

Nailed! Marque Lawyers' semi-regular wrap up of who's been sprung by the ACCC and how much it cost

MARQUE

Money for nothin' – ACCC kicks off first excessive payment surcharges prosecution

Now that the excessive surcharge payments bans have been in for at least a year, the ACCC is on the warpath. The laws took effect in September 2016 for big businesses and September 2017 for everyone else. Businesses cannot charge customers more than it costs them to process the card payment.

The first hit was Cruisin Motorhomes, who paid \$12,600 (and swiftly reduced their surcharges) after an infringement notice. But the latest and biggest one is Europcar. Facing the first litigation under the excessive surcharge provisions, the ACCC alleges overcharging of up to 0.65 percentage points, and claims Europcar was well aware of its actual acceptance costs. Be warned – it's time to check those surcharge policies.

Big fines for Heinz

After Heinz was found guilty for healthy labelling on sugary toddler products, the big question was how much they would have to pay. We now have the answer: \$2.25M. Less than the \$10M that the ACCC asked for, more than the \$400k that Heinz suggested. So where did this number come from?

There were no prior contraventions (positive), but Heinz was kind of breaching its own guidelines (less positive). Throw in that the Court found the conduct was serious and extensive, and the need for deterrence (it had to be more than just negating the profits of a bit over \$400k), and out comes \$2.25M. Magic!

Roofing supply deal goes under

Exclusivity in supply contracts is often ok. But not if your purpose is to stop competitors accessing the supplier, giving you an unfair competitive advantage. Two of Australia's largest distributors of polycarbonate roofing found this out the hard way. They paid \$5.5M in penalties after locking a common supplier into an exclusive deal, preventing the supplier from dealing with their competitors. The individuals involved copped it too. One director wore a personal fine of \$100k and another was disqualified for 3 years.

This kind of behaviour can get you in hot water for exclusive dealing or cartel conduct. The bottom line is to get legal clearance on any dealing with a competitor, or any exclusivity in a contract.

If it walks like duck.... Husqvarna mowed down over franchisee rights

ACCC found that Husqvarna likely misled franchisees by giving the impression that the Franchising Code of Conduct didn't apply to their contracts. Turns out that simply calling them 'dealership agreements' – definitely not 'franchise agreements' – doesn't make it so.

If it meets the definition of a franchise agreement, it will be covered by the Franchising Code – with all of the protections that brings. There were also some questions about unfair contract terms thrown into the mix. But Husqvarna cooperated, rewrote its agreements and has undertaken to the court not to enforce the terms that the ACCC considered unfair.

Questions? Give us a call.



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