

## PRIVACY & THE TPA

The Australian Government's renewed interest in the national framework for privacy protection makes privacy our lead story for this quarter. The linkage between privacy protection and the TPA may not be obvious, but it is quite direct: a business or council that publishes a privacy policy then acts in contravention of that policy has engaged in misleading and deceptive conduct.

Under the current privacy protection framework, this is the only way a breach of privacy by an "ordinary" business can attract a pecuniary penalty, other than for a breach of the credit reporting provisions of the Privacy Act. By "ordinary" we mean businesses that are not subject to a specific regulatory regime with a privacy component (such as energy company licensing).

This situation is set to change following the publication of the Australian Law Reform Commission ("ALRC") report into Australia's privacy framework. Among other things, the ALRC has recommended granting substantial new powers to the Federal Privacy Commissioner, including the power to impose civil penalties where there is a breach of privacy principles.

Some other powers that are included in the package are:

- Power to accept enforceable undertakings
- Power to issue compliance notices that are enforceable in the Federal Court

The privacy principles themselves are set to be amended, principally in the name of harmonisation. The ALRC concluded, and the Government has accepted, that the current patchwork of principles operating at the State and Commonwealth levels is inefficient, and should be replaced with a set of Uniform Privacy Principles.

The amended Privacy Act will override all State and Territory laws and under the Government's timetable will take effect early in 2010, following further consultations. Given the need to engage the States in this process, many commentators believe this is a highly optimistic schedule.

A matter of practical interest to many councils and private sector businesses is the proposal to include State identifiers in the category of government identifiers (such as Medicare numbers, tax file numbers) that cannot be recorded or used. Given the widespread use of drivers' licences for identification purposes, this may require some major procedural changes.

All these changes are included in Stage 1 of the reform pro-

posal, to be enacted in 2010. Stage 2 – for which there is as yet no timetable – will involve the introduction of a new "statutory tort" of invasion of privacy. The effect of this will be to give individuals the right to take their own action for damages and other relief in the event that their privacy is breached.

Another Stage 2 proposal is to remove the current exemption of employee records from the Privacy Act. This will give employees a right they do not currently enjoy, to have access to the records held by their employer and to seek correction of inaccurate information.

The last element of the Stage 2 reforms could have significant implications for councils and other enterprises: the mandatory reporting of data breaches to the Privacy Commissioner. Given the substantial penalties that will by then be available to the Privacy Commissioner, this reform is likely to alter every council's risk profile.

Clients who receive PCA's "Advanced" training modules are reminded that we offer a combined TPA-Privacy module as one of our delivery options. This module will be upgraded in 2010 to give detailed coverage of the ALRC proposals and the progress that has been made towards their implementation.

## SMALL BUSINESSES BEWARE

### RENEWAL SCAMS

In August, the ACCC issued a strong reminder to business owners to be vigilant about unsolicited letters that appear to be trade mark renewal notices. More than 150 complaints and inquiries about trade mark letters were lodged with the ACCC in that month alone.

Similar scams involving unnecessary services such as domain name registrations, listings on online databases and ads in various publications are also prevalent. They aim to capitalise on a busy office environment and the inexperience of the owner.

The ACCC has taken court action against a number of traders involved in false billing activity including Business Pages Pty Ltd for its online directories and Domain Names Australia Pty Ltd for domain name renewals.

Its action against Australialink Pty Ltd resulted in declarations this September that the company had engaged in conduct likely to mislead or deceive and acted unconscionably in demanding payment for its online directory services.

The company solicited customers for its directory listing services by sending out a document called a "Listing Advice Notice" (LAN) to a number of businesses. The LAN gave the misleading impression that businesses had already sought Australialink's services or had an existing business relationship with it.

Once businesses signed and returned the LAN they would be invoiced \$195.00 plus GST.

The court also declared that Australialink and two of its employees acted unconscionably and with a lack of good faith towards businesses by intentionally misrepresenting that it had instituted, or was in the process of instituting, court proceedings against those businesses that had been invoiced for the listing but had not paid.

Councils may wish to alert businesses in their region to these practices, and remind them of the ACCC's advice, ie:

- Read any documents that are sent to you carefully before signing and returning them
  - Never give out or clarify any information about your business unless you know what the information will be used for
  - Don't assume that any 'renewal' notice is from your original supplier. You may receive many such offers from operators competing for your business or they could be scammers. Check all the details
  - Ensure that only authorised employees are responsible for payments and they should have ready access to important dates and suppliers. Update them on any scam or unsolicited service that may be targeting businesses. Try to avoid having a large number of staff authorised to make orders or pay invoices
- If the service is something that you would like, shop around to see what deals are available and who are the most reliable suppliers
  - If you receive letters of demand you may need to get legal advice to understand your rights
  - Alert your industry association or local business advisor about any offers that you think may be untoward or misleading. They may be able to warn others in your network.

### FRANCHISING

This quarter saw a number of ACCC actions against franchisors, and one company pretending to be a franchisor, for misleading, deceptive and/or unconscionable conduct.

#### Spray Pave

Spray Pave Australia Pty Ltd, is a seller of businesses which provide spray-on concrete treatment for domestic areas such as driveways and outdoor recreation areas. It claimed to be a franchise and part of an international group. Spray Pave also stated that no qualifications were necessary to operate the business when in fact a builder's licence is required in South Australia, New South Wales and Queensland to conduct spray paving work.

The ACCC was concerned that potential purchasers would believe that they were buying into a franchise system that had the protection of the Franchising Code of Conduct and the benefits of an established franchise system. This was not the case.

**FRANCHISING (continued)**

Spray Pave has now agreed to stop making those representations as part of a court enforceable undertaking accepted by the ACCC. It will also place corrective notices on various websites and implement a trade practices compliance program.

**GJ Gardner Homes**

G.J. Gardner Homes is a residential building franchise with approximately 100 franchises operating in Australia and overseas. Its franchisor, Netdeen Pty Ltd, and its directors gave court enforceable undertakings – including an offer of \$40,000 compensation – after an ACCC investigation into allegations that the franchisor had misled former franchisees.

The misleading conduct involved representations about the benefits of the franchise, including the significance of its buying power, and some specific capabilities of its building management software system. These representations were not substantiated. The company will review its corporate materials, publish corrective notices on its website and in a franchising magazine, and establish a compliance program.

**Personalised Chocolates**

In July the ACCC instituted proceedings in the Federal Court against Personalised Chocolates 4U Pty Ltd and its sole director. It has alleged that PC4U marketed and sold personalised chocolate franchises by making false, misleading and deceptive representations, including representations that:

- Software essential to the business would be provided to franchisees – it was not
- A manual relevant to running the business would be provided to franchisees – it was not; and
- Refunds of franchise fees would be available on certain conditions – but some of those conditions were impossible for the franchisee to meet.

The ACCC also alleges that PC4U is promoting itself as a licence system when it is in fact a franchise system; and that PC4U failed to comply with various obligations under the Franchising Code of Conduct.

**Allphones**

The ACCC is engaged in multiple actions against Allphones Retail Pty Ltd and individuals involved in its management. One is a class action on behalf of 74 eligible current and former Allphones franchisees; that action is based in part on existing proceedings against the same parties.

In those proceedings Justice Foster made certain orders in October 2008. The ACCC now alleges that Allphones has breached those orders, and has initiated contempt of court proceedings.

As these actions approach their conclusion we will provide a more detailed account of the complex facts that took the parties to Court, and any principles in relation to unconscionable conduct laws that can be drawn from the judgments.

**ACCC ENFORCEMENT – PART IV CASES****More air freight matters**

The ACCC has now instituted proceedings against Emirates Airlines, alleging that between 2002 and 2006, Emirates entered into arrangements or understandings with other international air cargo carriers that had the purpose and effect of fixing the price of certain fuel surcharges, security surcharges and rates that were applied to air cargo carried by Emirates and other airlines.

The ACCC alleges that the arrangements or understandings were reached in countries including Singapore, Indonesia, Hong Kong, United Arab Emirates and India.

Similar proceedings were launched against Garuda Airlines in September, in relation to agreements allegedly made between 2001 and 2006 in Indonesia and Hong Kong. These arrangements had the purpose or effect of fixing the price of a fuel surcharge and a security surcharge that were applied to air cargo carried by PT Garuda Indonesia Ltd and other airlines.

Emirates was the ninth and Garuda the tenth airline to be the subject of ACCC proceedings for alleged price fixing in the air cargo industry, as reported in previous Updates.

To date the court has ordered a total of \$41 million in penalties against respondent airlines. The ACCC says that it is continuing to investigate other airlines with the assistance of cooperating parties, and further actions are expected over the next few months.

## ACCC ENFORCEMENT – PART IV CASES (cont'd)

### QUEENSLAND: STILL CARTEL COUNTRY

Since the 1990s, the Sunshine State has been synonymous with price fixing and other anti-competitive conduct. Here are the two latest examples.

#### Construction

Three construction companies allegedly engaged in price fixing and misleading or deceptive conduct in tendering for Government projects in Queensland between 2004 and 2007. T.F. Woollam & Son Pty Ltd, J.M. Kelly (Project Builders) Pty Ltd and Carmichael Builders Pty Ltd were involved in a practice known as 'cover pricing'.

Cover pricing involves one company colluding with another during the tender process to obtain a price that is intended to be too high to win the contract for the project on price alone. The company then submits this price as a genuine tender. The practice is allegedly used where a construction company may not have the time, resources or inclination to prepare an accurate tender, but still wants to be seen as tendering for the project.

The ACCC alleges that in each instance of cover pricing the companies involved in the conduct also warranted to the client that they had not collaborated or discussed their tender with another company tendering for the project, when in fact they had done so through the exchange of a cover price. It

commenced proceedings in the Federal Court in September.

#### Truck Retail

In July, the ACCC instituted proceedings against Vanderfield Pty Ltd, Sci-Fleet Motors Pty Ltd and three individuals for alleged price fixing and market sharing in the sale of trucks. Vanderfield sells Hino trucks in Toowoomba and the Gold Coast and Sci-Fleet sells Hino trucks in Brisbane. The ACCC alleges that between about February 2005 and September 2006, Vanderfield and Sci-Fleet made anti-competitive agreements in relation to the sale of light and medium trucks in south east Queensland, in contravention of section 45 of the TPA.

The ACCC is seeking court orders including declarations, injunctions and pecuniary penalties against the two companies and the three individuals.

## ACCC AUTHORISATIONS

### Sydney Councils' Waste Management Initiative

The latest local government application for authorisation in relation to a joint tendering arrangement looks likely to succeed, following a positive draft determination by the ACCC. This follows a series of authorisations granted to councils in respect of similar initiatives, reported in previous Updates.

Ten councils wished to jointly tender and contract for the provision of waste transfer, disposal and processing services to their local government areas.

Their aim is to stimulate investment in alternative waste technology facilities that are capable of transforming general waste into reusable products. This will assist the councils to meet tougher waste diversion targets set by the NSW Government and minimise their costs associated with disposing waste to landfill.

ACCC chairman, Graeme Samuel said that the proposal "is likely to ... deliver cost savings for the councils and their rate-payers and reduce environmental damage caused by landfill." The ACCC is proposing to grant authorisation to the arrangements until 31 December 2027. The eighteen year term allows the successful tenderer to recover the significant investment required to establish and operate the new facility. At the time of writing the period for lodging submissions had just closed; a Final Determination should be issued soon.

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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