

Submission by the Treasury to the Senate Economics References Committee's inquiry into *The impacts of supermarket price decisions on the dairy industry*

The Treasury welcomes the opportunity to make a submission to the Senate Economics References Committee for its inquiry into *The impacts of supermarket price decisions on the dairy industry*. The purpose of this submission is to highlight particular aspects of the Australian Consumer Law which may assist to inform the Committee in its inquiry.

By way of background, the Australian Consumer Law (ACL) is the principal, national consumer law in Australia.¹ The principal text of the ACL is located in Schedule 2 to the *Competition and Consumer Act 2010* (CCA) (formerly named the *Trade Practices Act 1974* (TPA)). The ACL commenced on 1 January 2011, following a Productivity Commission's recommendation for Australian governments to implement a national, generic consumer law that would apply in all jurisdictions.² The ACL is supported by the *Intergovernmental Agreement for the Australian Consumer Law* (IGA), which was signed by the Council of Australian Governments (COAG) on 2 July 2009.³ The IGA requires the support of the Commonwealth and four other jurisdictions (at least three must be States) to amend the ACL.

The ACL contains a number of consumer protection provisions against unfair business practices, including provisions which prohibit misleading or deceptive conduct and false or misleading representations. The Treasury considers that these provisions are adequate to prevent false, misleading or deceptive conduct.

The prohibition on misleading or deceptive conduct

The Committee's Second Interim Report (May 2011) raises the issue, with respect to Coles' marketing campaign which uses the words 'down down and staying down', what length of time 'staying down' means.⁴

Section 18 of the ACL contains a general prohibition on misleading or deceptive conduct which creates a broad norm of conduct in the market. Specifically, subsection 18(1) of the ACL prohibits a person, in trade or commerce, from engaging in conduct that is misleading or deceptive or conduct that is likely to mislead or deceive. This prohibition replaces a similar prohibition on misleading or deceptive conduct in section 52 of the TPA, and similar prohibitions in State and Territory Fair Trading Acts, without substantive change.⁵

A range of remedies are available under Part 5-2 of the ACL upon a court finding the misleading or deceptive conduct prohibition has been breached, including those of damages, injunctions and non-party redress. To assist in investigating complaints in relation to a potential breach of section

¹ Further information about the ACL is available at www.consumerlaw.gov.au

² Productivity Commission (2008), *Review of Australia's Consumer Policy Framework*, recommendation 4.1

³ A copy of the IGA is available at www.consumerlaw.gov.au

⁴ The Senate Economics References Committee, *The impacts of supermarket price decisions on the dairy industry*, Second Interim Report, May 2011.

⁵ The only change made was to apply the prohibition to 'a person' rather than 'a corporation' to reflect the broader application of the ACL. The ACL applies to all persons, including individuals and bodies corporate, as it applies as a law of the Commonwealth (through the *Competition and Consumer Act 2010*) and of each State and Territory through State and Territory application laws.

18 of the ACL, the Australian Competition and Consumer Commission (ACCC) is able to issue substantiation notices under Part 5-1 of the ACL.⁶ This is a relatively new enforcement power for the ACCC.⁷

The power to issue substantiation notices provides the ACCC with a preliminary investigative tool to seek information about claims or representations that may assist them in determining whether to take action for a suspected breach of the ACL.⁸ A notice would require the person whom the notice was issued to, to provide information or documents which could be capable of substantiating the representations made. The ACCC can also issue 'section 155 notices' to obtain information, documents or evidence which relates to a potential breach of section 18 of the ACL.⁹

There is considerable case law associated with the interpretation, meaning and application of the section 18 prohibition based on the now-repealed section 52 of the TPA (and the equivalent provisions in State and Territory Fair Trading Acts). This case law is still relevant in the interpretation, meaning and application of section 18 of the ACL.¹⁰

For instance, the High Court has held that intent is not relevant to establish a breach of section 18 of the ACL and that all that is relevant is whether, tested objectively, the conduct was misleading or deceptive (or likely to mislead or deceive).¹¹ 'Conduct' for the purpose of section 18 is not limited to positive acts (such as representations) but in certain circumstances can include omissions (such as silence).¹²

The courts have also held that while evidence of confusion is admissible, proof of confusion or uncertainty in the minds of the relevant members of the public, without more, is not ordinarily sufficient to establish misleading or deceptive conduct.¹³

Case-law also exists which examines the application of section 18 of the ACL to advertising.¹⁴ Some latitude is allowed in relation to advertising as, by its nature, it is likely to reflect the enthusiasm of the advertiser to place their goods or services in a favourable light. Latitude is also allowed when determining whether commercials are false, misleading or deceptive, with the public usually being accustomed to 'puffing' (or slight exaggeration) in advertisements.¹⁵

Whether an advertisement will be misleading or is likely to mislead or deceive would depend on whether any reasonable interpretation of it would lead a member of the class who can be expected

⁶ The ACCC enforces the provisions of the ACL in accordance with its *Compliance and Enforcement Policy* (a copy of which is available on the website www.accc.gov.au). Under the Policy, matters involving significant public concern, resulting in significant consumer detriment, relating to a national issue or concerning widespread misconduct, are accorded higher priority.

⁷ Substantiation notices were introduced by the *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010*

⁸ Section 219 of the ACL

⁹ Section 155 of the *Competition and Consumer Act 2010*

¹⁰ A discussion of the case law on section 18 of the ACL can be found in Millers, R.V., *Miller's Australian Competition and Consumer Law Annotated*, 33rd Ed. 2011, Thomson Reuters (Professional) Australia Ltd, pp.1547-1646.

¹¹ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191; *Yorke v Lucas* (1985) 158 CLR 661

¹² *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31

¹³ *Bing! Software Pty Ltd v Bing Technologies Pty Ltd* [2009] FCAFC 131; *SAP Aust Pty Ltd v Sapient Aust Pty Ltd* [1999] FCA 1027; *Chase Manhattan Overseas Corp v Chase Corp Ltd* [1986] FCA 404

¹⁴ See Millers, R.V., *Miller's Australian Competition and Consumer Law Annotated*, 33rd Ed. 2011, Thomson Reuters (Professional) Australia Ltd, pp.1585-1595.

¹⁵ *Stuart Alexander & Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 53 FLR 307

to read it, into error.¹⁶ Courts will also consider the degree of care which the ordinary reasonable viewer/reader would have paid to the advertisement, the degree of attention the person would have applied to it and the degree of accuracy they may expect of it.¹⁷

With respect to a representation made as to a future matter, section 4 of the ACL provides that a representation with respect to any future matter (including to do or not do any act) which the maker of the representation has no reasonable grounds for making, may amount to misleading conduct.¹⁸

Against this background, whether a particular conduct is misleading or deceptive is a question of fact to be determined in the context of the evidence of the alleged conduct. Each case is decided on its particular facts and relevant surrounding circumstances, and the court's impression of the particular representation (including advertisements) as to whether it amounts to misleading or deceptive conduct.

The prohibition on false or misleading representations

It should also be noted that subsection 18(2) of the ACL makes it clear that specific prohibitions on false or misleading representations under Part 3-1 of the ACL may apply concurrently with the general prohibition in section 18. For instance, Part 3-1 of the ACL contains a specific prohibition on the making of false or misleading representation with respect to the price of the good or service in trade and commerce.¹⁹

¹⁶ *Keehn v Medical Benefits Fund of Aust Ltd* (1977) 14 ALR 77

¹⁷ *Farquhar v Bottom* [1980] 2 NSWLR 380 per Hunt J

¹⁸ The application of section 18 of the ACL in a retailing context by the courts is discussed in Millers, R.V., *Miller's Australian Competition and Consumer Law Annotated*, 33rd Ed. 2011, Thomson Reuters (Professional) Australia Ltd, p.1631.

¹⁹ Paragraph 29(1)(i) of the ACL, which is based on the now-repealed section 53 of the TPA