LEGAL PROFESSION ADMISSION BOARD

MARCH 2013

COMPETITION & CONSUMER LAW

Time: Three Hours

Candidates <u>must</u> attempt <u>one</u> question only from Part A and <u>two</u> questions from each of Part B and Part C for a total of <u>five</u> questions. Please note the marks that have been allocated for each of the questions.

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If more than the specified number of questions is answered, only the <u>first</u> question attempted in **Part A** and the first <u>two</u> questions attempted in each **Part B** and **Part C** will be marked.

All questions may be answered in one examination booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates <u>must</u> indicate which questions they have answered on the front cover of the first examination booklet.

Candidates <u>must</u> write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade.

This examination is worth 80% of the total marks in this subject.

Permitted Materials:

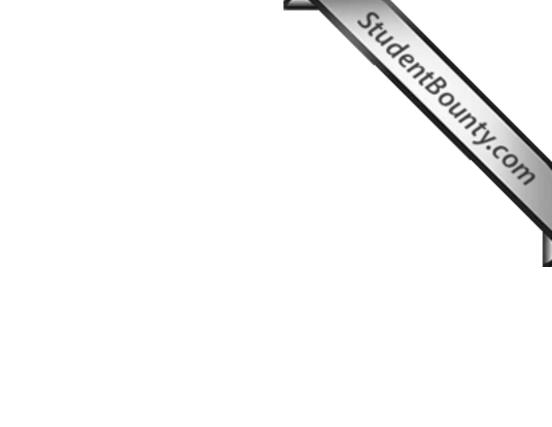
This is a closed book examination. No materials are permitted in the examination room.

Attached to this paper is a copy of the Case List contained in the Law Extension Committee's subject guide, an abbreviated index of the relevant provisions of the Competition & Consumer Act 2010 (CCA) and an abbreviated index of the relevant provisions of the Australian Consumer Law (ACL).

As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

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PART A

Attempt one question only in this part.

Question 1

Write notes on only <u>four</u> (4) of the following:

- (a) Conduct by silence (s4(2) CCA & s2 ACL).
- **(b)** The extension of jurisdiction to Commonwealth government authorities, in so far as they carry on a business. (s2A CCA).
- (c) 5 activities that **do not** constitute the "carrying on of a business" by either the Commonwealth or State/Territory governments (s2C CCA).
- (d) 5 forms of activities that would constitute exclusive dealing (s47 CCA).
- (e) 5 acts that would constitute resale price maintenance (s48 CCA).
- (f) 5 examples of unfair terms in a consumer contract (s25 ACL).
- (g) 5 forms of false or misleading representations about goods or services (s29 ACL).
- (h) 5 matters, as prescribed in s22 of the ACL, a court may have regard to in connection with unconscionable conduct as prescribed in s21.

(20 marks)

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OR

Question 2

Answer only two (2) of the following:

(a) "Competitors who regularly share sensitive market and price information (including at face-to-face meetings) and generally agree that the market within which they operate cannot afford to have another competitor are likely to have entered into an arrangement or understanding which contains an exclusionary provision and or have the purpose or effect or likely effect of substantially lessening competition in breach of s45 of the CCA.

Discuss.

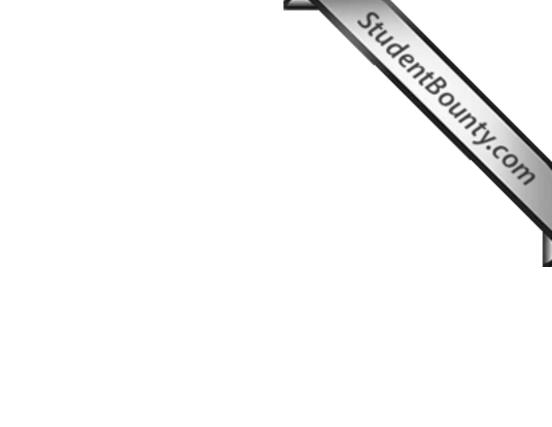
(b) The only two online retailers of medieval musical instruments and sheet music wish to merge. Both are operated through a company. Their services are particularly popular in country/remote areas where there are no shops selling such instruments or sheet music.

Advise as to whether the merger may be in breach of s50 of the CCA.

(c) Discuss the nature and scope of the harassment and coercion provisions in s50 of the ACL.

(20 marks)

(Part B follows)



PART B

Attempt any two (2) questions in this part.

Question 1

The Top Target Shooters Club (TTSC):

- i. is incorporated under the Associations Incorporation Act;
- ii. has 1,500 members;
- iii. has owned the only four target shooters facilities (which includes both indoor and outdoor target shooting ranges) located within a 20 km radius of the centre of Sydney;
- iv. has owned the facilities since it was incorporated 50 years ago;
- v. exclusively sells a range of American made pistols and rifles, ammunition, target sighting equipment, clothing and other paraphernalia;
- vi. uses the most advanced European target shooting technology for which they are also the exclusive Australian distributors;
- vii. charges an annual membership fee plus a fee of \$30 per hour for the use one of the facilities.

There are 6 other target shooting clubs in the Sydney region with both indoor and outdoor facilities. Together they have a total membership of 950 members. Their facilities are technologically unsophisticated by comparison with those of TTSC and are located at least 50 km from the centre of Sydney.

The Sure Fire Shooters Club (SFSC), with 390 members, has approached TTSC about having access to the TTSC facilities on a proper commercial basis.

TTSC has offered SFSC the use of only one of its facilities on the strict condition that SFSC:

- i. pay an annual fee to TTSC of \$50,000;
- ii. their members pay TTSC an hourly fee of \$90 for the use of the facility.

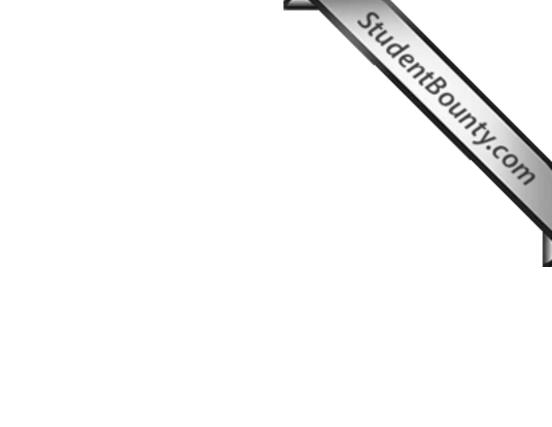
TTSC has refused to sell the advanced European target shooting technology to SFSC. SFSC has also approached a number of suppliers of pistols and rifles and associated equipment and has been informed that TTSC has entered into exclusive arrangement so that all retail sales are being conducted through TTSC

Advise SFSC of any action it may have against TTSC under s46 of the CCA.

(20 Marks)

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(Part B Question 2 follows)



Question 2

Student Bounty.com Assume all of the facts contained in Part B Question 1 and that TTSC insist that further condition, SFSC's members buy at least 80% of their guns and related appare from TTSC and all of their ammunition directly from Bullets Galore Pty Ltd, a company which is not related to TTSC.

Advise TTSC whether it has breached s47 of the CCA.

(20 Marks)

Question 3

Betty, the owner of 100 prize limousine cattle and a professional breeder conferred with a local vet about the fact that several of her livestock exhibited signs of fatigue, fever and glazed eyes. The vet inspected the cattle. On the recommendation of the vet, she purchased 500 vials of a vaccine, manufactured by Animal Ailments Pty Ltd ("AA"), at a cost of \$100 per vial. The instructions on the vaccine packets did not mention that refrigeration was essential, that the equipment used for vaccination must be thoroughly sterilised in solution prior to its use on each beast, and that surgical gloves should be used at all times.

The vet told Betty to vaccinate all of her livestock at least 5 times. Betty emailed the vet to confirm what she had to do and he repeated his oral advice. He never mentioned that sterilisation of the equipment and maximum hygiene were vital when undertaking the vaccination.

Betty religiously followed the vaccination instructions provided with the product.

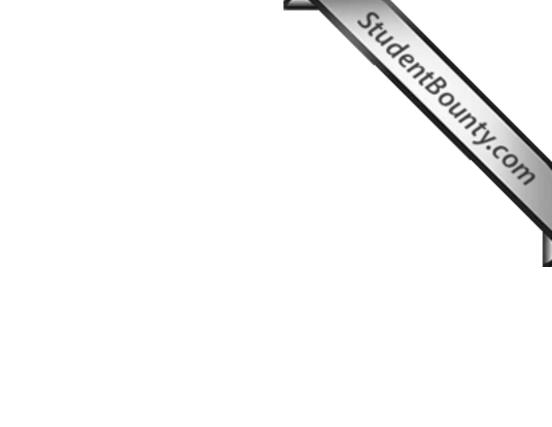
After 5 days, all of Betty's vaccinated cattle became very sick and half of them died. Each of the limousine cattle is ordinarily worth between \$10,000 and \$50,000.

Tests conducted by both AA and by an independent laboratory confirmed that the vaccines contained a rare form of micro-organism which is likely to become virulent when left unrefrigerated and used in unsterilized equipment.

Advise Betty as to her rights and remedies under the statutory consumer guarantee provisions of the ACL (Part 3 - 2 and Part 5 - 4).

(20 Marks)

(Part B Question 4 follows)



Question 4

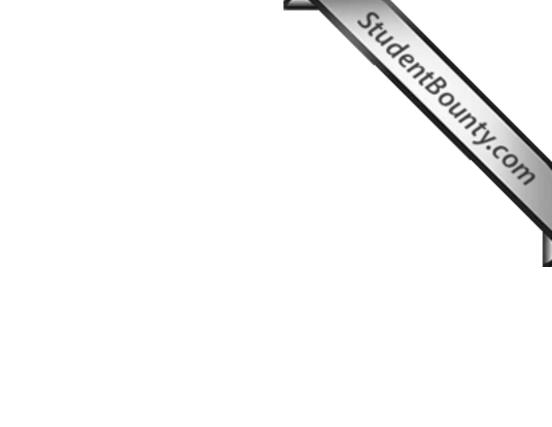
Assume the facts in Part B Question 3 and that:

- i. Betty herself became ill, was hospitalised and needed 3 months to recuperate;
- Student Bounts, com State government authorities issued an order that all of her cattle be put down and ii. cremated:
- iii. An official Quarantining Notice requires that Betty's property be fumigated and not hold livestock for at least 12 months; and
- Betty's elderly mother has had to be moved from the property into an aged care iv. facility for the duration of Betty's illness.

Advise Betty as to any action she may have against Animal Ailments Pty Ltd under the liability of manufacturers for goods with safety defects provisions in Part 3 - 5 of the ACL, including any damages that may be recovered.

(20 Marks)

(Part C follows)



PART C

Attempt any two (2) questions in this part.

Question 1

Assume the relevant facts in Part B Question 3 and that:

In their advertising, AA state that the vaccine:

- "contains a new and improved formula which vets around the world recognise as state-of-the-art".
- "is perfectly safe",
- "is guaranteed to protect livestock for up to 5 years, and
- "is manufactured in Tasmania under strict laboratory conditions" when, in fact, the active ingredients are imported in bulk from New Guinea and the vials are only filled and packaged in Tasmania.

The vet repeats what is in the AA advertising.

Advise Betty as to any deceptive trade practices claims she may have, pursuant to the ACL against AA.

(10 marks)

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Question 2

Assume the relevant facts in Part B Question 3 and Part C Question 1 and advise Betty as to the basis upon which she may claim damages under s236 of the ACL.

(10 marks)

Question 3

<u>Discuss</u> injunctions, including the requisite standing to apply for an injunction (s80 CCA & s232 ACL).

(10 marks)

Question 4

Explain the operation of the cartel provisions in Part IV, Division 1 of the CCA.

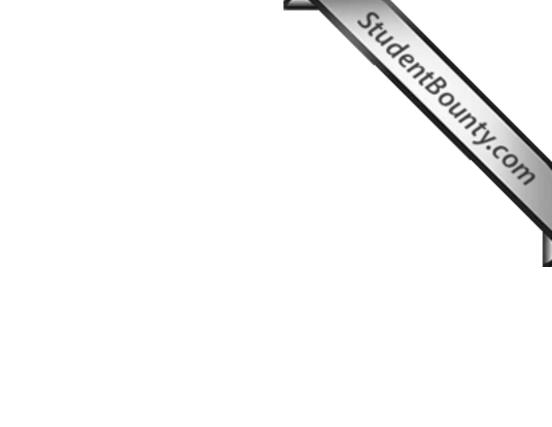
(10 marks)

Question 5

Identify 5 factors a Court may take into account when imposing a penalty on a corporation for a breach of a provision of Part IV, (s76 CCA).

(10 marks)

(Part C Question 6 follows)



Question 6

Write notes on the significance of only two (2) of the following cases:

- Student Bounty.com Campomar Sociedad, Limitada & Anor v Nike International Ltd & Anor (2000) 169 (a) **ALR 677**
- (b) TPC v Service Station Assoc (1993) 116 ALR 643
- Mark Lyons v Bursill Sportsgear (1987) 75 ALR 581 (c)
- Dandy Power Equipment v Mercury Marine (1982) 44 ALR (d)
- NSW Lotteries Corp Pty Ltd v Kuzmanovski [2011] FCAFC 106 (24 August 2011) (e) В
- **(f)** Glendale Chemical P/L v ACCC (1998) 90 FCR 40

(10 marks)

END OF PAPER

Student Bounty.com COMPETITION & CONSUMER ACT 2010 ("CCA INCORPORATING, IN SCHEDULE 2, THE AUSTRALIA **CONSUMER LAW ("ACL")**

ABBREVIATED INDEX FOR EXAM PURPOSES

CCA - PRELIMINARY

2.	Object of this	Act
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- 2A. Application of Act to Commonwealth and authorities
- 2B. Application of Act to States and Territories
- 2BA. Application of Part IV to local government bodies
- 2C. Activities that are not business
- 4. Interpretation
- 4B. Consumers
- 4C. Acquisition, supply and re-supply
- 4D. **Exclusionary provisions**
- 4E. Market
- 4F. References to purpose or reason
- Lessening of competition to include preventing or hindering competition 4G.
- Loss or damage to include injury 4K.

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Subdivision A—Introduction

Subdivision B—Offences etc.

Subdivision C—Civil penalty provisions

Subdivision D—Exceptions

Division 2—Other provisions

- 45. Contracts, arrangements or understandings that restrict dealings or affect competition
- 46. Misuse of market power
- 47. Exclusive dealing
- 48. Resale price maintenance (refer to Part VIII of CCA as follows)
- 50. Acquisitions that would result in a substantial lessening of competition

PART VIII OF CCA - RESALE PRICE MAINTENANCE

- 96. Acts constituting engaging in resale price maintenance
- 96A. Resale price maintenance in relation to services
- 97. Recommended prices
- 98. Withholding the supply of goods
- 99. Statements as to the minimum price of goods
- 100. Evidentiary provisions

51ACA. Definitions

51AD. Contravention of industry codes

PART VI OF CCA - ENFORCEMENT AND REMEDIES

- Pecuniary penalties 76.
- 76C. Defence to proceedings relating to exclusionary provisions
- 80. Injunctions
- 81. Divestiture where merger contravenes section 50 or 50A
- 82. Actions for damages
- 83. Finding in proceedings to be evidence
- 84. Conduct by directors, servants or agents
- 85. **Defences**
- 87. Other orders

THE AUSTRALIAN CONSUMER LAW CHAPTER 1 OF ACL--INTRODUCTION

- 1 Application of this Schedule
- 2 Definitions
- 3 Meaning of consumer
- 4 Misleading representations with respect to future matters
- 7 Meaning of *manufacturer*
- 8 Goods affixed to land or premises
- 9 Meaning of safety defect in relation to goods
- 11 References to acquisition, supply and re-supply
- 13 Loss or <u>damage</u> to include injury

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- 21 Unconscionable conduct in connection with goods or services
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- 24 Meaning of *unfair*
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- 35 Bait advertising

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Division 5--Other unfair practices

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- 50 Harassment and coercion

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- 53 Guarantee as to undisclosed securities etc.
- 54 Guarantee as to acceptable quality
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- 56 Guarantee relating to the supply of goods by description
- 57 Guarantees relating to the supply of goods by sample or demonstration model
- 58 Guarantee as to repairs and spare parts
- 59 Guarantee as to express warranties

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- 62 Guarantee as to reasonable time for supply
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- 142 Defences to defective goods actions

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- 276ALimitation in certain circumstances of liability of manufacturer to seller

COMPETITION & CONSUMER LAW CASE LIST

1. CONSTITUTIONAL ISSUES. **EXTENDED JURISDICTION, DEFINITIONS**

Re Trade Practices Tribunal: ex parte St George CC (1974) 130 CLR 533 R v Federal Court of Australia: ex parte W A National Football League (1979) 143 **CLR 190**

State Superannuation Board of Victoria v TPC (1982) 150 CLR 282 O'Brien v Smolonogov (1983) 53 ALR 107

Fencott v Muller (1983) 152 CLR 570 Hughes v WACA (1986) 69 ALR 660 E v The Australian Red Cross Society (1991) 99 ALR 601 at 630-47 SGIC v GIO of NSW (1991) 101 ALR 259 Crisp v ANZ Bank Corp (1994) ATPR 41-294

Nagy v Masters Dairy Ltd (1996) 150 ALR

Dataflow P/ L v Goodman (1999) 168 **ALR 169**

Application to Governments

JS McMillan P/L v C'w (1997) 77 FCR 337

State of NSW v R.T. & Y.E. Falls Investments P/L; R.T. & Y.E. Falls Investments P/L v State of NSW [2003] NSWCA 54

Village Building v Canberra International Airport (No 2) 2004 208 ALR 98 NT Power Generation Ptv Ltd v Power and Water Authority [2004] 210 ALR 312

"In Trade or Commerce"

Concrete Constructions (NSW) v Nelson (1990) 169 CLR 594 Australian Federation of Consumer Organisations v Tobacco Institute of Australia (1991) 98 ALR 670 Pears v Balzer (1996) 137 ALR 180 Martin v TDR (1999) 163 ALR 79 McCormick v Riverwood International (Australia) Pty Ltd (1999) 167 ALR 689

Pritchard v Racecage (1997) 142 ALF 527

Student Bounty.com Village Building v Canberra International Airport (No 2) 2004 208 ALR 98; FCFCA210 ALR 114

Conduct by Silence

Demagogue v Ramensky (1992) 110 ALR 608.

Costa Vraca Pty Ltd v Berrigan Weed & Pest Control Pty Ltd (1998) 155 ALR 714 Peninsular Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211 Forwood Products v Gibbert [2002] ATPR 41-870

Metalcorp Recyclers Pty Ltd v Metal Manufacturers [2004] ATPR 46-243

2. PART IV OF THE ACT -RESTRICTIVE TRADE PRACTICES

Definition of "market", (a) competition policy

Mark Lyons v Bursill Sportsgear (1987) 75 ALR 581

Qld Co-op Milling Assoc (1976) 8 ALR 481

Singapore Airlines v Taprobane Tours WA (1991) 104 ALR 633

Australian Meat Holdings v Trade Practices Commission (1989) 11 ATPR 40-932

Trade Practices Commission v A I &S (1990) 92 ALR 395

Trade Practices Commission v Arnotts (1990) 97 ALR 555

- Cartel Conduct Division 1 (b)
- Section 45: anti-competitive non-(c) price

Top Performance Motors v Ira Berk (Queensland) (1975) 5 ALR 465 Trade Practices Commission v Nicholas Enterprises (No. 2) (1979) 26 ALR 609

Morphett Arms Hotel v Trade Practices Commission (1980) 30 ALR 88 Trade Practices Commission v Email (1980) 43 FLR 383 Trade Practices Commission v Ansett Transport (1978) 20 ALR 31 O'Brien Glass v Cool & Sons (1983) 48 ALR 625 Radio 2LIE Sydney v Stereo FM (1982)

Radio 2UE Sydney v Stereo FM (1982) 44 ALR 557

TPC v Tubemakers (1983) 5 ATPR 40-358

TPC v David Jones (Aust) (1986) 64 ALR 67

TPC v Service Station Assoc (1993) 116 ALR 643

News Limited v Australian Rugby Football League Limited (1996) 139 ALR 193 ACCC v CC (NSW) P/L (1999) 165 ALR 468

News Limited v South Sydney District Rugby League Football Club Ltd [2003] 200 ALR 157

Visy Paper P/ L v ACCC [2003] 201 ALR 414

Rural Press Ltd v ACCC [2003] 203 ALR 217

Apco Pty Ltd v ACCC [2005] FCAFC 161 ACCC v Leahy Petroleum Pty Ltd [2007] FCA 794 (29 May 2007)

(d) Section 46: misuse of market power

Top Performance Motors v Ira Berk (Queensland) (1975) 5 ALR 465
Victorian Egg Marketing Board v
Parkwood Eggs (1978) 33 FLR 294
TPC v CSBP and Farmers (1980) 53 FLR 135
Mark Lyons v Bursill Sportsgear (1987) 75 ALR 581
Q W I v BHP (1989) 167 CLR 177
ASX v Pont Data (1990) 97 ALR 513
Eastern Express v General Newspapers (1992) 106 ALR 297
Singapore Airlines v Taprobane Tours WA (1991) 104 ALR 633
Dowling v Dalgety (1992) 106 ALR 75

General Newspapers v AOTC (1993)

ATPR 41-215

TPC v Pioneer Concrete (Qld) (1)
ALR 685
Sita Qld Pty Ltd v Q'land (1999) 164 A
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Melway Publishing Pty Ltd v Robert Hicks
Pty Ltd (2001) 178 ALR 253
Monroe Topple & Associates v Institute of
Chartered Accountants; (2002) ATPR 41879
Boral Besser Masonry Ltd v ACCC [2003]

(e) Section 47: exclusive dealing (solus agreements, vertical customer and territorial restraints, third line forcing)

195 ALR 609

S W B Family Credit Union v Parramatta Tourist Services (1980) 48 FLR 445 Victorian Egg Marketing Board v Parkwood Eggs (1978) 33 FLR 294 Shell Co of Australia (1975) 1 TPCD

Nashua Australia (1975) 1 TPCD 168
Trade Practices Commission v Legion
Cabs (Trading) Co-operative Society
(1978) 35 FLR 372
Dandy Power Equipment v Mercury

Marine (1982) 44 ALR 173
Outboard Marine Aust v Hecar
Investments (No 6) (1982) 44 ALR 667
O'Brien Glass v Cool (1983) 48 ALR 625
Castlemaine Tooheys v Williams and
Hodgson Transport (1986) 162 CLR 395
Paul Dainty Corporation v National
Tennis Centre Trust (1990) 94 ALR 225
ACCC v Health Partners (1997) 151 ALR
662

Munday v ACT (No 2) (1999) 137 ACTR 53

Munroe Topple & Associates v Institute of Chartered Accountants; (2002) ATPR 41-879

Universal Music v ACCC [2003] 201 ALR 639

ACCC v Australian Safeway Stores Ltd (No 2) (2001) 119 FCR 1

(f) Sections 48 and 96-100: resale price maintenance

Bata Shoe Co -Aust v TPC (1980) 44 **FLR 149**

Ron Hodgson (Holdings) v Westco Motors (Distributors) (1980) 29 ALR 307 Trade Practices Commission v Orlane Australia (1984) 51 ALR 767 Trade Practices Commission v Mobil Oil Australia (1984) 55 ALR 527 BP Australia v Trade Practices Commission (1986) 66 ALR 148 Heating Centre v Trade Practices Commission (1986) 65 ALR 429 Trade Practices Commission v Penfolds Wines (1992) ATPR 41-163 ACCC v Australian Safeway Stores Ltd (1997) 145 ALR 36 & (No 2) (2001) 119 FCR 1 ACCC v Dermalogica Pty Ltd (2005) 215

Section 50: mergers/acquisitions (g)

ACCC v Jurlique International Pty Ltd

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Trade Practices Commission v Ansett Transport Industries (1978) 32 FLR 305 TPC v Bowral Brickworks (1984) 55 ALR 733

Australian Meat Holdings v TPC (1989) 11 ATPR 40-932

Trade Practices Commission v Australian Iron and Steel (1990) 92 ALR 395 TPA v Arnotts (1990) 97 ALR 555

3. THE DECEPTIVE TRADE **PRACTICES (ACL)**

Predictions and promises (a)

ACCC v IMB Group [1999] FCA 819 O'Neill v MBF of Australia [2002] 122 FCR 455 Digitech (Aust) v Brand 2004 NSWCA 58 Sykes v Reserve Bank (1988) 88 FCR 511, 158 ALR 710 McGrath in the matter of Pan Pharmaceuticals v Australian Natural

Student Bounts, com Care Products Pty. Limited (2008) FCR 230

(b) Misleading and deceptive conduct

Hornsby Building Info Centre v Sydney Building Info Centre (1978) 140 CLR 216 McDonald's System of Australia v McWilliam's Wines (No 2) (1979) 41 FLR 429

Taco Co of Aust v Taco Bell (1982) 42 **ALR177**

Parkdale Furniture v Puxu (1982) 149 **CLR 191**

Gates v City Mutual Life Assurance Society (1986) 160 CLR 1 Glorie v WA Chip & Pulp (1981) 55 FLR 310

Smolonogov v O'Brien (1982) 67 FLR 311 Henjo Investments v Collins Marrickville (1988) 79 ALR 83

Campomar Sociedad, Limitada & Anor v Nike International Ltd & Anor (2000) 169 **ALR 677**

NSW Dairy Corp v Murray Goulburn Coop (1989) 86 ALR 549

Telmak v Coles Myer (1989) 89 ALR 48 Fraser v NRMA Holdings (1995) 127 ALR 543

NRMA Holdings v Fraser (1995) 127 ALR

Cassidy v Saatchi & Saatchi [2004] ATPR 41-980

Bodum v DKSH Australia Pty Limited [2011] FCAFC 98 (5 August 2011) NSW Lotteries Corp Pty Ltd v Kuzmanovski [2011] FCAFC 106 (24 August 2011)

(c) **Unconscionable conduct**

NAB v Nobile (1988) 100 ALR 227 Zoneff v Elcom Credit Union (1990) 12 ATPR 41-009

Qantas v Cameron (1996) 145 ALR 294 ACCC v Samton Holdings (2002) 189 **ALR 76**

Monroe Topple & Associates v Institute of Chartered Accountants (2002) ATPR 41-

ACCC v Berbatis Holdings [2003] 197 **ALR153**

ASIC v National Exchange [2005] 147FCR 132

Other sections of ACL (d)

Yorke v Lucas (1985) 158 CLR 661 Global Sportsman v Mirror Newspapers (1984) 55 ALR 25

Brown v The Jam Factory (1981) 53 FLR 340: 35 ALR 79

TPC v Pacific Dunlop (1994) ATPR 41-307

QDSV Holdings (t/as Bush Friends Aust) v TPC (1995) 131 ALR 493

Kizbean v W G and B (1995) 184 CLR 281

Qantas v Cameron (1996) 145 ALR 294 Qantas Airways v Arauco (1996) 136 ALR 510

Nationwide News v ACCC (1996) 142 **ALR212**

Acohs Pty Ltd v Bashford Consulting (1997) 144 ALR 528; (appeal) Bialkower v Acohs (1999) ATPR 41-685

McIlhenry Co v Blue Yonden Holdings Pty Ltd and Another (1997) 149 ALR 496 Effem Foods Ltd v Lake Cumberline Pty Ltd (1999) 161 ALR 599

Burg Design P/d v Walli (1999) 162 ALR 639

Kenny & Good v MGICA (1999) 199 CLR

Henschke v Rosemount [2001] ATPR 41-

Peninsular Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211 Cassidy v Saatchi & Saatchi [2004] ATPR 41-980

ACCC v Cadbury Schweppes (20 516

BUTCHER V LACHLAN ELDER REAL LIMITED (2004) 218 CLR 592

Shindent Bounty.com Campbell v Backoffice Investments Pty Limited [2009] HCA 25; 83 ALJR 903

4. PRODUCT LIABILITY - ACL PARTS 3.2 Div 1, 3 – 5 AND 5 – 4

Glendale Chemical P/L v ACCC (1998) 90 FCR 40

Ryan v Great Lakes Council [1999] FCA 177

Medtel Pty Ltd v Courtney [2003] 198 **ALR 630**

Effem Foods Ltd v Nicholls [2004] ATPR 42-034

5. ENFORCEMENT AND REMEDIES -PART VI OF CCA & CHAPTER 5 of **ACL**

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August 2011