it makes regarding its supply of goods and services. A *public warning* power allows regulators to inform the public of potentially harmful conduct taking place in the very short term. Both these powers exist in various forms in a number of jurisdictions, and the intent is to ensure that they are framed and applied consistently.

The proposal to introduce an *infringement notice* system is highly controversial, with numerous submissions opposed – including this writer's. Under this proposal the regulator could issue notices that are prima facie evidence of guilt, with a pecuniary penalty attached. Failure to comply with an infringement notice may have consequences for the recipient including possible further action by the regulator.

We acknowledge the argument for such a system in relation to issues such as product safety. But the suggestion that a "parking ticket" approach can be applied to allegedly misleading conduct is quite disturbing.

The *non-party redress* proposal aims to improve the ability of the courts to respond to situations where a large number of consumers are affected by a contravention of the consumer law. Redress would be available when a number of consumers suffer similar detriments.

AUTHORISATIONS & NOTIFICATIONS

Collective bargaining

The ACCC has dealt with several collective bargaining issues of late, including the following:

- independent record labels offering joint licences to broadcasters
- Catholic health facilities dealing with health funds
- newsagents dealing with newspaper and magazine publishers/ distributors
- Wizard Home Loans franchisees negotiating with Aussie Home Loans and GE Money
- chicken growers dealing with Inghams
- owner-drivers contracting with earthmoving companies.

In some of these cases, the mechanism was an *authorisation* application. In others, the parties had lodged a *notification* with the ACCC. This gives the same legal protection as authorisation without the need for a formal determination, unless the ACCC decides to oppose it.

The issues are essentially the same regardless of the mechanism. The notification process is, however, seen as simpler and more affordable for small businesses; this was the main reason for its introduction.

In the case of the independent record labels, the ACCC was able to issue its decision on the arrangements in under 4 weeks.

ACCC Chairman Graeme Samuel said "This process offers a more affordable and streamlined approach for small business to gain approval to get together to collectively bargain with a larger supplier or acquirer of goods and services."

The same course was followed by a group of franchisees of Wizard Home Loans as they set about negotiating new franchise agreements.

18 chicken growers in South Australia obtained notification protection for their collectively dealings with Inghams Enterprises. In that instance Mr Samuel commented that "This will allow growers to achieve more balanced and mutually beneficial commercial outcomes which may also result in transaction cost savings."

Exclusive now, compete later

Two authorisations have been granted – to Stadium Australia and Woolworths respectively – that allow a period of non-competition in order to establish new technology that may generate greater future competition.

Both applications concerned "contactless" payment systems. The Woolworths Everyday Money Credit Card will be the only payment option at Woolworths' new contactless pay at pump facility until August 2010. Similarly, the Visa pay-Wave card will for three years be the only contactless payment service at ANZ Stadium.

In both instances the applicants successfully argued that the technological advance would not be viable without a period of exclusivity.

ACCC ENFORCEMENT SNIPPETS – PART IV

Shepparton White Top Taxis

ACCC action against Shepparton's White Top Taxis Limited, its directors and a taxi driver – reported in Edition 29 – have concluded. The Federal Court found that an anti-competitive roster system has operated in the taxi industry in Shepparton for many years and ordered total penalties of \$77,000.

The system divided work between all vehicles by allocating each vehicle a rotating weekly shift of hours. The court was told that the roster had both a roster on and roster off purpose. The roster on provision provided for a taxi to operate at a time of low demand and to ensure availability of a service; however the roster off provision had the purpose of limiting the number of taxis at higher demand times. The penalties reflect the seriousness of the conduct whilst recognising mitigating circumstances, such as the dual purpose noted above.

ACCC Chairman Graeme Samuel noted that whilst some in the industry may wish to describe such arrangements as 'gentlemen's agreements', they are illegal and have previously been identified as such by the ACCC.

More airlines penalised for price fixing

The international air freight cartel continues to be prominent in the Court and the press. Another four airlines received penalties of \$16 million for their involvement in the fuel sur-

charge conspiracy that operated between early 2003 and 2006.

Air France and *KLM* admitted to illegal price fixing understandings with Lufthansa, repeatedly exchanging assurances with Lufthansa in the implementation of fuel surcharge increases for carriage of air cargo.

Martinair admitted to illegal price fixing understandings with KLM and Cargolux. They would have discussions and exchange and confirm information with each other in relation to the application of fuel surcharges on cargo.

Cargolux admitted to illegal price fixing understandings with each of Lufthansa, Air France and KLM that each of them would impose a fuel surcharge on cargo, except where local conditions prevented the full imposition of the surcharge).

If we add these penalties to those recently ordered against Qantas and British Airways, the total penalties incurred in Australia by this illegal cartel amount to \$41 million. And it's not over yet. Cooperating parties are continuing to assist the ACCC's ongoing investigations with a view to further action against other airlines.

BUSHFIRE RELIEF

PCA will donate up to ten days of TPA training services to the bushfire relief effort. Councils in fire affected areas will pay nothing for TPA training; fees paid by other Councils will go directly to the Red Cross. Book now through John de la Rue.

ACCC ENFORCEMENT SNIPPETS – PART V

Telcos still in spotlight

This quarter saw two major speeches and a number of enforcement actions as the ACCC continues to strive to clean up this difficult industry.

TPG Internet

TPG Internet Pty Ltd gave an enforceable undertaking to the ACCC after an investigation of advertising for its Unlimited Cap Saver mobile phone plan.

TPG Internet Pty Ltd published The advertisements appeared on television, in newspapers and on billboards across Australia between September and December 2008, and stated that the plan:

- included unlimited calls and text for \$59.99 per month when there were multiple exclusions to the plan
- was available for only \$59.99 per month when the minimum charge for was actually \$79.99 (due to an additional \$20 SIM card fee payable on registration).

Tel.Pacific

The Federal Court made declarations and orders by consent against Tel.Pacific after the company misled and deceived consumers over its international pre-paid phone card products,.

Tel.Pacific represented that the cards would provide callers with a specific amount of call time; but this time could not be ordinarily achieved because of undisclosed fees and charges.

ACCC ENFORCEMENT SNIPPETS (continued)

Tel.Pacific also represented that no fees, other than timed call charges, would apply to certain phone card products when that was not so.

Mr Samuel said companies must be transparent in the way they advertise their products. "Where companies use complex pricing models that require consumers to undertake significant inquiries to understand what they are purchasing, as pre-paid phone card suppliers do, they run a high risk of contravening the Trade Practices Act."

Ads in youth magazines

Action has commenced against two overseas based companies for alleged misleading advertising of mobile telephone premium services in Australian youth magazines. The services include wallpapers, ring-tones, and games supplied through a mobile telephone or landline.

Of more practical value, however, may be the enforceable undertakings provided by the Australian publishers of the youth magazines: Pacific Magazines, the publisher of *Girlfriend* and *TV Hits*, and ACP Magazines, the publisher of *Dolly*, *Cosmopolitan* and *Cleo*.

The ACCC was concerned by the attractive and busy layout of some advertisements, combined with what it saw as inadequate and inappropriate use of fine print disclaimers. Young consumers responding to the advertisements might unknowingly be subscribing to a costly ongo-

ing service rather than making a one-off purchase.

The undertakings require that advertisements for mobile premium services published in magazines targeted at young readers clearly state:

- that the service is a subscription service
- the cost of the service
- the eligibility of consumers to receive the benefit of the services.

Meanwhile legal proceedings have been instituted against AMV Holdings Limited, a UK company, and Teracomm Limited, a Bulgarian company.

Misleading price claims

Ascot Four (Zamels)

Federal Court action against the former owner of retail jeweller Zamels has concluded with the imposition of \$380,000 in penalties and a costs award. Ascot Four was found to have falsely represented that the purchase of each of the 11 items during the sale period would have resulted in a saving of the difference between the sale price and a strike through price. Ascot Four has lodged an appeal.

Harris Scarfe

Harris Scarfe Australia Pty Ltd misled consumers by representing in a catalogue that certain advertised items were discounted by a specific amount when in fact they were discounted by less than that amount, or not at all. The Federal Court ordered that Harris Scarfe be restrained from such conduct and to maintain its

compliance program for a period of three years.

Dumbest deception 2009?

The ACCC has accepted court enforceable undertakings from Stamford Hotels Pty Ltd over a misleading representation made by a former employee. The company owns and operates the Stamford Grand North Ryde Hotel, which is part of a chain of hotels and resorts in Australia and New Zealand known as Stamford Hotels and Resorts.

In April 2008 the then General Manager of the hotel, made a representation to a guest – had made a complaint about the hotel's advertising – that the advertising had been cleared by the ACCC. Stamford Hotels has now acknowledged that the ACCC does not clear the advertising of traders as part of its functions, and that it contravened the TPA through its former employee's representation.

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 Treasury for content in this bulletin.

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