

Commercial Dispute Resolution Newsletter

June 2008

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Misleading and deceptive conduct in dual price advertising

The recent Federal Court decision of *ACCC v Prouds Jewellers Pty Ltd* [2008] FCA 75 is an important reminder for companies when engaging in dual price advertising. The Australian Competition and Consumer Commission (**ACCC**) brought proceedings against Prouds Jewellers Pty Ltd (**Prouds**) in relation to two catalogues promoting the sale of its jewellery in the "Summer of Love" sale and "Love You Mum" sale.

Facts

Prouds published catalogues in which it offered certain jewellery for sale at discounted prices for a limited period. In the catalogues, Prouds offered each item for sale at a price described as the "now" price near a picture of the item and another price described as the "was" price. The "was" price was higher, and often much higher, than the "now" price.

The ACCC alleged that the publication of the catalogues amounted to misleading and deceptive conduct under sections 52 and 53 of the *Trade Practices Act 1974* (Cth) (**the Act**).

In summary, the alleged misrepresentations were:

- the consumer would save the difference between the "was" and "now" price
- the "was" price was the usual price for the item
- the "was" price was the price at which the item had been sold immediately before the sale period and
- the "was" price suggested that the items had been offered for sale at that price before the sale period.

The relevant audience

In assessing whether an audience is misled by a representation regarding a price, it is necessary to isolate who are the "ordinary" or "reasonable" members of a class of prospective purchasers. That process involves an objective attribution of certain characteristics.

While Moore J accepted the ACCC's submission, that the audience for each catalogue was the public at large, there was an important subgroup within the general audience, namely consumers without experience in purchasing jewellery and without knowledge of the Australian jewellery industry or Prouds' pricing or promotion practice. The trial judge found that this material section of the broader audience would have been misled by the advertising.

Price at which an item is offered for sale versus price at which item is in fact sold

Central to the defence of Prouds, was the contention that the "was" price would have been understood as the initial offer price and not the ultimate sale price. However, the evidence established extensive discounting by Prouds which meant that original quoted prices were rarely the final sale price for jewellery. Amongst other things, it was accepted that:

- Staff would invariably discount an item for the customer in order to secure the sale provided it was not already discounted
- A large majority of customers ask for, and expect to be given, a discount when purchasing jewellery and that Prouds sells very few of its items at the regular marked price
- While Prouds offered items to its customers at the retail price expecting to achieve sales at their retail price, the degree of competition between jewellery retailers would often prevent sales at the full price
- Prouds' stores are located in close proximity to other jewellery retailers, which encouraged customers to shop around, giving them greater bargaining power to seek, and obtain, discounts.

The trial judge concluded that based on the relevant advertising,

a hypothetical consumer would have made the erroneous assumption that he or she could have purchased the item at the "was" price if he or she had attempted to purchase the item before the sale.

If your business engages in discounting practices, it should not be assumed that your target audience is aware of this. It should not be assumed that any price represented as the "was" price will be understood to have been the initial offer price and not the final sale price.

Price at which an item is sold "preceding" the sale

The evidence of ACCC established that a number of the items in one of the catalogues were not offered for sale at the "was" price in the period immediately prior to the advertising.

The ACCC alleged that 12 of the 17 contentious items in the *Love You Mum* catalogue were in fact offered for sale from 26 December 2005 to 22 April 2006 at prices which in every case were less than the "was" price. Seven items in the *Love You Mum* catalogue, had never in fact been offered for sale at the "was" price.

Prouds submitted that it was unnecessary for an item to have been offered for sale at the "was" price immediately before the *Love You Mum* catalogue was published (and thus immediately before the sale commenced) and it was sufficient for it to have been

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offered for sale at the "was" price at some comparatively proximate point in the past.

His Honour did not accept Prouds' defence and concluded that it was misleading to identify in the catalogue a "was" price which did not represent the price at which an item had been offered for sale and would have been purchased by the hypothetical consumer immediately before the sale commenced.

His Honour concluding Prouds had contravened the Act noted:

"The contravening conduct flows from the fact that the goods offered for sale in the context of dual pricing, were not offered for sale at the "was" price immediately before the sale. In my opinion there would be no contravention of the Act if the goods had been offered for sale at the "was" price for a period of two months preceding the sale period. While there can be no precision about the length of the anterior period, it must represent a period of substance in which the price the goods were offered for sale at the "was" price and, negotiated discounts aside, would have been purchased at that price. If the period was unduly short, then the publication of the "was" price in the context of dual pricing would remain misleading and deceptive."

This conclusion highlights the importance of ensuring that when engaging in dual price advertising, the "was" price represents the

price at which an item has been offered for sale and the price at which the item would have been purchased immediately before the sale. Further, the period preceding the sale must represent a period of substance in which the item was offered for sale at the "was" price, and would have been purchased at that price, discounts aside.

Consequences of Findings

In some circumstances a company may be liable for misleading and deceptive conduct when engaging in dual price advertising.

Although much will turn on the individual scenario, it is important when engaging in dual price advertising to:

- Ensure the representations are easily understandable - especially to those with limited prior experience in the relevant market;
- Ensure the "was" price represents the price at which the item has genuinely been offered for sale, and could have been purchased at that price; and
- Ensure the "was" price represents a period of substance in which the price of the item was offered for sale and, negotiated discounts aside, would have been purchased at that price.

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Proposed National Employment Standards

Current employment standards

March 2006 amendments to the *Workplace Relations Act, 1996 (Cth)* (WRA) legislated five minimum terms of employment that would apply to all employees within the federal jurisdiction whether covered by an award, agreement or contract.

They were:

- basic rates of pay and casual loading
- maximum ordinary hours of work
- annual leave
- personal leave and
- parental leave.

It is estimated that between 85 to 90 percent of Australian employees are governed by the WRA and are covered by the five minimum employment standards.

Proposed employment standards

As part of its election platform the Federal Labor Government proposed that the WRA be further amended to include 10 National Employment Standards (NES) which would apply to all employees

in the federal jurisdiction whether covered by an award, agreement or contract. The proposed 10 NES were released in February 2008 as follows:

- maximum weekly hours
- request for flexible working hours
- parental leave
- annual leave
- personal leave
- community service leave
- long service leave
- public holidays
- notice of termination and redundancy pay and
- fair work information statement.

It has been proposed that four of the five current standards will remain. However, although the WRA currently includes basic rates of pay and casual loading as a legislated minimum entitlement, such terms are currently not proposed to be part of the NES.

Review of proposed NES

Maximum weekly hours

It is proposed that the maximum weekly hours will remain at 38 hours per week and will apply to all employees including managerial and professional staff. An employer may require an employee to work in excess of 38 hours per week but the employee cannot be required to work unreasonable additional

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hours. In determining whether additional hours are "reasonable" the following factors will be considered:

- any risk to an employee's health and safety from working the additional hours
- the employee's personal circumstances including family responsibilities
- the state of the workplace in which the employee is employed
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for working additional hours
- the notice to be given by the employer of any requests to work additional hours
- the notice to be given by an employee of his/her intention to refuse to work the additional hours
- any other relevant matters.

Most of the above factors are subjective in nature. We anticipate they will give rise to disputes as to whether they apply in various circumstances.

Request for flexible working arrangements

This proposed standard is an attempt to assist working families balance their family and work responsibilities and assist employers by encouraging greater workforce participation.

This entitlement will apply to an employee who is a parent of a child under school age, or who has the responsibility for the care of a child under school age.

It is proposed that an employee will be required to make a request in writing to amend their current work arrangements and the employer will be required to respond to the request within 21 days. An employer may only refuse a request for "reasonable business grounds".

Parental leave

This standard provides an enhanced period of leave whereby each parent would be entitled to take up to 12 months unpaid parental leave or, as an alternative, one parent could take a longer period of unpaid leave up to 24 months.

As with the current parental leave provisions, leave is only available to a full time and part time employee who has completed at least 12 months with continuous service with an employer or to a casual employee employed on a systemic and regular basis over at least a 12 month period prior to the expected due date.

A further proposal will allow a female employee, if pregnant, to request transfer to a "safe job" if she provides medical evidence of fitness to work but not in her current position due to risks arising from the pregnancy. It is proposed that where no safe job is available,

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the employee would be entitled to paid leave for a specified duration at her base rate of pay excluding bonuses, loadings, allowances, overtime or penalty rates.

Annual leave

This standard remains unchanged. Employees will continue to be entitled to four weeks of paid annual leave per year. However, the proposed method of accruing annual leave has changed in that annual leave would accrue during periods of an employee's "service". Service is defined as all periods of employment other than unpaid leave, unpaid absence (other than community service leave) or unauthorised absence.

Personal/carers leave and compassionate leave

It is proposed this form of leave remain unchanged except that carer's leave is no longer capped at 10 days per leave. Assuming an employee has accrued the required amount of personal leave covering the period of absence on carer's leave it is proposed an employee would be entitled to payment for the leave.

Community service leave

While community service leave has been provided in a number of awards and agreements, this is the first occasion on which it is being considered as a legislated entitlement. This leave would provide employees engaged in voluntary community service activity, the right to unpaid leave

for the period so engaged. It is proposed that jury service in addition to voluntary emergency management activity is covered by community service leave.

Long service leave

Although long service leave is currently not covered by the WRA, it is proposed that it will become an NES. Currently the standard of long service leave varies from state to state. As such in order to become an NES a uniform standard with respect to long service leave will need to be adopted.

It is proposed that state long service leave entitlements will be preserved until a uniform long service leave standard is developed.

Public holidays

It is proposed that public holidays declared by state and territory governments will be protected.

Notice of termination and redundancy pay

Notice periods for the termination of an employees employment have been prescribed in Federal legislation since 1997, however, this is the first occasion that the government has proposed that redundancy pay be prescribed by legislation.

The proposed redundancy pay provision provides that an employee would be entitled to redundancy pay if the employee's employment is terminated at the initiative of the employer because

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the employer no longer requires the job duties to be performed or because of the insolvency or bankruptcy of the employer.

It is proposed that there will be no entitlement to redundancy pay where the employee is employed by a business with fewer than 15 employees.

The proposed redundancy pay scale is as follows:

Period of continued service	Severance pay
Less than one year	Nil
One year and less than two years	Four weeks pay
Two years and less than three years	Six weeks pay
Three years and less than four years	Seven weeks pay
Four years and less than five years	Eight weeks pay
Five years and less than six years	Ten weeks pay
Six years and less than seven years	Eleven weeks pay
Seven years and less than eight years	Thirteen weeks pay
Eight years and less than nine years	Fourteen weeks pay
Nine years and less than ten years	Sixteen weeks pay
Ten years and over	Twelve weeks pay

Fair work information statements

Under this proposed standard, employees would have access to information about their rights and entitlements in the workplace. The statement would be published by Fair Work Australia and would contain information about the NES, modern awards, agreement making, the right of freedom of association and the role of Fair Work Australia.

Conclusion

The proposed amendments to the WRA should create an enhanced "safety net" for the majority of Australian employees. In addition, the proposed amendments would ease the administrative burden of employers currently governed by a number of different industrial instruments by creating uniformity with respect to 10 terms of employment.

We will continue to monitor the progress of the WRA Amendments and will keep you informed of further updates.

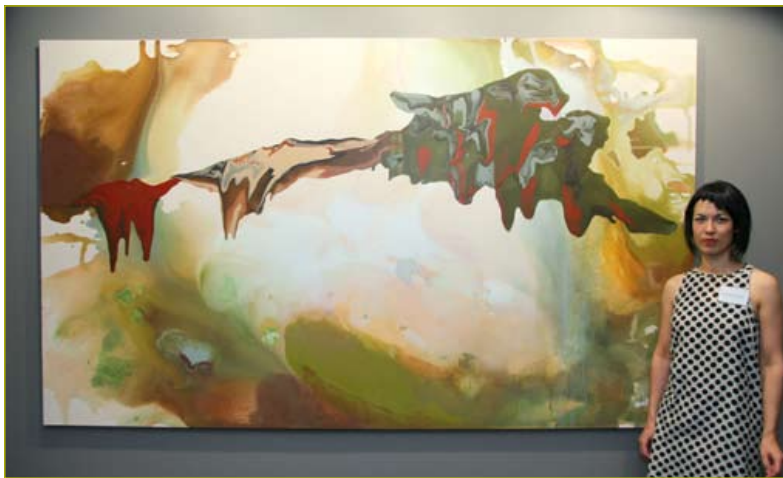
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Emerging Artist Function



Clients of CBP's CDR Division enjoyed an unusual event recently with the launch of CBP's first emerging artist exhibition on 2 April 2007.

Over 80 people gathered in the reception area of CBP for a cocktail function where they viewed three major art pieces which were created and installed by young Australian artist Noël Skrzypczak.

Barbara Flynn, curator of the exhibition series, has worked with a number of major Australian corporations to help them develop unique initiatives in support of the visual arts. Flynn has turned over CBP's entire reception area to the exhibition of a single artist at a time, enabling the artist's intentions to become clear based on the example of a number of works – an idea developed especially for CBP.

Skrzypczak's art inspired thought and provoked conversation amongst both staff and clients. At the exhibition opening CBP's clients and guests heard the artist tell of her first adventures in art – drawings made as a 7-year old during a year with her family in Japan – and her first mature body of work, which began as a series of paintings of the family's dog and then began to spill over the edges of the canvas onto the wall, in a moment prescient of the way she works today. On the night Skrzypczak spoke of her "enjoyment of the primal nature of painting" and said that she "attempted to establish a mood or feeling, rather than show a real place in her art".

Dunstan de Souza, CBP's Managing Partner said "We believe we have a responsibility to assist young people in our community with great talent who do not otherwise have opportunity to succeed. It is in this context that we decided to undertake our first emerging artists' exhibition. We were delighted to be able to exhibit the works of Noël Skrzypczak who is a wonderfully energetic and exciting emerging Australian artist. I commend the exhibition to you."

Noël's work has been featured on ABC TV and in the print media, including Vogue Interiors, Eyeline and UN Magazine. She is currently a resident at Gertrude Contemporary Art Spaces, Melbourne and in 2009 will take up

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residence at the Australia Council's Japan Studio. Her work is held in a number of public and private collections in Australia and New Zealand, including Artbank, the Richard Larter Collection and UBS Wealth Management, Brisbane.

Noël's works will be on exhibition in CBP's reception until the end of June.

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Upcoming Seminar: Discrimination and Harassment

On 22 July 2008, the CDR Division will be holding a breakfast seminar on Discrimination and Harassment. This practical seminar will look at what constitutes discrimination, harassment and bullying. Recent case law will be reviewed to demonstrate the potential financial costs to an organisation where workplace discrimination, harassment or bullying has occurred, as well as strategies that organisations can implement to minimise the risk of such conduct.

The seminar, the third in a four part series, will be presented by CBP Partner, Kristen Lopes and follows the second seminar presented on 8 April 2008 by Sam Ingui entitled Executive Employment Contracts.

Further details and invitations for the seminar will be emailed shortly.

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Profile

Penny Karvouniaris



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Penny Karvouniaris is a solicitor in the Commercial Dispute Resolution (CDR) Division who specialises in employment law and workplace relations, a growing practice area within the CDR Division.

Penny has expertise in advising clients on a range of employment related

matters, such as the drafting of employment contracts and industrial instruments, drafting and reviewing employment policies and procedures, termination of employment, unfair dismissal claims and breach of contract claims.

Since joining CBP in February 2008, Penny has worked on appeal matters in the federal and state industrial relations commissions and advised clients on the latest changes to the Workplace Relations Act 1996 (Cth), implemented by the Rudd Government in March this year.

Outside the law, Penny enjoys travelling, food and learning languages. Prior to joining CBP, she lived in Spain for a year and a half, sampling the great food and wine, learning Spanish and teaching English. In her free time, she can be found testing out tapas restaurants in search of the perfect slice of Spain in Sydney.

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