

Australian Competition & Consumer Law News

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NEWS

Court says Excite Mobile's conduct misleading

Excite Mobile has been found to have engaged in misleading and deceptive conduct in its provision of mobile phone services to remote indigenous communities.

The Australian Competition and Consumer Commission (ACCC) brought the action against Excite after receiving a complaint from the Indigenous Consumer Assistance Network.

The court found that Excite Mobile:

- used unconscionable sales techniques to induce consumers into signing 24-month contracts
- falsely represented that customers had network coverage in their areas when in fact they did not
- created a fictitious complaints body called the "Telecommunications Industry Complaints"
- sent debt collection letters from a fictitious debt collection agency, which also made false claims about consumer rights and remedies.

The directors of Excite Mobile, Mr Obie Brown and Mr David Samuels were both found to be knowingly concerned in the company's conduct, as was Ms Fiona Smart, an agent for Excite.



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Relief will be decided at a later date, with the ACCC seeking injunctions, declarations, costs, pecuniary penalties and disqualification for the directors.

This case will be reported in the Australian Competition and Consumer Law Reporter service.

Source: *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350.

ACCC targets false country of origin claims

The Australian Competition and Consumer Commission (ACCC) has commenced proceedings against Euro Solar and Australian Solar Panel for allegedly claiming that their solar panels were made in Australia when they were in fact made in China.

The ACCC is also taking action against the companies in relation to what they say were false customer testimonials posted on the Australian Solar Panel and Euro Solar websites as well as on YouTube.

The ACCC has also taken action against Mr Nikunj Kumar Patel for being knowingly concerned in the conduct.

The first court date in the matter is set for 8 July 2013 in Adelaide.

Source: ACCC Media Release Number 99/13, *ACCC takes action against Euro Solar and Australian Solar Panel for misleading claims*, 8 May 2013.

Draft authorisation guidelines released

The Australian Competition and Consumer Commission (ACCC) has released its revised draft Authorisation Guidelines for comment.

This is the first time the guidelines have been substantially updated since 2007 and the ACCC is calling for comment from

interested parties before final guidelines are released.

ACCC Commissioner Dr Jill Walker:

“While the authorisation provisions and legislative processes in the Act remain the same, the draft provides updated guidance on the ACCC’s approach based on its recent experience and relevant determinations by the Australian Competition Tribunal.”

Written submissions need to be sent in by 31 May 2013 and can be sent via email to adjudications@acc.gov.au.

Source: ACCC Media Release Number 97/13, *ACCC seeks comment on revised authorisation guidelines*, 6 May 2013.

Consumers misled by false “cruelty free” claims

Choice has released findings that show cosmetic companies which claim their products are not tested on animals and are “cruelty free” are in fact testing products on animals in order to sell within China.

Chinese law prohibits the sale of cosmetics that have not undergone eye and skin irritation tests on animals. Choice claims that cosmetic companies have gone back on their word to stop animal testing in order to break into the lucrative Chinese cosmetics market.

Choice conducted a “shadow shop” at Myer and David Jones and found that sales people selling SKII, Lancome, Dior and M.A.C claimed their products were not tested on animals, when in fact it is known that these companies test on animals in order to meet Chinese legal requirements.

Choice also found that while many cosmetic brands displayed logos and words such as “cruelty free” and “against animal testing” which give consumers the impression that the products are not tested on animals, only a handful were actually certified by a third party.

Choice is calling on the Australian Competition and Consumer Commission to protect consumers against false and misleading animal testing representations by cosmetic companies.

More information is available at www.choice.com.au/animaltesting.

ACCC commences unfair contract terms case against internet service provider ByteCard

The Australian Competition and Consumer Commission (ACCC) has commenced proceedings against ByteCard Pty Ltd, better known as Netspeed Internet Communications, for breaches of the unfair contract provisions of the Australian Consumer Law (ACL).

The ACCC allege that Byte Card's standard form contract contains clauses which are unfair to consumers and should be declared void. These include clauses that allow ByteCard to unilaterally alter the contract, including increasing the price, without allowing the consumer to terminate the contract, and the requirement that the consumer indemnify ByteCard even when there has been no breach of the contract by the consumer.

These proceedings, the first of its kind brought under the new unfair contract provisions in the ACL, follow on from the ACCC's recent industry review of standard form contracts which was released in March 2013.

Source: ACCC Media Release Number 87/13, *ACCC institutes proceedings against ByteCard Pty Limited for unfair contract terms*, 22 April 2013.

ASIC accepts enforceable undertaking from Solar Rental Company

Solar Rental Company Pty Ltd, which operates a business renting solar systems to consumers in South Australia, has entered into an Enforceable Undertaking (EU) with ASIC following an investigation.

ASIC found that between 19 October 2011 and 5 May 2012, Solar Rental entered into 239 rental agreements with consumers while not holding an Australian credit licence. There were also concerns that the rental agreements did not contain the disclosures required under the National Credit Act.

Solar Rental is required to write to all affected consumers and offer them the following options:

- termination of their rental arrangements with Solar Rental
- purchase of the solar systems at the price paid at the time of the rental agreements less rental amounts already paid, or
- entry into a new rental agreement with Solar Rental that is compliant with the National Credit Act.

The letter must also provide the affected customers with the disclosure required under the National Credit Act.

ASIC Commissioner Peter Kell said:

“This case is a reminder to the industry that it is a fundamental responsibility of those engaging in credit activities to be fully aware of their obligations under the National Credit Act.

I would encourage consumers to check ASIC's registers to ensure the person or company they are dealing with is licensed, and to contact ASIC or visit our MoneySmart website if in doubt.”

Source: ASIC Media Release 13-090MR, *ASIC accepts enforceable undertaking from Solar Rental Company*, 29 April 2013.

Virgin free to acquire Tiger Airways

The Australian Competition and Consumer Commission (ACCC) has announced that it will not block Virgin Australia's proposed bid for 60% of Tiger Airways Australia.

The ACCC has stated that it does not believe that the acquisition will lead to substantially lessening of competition in the domestic air passenger travel market.

Central to its assessment was that it was unlikely that Tiger would remain within the market if the acquisition did not proceed. The airline is in considerable debt and has not reported a profit in the six years it has operated in Australia.

Virgin intends to continue Tiger's operations as a low cost airline for price sensitive consumers — its main competitor being Jetstar.

Source: ACCC Media Release Number 89/13, *ACCC to not oppose Virgin Australia's proposed acquisition of 60% of Tiger Australia*, 23 April 2013.

ACCC denies authorisation to electrical goods retailers

The Australian Competition and Consumer Commission (ACCC) has announced that it will not authorise a number of electrical goods retailers to set a minimum advertising price for BEKO branded products including televisions, cameras, white goods and kitchen appliances.

Narta International Pty Ltd, which represents 30 Australian electrical retailers including Betta Electrical, JB Hi-Fi, Bing Lee, David Jones, Myer and Radio Rentals sought the authorisation from the ACCC in order to prevent any breach of the Australian Consumer Law.

The ACCC says it denied the authorisation as the setting of a minimum price would likely reduce competition among retailers and increase the price of electrical goods for consumers.

A copy of the determination is available on the ACCC's *Authorisations register*.

Source: ACCC Media Release, *ACCC rejects minimum advertising price proposed for selected electrical goods*, 82/13, 11 April 2013.

ASIC reports on monitoring and supervision of credit representatives

Since the commencement of the responsible lending obligations contained in the *National Consumer Credit Protection Act 2009* (NCCP Act), ASIC has released a number of reports regarding credit licensees' compliance with those obligations. (See, for example, Report 262 *Review of credit assistance providers' responsible lending conduct, focusing on "low doc" home loans* and Report 264 *Review of micro lenders' responsible lending conduct and disclosure obligations*. These reports were discussed in Issue 34 of *Australian Legal Compliance News*.)

The latest is Report 330 *Review of licensed credit assistance providers' monitoring and supervision of credit representatives* which was released on 13 March 2013.

This report sets out the results of ASIC's review of how effectively 18 credit assistance providers were supervising their credit representatives' compliance with the responsible lending obligations. These representatives provide credit assistance for home loans and constitute approximately 40% of all the credit representatives notified to ASIC as at 1 October 2011. Under s 47(1)(e) of the NCCP Act, a credit licensee must take reasonable steps to ensure that its representatives comply with the credit legislation.

ASIC's review found that there was room for improvement in licensees' supervision of

their representatives and recommends eight ways to improve their supervision of, and interaction with, their credit representatives.

A focus of the report is on the importance of credit licensees conducting regular compliance reviews of the credit assistance provided by their credit representatives. At the outset of ASIC's review, 16 of the 18 licensees were conducting regular reviews and the remaining two licensees commenced regular reviews over the course of ASIC's review. In ASIC's view, not undertaking any compliance reviews places licensees at significant risk of not complying with their responsible lending obligations, as well as their obligation to ensure compliance by their credit representatives. Four of the report's eight recommendations deal with compliance reviews.

A copy of Report 330 can be downloaded from: www.asic.gov.au/asic/asic.nsf/byheadline/Reports?openDocument#rep330.

In addition, ASIC is currently reviewing the compliance with responsible lending obligations by credit providers when providing home loans promoted as low doc. This report is expected to be released later this year.

(Source: ASIC media release 13-046, "ASIC review sharpens credit licensees' supervision of representatives engaged in mortgage broking", dated 13 March 2013, at www.asic.gov.au/asic/asic.nsf/byheadline/13-046MR+ASIC+review+sharpens+credit+licensees%27+supervision+of+representatives+engaged+in+mortgage+broking?openDocument.)

Consumer credit & contract law: covered

Australian Consumer Credit Law Reporter

Australian Consumer Credit Law Reporter explains the application and regulation of relevant state and commonwealth consumer credit laws including the new national consumer credit protection regime. Online subscriptions include legislation, commentary, releases and cases on both the new and old consumer credit law regimes. Subscriptions include either a newsletter or tracker service to ensure you are kept informed of important regulatory developments.

Key features:

- Contains full text of all relevant consumer credit legislation and commentary.
- Up-to-date reporting of credit-related judicial decisions in full text and with an editorial abstract.
- Includes the new information on the National Credit Protection Package and other topical issues in consumer credit law.

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No. updates: Up to six per year

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Australian Contract Law Reporter provides a clear and practical explanation of the basic principles of contract law and the steps to be followed when drafting and advising on the validity of contracts. This product will quickly become an invaluable daily reference tool for legal practitioners. It contains commentary and analysis, legislation and cases. This service is an easy-to-use one-stop-shop on contract law which will allow you to both draft and advise on contracts more efficiently.

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