LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 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:

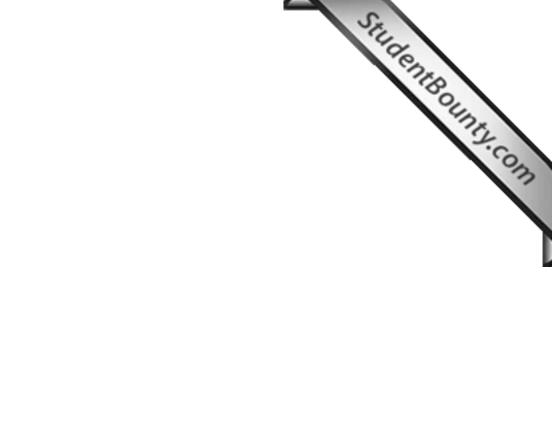
This is a closed book examination. No materials are permitted in the examination room.

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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CCA: Competition & Consumer Act ACL: Australian Consumer Law

PART A

Attempt one question only in this part.

Question 1

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

- (a) A "submarket " (s4E of CCA).
- **(b)** The term "manufacturer" (s7 of ACL).
- (c) The identity of the 3 forms of anti-competitive purposes a corporation, with market power or a substantial share of a market, is prohibited from engaging in, (s46 CCA).
- (d) The identity of 5 forms of exclusive dealing, that are subject to the "substantially lessening of competition" test (s47 CCA).
- (e) The identity of 5 factors a court must take into account when determining whether an acquisition of shares or assets will substantially lessen competition (s50 (3) CCA).
- (f) The identity of 5 factors a court may take into account when imposing a pecuniary penalty on a corporation for a breach of a provision of Part IV of the CCA, (s76 CCA).
- (g) The circumstances when an action under the CCA/ACL can be commenced against a Commonwealth Government department or authority (s2A CCA).

(20 marks)

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OR

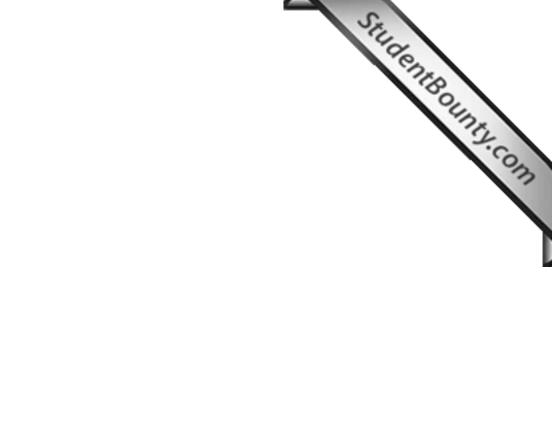
Question 2

Answer only two (2) of the following:

- (a) Discuss how a "market" is derived, when considering whether an acquisition of shares or assets substantially lessens competition or is likely to substantially lessen competition (s50 (6) CCA,)
- (b) What is necessary for there to be a "contract", "arrangement" or "understanding" in relation to the cartel provisions (Division 1 of Part IV of CCA) and s45 of the CCA?
- (c) Explain whether the following purchases are made by a "consumer" (s3 of ACL):
 - (a) A \$25,000 spa pool by a motel;
 - (b) \$5,000 worth of silver ingot by a jeweller;
 - (c) A \$190,000 truck, with a horse float affixed, by a racing horse trainer;
 - (d) \$60,000 worth of ceiling insulation materials for residential accommodation being constructed at a remote site by a mining company;
 - (e) A \$70,000 dialysis machine by a diabetic for use at home.

(20 marks)

(Part B follows)



PART B

Attempt any two (2) questions in this part.

Question 1

StudentBounts.com Super Snow Products Pty Limited ("SSP") manufactures and distributes a range of premium quality ski equipment including boots, bindings, skis, snow boards, clothing and accessories. The "SSP" label is worn by professional skiers as well as those who can afford the high prices.

Since it started in 1998, SSP has sold its products through boutique ski shops, up market sports stores and one large national department store. Prior to the ski season, SSP circulate a 'recommended" price list together with a circular which stated:

"Our products are top of the line and are considered "high status". Accordingly, our loyal customers expect to pay a premium. They will react negatively if the status of the product is diminished in any way. We recommend that you display our products and maintain prices so as to reflect the premium nature of the products."

In the March 2013 edition of a popular sports magazine, an article appeared which mentions the usual prices charged by retailers for SSP's products.

SSP sales representatives are instructed to tell retailers:

"We will support you to the hilt so long as you promote our product as a premium product. The one thing that will hurt the product's image is discounting."

Sports Galore Pty Limited ("SG") is one of the sport shops supplied with SSP's products. They have shops in Parramatta, Canberra and Jindabyne.

Three (3) months ago, SG installed a large sign in the front window of their Parramatta shop which said; "Discounted ski gear. You won't do better."

SG also sells via the internet and for the past 6 weeks, has advertised SSP's skis, snow boards and gloves at "50% less than the usual price".

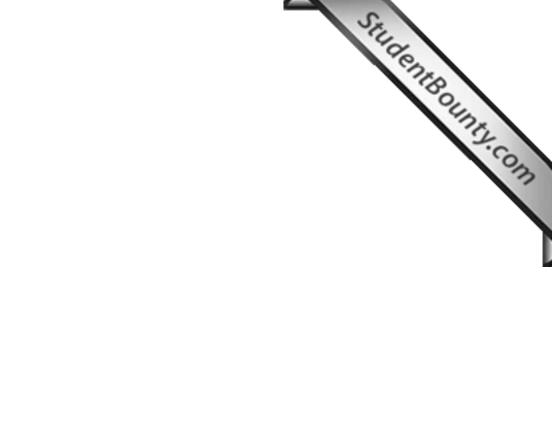
Three (3) weeks ago an SSP representative visited the Parramatta store and said to the store manager:

"You should look closely at your pricing strategy because I am having great trouble convincing my management to continue supporting the shop. You should check out other retailers in the area because they are complaining about your strategy."

SG continued to sell SSP's skis, gloves and snowboards via the internet for 50% less than the "appropriate price" and to generally discount all products in their Parramatta shop.

Since dropping the price of skis, gloves and snowboards, SG has enjoyed a 50% increase in their total sales of sports gear.

(Part B Question 1 continues)



(Part B Question 1 co

SHIIDENT BOUNTY. COM SSP has now informed SG that there will be delays in future supplies of the latest mu skis, bindings, boots and snowboards.

Advise SSP as to whether they have engaged in resale price maintenance ("rpm") pursuant to s48 of the CCA.

i.	Key facts.	(3marks)
ii.	Threshold issues.	(3marks)
iii.	Direct rpm.	(4 marks)
iv.	Indirect rpm.	(4 marks)
v.	Defences.	(2 marks)
vi.	Conclusion.	(4 marks)

Question 2

Sam's patio has newly laid floor tiles which he bought from Tim's Tiles P/L (TT). Sam is a tiler by trade and regularly buys tiles from TT.

The tiles were described by TT in a radio advertisement as "highest quality, imported Italian tiles", "latest Italian design", "nonslip", "commercial grade" and "made to Australian standards".

An advertisement in the local paper stated:

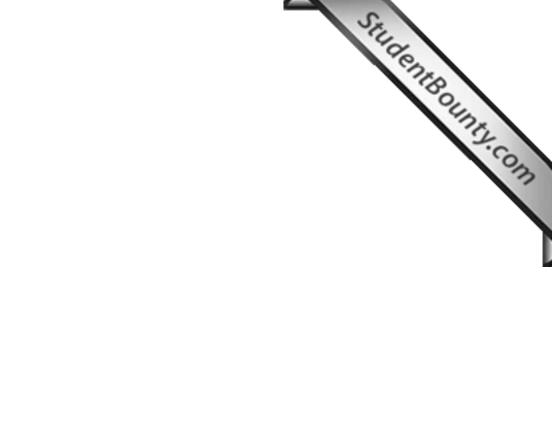
"Perfect tiles for wet areas especially the bathroom, laundry and outdoor patios. As used in the latest five-star hotels"

TT imported the tiles from Thailand. They were part of an original order placed by a Thai construction Company that was building a new hotel in Bangkok in 2005. When the Thai construction company realised that the tiles were not "top quality" or "Italian", or "nonslip" and not of "commercial grade", they sold them on the Internet. TT bought them in 2006 for a pittance and stored them in their warehouse. They first put them on the market in 2013.

Advise Sam as to any action he may have against TT pursuant to the deceptive trade practices provisions of the ACL.

i.	Key facts.	(4 marks)
ii.	ii. Application of at least 2 deceptive trade practices provisions in	
		(4 marks)
iii.	Threshold issues, including conduct by silence.	(4 marks)
iv.	Audience related issues.	(4 marks)
٧.	Conclusion.	(4 marks)

(Part B Question 3 follows)



Question 3

Assume the facts in question 2 and that:

- TT has been placed into administration;
- Student Bounts, com • A chemical substance used to render the tiles "nonslip" is ineffective when brought into contact with alcoholic beverages and cleaning detergents;
- Sam's partner, Pam, is a professional musician. Sam and Pam use a gas barbeque, borrowed from their neighbour for a dinner party;
- The barbecue was a gift and had never been used before;
- The instructions on the side of the barbeque read:
 - "Failure to properly read these instructions will nullify any liability in the event of an accident. Connect the Barbecue's hose to the gas bottle. Test for any gas leakages. Use the automatic ignition only to light."
- The instructions did not state how the connection of the hose to the gas bottle should be sealed or that plumber's tape should be used or that the gas was highly inflammable or how to test for leakages. The thread on the part of the gas bottle to which the hose was connected was defective.

Almost at the same time, the following occurred:

- Pam slipped on some spilt wine on the patio tiles.
- As Sam and Lexie turned the snags on the barbeque, Lexie lit a cigarette causing the gas bottle to explode.

Sam and Lexie received 3rd degree burns to 70% of their bodies. The barbeque was destroyed. The back of the house and the outdoor furniture were damaged.

Pam suffered a broken wrist and back and head injuries, as well as sustaining damage to her clothing, jewellery and watch.

Advise Sam, Pam and Lexie of their rights to recover damages under the product liability sections of the ACL.

i. Statutory guarantees breaches. (4 marks)

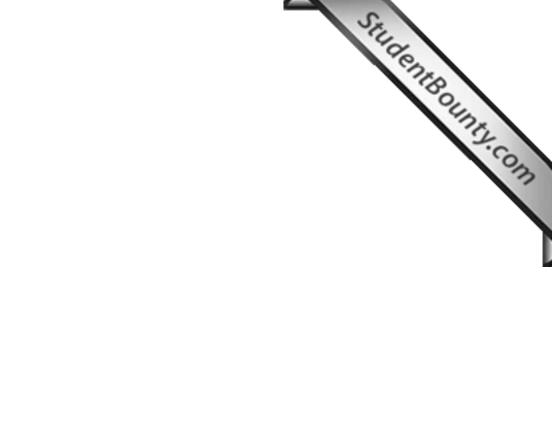
- ii. Action against suppliers of goods – Division 1 Part 5 – 4 of ACL. (3 marks)
- iii. Action against manufacturers of goods Division to Part 5 4 of ACL.

(3 marks)

iv. Liability of manufacturers of goods with safety defects – Part 5 – 3 of ACL.

(10 marks)

(Part C follows)



PART C

Attempt any two (2) questions in this part.

Question 1

Student Bounty Com Explain the circumstances in which a corporation that enters into a Contract, arrangement or understanding that restricts dealings or affects competition may be in breach of s45 of the CCA.

i.	Threshold issues.	(4 marks)
ii.	Application of exclusionary provisions (s 4D).	(3 marks)
iii.	Application of anti-competitive test.	(3 marks)

Question 2

Explain the circumstances in which a person may breach the unconscionable conduct provisions of the ACL.

i.	Threshold issues	(3 marks)
ii.	Application of s20 of the ACL.	(3 marks)
iii.	Application of sections 21 & 22 of the ACL.	(4 marks)

Question 3

Explain the remedies available under the CCA and ACL where there are breaches of the – restrictive & deceptive trade practices provisions.

i.	Injunctions (interim & final).	(3 marks)
ii.	Damages (causation & measure).	(4 marks)
iii.	Other orders.	(3 marks)

Question 4

Explain:

The remedies available against suppliers of goods when there is not a major i. failure to comply with a statutory guarantee.

(4 marks)

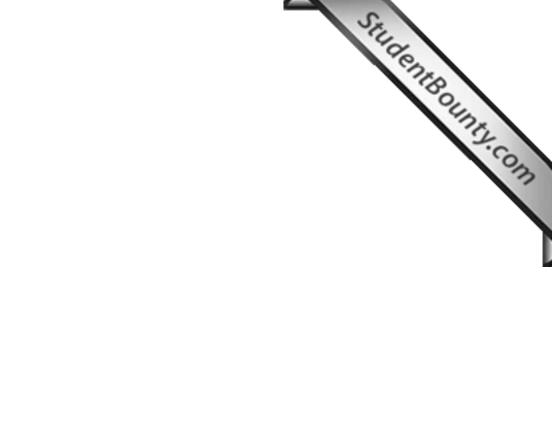
The remedies available against suppliers of goods when there is a major failure to comply with the statutory guarantee.

(4 marks)

iii. What are the statutory consumer guarantee rights of gift recipients (s266 of the ACL)?

(2 marks)

(Part C Question 5 follows)



Question 5

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

- Student Bounty.com Trade Practices Commission v Legion Cabs (Trading Cooperative Society) (1978) 35 FLR 372
- **(b)** Fencott v Muller (1983)-152 CLR 570
- (c) Sykes v Reserve Bank of Australia (1988) 88 FC R 511
- (d) ACCC v Kingisland Meat Works & Cellars FCA August 2012
- (e) ACCC v Dermalogica Proprietary Ltd (2005) 215 ALR 482
- Glendale Chemical P/L v ACCC (1998) 90 FCR 40 (f)

(10 marks)

Question 6

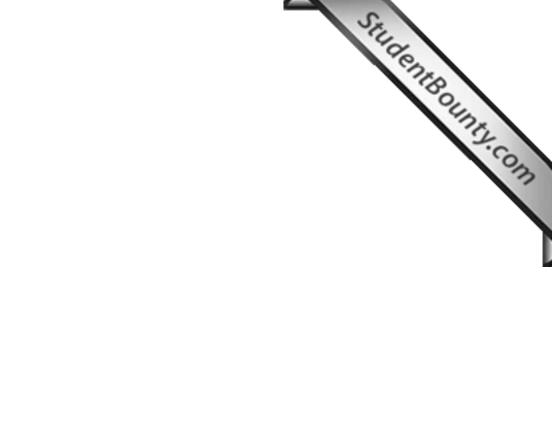
Explain what is meant by an "unfair term" of a consumer contract pursuant to sections 23 and 24 of ACL.

(4 marks)

- ii. Give 3 examples of an "unfair term" pursuant to s25 of ACL. (3 marks)
- iii. What constitutes a "Standard form contract" pursuant to s27 of ACL?

(3 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

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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 B—Offences etc.

Subdivision C—Civil penalty provisions

Subdivision D—Exceptions

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- 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

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- 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
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- 81. Divestiture where merger contravenes section 50 or 50A
- 82. Actions for damages
- 83. Finding in proceedings to be evidence
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- 85. **Defences**
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THE AUSTRALIAN CONSUMER LAW CHAPTER 1 OF ACL--INTRODUCTION

Student Bounts, com

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- 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
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COMPETITION & CONSUMER LAW CASE LIST

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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) 142 527

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

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 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 Marketing Board Victorian Egg 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 18

StudentBounty.com Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 178 ALR 253

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

Boral Besser Masonry Ltd v ACCC [2003] 195 ALR 609

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

S W B Family Credit Union v Parramatta Tourist Services (1980) 48 FLR 445 Victorian Egg Marketing Board Parkwood Eggs (1978) 33 FLR 294 Shell Co of Australia (1975) 1 TPCD 167A

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 Hecar V 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 Trade V **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 ALR 482

ACCC v Jurlique International Ptv Ltd [2007] FCA 79

Section 50: mergers/acquisitions (g)

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)**

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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 Bounty Com Care Products Pty. Limited (2) 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 McWilliam's Wines (No 2) (1979) 41 FLR

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

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