

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2013

COMPETITION & CONSUMER LAW

Time: Three Hours

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

If more than the specified number of questions is answered, only the **first** question attempted in **Part A** and the first **two** 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 **must** indicate which questions they have answered on the front cover of the first examination booklet.

Candidates **must** 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.

CCA: Competition & Consumer Act
ACL: Australian Consumer Law

PART A

Attempt one question only in this part.

Question 1

Write notes on only four (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)

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

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)

SSP has now informed SG that there will be delays in future supplies of the latest models of 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", "non-slip", "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 "non-slip" 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. Application of at least 2 deceptive trade practices provisions in ACL. (4 marks)**
- iii. Threshold issues, including conduct by silence. (4 marks)**
- iv. Audience related issues. (4 marks)**
- v. Conclusion. (4 marks)**

(Part B Question 3 follows)

Question 3

Assume the facts in question 2 and that:

- TT has been placed into administration;
- 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.

- Statutory guarantees breaches. (4 marks)**
- Action against suppliers of goods – Division 1 Part 5 – 4 of ACL. (3 marks)**
- Action against manufacturers of goods – Division to Part 5 – 4 of ACL. (3 marks)**
- 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

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:

- i. The remedies available against suppliers of goods when there is not a major failure to comply with a statutory guarantee. (4 marks)
- ii. 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:

- (a) 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
- (f) *Glendale Chemical P/L v ACCC* (1998) 90 FCR 40

(10 marks)

Question 6

- i. 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

COMPETITION & CONSUMER ACT 2010 ("CCA")
INCORPORATING, IN SCHEDULE 2, THE AUSTRALIAN
CONSUMER LAW ("ACL")

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- 4C. Acquisition, supply and re-supply
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- 45. Contracts, arrangements or understandings that restrict dealings or affect competition
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- 97. *Recommended prices*
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- 100. *Evidentiary provisions*

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51ACA. Definitions

51AD. Contravention of industry codes

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THE AUSTRALIAN CONSUMER LAW

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- 4 Misleading representations with respect to future matters
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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 273

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 Pty 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 ALR 527

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

(a) Definition of “market”, 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

(b) Cartel Conduct – Division 1

(c) Section 45: anti-competitive non-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
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) (1981) 1 ALR 685
Sita Qld Pty Ltd v Q'land (1999) 164 ALR 18
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 v 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 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 ALR 482

ACCC v Jurlique International Pty Ltd [2007] FCA 79

(g) Section 50: mergers/acquisitions

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)**(a) Predictions and promises**

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

Care Products Pty. Limited (2000) 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 Co-op (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 577

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 41-879
ACCC v Berbatis Holdings [2003] 197 ALR153
ASIC v National Exchange [2005] 147FCR 132

(d) Other sections of ACL

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 413
Henschke v Rosemount [2001] ATPR 41-793
Peninsular Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211
Cassidy v Saatchi & Saatchi [2004] ATPR 41-980

ACCC v Cadbury Schweppes (2005) 131 ALR 516
BUTCHER V LACHLAN ELDER REAL ESTATE PTY LIMITED (2004) 218 CLR 592
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
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