

MINISTERIAL COUNCIL: STRATEGY 2010-2012

On 4 December 2009, the Ministerial Council on Consumer Affairs (MCCA) and the Standing Committee of Officials of Consumer Affairs (SCOCA) published a strategy document that outlines what the two bodies call a new approach to consumer policy.

The key strategic objective is to implement the reforms agreed by the Council of Australian Governments (COAG), reported in edition 31 of *C&C Update*. There will also be greater policy coordination and regulatory consistency with New Zealand.

MCCA's stated aspirations for consumer policy are as follows:

- Consumers and businesses enjoy the benefits of simpler consumer laws
- Consumers drive compliance with the law
- Consumer laws are reaching the most problematic traders and protecting vulnerable consumers
- Emerging consumer issues are identified early and responded to in a rapid, cohesive manner
- The impact of consumer policy regulatory reform is demonstrable

The strategy document provides a detailed timetable for the implementation of the key COAG reforms. The most significant of these is the Australian Consumer Law (ACL) legislation, which will incorporate a new national consumer guarantees regime. To achieve this by the deadline of 1 January 2011 will require passage of the Commonwealth ACL Bills in sufficient time to allow States and Territories to pass application laws. Assuming this deadline is met, a further 12 months will be required – to 31 December 2011 – to put regulations in place.

Before this happens, MCCA proposes the introduction of a National Unfair Contract Terms law in May 2010 for commencement on 1 July 2010. Since the national law will be based on existing Victorian legislation, this will have no practical impact on businesses or consumers in this State.

Other initiatives include

- National occupational licensing scheme
- Reform of residential tenancy databases
- Australian Uniform Cooperatives Agreement
- Harmonised debt collection regulation
- National Indigenous Consumer Strategy

BUSHFIRE BUNKERS

In October 2009 the ACCC reported its concerns that some web-based advertising had given consumers the impression that there was an Australian Standard for bushfire bunkers which their product met. It raised concerns with three traders who had made claims about compliance with standards linked to products such as septic tanks or concrete structures.

There is currently no Australian Standard for bushfire bunkers, although the Victorian Bushfires Royal Commission stated in its second Interim Report (November 2009) that “a minimum standard for bunkers must be developed as the basis for regulating their design, siting and construction, and that this should occur immediately.”

The Australian Building Codes Board has begun work on a national standard for the design and construction of bushfire bunkers for personal use, with a view to completing the standard within six months. Meanwhile, on 11 November 2009, the Building Amendment (Private Bushfire Shelter Construction) Interim Regulations 2009 introduced interim arrangements for the construction of bunkers in Victoria while the national standard is being developed. There are, however, some contentious issues to address.

BUSHFIRE BUNKERS (continued)

The Royal Commission said that "... it would appear that a well designed and constructed bunker can provide shelter from a bushfire while the fire front passes, and can be a useful 'Plan B' when efforts to defend a house have failed, or when for some reason it has not been possible to leave the property. However, these accounts also contain notes of caution... [and] Other evidence before the Commission indicates that taking refuge in a bunker or in a space underneath a house may be extremely dangerous.... This evidence indicates that extreme caution should be taken in the use of bushfire bunkers as part of a household's fire plan. Misplaced reliance on a bunker can be life threatening."

Given these views, the Royal Commission was understandably concerned that the Interim Regulations included performance requirements that had not been recommended by the Commission, especially the requirement for the design and construction of bunkers to provide for 'appropriate sanitation and other measures'. The Commission cautioned that performance requirements should be commensurate with the purpose of the structure, which is to provide short-term accommodation during the passage of a fire.

Regardless of how these issues are ultimately resolved, readers should be aware that at the time of publication there is no Australian Standard for bushfire bunkers. Any trader who claims compliance with such a standard is misleading customers.

ACCC ENFORCEMENT – PART V CASES

THE ACCC GOES TO BED

The last quarter of 2009 brought three separate cases involving the sale of beds.

Snooze

Bedding retailer Snooze conducted a promotional campaign in October 2008, in which many products were priced in stores by 'two-price' advertising in the form 'Was/Now'.

However, a number of Snooze's bedding products had been offered for sale for a cheaper price than their stated 'Was' price. Snooze admitted that the 'Was' prices were actually a reference to its own internally-set recommended retail prices, rather than the price at which the products were offered for sale for a reasonable period immediately before the October campaign. Thus the signage was likely to mislead or deceive customers about the savings they would obtain on its products.

Snooze undertook to write an apology letter to customers known to have purchased a product promoted by 'Was/Now' pricing during the campaign and offer a \$50 gift voucher. The undertakings also included displaying corrective notices in Snooze stores, an information notice in *FB Magazine*; and the establishment of a trade practices compliance program.

Craftmatic Australia

In edition 32 we reported the ACCC's action against this company for its misleading, deceptive and unconscionable

conduct toward senior citizens. In October 2009 the Federal Court accepted undertakings from Mr Wayne Day, a director of the company, not to engage in particular conduct for three years. The terms of Mr Day's undertaking are similar to injunctions ordered against Craftmatic and a former staff member. This concludes the Craftmatic proceedings.

Leather Lounges Direct/ Dekabu

Yarrabee Investments sells furniture products, including bedding, through two retail stores in Victoria - Leather Lounges Direct and Dekabu Leather. It conducted a sales campaign from April to August 2009 advertising models of beds in the Herald Sun newspaper and on its websites. The advertisement and website used price comparisons such as *Rec.Ret \$4989 Now Only \$999*. The advertisements included the words *Sale Now On* and *Limited Stock*.

Yarrabee Investments has acknowledged that it had no foundation for the particular recommended retail prices represented.

ACCC chairman Graeme Samuel said "Comparison pricing is a strong marketing tool used by consumers to not only judge the value of a represented saving but, as in the case of bedding, the higher price may also be taken by consumers to be indicative of the quality and features of a particular bed."

"Retailers referring to a product's recommended retail price can not merely make that price up themselves."

ACCC ENFORCEMENT – PART V CASES (continued)

QUALITY, ORIGIN, TYPE

Extra Virgin Olive Oil

After receiving information that a number of products sold in Australia as extra virgin olive oil may have been refined, adulterated with other oils (such as canola or rapeseed oil), or of poor quality, the ACCC commissioned tests on certain imported and locally produced oils labelled extra virgin olive oil.

The oils were measured against the International Olive Council's trade standard, which defines extra virgin olive oil and sets criteria for purity and quality. While the standard is not mandatory, it is a useful and recognised guide for establishing the essential elements of genuine extra virgin olive oil.

Three samples were not extra virgin olive oil:

- Isabella Extra Virgin Olive Oil, sold at IGA-branded supermarkets
- Paese Mio Organic Extra Virgin Olive Oil, imported by Calcorp (Australia) Pty Ltd and supplied exclusively through Coles supermarkets, and
- Aigeon 100% Extra Virgin Olive Oil, imported by Basfoods (Aust) Pty Ltd and supplied mostly to continental delicatessens and restaurants.

The ACCC accepted court-enforceable undertakings from the three enterprises to resolve its concerns.

Australian Bush Hats

The Australian Bush Hat Co Pty Ltd (ABHC) represented that its Premium Selection and Statesman hats were manufactured in Australia. Tags and labels attached to the hats included the statement Manufactured in Australia from Quality Imported and Local Products, ABHC's name and a map of Australia which created the overall impression that the hats were manufactured in Australia.

The hats were in fact substantially manufactured in India and imported into Australia by ABHC where they were subsequently trimmed and finished.

ABHC accepted that it had engaged in misleading or deceptive conduct, and undertook to:

- refrain from representing that its hats are manufactured in Australia unless they meet the country of origin test
- publish a corrective notice, offering refunds
- ask retailers to return non-compliant stock to ABHC, and
- establish and implement a compliance program.

Aboriginal Art

In December, the Federal Court declared that Australian Dreamtime Creations Pty Ltd misled consumers by representing that certain art that it sold was by an artist of Aboriginal descent named "Ubanoo Brown" when this was not the case. The company's director was found to be knowingly concerned in or party to the conduct.

Justice Mansfield said: "I note that Mr Antoniou asserted that he did not think he or ADC were doing anything wrong at any material times. In my view, that evinced at least some ingenuousness on his part. It is an ingenuousness which the findings of the court, and the declaratory and injunctive relief which I propose to make, will clearly have disabused him of."

PYRAMID SCHEME EXPOSED

It has been some months, possibly years, since the ACCC has had to take action against a pyramid scheme. But on 10 December the Federal Court found that Cosic Pty Ltd had taken part in an illegal international pyramid selling scheme known as Emerald Passport.

The Emerald Passport scheme promoted self help products which included internet based audio visual presentations. Under the scheme participants made an annual payment, induced by the prospect that they could earn between US\$1,000 and US\$10,000 each time they introduced a new participant to the scheme. They would also earn "commissions" from people the new participants subsequently introduced, and so on.

ACCC chairman Graeme Samuel said "Ultimately pyramid schemes must fail as it becomes harder and harder for participants down the chain to recruit people.... These proceedings should act as a warning to people promoting or participating in schemes of this nature that the ACCC will take strong enforcement action to stop the promotion of such schemes."

ACCC ENFORCEMENT – PART IV CASES

CARTEL CASES

Hino Trucks

The Federal Court ordered more than \$1 million in total penalties against two truck retailers and three individuals for engaging in price fixing and market sharing.

Vanderfield Pty Ltd, which sells Hino trucks in Toowoomba and the Gold Coast, and Sci-Fleet Motors Pty Ltd, which sells Hino trucks in Brisbane, will pay penalties of \$500,000 each, and the individuals \$30,000 each.

The Court found that between about February 2005 and September 2006, Vanderfield, through its then sales managers, and Sci-Fleet, through a sales manager, gave effect to anti-competitive agreements in relation to the sale of light and medium trucks in south east Queensland.

The parties made full admissions and also recommended agreed penalties to the court to resolve the matter. It was accepted that the individuals concerned did not understand the law or the legal consequences of their actions.

The ACCC Chairman commented that "I am pleased to note that all parties cooperated with the ACCC in resolving this case, and we therefore were able to recommend significant penalty discounts. ... The ACCC will seek much heavier punishment for those who are found guilty but who do not put their hands up, particularly for more serious cartel conduct, which is now a criminal offence."

Australian Karting Association

The Australian Karting Association (NSW) Inc and certain AKA clubs made an agreement at the AKA's 2008 annual general meeting, to fix minimum prices for the hire of their circuits to non-AKA operators, with all hire negotiations to be conducted by the AKA.

In November the Federal Court found that the parties had engaged in price fixing and exclusionary conduct, and ordered declarations, injunctions and penalties against the parties.

This case is a very timely reminder that every organisation or sporting association, no matter what its size, needs to be conscious of its obligations, as a breach may give rise to criminal proceedings.

More air freight matters

Last quarter there were two developments in the air freight matters reported in several past editions. The first was the Federal Court's dismissal of an appeal by Singapore Airlines which sought to challenge the validity of compulsory investigation notices issued by the ACCC. The primary challenge to the notices was whether routes between two points wholly outside Australia could be within a "market in Australia".

The Court rejected that challenge and noted that "prices fixed for legs of a journey which take place wholly outside Australia may ultimately affect competition in a market in Australia". The decision confirms that the Act is able to reach cartels formed outside Australia affecting Australians.

The second development, in October, was the institution of proceedings against Thai Airways. It becomes the eleventh airline to be the subject of ACCC proceedings for alleged price fixing in the air cargo industry.

The ACCC alleges that the company entered into arrangements or understandings with other international air cargo carriers that had the purpose or effect of fixing the price of fuel surcharges and security surcharges that were applied to air cargo carried by Thai Airways and other airlines. The arrangements or understandings were allegedly reached in Singapore, Indonesia and Hong Kong – plus Thailand in the case of a security surcharge called a crisis surcharge – for surcharges applied to cargo originating in those countries.

The ACCC is seeking declarations, injunctive relief, pecuniary penalties, and costs.

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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