

### CARTEL ACTIONS

The last quarter has seen an upsurge in visible ACCC activity around alleged cartel activity (price fixing and market sharing). Not all of it has been successful, as the following stories illustrate. But some key themes are emerging, especially the growing level of international co-operation in "cartel-busting" enforcement activity.

#### Marine hoses

On June 1 the ACCC instituted proceedings alleging that four global manufacturers of marine hoses conspired to avoid competition in tender processes led by major oil companies such as ExxonMobil, Woodside Petroleum, and BHP Billiton.

The alleged pact came to light in the course of a British court action, after which three executives were jailed. Four manufacturers are being sued over their Australian trading activities: Bridgestone Corporation of Japan, Dunlop Oil and Marine of Britain, Parker ITR of Italy and Trelleborg Industrie of France.

Court filings outline a series of meetings over ten years, beginning with a London meeting where manufacturers allegedly agreed to co-ordinate prices and not to compete against a "champion" which, it was agreed, would win the tender.

Subsequent meetings in Bangkok and Miami confirmed the illegal commitments they had allegedly made. In emails, faxes and other documents cited by the ACCC, the marine hose suppliers agreed that if they were asked to submit a competing quote they would suggest a figure above what the "champion" had offered.

#### More air freight matters

The ACCC has now instituted proceedings against Cathay Pacific Airways Ltd, alleging that between 2000 and 2006, the company entered into over 70 arrangements or understandings with other carriers that had the purpose or effect of fixing the price of a fuel surcharge, a security surcharge and rates that were applied to air cargo carried by Cathay Pacific Airways Ltd and other airlines. The ACCC alleges that the arrangements or understandings were reached in a range of countries including Singapore, Indonesia, Hong Kong, United Arab Emirates, India, Japan and Italy.

These allegations follow a series of air freight matters reported in previous Updates, involving Qantas, British Airways, KLM and many others.

Meanwhile, a Federal Court challenge by two of the airlines – Singapore Airlines and Emirates – to the ACCC's power to demand information and docu-

ments under section 155 TPA has failed.

ACCC Chairman, Mr Graeme Samuel, welcomed the decision, saying that "The ability to compel production of documents and information in relation to cartel investigations is an essential part of protecting Australian consumers. Arguments that we cannot investigate cartels formed outside Australia affecting Australians, or that the market in which goods are carried to Australia is not one to which the Act applies, are against the objects of the Act and the welfare of Australians."

#### Patrick-P&O settlement

The ACCC has abandoned claims that rival stevedores P&O and Patricks engaged in price fixing and collusive conduct in the market for port unloading services.

The two companies have, however, agreed to pay a penalty of \$1.9 million in relation to lesser offences. They admitted that their agreement to share facilities and to jointly acquire others *could have* led to a lessening of competition, and that they should have applied to the regulator for authorisation. But they refused to concede the deal *actually harmed* competition.

All the senior executives named in the lawsuit have escaped censure or fines.

**CARTEL ACTIONS (contd)****Australian Karting Association (NSW)**

The ACCC has instituted legal proceedings against the Australian Karting Association (NSW) Inc (AKA) and various AKA clubs and officers in relation to an agreement allegedly made at the AKA's annual general meeting in July 2008.

It is alleged that the clubs agreed to charge minimum fees for the hire of their circuits to non-AKA operators, with all negotiations for circuit hire to be conducted by the AKA.

This case illustrates the important point that you don't have to be an international airline or major listed company to fall foul of the price fixing provisions. Regardless of the outcome of the case, this must be a daunting experience for this small enterprise and the two officers that the ACCC claims were "knowingly concerned" in the making of the agreement.

The case continues on 24 July.

**DRS C3 Systems**

On June 22 the ACCC instituted proceedings against DRS C3 Systems alleging that DRS had agreed with another company that DRS would withdraw from a proposed procurement of an air combat manoeuvring instrumentation system by the Commonwealth of Australia.

The ACCC alleges that this agreement amounted to a market sharing agreement, and seeks various orders including declaration, injunctions, penalties and costs.

**ACCC ENFORCEMENT – OTHER PART IV CASES****Cabcharge Australia**

Cabcharge is well known as a supplier of services to the taxi industry including payment products, processing services, meters, and dispatch services. The ACCC has launched proceedings in the Federal Court alleging a range of breaches of the TPA by Cabcharge.

Among these allegations is a claim that Cabcharge used its market power to supply a significant number of taxi meters and fare schedule updates either free of charge or below cost for anti-competitive purposes. It is also alleged that Cabcharge entered into an arrangement with Townsville Taxis to acquire its charge account business and EFTPOS terminals, and replace these with Cabcharge terminals.

The ACCC alleges breaches of sections 45 and 46 TPA. It seeks declarations that Cabcharge's conduct contravened the Act, findings of fact, pecuniary penalties and costs.

**Janome RPM**

Janome Australia is a wholesaler of sewing machines, overlockers and associated products. The company and its managing director admitted engaging in resale price maintenance when they sought to impose a Minimum Advertised Price Policy on Janome retailers.

Lucky to escape penalty, Janome undertook not to engage in such conduct in future and published an instructive article in *Australian Stitches* magazine.

**ACCC ENFORCEMENT – UNCONSCIONABLE CONDUCT****Craftmatic Australia**

Craftmatic Australia Pty Ltd, a door to door seller of adjustable beds, agreed to court declarations and injunctions against it for acting unconscionably towards senior citizens. The company admitted that it misled and deceived elderly consumers and subjected them to unfair pressure to buy a bed.

From 2005 to June 2008, the company persuaded many elderly people to agree to a home presentation by one of its sales representatives. An elaborate sales process was then used to drive bed purchases that in some cases amounted to more than \$10,000.

Craftmatic's sneaky tactics included:

- on initial contact Craftmatic reassured the consumer, saying that the purpose of the contact was not to sell them anything, but that they could win a free bed
- consumers were advised that the presentation would only take up to an hour, but most took between two and three hours
- representatives would bring a cake or pot plant as a gift before asking questions, purportedly to assist the sales representative to reach a recommendation of which model of bed would best suit the consumer's needs, even though Craftmatic only had one model of bed . and every consumer was recommended that bed

**UNCONSCIONABLE CONDUCT****Craftmatic (cont'd)**

- reluctant consumers would be offered what were described as 'special discounts' only available that day – again this was not the case, and discounts were offered to every consumer who resisted
- sales representatives were taught not to accept no for an answer and where the consumer said they could not afford a bed would seek to sell on credit
- consumers were encouraged to buy even if they said that they wanted to check with their son or daughter before deciding.

The ACCC says some complainants only agreed to buy a bed because they were put under so much pressure and they felt that making the purchase was the only way to get the representatives to leave.

Acting Chairman of the ACCC, Mr Peter Kell, said that "Businesses need to be extra mindful to ensure appropriate conduct with any door to door sales. This is particularly true when dealing with elderly citizens who may be vulnerable to high pressure selling techniques."

The ACCC also took action against two individuals, Mr Wayne Lugg (an ex-sales representative) and Mr Ashley Day (an ex-director and part owner). Mr Lugg has consented to declarations and injunctions against him, while proceedings against Mr Day for misleading and deceptive conduct and unconscionable conduct continue.

**Dukemaster Pty Ltd**

Dukemaster is a landlord in the Paramount Centre, Bourke St, and its behaviour towards four tenants has been found unconscionable by the Federal Court. The company and the general manager of the Paramount Centre were ordered to pay over \$275,000 in compensation.

The tenants involved were small business owners with little ability to speak or read English. Dukemaster was aware of this when it claimed that proposed rental amounts were reasonable and below market value. This was not the case; in fact there was no basis for Dukemaster to seek the amounts stated. Dukemaster then imposed a very short time frame for the tenants to respond, without justification or explanation.

Justice Michelle Gordon stated that, in relation to one tenant, what had occurred was not a negotiation but an ultimatum and that the tenant had no choice. She observed that in relation to this tenant "...the actions ... were deliberate (or at least reckless), showed no regard for conscience and were irreconcilable with what is right or reasonable."

The ACCC's action in the Dukemaster case followed an investigation which commenced as a result of a referral from the Victorian Small Business Commissioner. It took the form of a representative action on behalf of four tenants affected by the conduct of their landlord, and required in effect four separate cases to be run in the one proceeding.

**ACCC ENFORCEMENT – PART V****Today Tonight**

The Wildly Wealthy Women case has featured in PCA training for some time, and this quarter saw its final chapter play out in the High Court. Meanwhile Today Tonight found itself linked to another questionable trader.

**Wildly Wealthy Women**

Readers will recall that Channel Seven broadcast stories on *Today Tonight* about a property investment training program known as the Wildly Wealthy Women ("WWW"). The ACCC alleged that claims that one of the WWW principals was a millionaire and the other owned in excess of 60 properties were misleading and deceptive.

The claims were untrue, but Channel Seven sought to rely on the "publishers' defence": s65A TPA. This section provides a general exemption to publishers of news and current affairs from liability for publishing misleading or deceptive material. It is designed to ensure that news and current affairs programs are generally free and not unduly restrained from reporting.

There are, however, exceptions to this defence including the publication of advertisements which the media know or should know are misleading or deceptive, and media self promotion where this is misleading or deceptive. Channel Seven pressed the defence unsuccessfully at first instance, but was successful on appeal. The ACCC then took the matter to the High Court.

***Wildly Wealthy Women (cont'd)***

The basis of this appeal was the circumstance where a media organisation publishes misleading or deceptive material about goods or services which is not an advertisement but is nonetheless subject to some other arrangement or understanding between the media and the subject of the story. Although it was not advertising in the usual sense of the word, there was an arrangement between Channel Seven and the WWW principals.

The Court held that "Where the information provider publishes matter in connection with goods or services which itself provides, or publishes an advertisement for its own or someone else's goods or services, the rationale of maintaining a free and vigorous press does not require its exemption from the prohibition of misleading or deceptive conduct. The same is true where the information provider promotes the goods or services of a third party pursuant to a contract, arrangement or understanding with that party."

***Kogan Technologies***

In April, *Today Tonight* was mentioned again (but not subject to enforcement action) in the case of Kogan Technologies Pty Ltd, which sells Kogan brand home entertainment products. The company received significant publicity when *Today Tonight* promoted it as a direct importer offering considerable savings by cutting out wholesalers.

Kogan Technologies' newspaper advertisement and website used price comparisons such as *Now*

*\$X (Save Y%) and save over \$X*. But the products had never been offered by Kogan Technologies at the higher price. The savings were based on an estimated average price a consumer might pay for a product with similar specifications from another manufacturer.

**Who moved the cheese? – misleading origin claims*****Harvey Fresh***

In May, the ACCC instituted proceedings against Harvey Fresh (1994) Pty Ltd alleging misrepresentations about the origin of some cheese products. It alleges that Harvey Fresh represented the place of origin of blocks of Matured Cheese and Semi Matured Cheese as being the south west of Western Australia when it was actually produced in Victoria.

This matter illustrates the ACCC's willingness to take action against all forms of misleading origin claims, not just "Made in Australia". But two other matters finalised over the quarter involved country of origin issues.

***Black & Decker***

This is the second time in three years that Black & Decker has supplied a product incorrectly labelled as 'Made in Australia'. On this occasion it labelled some of its Powerfile sanding belts as 'Made in Australia' when in fact the belts were made in Germany. The material to make the belts was originally sourced from Australia but was later sourced from Germany. Black & Decker failed to detect the change of sourcing.

The previous matter, in 2006, followed concerns that Black & Decker had representing that certain of its sanding sheets were 'Made in Australia' when in fact they were made in India.

***Dreamtime Creations***

The ACCC instituted proceedings in June against a wholesaler and retailer of Aboriginal art and the company's director. It alleges that Australian Dreamtime Creations Pty Ltd ("ADC") sold artworks that it claimed were painted by a person of Aboriginal descent and by an artist named 'Ubanoo Brown' when this was not so.

The ACCC also alleges that ADC represented that carved wooden artworks it sold were Australian-made when, in fact, they were made in Indonesia and imported by ADC.

We will report on the outcome of the ADC and Harvey Fresh cases when they are concluded.

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

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