

October 2008

From the Small Business Commissioner

The Commission has recently made a submission to the Parliamentary Inquiry into the Franchising Code of Conduct that makes several recommendations in relation:

- Improving the clarity and extent of disclosure to franchisees and potential franchisees
- Empowering the ACCC to conduct risk based credits
- Requiring explicit advice about rights of renewal or extension of franchise agreements
- Reviewing the law to provide protection for franchisees where a franchisor fails
- Reviewing the mediation model under the code
- Improving the collection of statistics and data on the franchising sector

The ACCC will give evidence at public hearings conducted by the joint Parliamentary Committee.

This editorial of Briefing will in future editions be newly appointed Deputy Chair of the ACCC, responsible for small business matters, Dr Michael Schaper.

John Martin

NEW DEVELOPMENTS

ACCC tougher line on merger undertakings

The ACCC has been forced to take a tougher stance on accepting undertakings during mergers following examples of businesses acting in bad faith. It is apparent that the incentive of some merger parties changes once an undertaking is accepted and the transaction is completed.

Before a merger is cleared, the priority of merger parties and their advisers is to get the deal done. Once the transaction is completed, however, priorities shift and some parties view the undertaking commitments given to the ACCC as annoying constraints on their commercial strategies. Their priority becomes minimising the impact those undertakings have on their business.

To deal with this problem the ACCC has had to considerably strengthen the elements that must be included in an undertaking before it is accepted.

MR 239/08

ACCC/ASIC debt collection phone-in day

The ACCC and ASIC held a phone-in day dedicated to debt collection concerns. The purpose of the day was to gather information about issues of concern in relation to debt

collection and unlawful conduct by debt collectors or creditors, and to increase consumer awareness of their rights and avenues for complaint. The ACCC and ASIC will use the information obtained during the phone-in day to assess possible breaches of the TPA or ASIC Act.

MR 214/08

FRANCHISING

Proceedings against Franchisor

The ACCC commenced proceedings against Seal-A-Fridge Pty Ltd and its director, Mr Nigel Rooney. The ACCC alleges that Seal-A-Fridge engaged in unconscionable conduct towards its franchisees and it failed to comply with the *Franchising Code of Conduct*.

The ACCC alleges that Seal-A-Fridge unreasonably withheld consent to the transfer of franchises, unilaterally increased the fees associated with the national Seal-A-Fridge telephone number contrary to franchise agreements, and disconnected franchisees from the national Seal-A-Fridge telephone number to procure agreement to the increased fees.

MR 206/08

CONSUMER AND SMALL BUSINESS PROTECTION

Proceedings instituted against Telecom provider

The ACCC instituted proceedings against Clarus Telecom Pty Ltd alleging that Clarus misled consumers by making representations that their company and the services they provide are affiliated with or provided on behalf of Telstra Corporation.

The ACCC is seeking orders that Clarus Telecom publish a corrective notice and an article aimed at informing the telecommunications industry about compliance with the Act.

MR 249/08

Alleged misleading conduct by Indigenous art dealer

Following legal action by the ACCC, the Federal Court declared that the operators of Doongal Aboriginal Art and Artefacts engaged in misleading and deceptive conduct.

The ACCC alleged the art dealer misrepresented that three of the artists whose works Doongal promoted and sold were of Australian Aboriginal descent when this was not the case. It was not alleged that any of the artists were involved in the misleading conduct or that any of the artists ever represented themselves to be Aboriginal.

The court-granted injunctions ordered the art dealer to write to certain purchasers of the artworks advising them of the court proceedings.

MR 247/08 & MR 213/08

Some items in *ACCC briefing* refer to media releases (MR, with number and year shown). These can be found on the ACCC website <www.accc.gov.au>. Most other reports and documentation are also available on the website. Subscribe to *ACCC briefing* by emailing small.business@accc.gov.au. For information on the Trade Practices Act contact—ACCC Infocentre 1300 302 502 or the ACCC small business helpline 1300 302 021

Australian Co-operative Foods falsely labelled products

The Federal Court found that Australian Co-operative Foods Limited (ACF), which trades as Dairy Farmers, engaged in misleading and deceptive conduct and made false representations on the packaging of certain cheese products.

ACF sold Romano style cheese that it packaged and labelled as Parmesan style cheese. The ACCC alleged that this conduct falsely represented the type of cheese and its nutritional attributes.

Where a company produces and markets distinct products it is simply not appropriate to substitute one for the other without clearly advising potential purchasers and amending other relevant representations on packaging.

MR 246/08 & MR 202/08

Solarium use claims declared false

The ACCC succeeded in its important public interest claim action against Australian Tanning Association Inc., Body Bronze International Pty Ltd and Tropical Sun Industries Pty Ltd after they made false claims about, and misrepresented, the risks associated with solarium use.

The Federal Court declared all parties to the ACCC's action had contravened the TPA. Action was also taken against Mr Scott Meneilly, the former president of the ATA and former chief executive officer of Body Bronze for being involved in the alleged contraventions of these parties.

MR 245/08

Former jewellery chain operator convicted for false prices

Ascot Four Pty Ltd, the previous owner of the jewellery retailer Zamel's, was convicted in the Federal Court of making false and misleading representations about the price of goods.

The charges were in respect to items which featured a sale price next to a strike through price. The court found that Ascot Four falsely represented that it had sold each of the items at the strike-through price within a reasonable time prior to the sale period. Ascot Four was also found to have falsely represented that purchase of the items during the sale period would result in a saving to the consumer of the difference between the sale price and the strike through price. In no case had the defendant sold any of those items at the strike through price.

MR 242/08

Action against biodegradable nappy claim

The ACCC instituted legal proceedings against SeNevens International Ltd, alleging it has engaged in false, misleading and deceptive conduct by promoting its disposable Safeties Nature Nappy product as 100 per cent biodegradable when the ACCC alleges it is not.

The ACCC is seeking a range of remedies including injunctions restraining the respondent from engaging in the conduct and declarations.

MR 238/08

Alleged misleading conduct in advertising mobile premium services

The ACCC instituted proceedings against TMG Asia Pacific for alleged false, misleading and deceptive conduct in contravention of the TPA. The ACCC alleges that in three of its television advertisements for its 'Text and Win' mobile premium services, TMG failed to adequately disclose the costs and terms associated with the services and that this was likely to mislead consumers.

The ACCC is seeking: declarations that TMG engaged in false and misleading deceptive conduct; injunctions restraining TMG from engaging in similar conduct in the future; corrective advertisements on television; an order that TMG implement a trade practices law compliance program; and ACCC costs.

Consumers should be wary before signing up to mobile premium phone services. These mobile services include extras such as ringtones, wallpapers and information services. As many of these services are directed at the younger, less experienced consumer, the ACCC is particularly concerned over what it considers is the failure of certain advertisements to adequately disclose the costs and ongoing nature of the services offered.

The Mobile Premium Services Industry Scheme was put in place in October 2006 to provide guidance in advertising practices and a complaints-handling process. The ACCC is taking part in the review of the scheme currently underway.

MR 236/08 & MR 237/08

EziBuy takes corrective action for inaccurate labelling

EziBuy Ltd offered refunds to purchasers of its 'Mohair Throws' and 'Pashmina Shawls' after acknowledging its fabric labelling and advertising may have been misleading and deceptive.

The ACCC accepted a court enforceable undertaking from EziBuy after they incorrectly labelled and advertised a throw as a 'Mohair Throw' or 'Pure Mohair Throw' when the throw was approximately 65 per cent acrylic. Ezibuy also incorrectly labelled and advertised a shawl as a 'Pashmina Shawl' with a fibre content of 70 per cent pashmina (cashmere wool) and 30 per cent silk in circumstances where the fibre content of the product was actually a cotton/polyester blend.

MR 223/08

Undertakings accepted over 'free' services claims

Fairfax Digital Australia and New Zealand Pty Ltd acknowledged concerns by the ACCC that advertisements representing the Domain mobile phone property listing search service as 'free' may have been misleading.

The ACCC was concerned about the banner advertisement on websites that Domain mobile phone services were free to consumers, when in fact users would incur charges by their telecommunications provider. The ACCC accepted court enforceable undertakings from Fairfax Digital.

MR 212/08

Consumers warned to check smartphone technology plans

The emergence of new smartphone technology, such as the recent release of the Apple iPhone 3G, led the ACCC to issue a note of warning to consumers.

The ACCC is particularly concerned that consumers may be misled if they are not made sufficiently aware that their data allocations can be exceeded—at significant cost. In the case of smartphones, consumers can download greater amounts of information from the internet than ever before so there is the potential for them to exceed their phone plan value and incur considerable additional charges.

The ACCC will remain vigilant in this new area and where concerns are raised over inadequate disclosure of terms and conditions of data use, it will act quickly.

MR 204/08

Misleading claims of work opportunities

The ACCC instituted legal proceeding against ATS All Trades and Services Pty Ltd for alleged false, misleading and deceptive conduct.

It is alleged that ATS All Trades and Services made misleading representations regarding the quality and nature of the list of job opportunities provided to members, the availability of discounts to members and the provision of a webpage that would be displayed after conducting a Google search.

The ACCC also commenced proceedings against Mr John Barry, the director of ATS All Trades and Services, and Mr Aaron Bell, a company employee.

MR 203/08

Diamond seller fined \$220 000 for misleading consumers

Diamond merchant, Carrerabenz Diamond Industries Pty Ltd, pleaded guilty in the Federal Court to 27 charges laid against the company by the ACCC for misleading consumers in the promotion of a series of diamond sales.

The court heard the company placed advertisements in national newspapers and listed each diamond or item of diamond jewellery with a unique stock number, together with a 'usual marked price' and a 'crazy price'. In each case, the 'usual marked price' was substantially higher (by between 42 per cent and 233 per cent) than the 'crazy price' offered.

The company admitted to the court that the items had not previously been offered for sale in Australia, or offered at the 'usual marked price' as claimed. The company was fined a total of \$220 000.

MR 197/08

PRODUCT SAFETY

Online trader recalls child restraint systems for cars

Xport Investments Pty Ltd issued a voluntary recall of two models of child restraint systems for use in motor vehicles after the ACCC raised concerns that the systems may not comply with the prescribed consumer product safety standard. After the ACCC raised its concerns Xport Investments immediately conducted a national consumer recall.

MR 248/08

WA retailer supplies non-compliant bunk beds

The ACCC accepted court enforceable undertakings from Living Momentum, which sold bunk beds that did not comply with *Consumer Protection Notice No. 1 of 2003—Consumer Product Safety Standard: Bunk Beds*.

Living Momentum cooperated with the ACCC and responded to concerns by immediately ceasing supply of the bunk beds, publishing a product safety recall notice, commencing a process of contacting customers who bought the bunk beds to inform them of the recall and informing its overseas suppliers of the problem.

MR 219/08

Undertaking from sunglass retailer for non compliance

The ACCC accepted a court enforceable undertaking from Busby Distribution Pty Ltd, trading as Aldo Australia, after it supplied sunglasses that failed to comply with the prescribed mandatory safety standard.

The sunglasses failed to comply with the labelling requirements of the standard, as they did not state the lens category number and corresponding description. Aldo conducted a voluntary product recall.

MR 215/08

Non-compliant children's night gowns recalled

The ACCC accepted court enforceable undertakings from Lincraft Australia Pty Ltd and Cotton Dreams Pty Ltd after certain bathrobes imported by Cotton Dreams and sold through Lincraft stores failed to comply with the mandatory safety standards for children's nightwear.

The bath robes failed to qualify for any of the four fire hazard categories and as such should not have been sold. Both companies took immediate action to rectify the problem and withdrew the garments from sale and carried out a voluntary product recall.

MR 188/08

RESTRICTIVE TRADE PRACTICES

Alleged resale price maintenance by children's clothing supplier

The Federal Court ordered Oobi Baby Pty Ltd to pay \$40 000 in penalties after the ACCC commenced proceedings alleging the company engaged in resale price maintenance in relation to the range of infant toy and clothing products that it imports and distributes to retailers throughout Australia.

The company admitted illegally inflating the internet retail prices of the products it designs, imports and distributes throughout Australia.

MR 251/08 & MR 207/08

Health care supplier bundling a misuse of market power

The Full Federal Court issued orders declaring that Baxter Healthcare breached the misuse of market power and exclusive dealing provisions of the TPA when it entered long-term contracts with state purchasing authorities.

The contracts related to bundling the supply of sterile fluids with peritoneal dialysis products used by people with kidney failure. The court found that Baxter, which is the sole supplier of sterile fluids, had taken advantage of its market power to structure the terms on which it offered to enter into contracts for the supply of these products. The court found that Baxter's purpose in leveraging its market was to deter or prevent competitors from being competitive in the supply of peritoneal dialysis products.

Having made declarations that Baxter's conduct contravened the TPA, the Full Federal Court has remitted the matter to a single judge of the Federal Court to consider the imposition of penalties and other relief.

MR 233/08

Proceedings against regional taxi company

The ACCC instituted proceedings in the Federal Court against White Top Taxis Limited, a taxi network in the country Victorian town of Shepparton.

The ACCC alleges that three directors and a driver gave effect to a series of anti-competitive rostering arrangements in contravention of the Competition Code of Victoria and sought to induce other taxi drivers and operators to abide by the rostering arrangements. The ACCC is seeking: declarations, injunctions, a trade practices compliance program, pecuniary penalties and costs.

MR 225/08

Investigation into community newspaper undertaking compliance

The ACCC concluded its investigation into compliance by Fairfax Media Limited with its undertaking to the ACCC.

The ACCC's investigation was undertaken in response to changes made by Fairfax to the format and content of *The Newcastle and Lake Macquarie Post* and *The Hunter Post* newspapers, prior to the sale of these newspapers as required by the undertaking. The ACCC was concerned that the changes made by Fairfax potentially affected the viability of the Post, and its ability to compete with other community newspapers retained by Fairfax with a similar circulation area to that of the Post.

In January 2008 Fairfax agreed to implement remedial arrangements immediately, designed to ensure the ongoing viability of the Post. The ACCC has since been monitoring Fairfax's compliance with these arrangements. The ACCC is satisfied that the remedial measures taken by Fairfax have addressed the concerns.

MR 220/08

MERGERS AND ACQUISITIONS

Westpac's proposed acquisition of St George not opposed

The proposed acquisition of St George Bank by Westpac is unlikely to substantially lessen competition under s. 50 of the TPA in the markets in which they compete.

The ACCC reached the conclusion that, while St George is a relatively innovative and dynamic competitor with a strong focus on customer service, other competitors to the merged

entity that remain in the market will continue to play a similar role.

The Public Competition Assessment is available on the ACCC's website, www.accc.gov.au/publiccompetitionassessments.

MR 228/08

Proposed health insurance acquisition not opposed

The ACCC will not intervene in the proposed acquisition of Australian Health Management Group Limited by Medibank Private Limited.

In reaching its decision the ACCC found that there are likely to be alternative providers of health management services currently operating or capable of expanding their operations to form an alternative to the merged entity for small to medium PHI providers.

MR 226/08

Undertaking in Dairy Farmers acquisition accepted

The ACCC will not intervene in the acquisition of Australian Co-operative Foods Ltd (Dairy Farmers) by National Foods Ltd and Warrnambool Cheese and Butter Factory Company Holdings Ltd, after accepting court enforceable undertakings from National Foods and its holding company Kirin Holdings (Australia) Pty Ltd.

The ACCC is satisfied that the proposed acquisition, subject to the court enforceable undertaking, would be unlikely to substantially lessen competition in the relevant markets.

MR 211/08

AUTHORISATIONS AND NOTIFICATIONS

IATA tariff coordination system granted authorisation

The ACCC issued a determination granting authorisation to the International Air Transport Association for its new passenger tariff coordination system. The ACCC also extended authorisation to the current system to allow a transition period.

The ACCC considers that significant steps have been taken to address previous competition concerns regarding the sharing of information and the impact of IATA fares in the market.

MR 244/08

Immunity removed for speedway racing notifications

The ACCC issued a decision revoking third line forcing notifications that enable National Association of Speedway Racing to restrict its licensees from racing only at NASR-approved tracks and venues.

While acknowledging there is significant public benefit in having safety standards for speedway tracks and venues, which are monitored and enforced, the ACCC considers a significant public detriment results from preventing NASR licensees from racing at tracks and venues which are not approved by NASR, but which otherwise meet the appropriate safety and insurance standards.

The ACCC has also revoked similar notifications lodged by the national governing body for each of the sprint car, saloon car and V8 dirt modified car-racing divisions, proposed to make

membership conditional upon obtaining a licence from NASR and restricting their drivers to racing at approved tracks.

243/08

Authorisation of central Queensland councils joint arrangements for waste management

The ACCC issued a determination granting authorisation to the Rockhampton, Gladstone, Central Highlands and Isaac regional councils to allow them to conduct a joint tender for the provision of water, recyclables and ancillary waste services.

The ACCC considers that the joint tender is likely to result in cost savings to ratepayers and potentially environmental benefits through the introduction of best practice recycling and the diversion of waste from landfill.

MR 232/08 & MR 199/08

Authorisation to AMA NSW collective bargaining

The ACCC granted authorisation to a collective bargaining arrangement put forward by the Australian Medical Association (NSW).

AMA NSW proposes to collectively negotiate with NSW Health and public health organisations, including area health services, the terms of contracts for visiting medical officers in the New South Wales public hospital system.

MR 231/08

Final decision on plastic bag charge trial

The ACCC issued its final decision to grant authorisation to the Australian National Retailers Association to conduct a four-week trial of a 10 cent charge for lightweight shopping bags.

The trial will take place at Coles, Woolworths and IGA supermarkets in Narre Warren, Wangaratta and Warrnambool in Victoria.

The ACCC considers that the proposed trial has the potential to result in benefits to the public by providing some evidence of the extent to which the charge will reduce bag usage and by assisting governments to determine the most effective way to achieve their goal of reducing plastic bag consumption.

MR 225/08 & 201/08

Authorisation to Myer for joint promotions

The ACCC issued a draft determination proposing to grant authorisation to Myer to enable it to continue to invite concession businesses operating within Myer stores to participate in its various promotions.

The ACCC considers that the arrangements will result in a significant public benefit in the form of reduced prices for consumers by facilitating the participation of concession businesses in periodic sales and through the simplification of Myer promotions.

MR 222/08

Conditional authorisation of standard flood definition

The ACCC issued a decision proposing to grant conditional authorisation to the Insurance Council of Australia for a proposed common definition of 'inland flood'.

The ACCC considers that the proposed standard definition has the potential to result in benefits to consumers, predominantly by helping consumers to better understand their policies, including what they are covered for.

The ACCC has proposed a number of conditions which are aimed at improving the transparency of the Insurance Council's proposal.

MR 190/08

Authorisation of cartage allocation system

The ACCC granted revocation and substitution of authorisation to CEMEX Australia for the continued operation of its premixed concrete cartage allocation system.

The Equal Opportunity of Trips (EOT) system is intended to equalise work opportunities for lorry owner-drivers in Western Australia. The ACCC considers that the EOT system produces some public detriment as a result of reduced competition; however, it is satisfied that the continued operation of the system is likely to result in the public benefit of continued industrial harmony and some reduction in transaction costs, which would outweigh the detriment.

MR 189/08

REGULATED SERVICES

Some Telstra metropolitan services granted exemptions

The ACCC made an in-principle decision to grant Telstra exemptions from its obligations to supply two 'declared' services in parts of metropolitan Australia, subject to a number of conditions. The exemptions, which cover 248 exchange service areas, are not as broad as those requested by Telstra.

The rationale for granting the exemptions is that access regulation should focus on those elements of the fixed-line network that continue to represent 'enduring bottlenecks', which refers to a network element or facility that exhibits natural monopoly characteristics and is 'essential' to providing services to end users in downstream markets. The ACCC is of the view that wholesale voice services no longer represent an 'enduring bottleneck' in the areas subject to exemption.

MR 241/08 & MR 229/08

Telecommunications pricing principles released

The ACCC issued final pricing principles and indicative prices for the local carriage service (LCS) and the wholesale line rental (WLR) service for 2008–09. The ACCC's indicative prices are determined by deducting Telstra's avoidable retail costs from the retail prices of chosen benchmarks.

The ACCC took the view that the appropriate retail benchmarks for the LCS and WLR service are Telstra's unbundled HomeLine Part and BusinessLine Part services.

MR 221/08

ACCC to oversee access to Telstra exchange facilities

The ACCC has made a record-keeping rule requiring Telstra to keep and retain records and give reports to the ACCC relating to access to Telstra exchange facilities.

The rule requires Telstra to give monthly reports, including details of Telstra decisions to cap and uncap exchanges and the amount of space in an exchange reserved by Telstra for its own anticipated future requirements. It also requires Telstra to report on the details of queued access seekers, their position in the queue and any progress in the queue.

MR 196/08

Data on take-up of broadband access services

The ACCC published details of the take-up of broadband access services on Telstra's copper network. The data provides, for the first time, details of the take-up of these broadband access services between metropolitan, regional and rural areas. The data shows three quarters of these services—and the bulk of unconditioned local loop services and line sharing services—are located in metropolitan areas. Details of voice-only lines are also provided. The ACCC has begun consultation with Telstra about publication of this information at the end of each quarter.

MR 205/08

Telecommunications access dispute

The ACCC received notification of a number of telecommunications access disputes under Part XIC of the TPA. The disputes relate variously to Telstra's supply of the line sharing service and the unconditioned local loop service.

MR 191/08 and MR 195/08

Final decision on Australia Post's proposed price increases

The ACCC issued a final decision not to object to Australia Post's proposal to increase the price of the basic postage rate from 50c to 55c. The ACCC also decided not to object to their proposal to increase other letter prices, including large ordinary letters and small and large PreSort bulk mail.

MR 218/08

Undertaking accepted for interstate rail access

The ACCC accepted an undertaking from the Australian Rail Track Corporation that provides train services to access much of Australia's interstate rail track.

ARTC's undertaking sets out the principles and processes under which ARTC, as an infrastructure provider of rail, will be obliged to provide access to business wishing to run trains on ARTC's interstate rail network. The ACCC's approval of the undertaking will allow rail operators to use the track and compete for rail business.

The undertaking is particularly important as continued growth in rail freight volumes and rail efficiency is likely to be of increasing significance to Australia's long-term competitiveness.

MR 217/08

Position paper for water market rules

The ACCC released its position paper seeking submissions on the development of water market rules. The water market rules form a key component of the *Water Act 2007*, which creates new institutional and governance arrangements to address the sustainability and management of water resources in the Murray-Darling Basin.

The rules will ensure that policies or administrative requirements of operators of irrigation infrastructure who hold a group water access entitlement on behalf of their member irrigators do not unreasonably prevent or delay trade.

MR 193/08