

SUMMER SAFETY CONCERNS

Product safety issues occupied much of the ACCC's time this summer, so we have decided to lead this edition with those stories – starting with an urgent warning to consumers and tradespeople.

'Stacked Stone' wall tiles

In February, the ACCC became aware of the sale of decorative wall tiles containing Tremolite asbestos, a prohibited hazardous substance. The tiles were sold under the brand name *Snow White* and are described as bright white in colour, with a quartz like appearance.

The tiles, which were imported from China, are made up of a number of pieces glued together to give the appearance of stacked stone. While most of the product has already been withdrawn it is possible that some product has been installed or is still available on the market.

The ACCC is working closely with the Customs and Border Protection Service and Workcover authorities on this matter. Consumers who suspect they have tiles which could contain Tremolite asbestos, and tradespeople concerned that they have used the materials should contact the suppliers and/or their state Workcover authorities for further information.

Apollo children's bicycle

Apollo Bicycle Co Pty Ltd withdrew from sale a child's bicycle that was missing three required safety components after the ACCC raised concerns.

More than 450 *Radius Racer X Al 12"* children's bicycles supplied by Apollo did not have a hand brake, a front white reflector or red rear reflector as required under the mandatory product safety standard for pedal bicycles. By supplying the bicycles without those components the company breached section 65C of the TPA.

According to a 2009 report on land transport accidents during 2006-2007, a total of 4403 pedal cyclists aged between 5-17 years were seriously injured in accidents, representing 39 per cent of all seriously injured children in this age group. The safety standard for bicycles, requires that children's bikes over a certain size have both back pedal and front brakes so a child can operate them safely, and includes requirements for front and rear reflectors.

STOP PRESS

The Australian Consumer Law reforms, outlined in our last edition, were endorsed by the Senate on March 17. Further details in our July edition.

Mini jelly cups

On 24 February, Sony Trading offered the ACCC court enforceable undertakings after supplying banned mini jelly cups. Mouth-sized jelly cups containing konjac have been banned in Australia since 2002. The products are dangerous because the konjac means the jelly substance does not readily dissolve. As the jelly is sucked directly from the cup it can lodge in the throat, forming a plug that blocks air supply.

Konjac is also known as glucomannan, conjac, konnyaku, konjonac, taro powder and yam flour. Since 1995, at least 17 people around the world have died after choking on mini jelly cups. Acting ACCC Chairman Peter Kell noted that "Despite the ban, the ACCC is still finding suppliers selling the cups and has recently worked with four other major Asian food importers to ensure no mini jelly cups with konjac are sold."

Bunk beds

The ACCC arranged testing of *Snow Bunk* beds supplied by Linksea Pty Ltd and found that they did not comply with the mandatory safety standard. The gap for entry into the upper bunk was too large to prevent a child from falling out. Other gaps within the guardrails posed entrapment hazards.

SUMMER SAFETY CONCERNS (continued)

Bunk bed-related injuries to children occur relatively frequently, and falls from bunk beds are one of the most common causes of injuries affecting young children. However, no injuries occurred as a result of Linksea's non-compliance.

On 4 March, Linksea undertook to modify its designs and monitor the quality of beds it imports to ensure they comply with the mandatory safety standard.

Baby rattles

On 31 March the ACCC instituted Federal Court proceedings in Perth against Alvaton Holdings Pty Ltd, trading as Cut Price Imports.

The case involves ACCC allegations that Cut Price Imports supplied baby rattles that did not comply with the mandatory consumer product safety standard relating to toys for children up to the age of 36 months. Between April 2006 and September 2009 the company supplied more than 9,000 Smile Bear (Bear with Keys) rattles to retailers across Australia. It also supplied 780 Bao Bei (Zhiyue) key rattles to retailers between April 2009 and August 2009. The ACCC alleges that the rattles contained parts constituting a choking /suffocation hazard, and that the Bao Bei (Zhiyue) key rattle was found to break apart causing an inhalation / ingestion hazard.

The ACCC is seeking a range of remedies including declarations, injunctions, costs and a TPA compliance program order.

ACCC ENFORCEMENT – PART V CASES

GENEROUS REMEDIES

Two cases settled out of court over summer involved forms of 'community service' that will assist deserving recipients.

Golden Circle

H.J. Heinz Company Australia Limited admitted that it engaged in misleading conduct by representing that Golden Circle was 'Proudly Australian owned'. As a result, more than 800,000 cans of Golden Circle fruit and vegetables have gone to Australian welfare agencies that feed the hungry.

Heinz, which is wholly owned by the US company H.J. Heinz Company, acquired Golden Circle in December 2008. After the acquisition, Heinz continued to sell Golden Circle products with the representation 'Proudly Australian Owned' while rolling out new labels. As late as January 2010 Heinz was manufacturing some Tetra Pak beverages in packaging with the Australian owned representation.

A number of Australian-owned representations also remained on the Golden Circle website up to November 2009, including a statement that its 'iconic status has been achieved through a commitment to remaining proudly Australian owned'.

In addition to its food donation, Heinz agreed to cease the representations, attempt to ensure that in-store corrective signage continues to appear next to Golden Circle products, and to publish corrective advertisements in major newspapers.

Big W

As a part of its regular compliance monitoring, the ACCC identified that a number of children's nightwear items sold in Big W stores across Australia were incorrectly labelled as 'low fire danger' when flammability testing showed they should have been labelled 'high fire danger'. The products were supplied exclusively to Big W by Vinetex & Co Pty Ltd.

ACCC deputy chair Peter Kell noted that the mandatory standard for the labelling of children's nightwear is designed to reduce the risk of burns injuries to children by providing specific information on the fire hazard of relevant garments. "Although there has been a significant reduction in hospitalisation rates due to burns from nightwear since the late 1970s, when the standard was introduced, burns from nightwear can and still do occur. There is considerable research which shows that clear labelling helps minimise the risk of these injuries..."

After being advised of the breach, Woolworths (trading as Big W) undertook a voluntary recall across dozens of nightwear styles, including 19 styles from the Pink Sugar and Bed Bugs Girls Single Nighties range and eight styles from the Selected Sleepwear Nite Club Boys Nightwear range.

In settlement of the matter Woolworths will make a contribution of \$200,000 to the Sydney Children's Hospital, Randwick and \$200,000 to a major research program into the mandatory safety standard.

ACCC ENFORCEMENT – PART V CASES (continued)

‘ENDORSED BY THE ACCC’ – REALLY?

Our favourite form of misleading conduct, from a comedy perspective, is where a business claims to have ACCC endorsement. Given that the regulator never endorses anything, is bound to hear about the claim and almost certain to take action against it, we are impressed by the sheer boneheadedness involved. This summer brought not one but two!

Australian Opal Cutters

Australian Opal Cutters Pty Ltd used misleading price comparisons (involving a spurious 'normal retail price') in its advertising and marketing material from at least 2005 until March 2009. Then from September 2007 to February 2009, AOC made available for customer perusal a letter it had received from the ACCC, in a folder that alongside testimonials from previous customers.

In the ACCC's view, the display of its letter alongside customer testimonials could wrongly lead consumers to conclude that the Commission approved of or endorsed AOC's advertising practices, when in fact it does not approve or endorse any products or advertising by any company. In settlement of the matter the ACCC accepted AOC's undertakings not to repeat this conduct (or the misleading price comparisons), to place a notice acknowledging the conduct on its websites and at its premises and to implement a compliance program.

Refund Home Loans

The founder of Refund Home Loans, Mr Wayne Ormond, took the false endorsement concept a step further with two remarkable statements:

- "Now I've spoken to the ACCC. I've done everything in accordance with the law" and
- "Mate, I've had meetings with Graeme Samuel himself. I have nothing to worry about."

The above statements were made to Refund Home Loans' franchisees, in relation to its treatment of those franchisees. The intent appears to have been to discourage franchisees from exploring their own legal rights.

Proceedings in the Federal Court concluded with consent orders declaring that the company and Mr Ormond had contravened the TPA. Further orders included injunctions restraining such representations in the future, and corrective statements to all current and some former franchisees.

WARRANTY ISSUES

Many retailers have fallen foul of the TPA because of their failure to understand the extent of the statutory warranties that apply to the sale of goods in consumer transactions. This problem is becoming increasingly visible in the online retail sector as more consumers embrace this form of purchasing.

But the problem is by no means confined to internet sales, and this summer produced two illustrative cases.

Vodafone Hutchison

Vodafone Hutchison Australia (VHA) gave enforceable undertakings to the ACCC in connection with the conduct of Hutchison 3G Australia (prior to its merger with Vodafone).

Hutchison staff made representations to its customers that the only remedy available to them for a faulty mobile phone was a repair. Generally the only time a customer was able to obtain a replacement mobile phone was during the 'early life failure' period, which was normally 14 days after purchase.

Under the TPA, however, if a mobile phone is faulty the consumer may have a statutory right to request a replacement from the retailer rather than accept an offer of repair. Such a right is usually available for a 'reasonable time' after the consumer received the good. A 'reasonable time' depends on factors such as the cost and quality of the good – but generally it will be more than 14 days, as VHA acknowledged.

Mwave

Online retailer Esel Pty Ltd, trading as Mwave has amended its warranty policy and website and will consider some previously denied claims after ACCC intervention in March.

Mwave admitted that statements in its warranties and returns policy were false and misleading (for example, that consumers must deal directly with the manufacturer; that warranties arising from statute do not apply; and that the consumer must pay any shipping costs).

ACCC ENFORCEMENT – PART V CASES (continued)

GREEN FINANCIAL SCAMS

Global Green Plan

Global Green Plan Ltd will purchase more than 4000 renewable energy certificates which it failed to buy on behalf of customers as the operator of the GreenSwitch retail operation.

GreenSwitch accepted payments from customers and undertook to purchase certificates on their behalf. GreenSwitch was officially deregistered from the GreenPower Program in 2008 as a result of its failure to purchase certificates, but Global Green Plan continued to accept payment from customers for two months after being deregistered.

The company provided undertakings to the ACCC, including the purchase of certificates. This will ensure that its customers' money goes towards supporting renewable energy.

Prime Carbon

The Federal Court has declared that Prime Carbon Pty Ltd made false representations concerning the supply of its services in relation to the sale of carbon credits. Prime Carbon sells a 'soil carbon and sequestration program' to farmers, one outcome of which is carbon credits.

Justice Spender declared that between July 2008 and December 2009, Prime Carbon claimed an affiliation or association with the National Stock Exchange of Australia that it did not have, in contravention of section 53

TPA. The court also declared that Prime Carbon had made misrepresentations concerning the National Environment Registry Pty Ltd, a company through which Prime Carbon supplied some of its services. Those misrepresentations included that the NER was regulated by the Australian Government, when it was not, and that NER entered into an arrangement with the Chicago Environment Registry, when it had not.

WesternField

The ACCC has urged wariness of overseas based telemarketers touting a carbon credit investment opportunity which may have fleeced consumers of more than \$3.5 million.

"This is a highly sophisticated scam and involves overseas based telemarketers making unsolicited calls to Australian consumers and businesses to ask their views on current environmental concerns and whether they would consider investing in environmental projects. Those who express an interest are then contacted by someone claiming to work for the bogus Japanese based business, WesternField Holdings Inc. and offered an opportunity to 'invest' in projects which generate carbon credits" said Deputy Chairman Peter Kell on 16 March.

"This is not an investment opportunity. The individuals behind WesternField Holdings are operating a highly sophisticated scam and are seeking to take advantage of current concerns about the environment and climate change."

ACCC ENFORCEMENT – PART IV CASES

CARTEL CASES

Space does not permit detailed discussion of this quarter's cartel activity, but it includes:

- \$4m penalties for APRIL Fine Paper Trading of Singapore and a related company for breaching the price fixing provisions in relation to the supply of copy paper;
- orders by consent – including \$1 million in penalties – against American-based DRS C3 Systems, for an agreement with a rival to withdraw from a proposed procurement process for an air combat instrumentation system;
- prevention of a collective boycott by doctors at the Kangaroo Island hospital;
- action against Korean Air Lines, the latest in the ongoing air freight saga (see previous editions).

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

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