AUSTRALIAN JOURNAL OF COMPETITION AND CONSUMER LAW

Volume 21, Number 3

September 2013

EDITORIAL 151

ARTICLES

Neither adopt nor endorse: Liability for misleading and deceptive conduct for publication of statements by intermediaries or conduits – *Radhika Withana*

This article examines the High Court decision Google Inc v Australian Competition and Consumer Commission (ACCC), which dealt with liability under s 52 in the context of the publication of statements by one party that were authored by another party. In Google's case, advertisers who advertised on its website came up with the wording in the advertisements and were responsible for their contents. Google provided the software program by which the advertisements were displayed and developed the algorithm that selected which advertisements would be ranked highest when triggered by a user's keyword search of particular terms. The High Court did not find Google liable for contravention of s 52(1), and this article explores the principal basis for that decision. It examines the line of authority on which a majority of the High Court relied in dismissing the ACCC's appeal, and concludes that the decision clarifies the state of the law in respect of publishers who publish information provided by third-party intermediaries. 152

Evidential issues in brand appropriation litigation – *Peter Gillies*

Brand appropriation litigation in Australia centres on one or more claims of trade mark infringement, breach of s 18 of the Australian Consumer Law (formerly s 52 of the Trade Practices Act 1974 (Cth)), and commission of the tort of passing off. At the core of these actions is an allegation that the consumer was relevantly misled into buying the pirate brand rather than the legally protected one. Expert evidence, such as consumer survey evidence and that from marketing psychologists, is often (but not universally) tendered in cases of this type. The adducing of evidence in this category tends to prolong litigation and increase its cost. It is therefore appropriate to examine its utility. Cases to be commented upon include those centring upon the fictional Duff beer "brand", the Cadbury brand (where Cadbury sought a monopoly on the shade of purple associated with its branding), and the Red Bull energy drink brand. 165

Division 1A of the Competition and Consumer Act 2010 (Cth): A critique – *Nicholas Wendon*

The purpose of this article is to investigate the application and likely interpretation of Div 1A in Pt IV of the Competition and Consumer Act 2010 (Cth) which addresses the difficulty in establishing collusion in cases concerning price-signalling (as opposed to an agreement to fix prices) within the Australian legal context. In comparing the policy behind the prohibitions in the both the United States and the United Kingdom and their application in recent cases, a framework is created within which the effectiveness of the

Act in dealing with anti-competitive information disclosures will be assessed. It is demonstrated that Div 1A in its current form is likely to capture benign or pro-competitive disclosures due to the narrow and prescriptive criteria used to establish liability. The application of Div 1A is limited to industries specified in the regulations subject to further review and consideration by the federal government. It is concluded that, with significant amendments to create greater consistency with international practices and economic literature on the likelihood of harm, Div 1A should be expanded to other industries. 181

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