

November 2010

Trade Practices Update: ACCC cracks down on Trade Practices Compliance

Stephens Lawyers & Consultants: Trade Practices Update: November 2010

In Brief

In recent months, the *Australian Competition and Consumer Commission* ('ACCC') has stepped up efforts to combat unfair business practices and ensure compliance with the *Trade Practices Act 1974*. Areas of particular focus have included component pricing and false, misleading and deceptive claims/conduct.

Component Pricing

Under the component pricing laws in section 53C of the *Trade Practices Act*, businesses who list the cost of goods or services in, or as a sum of, multiple component parts, must also provide consumers with a prominent, single, total price.

- The Federal Court has found two restaurants in breach of the component pricing laws for failing to specifically stipulate Sunday or public holiday prices on their menus. Both businesses face civil penalties of \$13,200. [\[1\]](#)

False, Misleading & Deceptive Claims/Conduct

Sections 52 and 53 of the *Trade Practices Act* prohibit businesses from making false or misleading and deceptive representations in the course of business.

- The Federal Court [\[2\]](#) has held that Optus' "THINK BIGGER" and "SUPERSONIC" broadband internet promotions were misleading and deceptive, and breached the *Trade Practices Act*;
- 9 traders face joint proceedings in the Federal Court for false and misleading claims about allergy treatments; [\[3\]](#) and
- The ACCC has accepted LG Australia's enforceable undertakings over misrepresenting refrigerator energy efficiency ratings. [\[4\]](#)

Companies need to implement comprehensive review procedures to ensure that their advertising slogans and promotional activities comply with Part V of the *Trade Practices Act 1974* (Cth) or face the risk of substantial penalties or court action.

1) Component Pricing

Component pricing involves advertising the cost of goods or services, in multiple component parts. Under the *Trade Practices Act*, businesses that use component pricing, must also provide consumers with a prominent single total price for the goods or services. Whilst the ACCC has recently targeted component pricing practices in the restaurant industry, the travel, motor and other industries may also face ACCC scrutiny, as component pricing is commonly used in:

- **Airline ticket prices:** a number of price components are commonly included, such as the cost of airline fees, taxes, surcharges, booking fees, credit card and other charges; and
- **Motor vehicle prices:** which include the cost of the vehicle, delivery charges, on road costs, and taxes. [\[5\]](#)

Café and Restaurant menus targeted

The ACCC succeeded in Federal Court proceedings against two restaurants, *Georges Bar and Grill* and *Steersons Stakehouse*, for failing to include Sunday and/or public holiday surcharges on menu prices. The menus in question provided a statement at the bottom of each menu, in small print that: "A 10% surcharge applies on Sundays and public holidays". [\[6\]](#) This required customers to manually add the surcharge on such days, in order to calculate the true charge. This conduct was found to have breached the component pricing laws under section 53C of the *Trade Practices Act*, which requires businesses to specify 'in a prominent way and as a single figure, the single price for the goods or services'. [\[7\]](#)

This court action follows the ACCC's compliance survey undertaken earlier in 2010, which audited numerous cafe and restaurant menus. The ACCC issued Infringement Notices to 8 traders which they believed failed to comply with the *Trade Practices Act*. Court proceedings were instituted against the traders that did not pay the Infringement Notice Penalty of \$6,600. [\[8\]](#)

Both businesses were ordered to pay a pecuniary penalty of \$13,200 and the ACCC's costs, agreed at \$1,500. These are the first proceedings where a court has ordered civil penalties for this type of breach. [\[9\]](#) In ordering the pecuniary penalty, Justice Jagot noted that 'orders should be made to reflect the importance of general deterrence in a case such as this...[given that] representations as to price are made by cafes and restaurants to consumers virtually every day'. [\[10\]](#)

2) False, Misleading & Deceptive Claims/Conduct

Optus' "think bigger" and "supersonic" broadband ads mislead customers

The Federal Court has held that Optus' "THINK BIGGER" and "SUPERSONIC" advertisements, promoting the company's broadband internet plans, were misleading and deceptive. The advertisements represented that, for a monthly payment, a consumer would receive a headline data allowance of broadband, which was then split into peak (12pm-12am) and off peak (12am-12pm) data allowances. [\[11\]](#) The ACCC alleged that Optus had insufficiently disclosed that service speeds would be limited to 64kb/s once a customer exceeded peak data allowances. [\[12\]](#)

Justice Perram ordered an injunction to restrain Optus from engaging in similar conduct for the next three years and required Optus to pay the ACCC's costs of the proceedings to date. [\[13\]](#) In ordering the injunction, His Honour described Optus' behaviour as 'tricky', [\[14\]](#) and emphasised that 'the contravention is a serious one and the public should be protected from any further repetition of it'. [\[15\]](#)

Optus is also required to issue corrective advertising in store and on their website, and to directly contact customers who purchased the plan since 25 April 2010 through to 31 December 2010, informing them of the misleading advertising. [\[16\]](#) The ACCC is also seeking pecuniary penalties; judgment is yet to be delivered on this issue.

Action instituted against traders for false & misleading allergy claims

The ACCC has also instituted Federal Court joint proceedings against five companies and four individuals, whom it alleges, made false and misleading claims about allergy treatments. The respondents are:

- Renew You Centre for Wellbeing & Longevity Pty Ltd;
- Newlife Publishing and Marketing Pty Ltd;
- Bjoan Schianetz;
- Dzung Kieu Price;
- Willesee Healthcare Pty Ltd;
- Theoliza Pty Ltd;
- Theta Line Pty Ltd;
- Maria Teresa Colosimo; and
- Sophie Lee-Anne Georganicas. [\[17\]](#)

In the allegations against Renew You, Newlife and Price, the ACCC claims that the respondents falsely and misleadingly represented that they could test for and identify a substance to which a child is allergic, and subsequently treat, cure or eliminate the allergy. [\[18\]](#) The ACCC is seeking civil pecuniary penalties against Renew You, Newlife and Price, and various orders including declarations, injunctions, corrective advertisements and costs, against all respondents. Further, the ACCC is seeking orders to disqualify Schianetz and Price from corporate management for 3 years. [\[19\]](#)

The ACCC has recently been monitoring the behaviour of alternative health therapy providers and suppliers of complimentary medicines/therapies. In 2009, the ACCC brought successful Federal Court proceedings against Allergy Pathway, [\[20\]](#) who was found to have made false and misleading claims about its ability to test, cure and treat allergic conditions. The court ordered Allergy Pathway to pay the ACCC's costs, agreed at \$7,500, and accepted undertakings from Allergy Pathway and its director, not to engage in similar conduct for three years. Allergy Pathway was also required to issue corrective advertising and send letters to affected customers and implement a Trade Practices compliance program. [\[21\]](#)

ACCC Chairman Graeme Samuel has criticised this ongoing behaviour by alternative therapy providers and producers, as 'making claims that can't be substantiated can jeopardise public health and safety and run a number of risks, not least of which may be rigorous enforcement action by the ACCC, which may in appropriate cases, involve a criminal prosecution'. [\[22\]](#)

ACCC accepts LG Australia's undertakings for energy efficiency misrepresentations

LG Australia has provided court enforceable undertakings to the ACCC, following concerns that LG may have breached the *Trade Practices Act*, by misrepresenting the Comparative Energy Consumption (CEC) of various refrigerator models. [\[23\]](#) The ACCC conducted investigations earlier in 2010, regarding various "energy saving" LG refrigerators produced in 2007-2009, which were marketed with a CEC label of 738kWh/year. The ACCC was concerned that LG had misled the public as to the energy efficient characteristics of the various models, which operated at a substantially lower CEC than claimed. [\[24\]](#)

In March 2010, LG Australia implemented a compensation program for consumers of the refrigerator models in question. The enforceable undertakings require LG Australia to:

- Continue to offer compensation to affected consumers until the end of November 2010;
- Establish and implement an upgraded trade practices compliance program; and
- Conduct additional testing on a range of refrigerators, televisions, washers, dryers and dishwashers, before they are released onto the market. [\[25\]](#)

Implications

These cases reinforce the ACCC's zero-tolerance approach towards businesses that mislead consumers through advertising or business practices. Business need to ensure that they have adequate processes and proper compliance procedures in place, to review and scrutinise advertisements for Trade Practices compliance, or face the risk of a range of penalties, including substantial fines, for contravening Part V of the *Trade Practices Act*.

Stephens Lawyers & Consultants have a high level of expertise in trade practices and consumer law compliance.

Our lawyers represent leading companies in both litigious and commercial matters.

For further information contact:

Stephens Lawyers & Consultants
Level 3, 530 Lonsdale Street
Melbourne VIC 3000
Phone: (03) 8636 9100
Fax: (03) 8636 9199
Email: stephens@stephens.com.au
Website: www.stephens.com.au
All Correspondence to:
PO Box 13286
Melbourne Law Courts
Melbourne VIC 8010

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[1] *Australian Competition and Consumer Commission v Gourmet Goody's Family Restaurant Pty Ltd* [2010] FCA 1216.

[2] *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd* [2010] FCA 1177; *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 2)* [2010] FCA 1200; *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 3)* [2010] FCA 1272.

[3] Australian Competition and Consumer Commission, *Media Release: ACCC institutes action against nine traders for false, misleading allergy claims*, <http://www.accc.gov.au/content/index.php/html/itemId/951318>, 12th October 2010.

[4] Australian Competition and Consumer Commission, *Media Release: LG Australia provides ACCC with undertaking over energy efficiency claims*, <http://www.accc.gov.au/content/index.phtml/itemId/947285> , 16th September 2010.

[5] For more information and guidance on Component pricing please see Stephens Lawyers' May 2009 Newsletter "*Trade Practices Compliance: New Laws on Component Pricing*" at <http://www.stephens.com.au/view/22/2009052975440>.

[6] *Australian Competition and Consumer Commission v Gourmet Goody's Family Restaurant Pty Ltd* [2010] FCA 1216, [3] (Jagot J).

[7] *Trade Practices Act* ss 53C(1): A corporation must not, in trade or commerce, in connection with: (a) the supply or possible supply of goods or services to a person (the **relevant person**); or (b) the promotion by any means of the supply of goods or services to a person (the **relevant person**) or of the use of goods or services by a person (the **relevant person**); make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the corporation also: (c) specifies, in a prominent way and as a single figure, the single price for the goods or services.

[8] Australian Competition and Consumer Commission, *Media Release: Restaurants menus mislead consumers*, <http://www.accc.gov.au/content/index.phtml/itemId/954781> , 4th November.

[9] *Australian Competition and Consumer Commission v Gourmet Goody's Family Restaurant Pty Ltd* [2010] FCA 1216, [6] (Jagot J).

[10] *Australian Competition and Consumer Commission v Gourmet Goody's Family Restaurant Pty Ltd* [2010] FCA 1216, [10] (Jagot J).

[11] Australian Competition and Consumer Commission, *Media Release: Optus' "THINK BIGGER" internet plans declared "tricky"*, <http://www.accc.gov.au/content/index.phtml/itemId/954437> , 2nd November 2010.

[12] Australian Competition and Consumer Commission, *Media Release: Optus' "THINK BIGGER" internet plans declared "tricky"*, <http://www.accc.gov.au/content/index.phtml/itemId/954437> , 2nd November 2010.

[13] *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 2)* [2010] FCA 1200 [8] (Perram J).

[14] *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd* [2010] FCA 1177 [42] (Perram J).

[15] *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd* [2010] FCA 1177 [42] (Perram J).

[16] *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 3)* [2010] FCA 1272 [31] (Perram J).

[17] Australian Competition and Consumer Commission, *Media Release: ACCC institutes action against nine traders for false, misleading allergy claims*, <http://www.accc.gov.au/content/index.phtml/itemId/951318> , 12th October 2010.

[18] Australian Competition and Consumer Commission, *Media Release: ACCC institutes action against nine traders for false, misleading allergy claims*, <http://www.accc.gov.au/content/index.phtml/itemId/951318> , 12th October 2010.

[19] Australian Competition and Consumer Commission, *Media Release: ACCC institutes action against nine traders for false, misleading allergy claims*, <http://www.accc.gov.au/content/index.phtml/itemId/951318> , 12th October 2010.

[20] *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd* [2009] FCA 960.

[21] *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd* [2009] FCA 960.

[22] Australian Competition and Consumer Commission, *Media Release: Allergy treatment declared misleading*, <http://www.accc.gov.au/content/index.phtml/itemId/890253/fromItemId/622975> , 27th August 2009.

[23] Australian Competition and Consumer Commission, *Media Release: LG Australia provides ACCC with undertaking over energy efficiency claims*, <http://www.accc.gov.au/content/index.phtml/itemId/947285> , 16th September 2010.

[24] Australian Competition and Consumer Commission, *Media Release: LG Australia provides ACCC with undertaking over energy efficiency claims*, <http://www.accc.gov.au/content/index.phtml/itemId/947285> , 16th September 2010.

[25] Australian Competition and Consumer Commission, *Media Release: LG Australia provides ACCC with undertaking over energy efficiency claims*, <http://www.accc.gov.au/content/index.phtml/itemId/947285> , 16th September 2010.