

## **NEW AUSTRALIAN CONSUMER LAW**

As foreshadowed in our January edition, the Australian Government has begun the implementation of a national approach to consumer protection. The Australian Consumer Law comprises three reform “tranches”, and the first of these was enacted on 15 April 2010.

### **NEW POWERS FOR THE ACCC**

#### **Financial Penalties & Orders**

Under the new legislation the ACCC can seek financial penalties of up to \$1.1 million for corporations and \$220,000 for individuals in civil cases for unconscionable conduct, pyramid selling and sections of the law dealing with false or misleading conduct.

Previously there was no capacity to impose fines for unconscionable conduct. In relation to false or misleading conduct, the penalties were criminal by nature, requiring a higher standard of proof; under the new civil regime it is reasonable to expect the ACCC to pursue penalties in more cases. This view is supported by Graeme Samuel’s comments in relation to the *Lift Shop* matter – see below.

Banning orders are a new remedy that the ACCC will be able to seek where it regards a person as a ‘repeat or serious of-

fender’. These orders ban the offender from managing corporations for a period of time. They will be available in cases involving unconscionable conduct, and breaches of various consumer protection and product safety provisions.

#### **Notices**

Where the ACCC has reasonable grounds, it may now issue an *infringement notice* in cases of suspected unconscionable conduct, some false or misleading conduct, pyramid selling and various product safety provisions. The aim is enable a rapid response to alleged breaches of these parts of the law and to facilitate quick resolution.

Infringement notice penalties are \$6,600 for corporations and \$1,320 for individuals. Once an infringement notice penalty is paid, the ACCC may not commence court proceedings in relation to the matter.

The ACCC will also be able to issue *substantiation notices* that require traders to justify claims they make about products they promote. Examples cited by the Commission include was/now price claims and claims about food, health, environmental impact and business opportunities.

Substantiation notices do not require a person to prove that a claim or representation is true or

is not misleading. They are a preliminary investigative tool.

Individuals are not required to provide information or documents if the information or documents may incriminate them or expose them to a penalty. But otherwise, a person served with a substantiation notice must comply within 21 days.

The ACCC may now issue a *public warning notice* to alert consumers to a suspected breach, and will do so where:

- it has reasonable grounds to suspect that the conduct may constitute a contravention of the TPA;
- it is satisfied that one or more other persons has suffered, or is likely to suffer, detriment as a result of the conduct, and
- it is satisfied that it is in the public interest to do so.

The ACCC says that a key consideration in evaluating whether to issue a public warning notice will be whether it considers there is an imminent need to inform consumers so they can avoid suffering detriment.

Examples of situations which may warrant a public warning include potential for physical injury from unsafe products, or concerns about widespread loss through scams. The likely impact on the businesses involved will also be a key consideration.

## **NEW AUSTRALIAN CONSUMER LAW (cont'd)**

### **NEW POWERS FOR THE ACCC**

#### **Consumer Redress**

The ACCC's has been given the ability to seek redress through the courts for consumers who are not included in a particular legal action. For example, the ACCC could ask the court to order an unscrupulous trader to provide refunds to consumers affected by misleading conduct.

### **NEW TPA PROVISION**

#### **Unfair Contract Terms**

The National Unfair Contract Terms law came into effect on 1 July 2010. As noted in our January edition, the national law is based on pre-existing Victorian law, so will have no major impact in this State. Its national extension does, however, make enforcement action more likely so a review of its key elements is appropriate and timely.

The law applies to standard form consumer contracts (ie not business to business contracts). In such a contract, a term will be unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party advantaged by the term; and
- it would cause detriment to a party if it were to be applied or relied upon.

An unfair term will be void. The court must consider how transparent the term is within the

contract, and the contract as a whole, when deciding whether the term is unfair and thus void.

In addition to the contract term being void, the ACCC or a local regulator could commence enforcement action. The ACCC has flagged an interest in contracts used in the telecommunications, health/fitness, travel, utilities and building sectors.

### **FURTHER CHANGES**

#### **Second & Third Tranches**

The second tranche of reforms will require adoption by the State Governments. If this goes to plan the changes are expected to commence on 1 January 2011. The most obvious change will be the renaming of the TPA as the *Competition and Consumer Act*.

More substantive changes are:

- the expansion of the consumer protection provisions to incorporate 'best practice' provisions for practices such as unsolicited selling (eg door to door and direct sales) and lay-by agreements;
- the establishment of a national scheme for statutory "consumer guarantees", to replace the implied conditions and warranties provisions in the TPA; and
- the establishment of a national scheme for product safety standards for certain goods or services.

Tranche three is yet to be passed by Parliament, but is intended to commence immediately after tranche two. We will provide further comment when the legislation is passed.

## **ACCC ENFORCEMENT – PART V CASES**

### **Lift Shop rips off college, council**

On 5 May the Federal Court declared by consent that Lift Shop Pty Ltd and its director, Leslie Katz, engaged in misleading and deceptive conduct.

Lift Shop supplies residential and limited mobility lifts. The court declared that the company had twice substituted an ordered platform lift with a different model with different features. It did this without the knowledge or consent of either customer: Saint Mary Star of the Sea College in Wollongong, NSW and the Stonnington Council Town Hall, Melbourne in 2008.

ACCC Chairman Graeme Samuel gave a strong indication of how future cases of this type may be handled. He said "Had this conduct occurred after the introduction of the new Australian Consumer Law, the ACCC would have sought from the court civil pecuniary penalties. .... The ACCC will not hesitate to seek civil pecuniary penalties in appropriate cases."

In this instance the court ordered injunctions restraining the company from making substitutions unless the written consent of the customer has been obtained. Lift Shop was required to advise the two affected customers of the court outcome and make ex gratia payments totaling \$7000 to them.

Lift Shop and Mr Katz were also ordered to pay a contribution of \$20,000 to the ACCC's costs, and to implement a trade practices compliance program.

## ACCC ENFORCEMENT – PART V CASES (continued)

### TELECOMMUNICATIONS

The ACCC continues to be very active in this sector. This quarter's cases include an interesting intervention against the word 'unlimited' and a general call for providers to lift their game.

#### Optus 'Unlimited Calls'

On 3 June the ACCC instituted legal proceedings against Singtel Optus Pty Ltd for alleged TPA contraventions in relation to the word "unlimited".

The ACCC alleges that certain television, radio and print advertisements advertising "unlimited" calls on its \$70 pre-paid Turbo Max plan are misleading because the offer is subject to a number of limitations and restrictions. It also alleges that advertisements promoting "unlimited" broadband and "unlimited" calls on Optus broadband and home telephone plans are misleading because they too have limitations and restrictions.

We will report on the progress of this case in future editions.

#### Phone warranties

The ACCC has warned mobile telephone service providers to 'play fair' with consumers whose handsets fail during the term of a service contract.

ACCC chairman Graeme Samuel observed that "... the handset is an integral part of the package and if it fails through no fault of the consumer, the company is responsible for replacement or repair."

Mr Samuel pointed to the recent resolution with Vodafone Hutchison Australia (VHA) over warranty issues under which it agreed that customers who acquired mobile phones under a service contract received a retail warranty at no extra cost for the contract's term.

The same issues arose in the ACCC's 14 April settlement with Fone Care Pty Ltd, which operates Nokia Care Centres throughout Australia, and Nokia Australia Pty Ltd.

A consumer had attempted to return a faulty Nokia mobile phone battery to a Nokia Care Centre and was asked to sign a service agreement (authorised by Nokia Australia). In the ACCC's view, the agreement:

- restricted consumers' rights to make a statutory warranty claim to within three months of purchase;
- required that consumers accept Nokia's decision with regard to any statutory warranty claim with no right to take any action if a consumer disagreed with the decision, and
- required consumers to agree to allow personal information to be disclosed to third parties.

Fone Care undertook to cease using the service agreement in its current form, and to refrain from making false or misleading representations as to consumers' statutory warranty rights. Nokia undertook to refrain from authorising the use of any document that makes false or misleading representations in relation to consumers' statutory warranty rights in the future.

## SCAMS

### Guaranteed Powerball Wins!

The disturbing aspect of the ACCC's action against Powerballwin.com.au Pty Ltd is that anyone believed the company's claim it had a secret method to predict future Powerball draws.

The scheme asked consumers to pay a \$59 subscription fee in order to receive a series of predicted numbers to help win all divisions of Powerball. The predicted numbers failed to produce any dividend for subscribers. On 23 April the court restrained further promotion of the scheme and ordered payment of \$48,163 compensation.

The ACCC continues to seek three other persons alleged to have been involved: David Walker, Michael Duggan and Mark Adams. Any person with knowledge of their whereabouts is asked to contact the ACCC on 1300 302 502.

### Pyramid Scheme Halted

On 14 May 2010 the ACCC obtained ex-parte injunctions restraining three individuals from promoting an alleged pyramid selling scheme called TVI Express. The scheme, promoted through various websites, involves an initial fee of \$330; participants receive a 'travel voucher' and the opportunity to receive payments for recruiting other people into the scheme.

The orders will prevent planned scheme presentations across Australia and New Zealand from going ahead. The individuals risk being in contempt of court if they ignore these orders.

## ACCC ENFORCEMENT – PART IV CASES

### CARTEL MATTERS

#### WA Air Conditioning

The Federal Court handed down in April its final orders in the long running Western Australian air conditioning cartel case which had involved bid-rigging and price fixing on projects totalling about \$129 million.

The conduct in question occurred from 1997 to June 2003. Members of the Air Conditioning and Mechanical Contractors' Association of WA would attend regular weekly meetings at which they would discuss upcoming tenders and try to agree which tender would be designated to submit the lowest price. The companies gave effect to the arrangements by providing and accepting 'cover prices'.

It was alleged that the conduct took place up until around 2003 and that some companies had been engaged in the conduct since the early 1990s.

Over the duration of the proceedings, the court imposed a total of \$9.2 million in penalties on 17 companies and 22 individuals.

#### Marine Hoses

Also in April, the Federal Court ordered four foreign based suppliers of marine hose to pay penalties exceeding \$8.24 million for engaging in cartel conduct.

Dunlop Oil & Marine, Bridgestone Corporation, Trelleborg Industrie SAS and Parker ITR allegedly gave effect to an international cartel arrangement

which included the Australian market from 2001 to 2006 for the supply of marine hose.

Marine hose is rubber hose used at offshore moorings to transfer crude oil and gas products from production facilities to tankers or buoys. The ACCC alleged the companies submitted 'rigged' bids to supply marine hose to customers in Australia such as Woodside Energy, BHP Billiton and ConocoPhillips.

ACCC Chairman Graeme Samuel commented that "Since the customers were mostly large oil and gas producers, the cost of the cartel ultimately fell on oil and gas end-users, namely the general public. Such losses are not ascertainable, but nevertheless real, and it is clear that the price of marine hose rose significantly in the period after the making of the Marine Hose Club Arrangement."

The actual making of the cartel arrangements occurred outside Australia. As a result, the penalties imposed relate only to dealings by the companies which gave effect to cartel conduct, and not to the separate contravention of making a cartel, arrangement or understanding.

The international cartel was effectively terminated in 2007 after searches and arrests by the US Department of Justice, the UK Office of Fair Trading, the European Commission and Japan's Fair Trade Commission. Since then cartel members have been, to varying degrees, the subject of global enforcement action.

#### International Air Freight

Action against international airlines for their alleged engagement in price fixing continued this quarter with the institution of proceedings against Malaysian Airline System Berhad and its wholly-owned cargo subsidiary (13 April); Japan Airlines International Co., Ltd and Air New Zealand Ltd (17 May).

Given the transnational quality of this enforcement action, recent events in the United Kingdom are quite interesting. In May, four British Airways executives walked free from court after the collapse of the first contested price-fixing prosecution brought by the UK competition watchdog. A jury was ordered to acquit the quartet after the Office of Fair Trading told the court its case had been undermined by the discovery of new evidence among tens of thousands of e-mails.

Many commentators have called this a serious setback for the watchdog, and we can only speculate about its implications for the Australian litigation.

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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