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Access denied: court denies Fortescue access to Pilbara railway lines

Michael Bradley and Jessica Vartuli MARQUE LAWYERS

On 4 May 2011, the Full Federal Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*¹ overturned the determinations of the Australian Competition Tribunal (the Tribunal) with respect to the declaration of railway lines under Pt IIIA of the Competition and Consumer Act 2010 (Cth) (the Act).

In deciding the case, the court considered some of the criteria that need to be taken into account by a Minister or Tribunal when declaring a service.

In particular, the court looked at the appropriate test to be applied in considering whether it would be uneconomical for anyone to develop another facility to provide the service. The court concluded that a much narrower test of economic feasibility should be applied, departing from previous decisions of the Tribunal and the court.

The decision has significant implications not only for any party seeking access to the Pilbara railway lines, but to parties seeking access to services generally under the Act.

Facts

Between 2004 and 2008, Pilbara Infrastructure Pty Ltd, a subsidiary of Fortescue Metals Group Ltd (Fortescue), applied to the National Competition Council (NCC) for recommendations that access to the following four railway lines in Western Australia and associated infrastructure be declared services under Pt IIIA of the Act:

- the Goldsworthy and Mt Newman lines, owned and operated by BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd (BHP); and
- the Hamersley and Robe lines, owned and operated by Rio Tinto Ltd (Rio Tinto).

The railway lines are used for the transport of iron ore from mines to ports on the Western Australian coast and Fortescue sought access so that it would be able to use those railway lines to provide transport services itself.

Upon the recommendation of the NCC, the Treasurer of the Commonwealth of Australia as the designated Minister declared the Goldsworthy, Hamersley and Robe lines for a period of 20 years.

Rio Tinto appealed the decisions of the Minister regarding the Hamersley and Robe lines to the Tribunal. On 30 June 2010,² the Tribunal:

- set aside the decision of the Treasurer to declare the Hamersley line; and
- varied the expiration of the Robe line to 10 years, instead of 20 years.

Fortescue and Rio Tinto appealed the decision of the Tribunal with respect to those declarations to the Full Federal Court of Australia.

The Full Court's decision

The Full Court:

- dismissed Fortescue's appeals, upholding the decision of the Tribunal not to declare the Hamersley line; and
- allowed Rio Tinto's appeal and set aside the decision of the Tribunal to declare the Robe line.

In reviewing the decision of the Tribunal and coming to those conclusions, the court considered the following two criteria of which the Minister must be satisfied when declaring a service.

1. That it would be uneconomical for anyone to develop another facility to provide the service (see s 44H(4)(b) of the Act). This was referred to as the Criterion B Issue.
2. That access (or increased access) to the service would not be contrary to the public interest (see s 44H(4)(f) of the Act). This was referred to as the Criterion F Issue.

What does uneconomical for anyone mean?

The court was required to consider the meaning of "not economical for anyone to develop another facility" and what test should be applied by a Minister or Tribunal with respect to Criterion B.

Rio Tinto argued that the "private economic feasibility" test should be applied. If that test was applied,

Criterion B should not be satisfied if it was privately profitable for someone to build another facility to provide the service in question.

The Tribunal had applied the “natural monopoly test” and concluded that Criterion B would not be satisfied because the existing facility can meet market demand at less total cost than two or more facilities. The application of the natural monopoly test was a departure from the “net social benefit” test previously applied by Tribunals.

In coming to a view on the appropriate test, the court had regard to the background to the introduction of Pt IIIA of the Act to “shed some light on the thinking which informs the legislation, but it is the text of s 44H which is decisive”.³

The court was of the opinion that it was the intention of the legislature that Criterion B was about economic feasibility as opposed to economic efficiency, rejecting the Tribunal’s application of the natural monopoly test. The word “anyone” is a reference not to society as a whole, but to participants in the marketplace.

When considering Criterion B, the Minister or Tribunal needs to be satisfied, based on the facts of the marketplace, that it is economically feasible for someone in the marketplace to develop another facility. Criterion B does not support the Minister or the Tribunal evaluating whether it would be economically efficient from the perspective of the community as a whole for another facility to be developed to provide the service, which is essentially the monopoly test proposed by the Tribunal.

In summary, the court concluded that where a person is found to be economically able to develop its own facility to provide the service, as was the case with respect to a company such as Fortescue, then Criterion B will not be satisfied, and the service cannot be declared. The court said:

This might occasion some wastage of society’s resources in some cases, but to say that, is to say no more than that the intention of the Parliament to promote economic efficiency did not trump the competing considerations at play in the compromise embodied in s 44H(4)(b) of the Act.⁴

Should the Minister take costs of access into account?

Even if Criterion B is satisfied, the Minister has a residual discretion to refuse to declare a service if he or she is not satisfied that access (or increased access) to the service is not contrary to the public interest.

The Minister in considering whether to declare the Hamersley line considered the costs of access to Rio Tinto.

Fortescue and the NCC argued that alleged costs to Rio Tinto of providing access to the services should not

have been taken into account by the Minister when declaring the service. Rather, these costs consequences should be dealt with if the parties are unable to come to an agreement and the terms of access are arbitrated by the Australian Competition and Consumer Commission.

The Tribunal considered that it was appropriate that costs of access be taken into account, despite the fact that some of those consequences are possibly speculative, as those consequences cannot simply be ignored: “The Tribunal should consider consequences that are likely to arise as a result of access, giving them a weight that pays regard to their degree of likelihood.”⁵

The court concluded that the Tribunal had applied the correct approach to the application of Criterion F, adding that a material improvement in competition in a market does not necessarily outweigh the likelihood of a cost to the public interest in the making of a declaration.⁶

Implications for the parties

What immediately follows from this decision is that Rio Tinto does not have to provide access to the Hamersley and Robe lines to Fortescue or any other access seeker.

By Fortescue’s own admission, Fortescue’s plans to expand its operations in the Pilbara region does not depend upon access to either of Rio Tinto’s or BHP’s lines because Fortescue has the funding to build its own railway lines.⁷ While the decision may not prevent Fortescue from providing those services, it makes it very difficult for those access seekers that are new to the market and that do not have the financial means to produce a duplicate facility.

The decision of the court in adopting an economic feasibility test has significant implications for any future assessment or application of Pt IIIA of the Act and other access regimes.

For a Minister or Tribunal considering whether to declare a service, the economic feasibility test is easier to apply than alternative tests because it focuses on the facts and participants in the marketplace, and does not require an evaluation of relative productive efficiency.

Prospective access seekers or providers now have a greater degree of certainty with respect to the factors which need to be considered by a Minister or Tribunal in declaring a service.

However, the court recognised that this is a much narrower test, possibly limiting the power of the Minister or Tribunal to declare a service, and is likely to lead to a duplication of resources. These concerns have been raised by the NCC and are likely to be debated in the future.

To the High Court?

Fortescue and the NCC have applied to the High Court for special leave to appeal the Full Court's decision. There is no word yet on whether the High Court will hear appeals filed by Fortescue and the NCC from the Full Court's decision.



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Footnotes

1. *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 277 ALR 282; [2011] FCAFC 58; BC201102737, Keane CJ, Mansfield and Middleton JJ.
2. *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256; 242 FLR 136; [2010] ACompT 2; BC201005122.
3. Above note 1 at [75].
4. Above note 1 at [100].
5. Above note 1 at [102].
6. Above note 1 at [116].
7. Fortescue, "Response to Full Federal Court decision on appeal against Australian Competition Tribunal decision on Hamersley and Robe railways", ASX release, 4 May 2011, available at www.fmg1.com.au/IRM/Company/ShowPage.aspx/PDFs/2279-75890091/ResponsetoFederalCourtDecision.

Misleading or deceptive conduct and public debate

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The history of the statutory prohibition of misleading or deceptive conduct,¹ introduced into Australia by s 52 of the Trade Practices Act 1974 (TPA) and now enshrined in s 18 of the Australian Consumer Law (ACL),² has been one of almost uninterrupted expansion. With only two notable exceptions, the scope of the prohibition has been gradually broadened by judicial decision and by statute, with the result that it now has the potential to apply to an unprecedented range of activity. As a general proposition, this is to be welcomed; misleading or deceptive conduct is not meritorious conduct and the contribution made by the prohibition to cleansing our markets of unscrupulous advertising and to creating a simplified means of obtaining redress in cases of serious misrepresentation is to be applauded. However, particularly since the decision of the High Court in *Houghton v Arms*,³ it now has the potential also to expose to liability advocacy groups and other participants in public debate to a degree that may be unappreciated and unwelcomed. The purpose of this article is to examine some of the situations in which this may occur and the impact that the case may have on public debate.

The scope of the prohibition

When introduced in 1974, the prohibition of misleading or deceptive conduct was envisaged as being merely one of a number of provisions designed to ensure that corporate businesses deal with consumers honestly and fairly.⁴ However, the breadth of the language used in s 52 and a desire to increase the range of those caught by the prohibition has seen its scope expand considerably. Thus, its “wide terms and its generality”⁵ have led the courts to determine that it is not restricted to public representations, but can also apply to conduct occurring during private negotiations;⁶ that it can be invoked by businesses as well as by consumers and their representatives;⁷ that it can be used by persons who are not the direct victims of the conduct in question and who have not suffered any personal loss or damage as a result of it occurring, as well as by those who have;⁸ that it does not require a course of dealings but can be invoked in respect of a single transaction;⁹ and that it is not

restricted to conduct pursued for profit, or that was intended to mislead or deceive, but can apply also to accidental¹⁰ or gratuitous¹¹ misleading conduct.

The scope of the prohibition was also greatly expanded during the 1980s and early 1990s by the introduction of Fair Trading Acts in each state and territory that included a provision which was identical to s 52, but which was directed to all persons, rather than merely to corporations. This expansion has been continued into s 18 of the ACL, which likewise applies to all persons. As a result, the prohibition has the potential to apply to everyone, their status of being incorporated, or not, being relevant only in relation to which statute a person aggrieved by their conduct will seek to invoke: if they are incorporated, liability can arise under s 18 as a matter of Commonwealth law;¹² if they are not, liability can arise under s 18 as a matter of the law of the state or territory having jurisdiction over the matter.¹³

It is suggested that this expansion advances the policy objectives of the TPA and now the CCA, set out in s 2 of the CCA. While these objectives include protecting consumers, they extend also to enhancing “the welfare of Australians” through promoting “fair trading” generally. This surely includes all trading activity, whether or not directed to, or involving, consumers and whether or not undertaken by businesses that are incorporated. However, what is less clear is whether it also includes conduct on the part of persons who are not themselves engaged in any form of trading activity but which impacts upon the trading activities of others, or has the potential to do so — for example, the conduct of a public interest lobby group, or a disgruntled consumer.

Restrictions on the prohibition

The first notable exception to the prohibition’s expanding coverage came in 1984 with the introduction of s 65A of the TPA. This exempted “prescribed information providers” (in broad terms, media organisations) from its scope in relation to the items they published, other than advertisements and similar material. It was enacted in response to cases such as *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd*¹⁴ and *Global Sportsman Pty Ltd v Mirror Newspapers Ltd*,¹⁵ which established that defamatory publications were

actionable using s 52 of the TPA without the defendant having access to the defences and qualifications available at common law in proceedings for defamation. In short, it prevented s 52 of the TPA being used as an alternative to a common law action for defamation, but only where the defendant was a prescribed information provider; other persons enjoyed no such protection.¹⁶ In significantly improved language, the s 65A exemption was included in the ACL as s 19.

The second exception concerns the prohibition's core requirement — namely, that the impugned conduct must occur “in trade or commerce” for liability to arise. As s 18 of the ACL, either as Commonwealth law or as state or territory law, applies to all persons, this is the only bar to the prohibition applying universally — ie, to all forms of conduct and in all situations. For this reason, the interpretation placed upon it is crucial to the prohibition's scope. In the seminal decision in *Concrete Constructions (NSW) Pty Ltd v Nelson*,¹⁷ a majority of the High Court acknowledged that, as a matter of language, the “in trade or commerce” requirement was capable of extending the prohibition to all forms of conduct engaged in when done so in connection with a trading or commercial activity. However, having regard to the statutory context in which it is found, their Honours held that these words constrain the prohibition so that it applies only to “conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character”¹⁸ and that, as a result, it will not apply to conduct that is merely incidental to a trading or commercial business activity.

As the majority appear to acknowledge, in some instances, on which side of this dividing line a particular case should fall will be difficult to determine and much will depend upon its unique facts. This has been amply demonstrated by subsequent cases, many of which are hard, if not impossible, to reconcile.¹⁹ Furthermore, an added difficulty in applying the decision is that the policy reasons underlying it — namely, to avoid s 52 of the TPA being used to circumvent the statutory compensation schemes established throughout the country to deal with industrial and motor vehicle personal injury claims — have no application outside these areas.²⁰ As a result, a more expansive interpretation may well occur elsewhere, as the High Court's subsequent decision in *Houghton v Arms* illustrates.

Houghton v Arms

This case involved a claim for damages brought by Arms, based on misleading or deceptive statements made to him by a company he had engaged to develop a website for his business. In relation to the company, his

action was based on s 52 of the TPA; it was successful and unexceptional. However, he also took proceedings under the Fair Trading Act 1999 (Vic) against the two employees of the company (Houghton and Student) who had actually made the statements in question. At first instance, this claim failed on the grounds that as Houghton and Student had been acting merely as employees of the company, they had not been acting in trade or commerce. The Full Court and subsequently the High Court disagreed. In a brief joint judgment, five members of the High Court endorsed *dicta* by Toohey J in *Concrete Constructions v Nelson* to the effect that the reference in s 52 to trade or commerce does not refer to “the trade or commerce of any particular corporation”.²¹ Consequently, although it will usually be the case, it does not require the person whose conduct is impugned to be acting in their own trade or commerce. As a result, “statements made by a person not ... engaged in trade or commerce may answer the statutory expression if, for example, they are designed to encourage others to invest, or continue investments, in a particular trading entity”.²² Applied here, this meant that even though the conduct of Houghton and Student did not occur in their trade or commerce, the requirement was still met because Arms was engaging in trade or commerce when they dealt with him.

Houghton v Arms is a very significant decision in at least three respects. First, it suggests that the High Court remains inclined to interpret the “in trade or commerce” requirement broadly and, in so doing, expand, rather than constrain, the prohibition's reach. This follows from the arguments for and against the point at issue being at least as evenly balanced as they were in *Concrete Constructions v Nelson* and their Honours adopting, unlike the court in that case, the broader alternative. It is submitted that had they so wished, they could, equally consistently with the language used in s 52, have adopted the narrower interpretation of the words “in trade or commerce” which would have required the person whose conduct is impugned to have been acting in their own trade or commerce. By not doing so, their Honours indicate a clear preference for giving the prohibition a broad interpretation, at least in the absence of policy considerations such as those that influenced *Concrete Constructions v Nelson*.

Second, the case has a dramatic impact on accessory liability, at least where the victim of misleading conduct was engaged in related trade or commerce. Previously, it appears to have been assumed that the individuals who engaged in misleading or deceptive conduct on behalf of a corporation could be personally liable for damages only where they were a “person involved in the contravention”, and hence liable under s 82 of the TPA (now s 236 of the ACL). For this to occur, their conduct

needed to fall within one of the limbs of s 75B(1) (now s 2(1) of the ACL), and this required them to have been aware of its misleading or deceptive nature. As a result, unlike the corporation which could be liable without fault being established on its part,²³ the individuals involved could be liable only if they had intentionally participated in the contravention.²⁴ However, by exposing the individuals who act on behalf of a corporation to personal liability under a Fair Trading Act, *Houghton v Arms* avoids this requirement. As a result, liability can now arise even where those individuals were unaware that their conduct was misleading or deceptive and had taken all reasonable steps to prevent it being so.

The third significant aspect of *Houghton v Arms*, and the one most relevant to public debate, is its confirmation that the trade or commerce requirement in the prohibition of misleading or deceptive conduct does not mean that the person whose conduct is impugned must be involved in their own trade or commerce. As noted above, it was envisaged that persons not otherwise engaged in trade or commerce could still incur liability for misleading or deceptive conduct if their conduct related to the trading or commercial activity of others — for example, by encouraging investment in “a particular trading entity”. Although this aspect of the High Court’s decision had been anticipated in cases such as *Advanced Hair Studios Pty Ltd v TVW Enterprises Ltd*,²⁵ *Sun Earth Homes Pty Ltd v ABC*,²⁶ *Fasold v Roberts*²⁷ and *Meadow Gem Pty Ltd v ANZ Executors & Trustee Co Ltd*,²⁸ the matter had not been previously settled, as a number of contrary decisions indicate.²⁹

Misleading conduct and public debate

Conduct by entities engaged in businesses

Although established for the purpose of engaging in trade or commerce and although clearly so engaged in its other activities, a business that publicly contributes to the debate of social, economic or political issues, or which seeks to influence public opinion in a particular direction, will not be regarded as acting in trade or commerce where it has no immediate commercial interest in the outcome of its representation and its conduct is not otherwise commercial in nature. Thus, for example, in *Robin Pty Ltd v Canberra International Airport Pty Ltd*,³⁰ advertisements by the respondent criticising plans to rezone land near the airport, in *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)*,³¹ public criticism of certain dog collars, and in *Village Building Co Ltd v Canberra International Airport Pty Ltd*,³² advertisements seeking to influence public opinion and government decision makers in relation to new flight paths for an airport were held not to have been published in trade or commerce. According

to the Full Court in *Village*, this was because the advertisements were not related to a commercial relationship with the persons to whom they were directed, they were not promoting the services of the airport to potential consumers, and they were not part of a process to secure approval to a commercial transaction. It was also envisaged by Finn J at first instance that this would remain the case even where the business stood to gain an indirect benefit from its advocacy, as it might, for example, from successfully advocating for a general reduction in business taxation, or for some general macro-economic reform. On the other hand, advocacy intended to advance the business’s commercial interests, or those of its clients, rather than to altruistically contribute to public debate or understanding, is likely to be characterised as occurring in trade or commerce. *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Incorporated*³³ provides an example. Here, the Full Court found that the Institute’s advertisements, arguing that passive smoking was not harmful, had been published in trade or commerce, as they were designed to promote or maintain the sale of cigarettes and thereby protect the commercial interests of cigarette manufacturers, rather than make a learned contribution to scientific debate.

Relevance of purpose

Conduct by those not engaged in business

Statements by a public interest lobby group, or a person on behalf of such a group, or a private individual on their own behalf, or a person acting in an official capacity, may be characterised as occurring in trade or commerce if the statement concerns the trading or commercial activities of another person or body, even though the person or group making the statement is not themselves engaged in any form of commercial activity. Although there were a number of first instance decisions to this effect before *Houghton v Arms*, there were also a number expressly, or implicitly, rejecting it. As noted above, one of the most significant aspects of that case was the High Court’s acceptance of the view that, in certain circumstances at least, statements by a person not themselves engaged in trade or commerce may, nevertheless, still be characterised as being in trade or commerce and, in so doing, the court’s confirmation of the former body of judicial opinion.

Although *Houghton v Arms* made it clear that to be exposed to liability under s 18 of the ACL, a speaker does not themselves have to be engaged in trade or commerce, it left at least two matters for further consideration. The first of these is whether it is sufficient for the speaker’s statement to be *about* a business or trading entity, or whether it must be *to* that entity. Cases

supporting the former, broader, view include *Meadow Gem Pty Ltd v ANZ Executors & Trustees Co Ltd*,³⁴ in which Hedigan J held that it was arguable that representations by a government minister, concerning the financial position of certain companies, were made in trade or commerce. Support for this position can also be found in the example of the conduct that would be caught given by the High Court itself — namely, statements “designed to encourage others to invest ... in a particular trading entity. On the other hand, in *TCN Chanel 9 Pty Ltd v Ilvarity Pty Ltd*,³⁵ a case decided after *Houghton v Arms*, the NSW Court of Appeal restricted the High Court’s decision to representations made “in the trade or commerce of the person to whom the representation was made”, a restriction consonant with the facts of the case that had been before the High Court. It is suggested that the former is the better view. Although it may be easier to establish the necessary connection with another person’s trade or commerce if the impugned statement is made directly to them, there is nothing in the court’s reasoning that compels the restriction. Furthermore, the policy reasons for allowing the victims of misleading conduct to utilise s 18 of the ACL apply just as forcefully in cases where that conduct is about them as they do in cases where it is directed to them.

The second matter for consideration is the degree of connectivity that must exist between the impugned statement and the other person’s business activity for the statement to be characterised as having occurred in trade or commerce. So far, the decided cases provide only some guidance on this issue and it would appear that this is an area in which much will depend upon the precise facts in each case and the judgments made by the court about them. As a result, generalised propositions drawn from earlier cases to provide pointers for the future should be treated cautiously. With that caveat, it is suggested that it is likely that a statement will be characterised as having been made in trade or commerce if it specifically and directly promotes a business entity — for example, by encouraging investment in that particular business³⁶ or by assuring members³⁷ of the public that it is financially sound. Similarly, a statement specifically and directly *attacking* a particular business entity is likely to be so regarded.³⁸

On the other hand, statements will not be characterised as occurring in trade or commerce merely because they relate in general terms to business matters, or might impact upon business interests. Examples include election promises by a professional politician,³⁹ statements made by a person seeking election to a company board,⁴⁰ comments on the outcome of tobacco litigation,⁴¹ policy statements by a government minister,⁴² comments made in an animal welfare campaign,⁴³ a press release by the Australian Competition and Con-

sumer Commission concerning orders it has obtained against a company,⁴⁴ and the delivery of a public lecture.⁴⁵ In the case of official statements, this will be so even though the person making the statement was a professional person engaged for reward for that purpose.⁴⁶

The dividing line between these two categories may be difficult to draw in practice and, as noted above, much will depend on the facts of the particular case. However, the following considerations appear to be important. First, whether the statement is made about a particular business, rather than about a section of the business community, will be considered. Thus, for example, a statement accusing a named firm of polluting the environment may well be characterised as occurring in trade or commerce, whereas one made accusing a particular industry of doing so is unlikely to be so regarded.⁴⁷ Second, whether the statement was designed, or intended, to affect the business about which it was made will also be considered. Although intention is not relevant to whether conduct is actually misleading or deceptive, in so far as a person may be guilty of such conduct even though they did not intend to mislead or deceive anyone, a number of cases have referred to the speaker’s intention in relation to whether or not their conduct occurred in trade or commerce. Thus, in *Houghton v Arms* itself, the example given of conduct that would be in trade or commerce was expressed in terms of a statement “*designed to encourage*” investment (emphasis added).⁴⁸ In particular, it is suggested that this consideration may be relevant when applying *Concrete Constructions v Nelson* to determine whether conduct was *in* trade or commerce, or merely in connection therewith. A third consideration is whether the impugned conduct was designed merely to promote the interests of the speaker, rather than to affect the interests of the target. Thus, for example, in *Dataflow Computer Services Pty Ltd v Goodman*,⁴⁹ it was held that the respondent’s conduct was not in trade or commerce because there was no evidence that he sought “to promote any interests other than his own”.

Conclusion

It is now clear that persons who are not involved in trade or commerce, but who nevertheless comment upon commercial matters, will come within the scope of s 18 of the ACL where their comments can be characterised as being “in the trade or commerce” of those about whom they were made. Of course, the most satisfactory way for them to avoid their comments attracting liability under that provision is to ensure that they are not misleading or deceptive in the first place. However, as liability under s 18 is strict, even the utmost care in this respect cannot guarantee success. As a result, it would be

advisable for commentators and public interest advocates to also seek to prevent their conduct falling within the scope of s 18 by framing their comments so that, as far as possible, they cannot be characterised as being “in the trade of commerce” of another entity. In this connection, the considerations identified above are especially relevant.

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Footnotes

1. The prohibitions in question also prohibit conduct that “is likely to mislead or deceive”; however, for ease of expression, reference is made only to conduct that is “misleading or deceptive”.
2. The Australian Consumer Law (ACL) is set out in Sch 2 of the Competition and Consumer Act 2010 (Cth); most of its provisions came into operation on 1 January 2011: see Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010, s 2(1).
3. *Houghton v Arms* (2006) 225 CLR 553; 231 ALR 534; [2006] HCA 59; BC200610333 at [34].
4. According to the Attorney-General, Senator Murphy, who was responsible for introducing the TPA, s 52 was designed to ensure that “the law is not to be continually one step behind businessmen who resort to smart practices”: see Senate Hansard, 30 July 1974.
5. See *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 223; 18 ALR 639; BC7800029 per Stephen J.
6. See *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325; 59 ALR 334; 4 IPR 467; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; 212 ALR 357; [2004] HCA 60; BC200408200.
7. See *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; 18 ALR 639; BC7800029; *Parkdale Custom Built Furniture v Puxu Pty Ltd* (1982) 149 CLR 191; 42 ALR 1; 1A IPR 684; BC8200090; *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; 92 ALR 193; 17 IPR 39; BC9002935.
8. See *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; 169 ALR 616; [2000] HCA 11; BC200000766.
9. *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325; 59 ALR 334; 4 IPR 467; *Sigma Constructions (Vic) Pty Ltd Maryvell Investments Pty Ltd* (2005) ATPR 42-048; [2004] VSCA 242; BC200408780.
10. See *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; 18 ALR 639; BC7800029; *Parkdale Custom Built Furniture v Puxu Pty Ltd* (1982) 149 CLR 191; 42 ALR 1; 1A IPR 684; BC8200090.
11. See *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621; 36 FLR 134; (1978) ATPR 40-094.
12. As was the case with s 52 of the TPA, liability for misleading or deceptive conduct under the Competition and Consumer Act can arise only if the respondent is incorporated, or is one of the limited range of natural persons caught by the extension provisions in the Act: see s 131 and s 6(3).
13. See Fair Trading Act 1987 (NSW), ss 27 and 28; Fair Trading Act 1999 (Vic), ss 8 and 9; Fair Trading Act 1989 (Qld), ss 15 and 16; Fair Trading Act 2010 (WA), ss 18 and 19; Fair Trading Act 1987 (SA), ss 13 and 14; Australian Consumer Law (Tasmania) Act 2010 (Tas), ss 5 and 6; Consumer Affairs and Fair Trading Act (NT), ss 26 and 27; Fair Trading (Australian Consumer Law) Act 1992 (ACT), ss 6 and 7.
14. *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* (1983) 47 ALR 497; 66 FLR 453; 1 IPR 119.
15. *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82; 55 ALR 25; (1984) ASC 55-334.
16. See, for example, *Nixon v Slater & Gordon* (2000) 175 ALR 15; (2000) ATPR 41-765; [2000] FCA 531; BC200001995.
17. *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; 92 ALR 193; 17 IPR 39; BC9002935.
18. *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 603; 92 ALR 193; 17 IPR 39; BC9002935.
19. For example, compare *Firewatch Australia Pty Ltd v Country Fire Authority* (1999) 93 FCR 520; [1999] FCA 761; BC9903234 with *Dataflow Computer Services Pty Ltd v Goodman* (1999) 168 ALR 169; (1999) ATPR 41-730; [1999] FCA 1625; BC9907691 and *Yates v Whitlam* (1999) 32 ACSR 595; [1999] NSWSC 976; BC9906123 with *NRMA Ltd v Yates* (1999) ATPR 41-721; [1999] NSWSC 859; BC9905393.
20. See *Barto v GPR Management Services Pty Ltd* (1991) 33 FCR 389; 105 ALR 339; (1992) ATPR 41-162; BC9103606, cited with approval on this point by the Full Court in *Village Building Co Ltd v Canberra International Airport Pty Ltd* (2004) 139 FCR 330; 210 ALR 114; [2004] FCAFC 240; BC200405571.
21. See *Houghton v Arms* (2006) 225 CLR 553 at 565; 231 ALR 534; [2006] HCA 59; BC200610333.
22. See *Houghton v Arms* (2006) 225 CLR 553 at 565; 231 ALR 534; [2006] HCA 59; BC200610333.
23. See *S & I Publishing Pty Ltd v Australian Surf Life Saver Pty Ltd* (1998) 88 FCR 354; 168 ALR 396; BC9806178.
24. See *Yorke v Lucas* (1985) 158 CLR 661; 61 ALR 307; 59 ALJR 776; BC8501069.
25. *Advanced Hair Studios Pty Ltd v TVW Enterprises Ltd* (1987) 18 FCR 1; 77 ALR 615; 10 IPR 97; (1987) ATPR 40-816.
26. *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1990) 98 ALR 101; 19 IPR 201; (1991) ATPR 41-067; BC9003689.
27. *Fasold v Roberts* (1997) 70 FCR 489; 145 ALR 548; BC9702172.
28. *Meadow Gem Pty Ltd v ANZ Executors & Trustee Co Ltd* (1994) ATPR (Digest) 46-130; BC9401058.

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29. See, for example, *Robin Pty Ltd v Canberra International Airport Pty Ltd* (1999) 179 ALR 449; (1999) ATPR 41-710; [1999] FCA 1019; BC9905793 and *Dataflow Computer Services Pty Lsp;Goodman* (1999) 168 ALR 169; (1999) ATPR 41-730; [1999] FCA 1625; BC9907691.
30. *Robin Pty Ltd v Canberra International Airport Pty Ltd* (1999) 179 ALR 449; (1999) ATPR 41-710; [1999] FCA 1019; BC9905793.
31. *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* (2002) 120 FCR 191; [2002] FCA 860; BC200203803.
32. *Village Building Co Ltd v Canberra International Airport* (2004) 139 FCR 330; 210 ALR 114; [2004] FCAFC 240; BC200405571.
33. *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Incorporated* (1992) 38 FCR 1; 111 ALR 61; (1993) ATPR 41-199; BC9203820; see also *Glorie v WA Chip & Pulp Co Pty Ltd* (1981) 39 ALR 67; 55 FLR 310; 1 TPR 84.
34. *Meadow Gem Pty Ltd v ANZ Executors & Trustee Co Ltd* (1994) ATPR (Digest) 46-130; BC9401058; see also *NRMA Ltd v Yates* (1999) ATPR 41-721; [1999] NSWSC 859; BC9905393.
35. *TCN Chanel 9 Pty Ltd v Ilvarity Pty Ltd* (2008) 71 NSWLR 323; [2008] NSWCA 9; BC200800732.
36. See *Houghton v Arms* (2006) 225 CLR 553 at 565; 231 ALR 534; [2006] HCA 59; BC200610333.
37. See *Meadow Gem Pty Ltd v ANZ Executors & Trustee Co Ltd* (1994) ATPR (Digest) 46-130; BC9401058.
38. See *Advanced Hair Studios Pty Ltd v TVW Enterprises Ltd* (1987) 18 FCR 1; 77 ALR 615; 10 IPR 97; (1987) ATPR 40-816; *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1990) 98 ALR 101; 19 IPR 201; (1991) ATPR 41-067; BC9003689; *NRMA Ltd v Yates* (1999) ATPR 41-721; [1999] NSWSC 859; BC9905393; *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* (2002) 120 FCR 191; [2002] FCA 860; BC200203803.
39. See *Durrant v Greiner* (1990) 21 NSWLR 119; (1990) ASC 56-000.
40. See *Yates v Whitlam* (1999) 32 ACSR 595; (2000) 18 ACLC 55; [1999] NSWSC 976; BC9906123.
41. See *Tobacco Institute of Australia v Woodward* (1993) 32 NSWLR 559; (1994) ATPR 41-285; BC9302295.
42. See *Unilan Holdings Pty Ltd v Kerin* (1992) 35 FCR 272; 107 ALR 709; (1992)ATPR 41-169.
43. See *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* (2002) 120 FCR 191; [2002] FCA 860; BC200203803.
44. See *Giraffe World Australia Pty Ltd v Australian Competition and Consumer Commission* (1999) ATPR 41-669; [1998] FCA 1560; BC9806563.
45. See *Plimer v Roberts* (1997) 80 FCR 303; 150 ALR 235; BC9706557.
46. See *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62; [2001] FCA 1106; BC200105040.
47. See *Robin Pty Ltd v Canberra International Airport Pty Ltd* (1999) 179 ALR 449; (1999) ATPR 41-710; [1999] FCA 1019; BC9905793.
48. See *Advanced Hair Studios Pty Ltd v TVW Enterprises Ltd* (1987) 18 FCR 1; 77 ALR 615; 10 IPR 97; (1987) ATPR 40-816; *Firewatch Australia Pty Ltd v Country Fire Authority* (1999) 93 FCR 520; [1999] FCA 761; BC9903234; *Fasold v Roberts* (1997) 70 FCR 489; 145 ALR 548; BC9702172; and, on appeal, *Plimer v Roberts Plimer v Roberts* (1997) 80 FCR 303; 150 ALR 235; BC9706557.
49. *Dataflow Computer Services Pty Lsp;Goodman* (1999) 168 ALR 169; (1999) ATPR 41-730; [1999] FCA 1625; BC9907691.

Regulations about defects warranties under the ACL: major failure?

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By now, you've probably heard quite a lot about the legislation formerly known as the Trade Practices Act 1974 (Cth) and its highly acclaimed second Schedule, the Australian Consumer Law (ACL).

As it turns out, there are quite good reasons why the legislation wasn't named the Australian Easy Compliance for Businesses, Especially Small Businesses, Law. If the unfair contracts rules weren't enough, now there are incoming rules about warranties against defects that sit somewhere on a sliding scale between "mildly confusing" and "horrible nightmare".

From 1 January 2012, businesses that choose to offer a warranty against defects to consumers will have to comply with some new regulations. There are rules about the kinds of information that must appear in the warranty. There's also some particular wording, let's call it the special wording, to include.

The new regulation raises a few questions. Does everyone have to start using this special wording? What about business that supply services? Is this another consumer guarantee?

Don't sweat it. We've put together a survival guide.

Consumer guarantees v warranties against defects

There are several components to the ACL. One component imposes some specific "consumer guarantees" on the supply of goods or services to consumers. The consumer guarantees relate to the quality and usefulness of goods and services, generally speaking.

The consumer guarantees apply across the board. You can't avoid them. You can't do anything that suggests you might not comply with them. They are non-negotiable and the Australian Competition and Consumer Commission (ACCC) is serious about enforcing them.

A different component of the ACL allows for the regulation of defects warranties, where a business chooses to offer one. The defects warranties regulations are distinct from the consumer guarantees under the ACL. To be clear, the ACL does not oblige businesses to offer defects warranties. The regulation just requires you to meet the information requirements and include the special wording in your defects warranty, if you offer one.

What is a defects warranty?

Some businesses choose to offer extra warranties on top of the consumer guarantees. They normally say things like "the manufacturer will repair or replace the goods if a defect occurs within the warranty period" (or words to that effect).

If you want to get technical, s 102(3) of the ACL says:

A *warranty against defects* is a representation communicated to a consumer in connection with the supply of goods or services, at or about the time of supply, to the effect that a person will (unconditionally or on specified conditions):

- (a) repair or replace the goods or part of them; or
- (b) provide again or rectify the services or part of them; or
- (c) wholly or partly recompense the consumer;

As of 1 January 2012, if a business offers one of these defects warranties with its goods or services, then it must comply with the new regulations about defects warranties. It's an offence if it doesn't comply.

Here are the requirements:

- The warranty must be in a document that is transparent. Not in the literal sense. It must be presented clearly and simply, and be easy for consumers to understand.
- The warranty must state:
 - the details for the person who gives the warranty;
 - what the business and the consumer must do for a claim under the warranty, and set out the procedure for making claims;
 - the time for which the warranty applies;
 - who bears the cost of claims under the warranty; and
 - that the business gives the warranty in addition to the other rights and remedies available to consumers under the ACL.
- The warranty must include the following wording — the "special wording":

Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major

failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

What about services?

The general requirements for defects warranties are easy enough to understand. The hard part is the special wording. It clearly only contemplates the supply of goods, and not services. But a defects warranty by definition can relate to services as well as goods.

For businesses that supply services to consumers, this is all a bit confusing. Including the special wording in a defects warranty for services is only likely to confuse consumers. But, under s 192 of the ACL, it's an offence not to include the wording in the warranty document. The penalty is up to \$50,000 and it's a strict liability offence.

It seems to us that service providers have a couple of options. The first one is not to offer a defects warranty in the first place. This avoids the issue altogether. The consumer guarantees would obviously still apply. The downside is that the business doesn't get the opportunity to use the defects warranty as a means of distinguishing itself from its competitors.

If a service business wants to provide a defects warranty, then it needs to get a bit clever. Here's what we recommend. First have the business include the special wording, in the context of "if" it provides goods. Then include some further wording to the effect that the business normally provides services, and state that similar guarantees exist for services under the Australian Consumer Law. Finally, write to the ACCC and ask it to recommend an amendment to the regulation because it's giving you a headache.



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Review of the ACCC publication Professions and the Competition and Consumer Act

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The Australian Competition and Consumer Commission (ACCC) has published a guide entitled *Professions and the Competition and Consumer Act*.¹

According to the ACCC, the publication discusses the issues commonly faced by professionals and professional associations under the Competition and Consumer Act 2010 (Cth) (CCA) and “outlines simple steps professionals and their representative associations can take to minimise the likelihood of breaching the CCA so that they can focus on their main role of providing professional services to Australian businesses and consumers”.²

Obligations on professionals

While the ACCC’s publication notes that professionals are in some ways unique (eg, by maintaining a focus on professional standards), in reality, when it comes to the CCA, the issues faced by professionals are no different from the issues faced by every other business. All professions and businesses have competitors and there can be a great temptation for business people and professionals alike to engage in anti-competitive practices in order to maintain their market position and their profits.

Although the CCA applies primarily to corporations, individuals (as sole traders or in partnerships) may be liable by reason that they have been “knowingly concerned” in the contravention of another person or by reason of the equivalent state provisions.

The provisions of the CCA that are identified in the ACCC’s publication as being of particular importance to professionals are:

- **cartel conduct:** price-fixing, market allocations, bid rigging and output restrictions;
- **exclusive dealing agreements:** anti-competitive restrictions are placed by a professional on the supply or acquisition of products or services by another professional or a consumer;
- **primary or secondary boycotts:** exclusionary agreements made between competitors;
- **the Australian Consumer Law (Sch 2 to the CCA):** engaging in misleading and deceptive conduct, making false representations or including unfair contract terms in consumer contracts; and

- **Pt IVA of the CCA:** unconscionable conduct.

Those provisions apply equally to professionals and other business people, but there will be different considerations for the court in each case, including the nature of the goods or services provided, the type of professional or business person involved, the nature of the industry, and consumers of those goods or services.

Professional associations

The ACCC’s publication also focuses on the position of professional associations.

It is fair to say that the obligations of professional or industry associations under the CCA are not as well documented as the obligations of the members that the associations represent and, of course, it is often the case that CCA breaches arise due to ignorance of the requirements.

For that reason alone, the ACCC’s effort to shed light on the obligations of professional associations under the CCA ought to be applauded.

As the ACCC points out, professional associations are in a unique and important position. While professional associations work to improve and promote the interests of their members, set standards of conduct and provide training, ultimately their members are competitors and the activities of professional associations therefore present opportunities for their members to come together and be tempted to engage in illegal restrictive trade practices.

As demonstrated by cases such as *Australian Competition & Consumer Commission v Tasmanian Salmonid Growers Association Ltd*³ (a case example used by the ACCC in its publication), industry associations can be equally liable for anti-competitive conduct. In that case, an incorporated salmon growers association was found to have been knowingly concerned with anti-competitive conduct and therefore liable under s 75B of the Trade Practices Act 1974 (Cth). The salmon growers association encouraged an agreement among members to reduce the salmon stocks so as to maintain market prices.

Moreover, because professional associations set standards and codes of conduct for the profession, associations have the ability to set barriers for entry which, if unreasonable, can restrict competition in the market.

The ACCC's publication, therefore, focuses on various activities that a professional association may be involved in and gives guidance as to the CCA issues that might arise.

The issues covered in the publication are the following:

- **Professional standards:** The ACCC publication comments that codes of conduct developed by the professional association may benefit both its members and consumers — for example, by setting standards for dealings with clients. The ACCC publication states, however, that “professional associations should ensure that the rules are transparent, that they do not relate to pricing policies and that any disciplinary procedures are not exclusionary in any way — restricting and reducing competition in the industry”.⁴
- **Recommended prices:** The publication states that a professional association should not require (either directly or indirectly) members to follow a recommended price guide. Instead, the association should ensure that recommended prices are published as “information only” and ensure that members understand that they must independently determine the prices to charge for their services.
- **Advertising:** The ACCC says that associations should educate members about advertising that may be misleading and deceptive, or confusing or overly complicated. The publication also says that any restrictions on the types of advertising conducted by members should be in the interests of consumers and not simply be used as a way to restrict the way that individual professionals promote their professional skills;
- **Restrictions on memberships:** While the ACCC accepts that membership requirements serve to lift standards and thereby ultimately protect consum-

ers, the publication says that restrictions on membership should be transparent, reasonable and not so onerous as to create an unnecessary barrier to entry.

- **Education:** The ACCC says that professional associations have a responsibility to educate their members, promote behaviour that is compliant with the CCA, and minimise the risk of using the association network and professional events for anti-competitive purposes.
- **Unfair contract terms:** Professional associations should ensure that they provide standard contracts for transactions with consumers that do not contain terms which breach the unfair contracts term provisions of the Australian Consumer Law. Of course, that may be a matter more easily said than done, particularly considering that the question as to whether a term is unfair will depend heavily on the individual circumstances of the member, the customer and the transaction being undertaken.

Finally, the ACCC's publication provides some information as to the process for obtaining ACCC authorisations and giving notifications of otherwise anti-competitive conduct.



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Footnotes

1. ACCC, Professions and the Competition and Consumer Act, May 2011, available at www.accc.gov.au/content/index.phtml/itemId/926503.
2. Above note 1, p iv.
3. *Australian Competition and Consumer Commission v Tasmanian Salmonid Growers Association Ltd* (2003) ATPR 41-954; [2003] FCA 788; BC200304205 per Heery J.
4. Above note 1, p 5.

News update: Competition and Consumer News

ACCC: Coles discounting of house brand milk is not predatory pricing

The Australian Competition and Consumer Commission (ACCC) announced today that it considers there is no evidence that Coles has acted in breach of the Competition and Consumer Act 2010 (Cth) (CCA).

“The major impact of the reduction in milk prices since January seems to have been a reduction in the supermarkets’ profit margins on house brand milk. These price reductions have benefited consumers who purchase house brand milk,” said ACCC Chairman Graeme Samuel.

The ACCC has been conducting industry-wide enquiries with dairy market participants — including industry associations, milk processors, supermarkets and independent retailers — to assess whether Coles is, or has been, in breach of the two predatory pricing provisions of the CCA.

Section 46(1) prohibits businesses that have substantial market power from taking advantage of that power for the purpose of (a) eliminating or substantially damaging a competitor; (b) preventing the entry of a person into a market; and/or (c) deterring or preventing a person from engaging in competitive conduct in a market.

Section 46(1AA) prohibits businesses with a substantial share of a market from selling goods or services for a sustained period at a price below the relevant cost of supply. As with s 46(1), to breach this provision there must be evidence that a business acted with an anti-competitive purpose.

“It is important to note that anti-competitive purpose is the key factor here. Price cutting, or underselling competitors, does not necessarily constitute predatory pricing. Businesses often legitimately reduce their prices, and this is good for consumers and for competition in markets,” Mr Samuel said.

ACCC enquiries have revealed evidence that Coles’s purpose in reducing the price of its house brand milk was to increase its market share by taking sales from its supermarket competitors, including Woolworths. This is consistent with what the ACCC would expect to find in a competitive market.

After Coles’s price reductions, Woolworths and other supermarket retailers have also reduced prices for house brand milk.

The ACCC’s enquiries show that there is a significant variation between respective costs of supply and operating margins among supermarket operators.

“As to the relationship between dairy farmers and milk processors, it is the case that some processors pay some farmers a lower farm gate price for milk sold as supermarket house brand milk. However, on the evidence we’ve gathered over the last six months, it seems most milk processors pay the same farm gate price to dairy farmers irrespective of whether it is intended to be sold as branded or house brand milk,” Mr Samuel said.

“On that front, the ACCC has recently issued a draft decision proposing to allow dairy farmers associated with Australian Dairy Farmers Ltd to continue to collectively bargain with milk processors for a further 10 years. This strengthens the position for farmers when negotiating with processors over milk prices.”

The ACCC will continue to monitor conduct within the dairy industry and grocery sector for signs of anti-competitive behaviour.

The ACCC does not usually comment on individual matters that it may or may not be investigating. However, given the substantial publicity generated by this issue, the ACCC considers it appropriate to provide these general comments on its findings.

Sourced from: www.accc.gov.au/content/index.php/itemId/998776/fromItemId/2332

ACCC calls for comment on FOXTEL’s proposed acquisition of AUSTAR

The ACCC today released a Statement of Issues on the proposed acquisition by FOXTEL Management Pty Ltd of AUSTAR United Communications Ltd.

The Statement of Issues seeks further information on certain competition issues which have arisen from the ACCC’s review to date.

The ACCC invites further submissions from the market in response to the Statement of Issues by 11 August 2011. As a result, the ACCC’s final decision will be deferred until 8 September 2011.

Submissions can be sent by email to the ACCC at mergers@acc.gov.au.

The Statement of Issues is available on the public merger register on the ACCC’s website at www.accc.gov.au/content/index.php/itemId/750995.

Sourced from: www.accc.gov.au/content/index.php/itemId/998738/fromItemId/2332

ACCC finalises fixed line telecommunications prices and delivers pricing certainty and stability to industry

The ACCC has issued final access determinations (FADs) for the fixed line telecommunications services following the completion of its public inquiry.

The FADs detail wholesale access prices for the fixed line network which will apply for a three-year regulatory period commencing on 1 July 2011 and expiring on 30 June 2014. The FADs incorporate prices included in the interim access determinations of March 2011, for the period from 1 January 2011 to 30 June 2011.

The final prices differ from the draft prices proposed in the ACCC's April 2011 Discussion Paper. The Unconditioned Local Loop Service price is slightly lower than the draft prices, while the Wholesale Line Rental price is slightly higher. Prices have been set for a three-year, rather than the draft five-year regulatory period, as there was broad industry agreement on the difficulty of forecasting for such a long period, given uncertainty about the timing of the roll-out of the NBN.

The prices included in the FADs apply where there is no commercial agreement between an access seeker and the infrastructure operator, Telstra. They create a benchmark that the parties can fall back on when they have not negotiated alternative access terms.

"The ACCC is committed to promoting competition and providing an appropriate level of price stability during the NBN roll-out and subsequent migration of services from the copper network to the NBN," ACCC chairman Graeme Samuel said. "This decision will benefit both industry and telecommunications end-users."

The prices for the six fixed-line services have been derived using a Building Block pricing framework, which is commonly used in other regulated industries. Moving to a Building Block pricing model has been widely supported by industry for some time.

"The ACCC has included fixed principles provisions in the FADs. These provisions lock in the assessed value of Telstra's assets and the framework for setting prices beyond the expiry of the current FADs," Mr Samuel said.

"These measures will promote certainty and predictability in the way the ACCC will calculate prices for these services for the next 10 years."

The ACCC has recognised the need for further industry consultation on the issues of exemptions and non-price terms for the FADs. It has decided to maintain the exemptions and non-price terms in the FADs in their current form (with minor amendments) until further consultation has been completed.

The further consultation in relation to exemptions is expected to be concluded before the end of the year.

The ACCC is considering the issue of non-price terms in two separate public inquiries in relation to making FADs for the Domestic Transmission Capacity Service and Mobile Terminating Access Service. As many non-price terms are common to all regulated services, the ACCC will consult further on non-price terms for the fixed line services, if needed, after the processes in relation to the other regulated services are completed.

The ACCC's *Inquiry to Make Final Access Determinations for the Declared Fixed Line Services: Final Report* (July 2011) sets out in detail the methodology, assumptions and model inputs used by the ACCC to estimate these prices. The *Final Report* is available on the ACCC's website at www.accc.gov.au/content/index.phtml?itemId=990530.

Sourced from: www.accc.gov.au/content/index.phtml/itemId/998524/fromItemId/2332

ACCC takes court action against Sensaslim for alleged misleading claims

The ACCC has instituted proceedings against Sensaslim Australia Pty Ltd (Administrator Appointed) (Sensaslim), Peter Clarence Foster, Peter Leslie O'Brien, Adam Troy Adams and Michael Anthony Boyle.

The ACCC alleges that Sensaslim and several of its officers engaged in misleading and deceptive conduct and made false representations in relation to the identity of Sensaslim officers, the Sensaslim Spray and the business opportunities offered by Sensaslim.

The alleged conduct includes:

- failing to disclose the involvement of Mr Foster in the business of Sensaslim;
- falsely representing that the Sensaslim Spray was the subject of a large worldwide clinical trial when in fact no such trial was conducted;
- falsely representing that Dr Capehorn, an obesity specialist, gave unqualified support to the effectiveness of the Sensaslim Spray and the purported clinical trials;
- falsely representing that Mr Boyle was managing the business of Sensaslim;
- failing to disclose that Mr Boyle was intending to resign as director immediately following the launch of Sensaslim;
- falsely representing that Sensaslim franchisees were already participating in, and profiting from, the Sensaslim franchise, that a Sensaslim franchise had a certain earning potential, and that there was a "money back buy back guarantee"

The ACCC is seeking court orders, including declarations, injunctions, penalties, compensation orders, orders that Sensaslim officers be disqualified from managing corporations in the future, and costs.

In the Federal Court in New South Wales on 20 July 2011, Justice Yates made orders by consent granting leave for the ACCC to proceed against Sensaslim up to 27 July 2011.

Orders are extended to 27 July 2011 that Mr Foster, Mr O'Brien and Mr Adams be restrained from taking

further steps to make representations regarding the efficacy of the Sensaslim Spray where the basis for the representation is a clinical trial or scientific report, unless the clinical trial was conducted and is the subject of a scientific report which has been published in a peer-reviewed scientific journal.

The matter has been adjourned for further hearing to 27 July 2011.

Sourced from: www.accc.gov.au/content/index.phtml/itemId/998494/fromItemId/2332

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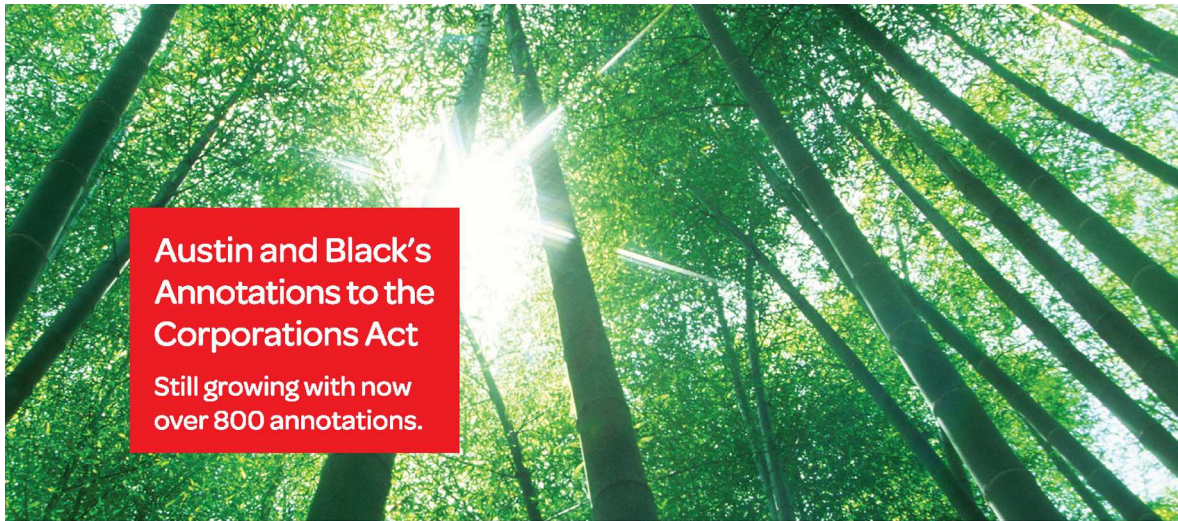
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