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Recent ACCC Cases highlight the importance of Competition and Consumer Law Compliance Programs in Australia

A recent penalty against laundry detergent market participants shows keeping clean from a competition perspective, has never been more important. Over the last two years the Australian Competition and Consumer Commission (ACCC) has ramped up its enforcement actions and has focused on increasing the size of penalties for contraventions of the *Competition and Consumer Act 2010* (CCA)

1. The ACCC is seeking to ensure competition compliance is at the forefront of business considerations

The ACCC, in its role as the enforcer of competition and consumer laws in Australia, has had several successful prosecutions of large corporations in recent months for various breaches of the CCA, including the Australian Consumer Law (**ACL**) which is contained in Schedule 2 to the CCA. The ACCC obtained sizeable pecuniary penalties in these cases – some AUD$40million in three days. The ACCC is still dissatisfied with some of the penalties and has appealed one and is considering appealing another.

Companies operating in Australia should expect that the ACCC will continue its focus on enforcement actions and to seek increased penalties in both competition and consumer law matters.

The ACCC's recent actions include prosecutions for cartel conduct and anti-competitive agreements with decisions in *Colgate-Palmolive*[1] and *Cement Australia*[2].

Equally, the ACCC has succeeded in relation to a misleading and deceptive conduct case against *Reckitt Benckiser*[3] as well as in *Europcar*[4] for unfair standard term contracts. These cases in relation to consumer protection and unfair contract terms are warnings of the need for foreign corporations with customers in Australia to ensure that they have contracts which comply with Australian laws, with the recent decision against *Valve Corporation*[5]

1 *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528.
2 *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2016] FCA 453.
3 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424.
4 *Australian Competition and Consumer Commission v CLA Trading Pty Ltd (Europcar Australia)* [2016] FCA 377.
5 *ACCC v Valve Corporation (No 3)* [2016] FCA 196.

Key points

- Competition and consumer law compliance in Australia has never been more important, including for foreign companies as highlighted by a string of recent cases.
- Significant pecuniary penalties have been successfully obtained by the ACCC, including penalties having particular regard to the maximum penalty based on a company's turnover for contraventions of Part IV of the CCA.
- ACCC enforcement actions cause significant reputational damage and importantly can also lead to an increased risk of class actions.
- The ACCC and courts are recognising the importance of compliance programs and taking them into account in penalty decisions.
- These decisions are an important reminder that companies must have appropriate safeguards and compliance programs in place to ensure that they do not fall foul of their obligations under the CCA.

confirming the extra-territorial operation of the CCA.

Indeed joint submissions by the parties in the case against *Colgate*, note the ACCC's desire in setting penalties that: "…*the Court can convey to large multinational corporations that have operations in Australia that whatever decisions may be made, Australia will not tolerate conduct that contravenes its competition laws*." [6]

Further details of each case and the lessons to be learned are set out below.

2. The need to be vigilant on information sharing and contact with competitors and the importance of compliance programs

***ACCC v Colgate-Palmolive Pty Ltd Colgate-Palmolive Pty Ltd (Colgate) (No 2)* [2016] FCA 528**

Overview

In December 2013, the ACCC commenced proceedings against Colgate, Cussons, Woolworths and a former director of Colgate, alleging the companies had engaged in cartel conduct arising from anti-competitive agreements in relation to the wholesale supply of certain low concentrate laundry detergent products and an agreement to supply high level concentrate laundry detergent products. Unilever was the 'whistleblower' in relation to the conduct and applied for immunity pursuant to the ACCC's Immunity Policy for Cartel Conduct.

In looking at the Statement of Agreed Facts and Admissions (**SAFA**) that was jointly filed by Colgate and the ACCC, agreeing to a penalty, it appears that the move by the laundry detergent suppliers to transition to supplying more highly concentrated laundry detergents stemmed from a similar industry led initiative overseas. Retailers in the United States had communicated to suppliers of laundry detergent products that they would no longer accept non-concentrated products by a particular date, as part of environmental sustainability programs[7]. It appears Colgate observed the benefits that could be obtained from replacing the lower concentrate products with higher concentrate products in Australia, including cost savings as a result of reduced expenditure on production and transport logistics including packaging.

However, in Australia, Colgate considered that, without an industry wide shift to higher concentrates, these benefits would not necessarily be realised as there was a risk that competitors would not follow and that consumers would continue to buy lower concentrate products and not switch to the higher concentrates.

Various meetings and informal exchanges ensued between participants in the market for the supply of laundry detergent. In the first instance, Colgate and Woolworths arranged for a meeting in early 2008, where an industry wide shift to higher concentrates was discussed. ACCORD, an industry body, appears to have been mentioned as a potential 'enabler' to a potential industry-wide, non-partisan sustainability initiative. The SAFA shows that Woolworths was in support of the proposal. Colgate subsequently contacted ACCORD and this was followed by an email on 18 April 2008 from ACCORD to Colgate, Cussons, Unilever and others attaching a document entitled 'Household Laundry Detergent Sustainability Initiative Proposal[8]. Further meetings and informal exchanges continued amongst the market participants throughout the course of 2008.

On 28 April 2016 the Federal Court, following admissions by Colgate pursuant to the SAFA, found that Colgate had entered into and given effect to understandings with its competitors that they would share with each other confidential and commercially sensitive information relating to the supply and price of their laundry detergent products. This was a per se contravention of the anti-competitive agreements and cartel provisions of the *Trade Practices Act* (the previous legislation to the CCA)[9]. Mr Paul Ansell, a former sales director of Colgate was found to have been, directly or indirectly, knowingly concerned in or party to the contraventions by Colgate.

Orders and penalties

Colgate was ordered to pay pecuniary penalties in the sum of $18 million for its contraventions as well as $450,000 of the ACCC's costs incurred in bringing the proceedings. Colgate was also ordered to enhance its compliance programs. Mr Paul Ansell was disqualified from managing

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6 Joint submissions at [123], annexed to *ACCC v Colgate-Palmolive (No 2)* [2016] FCA 528.

7 See SAFA at [37] annexed to *ACCC v Colgate-Palmolive Pty Ltd* (Colgate) *(No 2)* [2016] FCA 528.

8 See SAFA at [37] – [60] annexed to *ACCC v Colgate-Palmolive Pty Ltd* (Colgate) *(No 2)* [2016] FCA 528.

9 Sections 45(2)(a)(ii) and section 45 (2)(b)(ii) of the *Trade Practices Act (Cth) 1974*

corporations for a period of seven years and was ordered to pay a portion of the ACCC's costs in the amount of $75,000.

Colgate's pecuniary penalty is the third largest penalty that the Federal Court has imposed for breaches of Australia's competition laws.

In determining the terms and quantum of the penalty, key considerations of the Court included:

- The maximum penalty that could have been imposed in relation to the conduct, which in total would have been in excess of $100 million based on a turnover assessment of Colgate's business in Australia and the maximum penalty for contraventions of the competition sections of the CCA being up to 10% of turnover during the relevant financial year.[10] Ultimately the Court considered that the penalty of $18 million was sufficient as it recognised the seriousness of the contraventions. The Court accepted the parties' joint submission that the contraventions are 'serious, but not the most egregious end of the scale of seriousness, for various reasons'.[11]
- The prior relevant conduct of Colgate: Colgate had not previously contravened cartel provisions but had contravened the resale price maintenance provisions.
- The existence and effectiveness of Colgate's compliance programs. Colgate had an extensive trade practices and competition law compliance program which included training initiatives in relation to competition law compliance, legal approval processes that extended to cover functions at which competitors may have been present and compliance committees for the reporting and reviewing of problematic conduct. However the Court observed that Colgate's senior management were unaware of the nature and extent of Mr Ansell's communications in relation to the admitted contraventions, which brought into question the effectiveness of Colgate's programs. Relevantly however, it was considered that if Colgate's senior management had become aware of those communications, they would have taken disciplinary action against Mr Ansell.
- Colgate's extensive cooperation with the ACCC in the course of proceedings.[12]

The ACCC's claims against Cussons and Woolworths, are set down for hearing in June 2016. The views on the facts expressed in this briefing are therefore based on the SAFA between the ACCC and Colgate.

Key Lessons – information sharing between competitors can start off innocent enough

This decision provides an important insight into the conduct that may amount to an 'understanding' between competitors for the purposes of cartel conduct under the CCA and the dangers of information sharing. The understanding between Colgate and its competitors was brought about through a series of meetings, telephone calls and correspondence between the companies[13], importantly in the context of an industry transition and in this case a series of meetings that are claimed by the ACCC to involve the grocery retailer which stocked the relevant products. Phone calls between senior managers of competing companies, many of which started as social calls, turned to unlawful exchanges of pricing information. In its media release in relation to the case, the ACCC warned that "any contact between competitors carries risk and while discussion of price is particularly serious, there are many topics which may lead to an anticompetitive understanding.[14]

These observations give important lessons to companies as to the broad range of information exchanges that could trigger breaches of the cartel provisions. In light of this, organisations should be mindful that their compliance programs include things such as:

- Identifying areas of the company's business where it may

10 Other cases which have involved penalties based on the 10% turnover basis have included *ACCC v Cabcharge Australia Limited* [2010] FCA 1261, *ACCC v Mitsubishi Electric Australia Pty Ltd* [2013] FCA 1413 and *ACCC v Visa Inc* [2015] FCA 1020.

11 Joint submissions at [79], annexed to *ACCC v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528.

12 *ACCC v Colgate-Palmolive Pty Ltd (No 2)* [2016] FCA 528 at [17] – [24].

13 Ibid at [8].

14 ACCC media release – 28 April 2016 https://www.accc.gov.au/media-release/colgate-ordered-to-pay-18-million-penalty-in-laundry-detergent-cartel-proceedings

be exposed to the risk of cartel conduct;

- Providing competition law training to employees (including directors, officers and agents) at all levels in relation to the appropriate conduct in communicating with competitors; and
- Guidance as to the types of topics that employees should not talk about with competitors, such as pricing or other strategic information.

The case is also important as it demonstrates a factual situation where a consumer goods grocery retailer has become involved in contraventions between competing suppliers.

3. ACCC's increasing focus on the size of fines

***Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2016] FCA 536**

Overview

On 29 April 2016, one day after the decision against Colgate was handed down, the Federal Court ordered that Cement Australia pay penalties in the amount of $18.6 million for anticompetitive agreements that had the purpose or effect of substantially lessening competition.

The ACCC commenced the proceedings against Cement Australia in 2008, alleging that particular contracts it had entered into and renewed during the period of 2002 and 2006 were anti-competitive. The Federal Court made findings of contraventions in March 2014 and the penalty decision has now been handed down.

The contracts in question were between Cement Australia, as the acquirer, and four power stations in South East Queensland, as the suppliers, for the acquisition of "flyash", a by-product from the combustion of black coal which can be used in the making of concrete.

The four power stations in question were the only entities capable of producing flyash for purchase at the time. The contracts between Cement Australia and the power stations were said to prevent potential competitors of Cement Australia from acquiring flyash. Therefore the contracts were found to have had the effect of substantially lessening competition.

The judgment has not yet been publicly released as it contains significant confidential information.

Interestingly, it is suspected that the ACCC is considering appealing the decision as it is understood, based on media reports, to have considered penalties of approximately $90 million were more appropriate due to the seriousness of the conduct and impact on competition. Cement Australia is understood to have submitted that penalties of $4 million were appropriate as it did not involve cartel conduct nor a contravention of the misuse of market power provisions, but a contravention of the more factually complex competition test of whether the relevant conduct substantially lessened competition. The ACCC on the other hand based on a comparison with Colgate, appears to take the view that cooperation and admissions play an important role in reducing penalties. This is questionable as cartel conduct is more clear cut and it is commercially understandable that companies may wish to contest allegations that their conduct has the effect of substantially lessening competition.

Key lessons

As ever, this decision is an important reminder for companies to consider the potential effects of competition resulting from contractual arrangements. In particular, in respect of contracts between companies and their suppliers, companies should consider the potential competitive effects of significant contractual arrangements when entering into new contracts or renewing existing terms, having regard to the impact of an individual contract or such contracts in aggregate.

4. Warning bells and compliance programs

***Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424**

Overview

On 11 December 2015 the Federal Court found that Reckitt Benckiser, the marketers and distributors of the range of 'Nurofen Pain Relief Products' in Australia, had misled consumers by making representations that each product was specifically formulated to treat particular types of pain (being back pain, period pain, migraine pain and tension headaches), despite the fact that each product contained the same active ingredient.

Orders and penalties

The Federal Court ordered that Reckitt Benckiser pay a penalty of $1,700,000. This amount was in the lower range of penalties sought by the ACCC, especially given that the ACCC was seeking a penalty of $6 million. In imposing this penalty, the Court took into account:

- The fact that Reckitt Benckiser did not intentionally engage in the conduct.
- The products were effective to treat the pain that they represented, and so the only

potential effect of the misrepresentation to consumers was monetary.

- Reckitt Benckiser had 'detailed compliance programs[15]. Despite this however it was observed that the compliance programs of the global entity did not have a specific reference to the ACL. Justice Edelman stated that "a compliance program, even one as detailed as that which Reckitt Benckiser had, is substantially reduced if it cannot detect serious potential risks, particularly where there are obvious warnings".[16]

The Court was critical of Reckitt Benckiser's failure to act on warning bells in relation to its conduct including being awarded the consumer representative group, CHOICE, "Shonky Award" for its Nurofen Specific Pain Range products in 2010.

The ACCC has appealed this decision as to penalty.

On 23 May 2016 the ACCC appealed the penalty decision stating that: "*...The ACCC will submit to the Full Court of the Federal Court that $1.7 million in penalties imposed on a company the size of Reckitt Benckiser does not act as an adequate deterrent and might be viewed as simply a cost of doing business,".*

"This is particularly the case when the judge found that Reckitt Benckiser had made many millions in profits from sales of 5.9 million units of these products at around 8,500 outlets during the relevant period."

Reckitt Benckiser is also facing a class action in relation to the factual matters the subject of these proceedings.

Key Lessons

Compliance programs of international companies should have specific regard to the ACL if they are active in Australia. In addition, compliance programs should include mechanisms to ensure that sufficient regard is had to warning bells such as the negative publications of legitimate consumer advocacy groups.

Since the Court's findings from December 2015, class action proceedings have since been filed (on 24 February 2016) against Reckitt Benckiser, whereby consumers may be able to claim compensation from the manufacturer directly for purchasing the products. If the applicants are successful the manufacturer could be liable for extensive damages. This highlights the potential flow on effects of ACCC enforcement activities, particularly in respect of consumer claims.

5. Unfair contract terms and compliance with Australian laws

***Australian Competition and Consumer Commission v CLA Trading Pty Ltd (Europcar Australia)* [2016] FCA 377**

Overview

On 19 April 2016 the Federal Court declared that certain terms contained in Europcar Australia's (**Europcar**) 2013 standard rental agreement were unfair to consumers. The unfair terms provided that consumers would be liable for loss or damage to a vehicle, regardless of whether or not the consumer was at fault.

The Court also found that Europcar had made false or misleading representations in relation to consumer's liability if they were to purchase "extra cover" in connection with the standard rental agreement. Europcar represented to consumers that their liability would be capped if they purchased these extra options, however the standard rental agreement itself excluded this cap in certain circumstances.

Europcar cooperated with the ACCC, submitting agreed statement of facts and submissions and consented to orders for corrective advertising and costs. The Court ordered for Europcar to pay a pecuniary penalty in the sum of $100,000.

Key lesson

It is important that companies review their standard terms contracts to ensure that they are fair, particularly given that from 12 November 2016 the ACL will extend to cover contracts with small businesses (see our earlier briefing http://www.cliffordchance.com/briefings/2016/04/australian_consumerlawreview.html). The ACCC will consider a contract to be unfair where its terms provide for matters such as:

- One party being able to limit their obligations under the contract, but not another.
- One party being penalised for breaching or terminating the contract, but not another.
- One party being able to vary the terms of the contract, but not another.

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15 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424 at [70].

16 Ibid at [73].

6. Extraterritorial reach of the CCA and overseas companies providing goods or services to Australian consumers

Australian Competition and Consumer Commission v Valve Corporation (No 3) **[2016] FCA 196**

Foreign companies should also review their potential exposure to the CCA, with the recent decision against Valve Corporation (**Valve**) confirming that even companies based overseas will be subject to the ACL if they are providing goods and/or services to Australian consumers.

Valve is an entertainment software and technology company based in the State of Washington in the United States that operates the online game distribution network, "Steam". Users of Steam are able to download and install a large variety of video games from the platform. In order to use the platform, users would enter into a subscription agreement with Valve and would also be required to agree to certain licensing arrangements. The ACCC brought proceedings against Valve, alleging that the company had made false or misleading representations to Australian consumers, in the relevant subscription and licensing agreements in relation to the acceptable quality guarantee provided for by the ACL. Valve does not have physical retail stores in Australia however it has over 2 million Australian subscribers to its gaming platform.

Valve defended these claims on a variety of grounds, including on the ground that its conduct did not occur in Australia and that Valve does not carry on business in Australia therefore the ACL did not apply to it.

In determining whether or not the ACL applied to Valve, the court considered first whether (i) Valve's conduct was in Australia and; (ii) then whether Valve "carries on business in Australia". In respect of the former, Justice Edeleman noted that the relevant conduct were the representations relating to the supply of goods (as opposed to the supply of goods themselves). In this instance, representations in relation to chat logs were specifically made to individual Australian consumers and concerned the supply of goods in Australia. In making this finding, the Court rejected an argument of Valve that as the customer contracts were governed by Washington Law, they would be exempt from the ACL consumer guarantees.[17]

Justice Edelman also considered that Valve was carrying on business in Australia. For reasons including, amongst other reasons, the fact that Valve:

- has in excess of 2.2 million Australian customers in Australia and it earned significant revenue from Australian customers on an ongoing basis;
- has three servers in Australia, on which Steam content is "deposited"; and
- has significant personal property and servers located in Australia.

For these reasons, even if Valve did not engage in conduct in Australia, it was an incorporated body which was carrying on business in Australia and therefore captured by the ACL.

Key Lessons

The Valve decision is important as it clarifies what may constitute engaging in conduct in Australia. The decision also reinforces the importance of overseas companies selling products in or into Australia to comply with Australian consumer as well as competition law

[17] *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 at [178].

Contacts

Sydney

Dave Poddar
Partner
T: +61 2 8922 8033
E: dave.poddar@cliffordchance.com

Diana Chang
Office Managing Partner
T: +61 2 8922 8003
E: diana.chang@cliffordchance.com

Mark Grime
Associate
T: +61 2 8922 8072
E: mark.grime@cliffordchance.com

Penelope McCann
Graduate
T: +61 2 8922 8097
E: penelope.mccann@cliffordchance.com