

NOTICE OF FILING

Details of Filing

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File Title:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v BLOOMEX PTY LTD (ACN 147 609 443)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Form NCF1

Concise Statement

No. of

Federal Court of Australia

District Registry: Victoria

Division: General

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

BLOOMEX PTY LTD (ACN 147 609 443)

Respondent

1. The Applicant (**ACCC**) alleges that the Respondent (**Bloomex**) has made false or misleading representations and engaged in misleading or deceptive conduct on its website in contravention of ss 18, 29 and 33 of the *Australian Consumer Law (ACL)*, being Schedule 2 to the *Competition and Consumer Act 2010* (Cth). In general terms, the representations were that Bloomex's products were on sale or discounted, when they were not; that star ratings of Bloomex's products were a reliable indicator of customer satisfaction, when they were not; and that products could be purchased for a specified price, when in fact a surcharge would be applied at checkout. The ACCC alleges this latter representation also contravened s 48 of the ACL.

IMPORTANT FACTS GIVING RISE TO THE CLAIM

Background

2. Bloomex is an online floristry and gift retailer, conducting its business in trade or commerce in Australia through its website www.bloomex.com.au (the **Website**). It has production facilities in New South Wales, Queensland, Victoria and Western Australia. Via the Website, Bloomex customers may purchase for delivery floral bouquets, arrangements or wreaths, individual flowers, and gift hampers (the **Products**).

Discount Statements

3. Since at least 26 February 2019, all of the Products advertised for sale on the home page of the Website (**Home Page**), and since at least 20 December 2021, all or almost all of the Products advertised for sale on the Website, have been accompanied by two prices: a price for purchase of the Product (**Purchase Price**); and a higher price that was displayed in

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Filed on behalf of	Australian Competition and Consumer Commission, Applicant		
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[Form approved 01/08/2011]

strikethrough form (**Strikethrough Price**). Since 3 November 2022, the Strikethrough Price has been described as the 'Compare At' price. Examples are at **Annexure 1**.

4. Since at least 26 February 2019, certain Products advertised for sale on the Website have been accompanied with the words '50% off' or 'Half Price'. Examples are at **Annexure 1**.
5. Since at least 20 December 2021, when a potential customer clicked on the name or image of a Product, a webpage was displayed showing an image of the Product, a re-statement of the Strikethrough and Purchase Price, and underneath the words 'You Save', followed by an amount that is the difference (or the approximate difference) between the two prices (**You Save Statement**). An example is at **Annexure 2**.
6. In fact:
 - (a) for almost all the Products accompanied by a Strikethrough Price:
 - (i) Bloomex has never sold, nor has it offered for sale, the Products at the Strikethrough Price; and/or
 - (ii) the Strikethrough Price was higher than the price at which Bloomex has ordinarily sold the Products, or offered the Products for sale;
 - (b) for almost all the Products accompanied by a '50% off' or 'Half Price' statement, Bloomex has never sold, nor has it offered for sale, the Products at a price that was twice the Purchase Price; and
 - (c) in light of the matters set out in subparagraphs (a) and (b), a customer who bought any such Product would not have received savings in the amount of the difference between the Strikethrough Price and the Purchase Price or a 50% discount (if applicable).

Star Rating Statements

7. Since at least 26 February 2019, all the Products advertised for sale on the Website have been accompanied by an image of five stars, a number out of five (such as '4.3/5') (the **Star Rating**), and a statement purporting to explain that the basis of the Star Rating was 'Customer Reviews' (such as 'based on 1653 Customer Reviews'). Example Products that were accompanied by a Star Rating are at **Annexure 1**.
8. In fact, the Star Ratings were not a reliable indicator of the degree of customer satisfaction for the relevant Product because:
 - (a) the Star Ratings on the Website have remained static since January 2015. They do not incorporate, or otherwise account for, customer ratings or reviews that Bloomex may have received after January 2015;

- (b) the Star Ratings are based on data and reviews from Bloomex websites (www.bloomex.ca, www.bloomexusa.com, www.bloomex.com.au) including customer reviews for Products prepared and delivered outside Australia; and
- (c) the Star Ratings include ratings provided by visitors to the abovementioned Bloomex websites, meaning that calculations accounted for Star Ratings from persons who may have never purchased any Products from Bloomex and who, therefore, may not have been Bloomex customers.

Total Product Price Statements

- 9. To purchase any Product listed for sale on the Website, a customer is required to progress through several webpages before arriving to the 'Express Checkout – Billing' webpage. At that point, a customer is required to enter their personal details to complete any purchase.
- 10. Since at least 10 August 2022, for every Product on the Website, on each webpage prior to the customer entering their delivery postcode details on the 'Express Checkout – Billing' webpage, the Website displayed a purchase price for the Product.
- 11. In fact:
 - (a) the displayed purchase price was not the price of the Product. When a customer entered their delivery postcode and delivery date on the 'Express Checkout – Billing' webpage, the customer was then shown a surcharge that they would be required to pay if they continued with the transaction. The Website stated the surcharge was to cover 'overhead costs' due to 'rampant inflation';
 - (b) the amount of the surcharge varied, but could be an amount between \$1.95 and \$4.95; and
 - (c) neither the existence, nor the amount, of the surcharge was disclosed on the Website prior to the 'Express Checkout – Billing' webpage.

RELIEF SOUGHT FROM THE COURT

- 12. The ACCC seeks the relief set out in the accompanying Originating Application, which includes declarations, injunctions, pecuniary penalties, corrective notices, a compliance program, and costs.

PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

- 13. By engaging in the conduct set out in paragraphs 3, 4 and 5, Bloomex made the following express and implied representations, in trade or commerce, in connection with the supply or possible supply of goods and/or in connection with the promotion of the supply of goods to consumers on the Website:
 - (a) the Purchase Price was a discounted price;

- (b) the amount of the discount that a consumer purchasing the Product would receive was equivalent to the difference between the Strikethrough Price and the Purchase Price or 50% off the Strikethrough Price (if applicable);
 - (c) the Strikethrough Price was the price at which the Product was offered for sale by Bloomex to consumers before the discount was applied; and/or
 - (d) the Strikethrough Price was the price at which the Product was usually offered for sale to consumers absent any discounts,
- (together, the **Discount Representations**).
14. By engaging in the conduct alleged in paragraph 7, Bloomex made the following express and implied representations, in trade or commerce, in connection with the supply or possible supply of goods and/or in connection with the promotion of the supply of goods to consumers on the Website:
- (a) it maintains a customer review system that is reasonably up to date, where other Bloomex customers give or have given a rating out of five reflecting their degree of satisfaction with the Product purchased;
 - (b) the Star Rating is an average calculated by using all of the ratings that Bloomex has received from other customers in relation to the Product; and/or
 - (c) the Star Rating is a reliable indicator of the degree of customer satisfaction in the relevant Product,
- (together, the **Star Rating Representations**).
15. By engaging in the conduct alleged in paragraphs 9 and 10, Bloomex represented that a customer could purchase any particular Product for the displayed purchase price (**Total Price Representations**).
16. Each of the Discount Representations, the Star Rating Representations and the Total Price Representations was false, misleading or deceptive and/or likely to mislead or deceive consumers for the reasons set out in paragraphs 6, 8 and 11, respectively.
17. By making each of the Discount Representations and/or each of the Total Price Representations, Bloomex made false or misleading representations with respect to the price of goods in contravention of ss 18 and 29(1)(i) of the ACL.
18. By making each of the Star Ratings Representations, Bloomex has contravened s 18 of the ACL and has:
- (a) made a false or misleading representation that goods:
 - (i) are of a particular standard or quality; and/or
 - (ii) have particular performance characteristics or uses or benefits and/or approval,

in contravention of ss 29(1)(a) and (g) of the ACL; and

- (b) engaged in conduct that was liable to mislead the public as to the nature, characteristics or suitability for purpose of goods in contravention of s 33 of the ACL.

19. By making the Total Price Representations, for each Product, Bloomex, in connection with the supply, possible supply, or the promotion by any means of the supply to another person of goods ordinarily acquired for personal, domestic or household use, represented an amount that, if paid, constituted part of the consideration for the supply of that Product and did not specify in a prominent way and as a single figure the price for the Product. Thus, Bloomex contravened s 48(1) of the ACL.

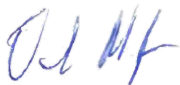
ALLEGED HARM

20. By its conduct, Bloomex may have misled customers about the value, cost and customer satisfaction for the Products offered for sale on the Website. As a result, customers may have been deprived of genuine consumer choice, including the opportunity to purchase other products. Bloomex's conduct may also have unfairly disadvantaged its competitors.

OTHER

21. The Applicant does not consider the issues in this Concise Statement are suitable for a report by a referee under s 54A of the *Federal Court of Australia Act 1976*.

Date: 8 December 2022



Signed by Daniel John Marquet
Partner, Corrs Chambers Westgarth
Lawyer for the Applicant

This Concise Statement was prepared by Peter Wallis KC and Lisette Stevens of Counsel.

Annexure 1 – Example Products showing Star Ratings, Purchase Price, Strikethrough Price, '50% off' and 'Half Price' statements

The following image captures were taken on 20 December 2021:

The image shows a screenshot of the Bloomex website, Australia's Official Florist. The top navigation bar includes links for Christmas, Specials, By Price, Occasions, Flowers, Gift Hampers, Corporate, My Account, Policies, and About Us. A red banner at the top right says 'Contact-Free Delivery' and '1 800-905-147 Live Chat'. A shopping cart icon shows 0 items for \$0.00. A red banner below the cart says 'SAME DAY DELIVERY AVAILABLE ON ORDERS PLACED BEFORE 1:00PM'.

Four product cards are displayed in a row, each featuring a bouquet of flowers, a star rating, a strikethrough price, a sale price, and an 'ADD TO CART' button:





- Designer Collection Anniversary I**: 4.4/5 stars (based on 1967 Customer Reviews). Strikethrough price: \$80.00. Sale price: \$40.00. Tag: 50% off.
- Designer Collection I**: 4.2/5 stars (based on 1868 Customer Reviews). Strikethrough price: \$80.00. Sale price: \$40.00. Tag: SALE 50% off.
- Birthday Designer Collection I Combo**: 4.3/5 stars (based on 2053 Customer Reviews). Strikethrough price: \$99.95. Sale price: \$49.95. Tag: SALE 50% off.
- Designer Collection Birthday I**: 4.7/5 stars (based on 2001 Customer Reviews). Strikethrough price: \$80.00. Sale price: \$40.00. Tag: SALE 50% off.

Below the product cards, a detailed view of the 'Specials' menu is shown. The menu lists various offers, including 'Holiday Gift Basket Specials', 'RED TAG SPECIALS', 'Designer Collection - 50% off', 'Sweet Blossoms Collection - 50% off', 'Sweetheart Collection - Half Price', 'Hugs and Kisses - Half Price!', 'Christmas Specials', 'Wolf Blass Wine Gift Baskets', '50% off Gourmet Hampers', 'Half Price Flowers', 'Lindt Hamper Collections - Half Price', 'Vases-Cards-Chocolates', 'Fruit Hampers - 50% off', and 'The Mason Jar Collection'.

Four product cards are displayed in a row, each featuring a bouquet of flowers, a star rating, a strikethrough price, a sale price, and an 'ADD TO CART' button:

- Gourmet Collection II**: 4.1/5 stars (based on 1187 Customer Reviews). Strikethrough price: \$100.00. Sale price: \$50.00. Tag: SALE 50% off.
- Christmas Bells IV**: 4.7/5 stars (based on 1965 Customer Reviews). Strikethrough price: \$122.95. Sale price: \$59.95. Tag: 50% off.
- Classic Mauve Daisy Bouquet**: 4.2/5 stars (based on 811 Customer Reviews). Strikethrough price: \$69.95. Sale price: \$59.95. Tag: SALE 50% off.


The following image capture was taken on 3 November 2022:

 <p>Colour Me Yours ★★★★★ 4.2/5 based on 2344 Customer Reviews Compare at: \$84.95 Bloomex Price: \$54.95</p> <p>ADD TO CART</p>	 <p>Designer Collection Anniversary IV ★★★★★ 4.7/5 based on 1431 Customer Reviews Compare at: \$150.00 Bloomex Price: \$75.00</p> <p>ADD TO CART</p>	 <p>Super Snapdragons in Mason Jar ★★★★★ 4.3/5 based on 1837 Customer Reviews Compare at: \$59.95 Bloomex Price: \$39.95</p> <p>ADD TO CART</p>	 <p>Holiday Tradition I ★★★★★ 4.4/5 based on 2677 Customer Reviews Compare at: \$94.95 Bloomex Price: \$59.95</p> <p>ADD TO CART</p>
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Annexure 2 – Example Product showing You Save Statement

The following image capture was taken on 12 August 2022:

HOME > OCCASIONS > BIRTHDAY FLOWERS GIFTS > DESIGNER COLLECTION BIRTHDAY III






Designer Collection Birthday III

★★★★★ 4.5/5 based on 1034 Customer Reviews SKU: DC-03B

\$60.00 ~~\$120.00~~
YOU SAVE: \$60.00

STEP 1 > Select Size







 <input checked="" type="checkbox"/> Regular	 <input type="checkbox"/> Deluxe +\$10	 <input type="checkbox"/> SUPERSIZE +\$15
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Our specially priced Birthday Designers Collection bouquets allow our professional, on-staff Floral Designers to work their magic and flaunt their creativity. These beautiful bouquets feature fresh cut flowers selected and creatively arranged by our Designers with a special Birthday theme. Leave it to the experts and let them design a beautiful bouquets for you or your loved ones.

Bouquet includes Designers Collection of a beautiful mix of at least 24 stems of assorted flowers or a single type of flower, like Roses.

* Note: Actual bouquet will vary from photo. Vase not included. Not valid for Same Day Delivery. Valid for delivery Tuesday- Friday only; order must be placed by 2:30 PM one day in advance. Cannot be used with coupon.

STEP 2 > Add an "Extra Touch"

Full Size Greeting Card  \$4.95 <input type="checkbox"/>	Deluxe Gift Packaging  \$4.95 <input type="checkbox"/>	Full Size Birthday Card  \$4.95 <input type="checkbox"/>	Teddy Bear  \$9.95 <input type="checkbox"/>	Premium Chocolates  \$11.95 <input type="checkbox"/>	Glass Vase  \$14.95 <input type="checkbox"/>
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Certificate of lawyer

I, Daniel John Marquet, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 8 December 2022



Signed by Daniel John Marquet

Lawyer for the Applicant