



# Commercial Law Newsletter

November 2008

## >>Misleading conduct: It's not easy being green!

### >>Saab in trouble over green claims

Saab has accepted that some of its advertisements referring to the company's "green" credentials were misleading.



The ads claimed that carbon emissions from the advertised Saab vehicle would be neutral over the life of the vehicle because 17 native

trees would be planted to offset carbon dioxide emissions for the life of the car. However, the emissions would not be neutral over the car's lifetime because 17 trees would only offset the car's emissions for one year.

Saab agreed to a settlement with the ACCC, which was accepted by the Federal Court. Saab agreed to retrain its marketing staff on making green claims, and promised to plant 12,500 native trees (equal to the number of cars sold during the campaign).

### >>V8 Supercars in trouble too

V8 Supercars introduced a Racing Green Program which claimed that planting 10,000 native trees would fully offset carbon emissions from the V8 Championship Series, including the races themselves, transport of the racing teams and related air travel and other activities.

The ACCC objected because the claim suggested that trees would absorb the carbon emissions in a short time, when in fact it would take decades for newly planted trees to absorb

the emissions from a year's racing. The ACCC argued that the marketing should make clear that the absorption would take place over the lifetime of the trees.

V8 Supercars gave the ACCC undertakings to have its green marketing vetted by a trade practices lawyer, so that the time frame for offset would be clear in any future claims of this kind, and to publicise the issues on its website.

The moral of these stories is that you need to be extremely careful when making "green" representations in your advertising. It is difficult to justify in precise terms, any generalised marketing claim of this nature and your advertising will be scrutinised. The ACCC has published detailed guidelines to assist businesses wanting to make environmental claims which leave substantial room for judgement in particular cases

If you are considering making green marketing claims it is worthwhile having an independent and objective pair of eyes review your marketing material before taking the risk. For more information contact:

Stephen Booth, Principal  
Phone: 9895 9222  
Email: [sbooth@colgreig.com.au](mailto:sbooth@colgreig.com.au)  
or  
Matt Rowe  
Phone: 9895 9270  
Email: [mrowe@colgreig.com.au](mailto:mrowe@colgreig.com.au)

## >>Copyright in Architectural Plans / Project Homes

Metricon Homes Pty Ltd recently appealed a Court decision that had found them guilty of copyright infringement.

In the initial hearing Metricon was found guilty of substantially “copying” one of Barrett Property Group’s project home designs. The dispute concerned a portion of a house design called the “alfresco quadrant”, which included a kitchen/meals area, the family living area, the alfresco (covered outdoor area) and the rumpus room, all contained under a single roof-line.

Metricon argued that their “alfresco quadrant”, with different dimensions, layout, kitchen details and door and window positioning, did not copy a substantial part of Barrett’s plans, however the Full Federal Court disagreed and their appeal was dismissed.

In determining whether a part of a work is a “substantial part” the Court looks to the quality of what is copied rather than the quantity: is the part alleged to have been taken an ‘essential’ or ‘material’ part of the work? To answer this question consideration must also be given to the originality of the part allegedly taken. The Court found that the Barrett Group had invested significant amounts of labour, skill and judgment in the development of their plans and additionally found that the distinctive and essential feature of their design was the alfresco quadrant. In coming to this conclusion the Court expressly rejected Metricon’s argument that the alfresco quadrant was merely an aspect of commonplace design.

### >>What constitutes copyright infringement?

A finding of copyright infringement requires two elements, resemblance to the copyright works and actual copying of the copyright works.

In the Metricon decision, the Court considered the differences between the two plans / project homes to be “not so great” and agreed with the first judge that there was a “striking similarity” between the two ‘alfresco quadrants’.

The Court also then concluded that there was an actual copying by Metricon.

The Metricon case appears to increase the protection for architectural plans / project homes from previous court decisions that were reluctant to find infringement of copyright in plans.

For example, in *Beck v Montana Constructions Pty Ltd*, the court stated that “the degree of protection of an architectural plan must of its nature be very limited... [because] in an architectural plan, more than any other form of literary or artistic reproduction, there is a greater element which may be described as common to all plans.”

In *Metricon*, the Court found that there are a number of ways in which an alfresco area can be incorporated into a home design and that the positioning of the area in Barrett’s design was “far from obvious”, therefore supporting the idea that the layout had been copied.

### >>Concepts vs Expression

The problem for the Court becomes determining the difference between the ‘idea’ or concept and the ‘expression’ or manifestation of a work.

In *Ancher, Mortlock, Murry & Woolley Pty Ltd v Hooker Homes Pty Ltd*, it was established that “an architect may legitimately inspect an original plan or house and then, having absorbed the architectural concept and appreciated the architectural style represented therein, return to his own drawing board and apply that concept and style to an original plan prepared by him and in due course to a house built to such plan.”

In using the 'concepts' of other plans and homes in their own designs, the challenge for home building companies is to avoid copying the physical 'expression' of those concepts. The question must be asked "is that plan or house only a copy of the concept or style of the original and hence legitimate, or is it a copy of the author's manifestation of that concept or style and hence an infringement?"

The *Metricon* case makes it even harder to determine just how different a plan would have to be from another in order to avoid allegations of copyright infringement!

If you are in the home building or architectural industry and have doubts about copyright and possible infringements, speak to one

of our experienced commercial solicitors as soon as possible. Early advice can save you considerable time and costs spent in litigation, as well as potential damage to your professional reputation.

For more information contact:

Stephen Booth, Principal  
Phone: 9895 9222  
Email: [sbooth@colgreig.com.au](mailto:sbooth@colgreig.com.au)  
or  
Matt Rowe  
Phone: 9895 9270  
Email: [mrowe@colgreig.com.au](mailto:mrowe@colgreig.com.au)

## >> Keeping up to date with amendments to the Trade Practices Act

Various proposals to amend the Trade Practices Act are currently under review. The latest state of play on each issue is summarised below:

1. Criminalising cartel behaviour: Draft legislation to this effect, including the use of imprisonment as a penalty option, has been released for comment, but has not yet been introduced into Parliament.
2. Misuse of market power and fixing the "Birdsville" amendments: This legislation failed to get through the Senate on the first try, and is presently being re-submitted to the Senate with some of the amendments sought by the Opposition and small party senators being accepted, and some rejected.

The legislation is intended to bolster the ACCC's power to pursue misuse of market power under section 46 of the Act in the interests of small business, particularly in relation to predatory pricing. It also aims to rectify some of the more unusual features of

the "Birdsville" amendments sponsored by Senator Joyce in 2007. The issue in dispute is the degree to which the amendments provide protection for small business, and whether that protection would be improved by the Opposition's proposed amendments.

3. Clarity in pricing: If passed, this bill will amend the Act to require sellers to provide consumers with a single comprehensive price for goods or services. The objective is to prevent "component pricing" where the price of one component is advertised without disclosing the prices of other necessary components of the goods or services. This bill is currently progressing through Parliament.

If you need information on how any of these changes may apply to your business, contact:

Stephen Booth  
Phone: 9895 9222  
Email: [sbooth@colgreig.com.au](mailto:sbooth@colgreig.com.au)

## >>Child Support Agreements: What they mean for your family

Recently, there have been some well-publicised changes to Child Support including the formula used to calculate the amount payable. In addition to those changes however, the new Child Support regime has also changed the law regarding child support agreements made between couples.

### >>Background

When couples with children separate, the provisions for the payment and receipt of child support under the law do not always adequately match their individual circumstances. For this reason, the Child Support Agency encourages parents to reach their own agreements about the financial support of their children.

Agreements can provide for financial support in various ways, such as the payment of school fees, health insurance premiums or mortgage repayments, as well as periodic cash payments. Child support agreements can also provide for the payment of child support in a lump sum, instead of monthly payments.

It is important to note that a child support assessment can be changed by entering into a child support agreement. If an agreement between the parties involved is reached it can then be registered with the Child Support Agency.

### >>Types of Child Support Agreements

There are two types of child support agreements:

1. Limited Child Support Agreements; and
2. Binding Child Support Agreements.

Limited Child Support Agreements can be entered into without legal advice. For people who enter into a Limited Agreement, it is possible to terminate the agreement after three years. It is also possible to terminate the agreement if the amount that they should pay or receive under a child support assessment

changes by more than 15%. It is essential that the amount of child support payable under a limited child support agreement is at least the amount that would be payable under the child support formula for their particular situation.

Binding Child Support Agreements can only be entered into after both parties have received independent legal advice. The amount payable under a Binding Child Support Agreement can be less than the amount payable under the child support formula that would otherwise apply.

If parents agree, they can end a child support agreement at any time by making a further agreement which terminates the earlier version. However, it is important to note that independent legal advice is also required for an agreement terminating a Binding Child Support Agreement.

### Family Tax Benefit Implications

A parent's eligibility for the Family Tax Benefit is determined based on the assumption that they are receiving the amount of child support to which they would be entitled under an assessment. Thus, a person who enters into a child support agreement to receive less than their usual entitlement to child support will not be entitled to a higher Family Tax Benefit payment as a consequence.

It is always best to check with an accredited specialist in family law before entering into a child support agreement, even though legal advice is not compulsory for limited child support agreements.

If you, or someone you know, would like assistance with child support or family law issues please contact our Family Law Team on 02 9635 6422 or

Susan Warda, Principal  
Phone: 9895 9296  
Email: [swarda@colgreig.com.au](mailto:swarda@colgreig.com.au)

## >>Make Good Obligations in Leases

The commercial property team here at Coleman & Greig is seeing more and more landlords and tenants at loggerheads over “make good obligations” in leases.

Make good obligations differ from lease to lease, but generally we have found that a tenant is obliged to:

- Keep the premises in good condition and state of repair, subject to fair wear and tear.
- Repair any structural damage caused by the tenant during the term.
- Repaint. The obligations in this regard range from just repainting the same colour as at the commencing date, to repainting the number of coats and type of colour and paint as specified by the landlord. There may be an obligation to repaint internal walls or there may be a requirement to repaint all inside and outside surfaces.
- Re-cover flooring – eg. carpeting. The obligations can range from just repairing damaged areas to fully re-carpeting or re-treating to a standard and type required by the landlord.
- Remove fit-out. The obligations can range from merely removing partitioning and cabling and other items of moveable fit-out (and repairing any damage caused to the premises in the process), all the way to a complete return of the premises to a shell.
- Return the premises to the condition the tenant found it in when they first took occupation (under an earlier lease) or to a condition they found the premises in as at the commencement of an earlier lease.

If a bond is provided by the tenant (whether in the form of a security deposit or bank guarantee), then it is usually a condition of the lease that the bond will not be returned until the tenant has performed their make good obligations.

### >>Individual Interpretations

We have found that landlords and tenants are increasingly having different opinions as to what they understand to be their obligations in each of the categories referred to above. The differing opinions often have the following consequences:

- Landlords refusing to release bonds because they believe the tenant has not performed their make good obligations in accordance with the lease.
- Landlords pursuing tenants for reimbursement of the cost of making good to the standards they believe are required under the lease.
- Landlords seeking compensation for any loss of rent incurred from prospective tenants while they complete the make good in accordance with what they believe the lease requires.
- Tenants pursuing landlords for recovery of bonds on the basis that they have complied with their make good obligations.

Sometimes, the parties are fortunate enough to discover and resolve their difference of opinion regarding obligations before the lease comes to an end.

However, more often than not, the tenant has already completed the make good (to a standard that they believe is in accordance with the lease) and have handed back the premises to the landlord only to face a dispute as to the make good.

## >>Make Good Obligations in Leases cont.

Differences of opinion regarding obligations usually emerge because what one person may view as fair wear and tear may not necessarily be the same as the next person – what the tenant may see as ongoing fair wear and tear may be viewed as structural damage caused by the tenant. Alternatively, the parties may agree on what the make good standard is, but may disagree on the actual cost.

As a result, parties find themselves involved in costly legal disputes, which they can ill afford in an increasingly tight economic climate. This is particularly relevant when a tenant is vacating the premises because they are downsizing their business and cannot commit to a new lease, and the landlord is struggling to find a new tenant.

### >>How to avoid a dispute

So how can these differences of opinion and disputes be avoided?

We would suggest that when the lease is being negotiated, parties should:

- Clearly establish what their make good obligations are to be and have this specifically spelt out in the lease.
- Photographs should be taken before the lease commences and a condition report completed and signed off by both the landlord and tenant so that the parties are clear on what the condition of the premises is at the start of the lease. This provides a point of reference for parties when the premises are returned.

We also suggest that:

- Before the lease ends, parties should sit down, discuss and agree on what make good works are to be done.

- Give enough time before the lease ends to negotiate and come to a settlement on the make good obligations.
- If you are a tenant, try to complete your make good before the termination date unless you are able to come to some agreement with the landlord to allow you to stay in occupation after the termination date to complete the make good. This can avoid any claims of compensation from the landlord for loss of rent (you will probably have to pay additional rent on a monthly basis).

Our leasing team, headed by Andrew Grima, is happy to advise you on the issue of make good when negotiating your lease or upon termination.

For more information contact:  
Andrew Grima, Principal  
Phone: 9635 6422  
Email: [agrama@colgreig.com.au](mailto:agrama@colgreig.com.au)

## >>Misleading conduct: A squid by any other name ...



A supplier of seafood products was marketing crumbed seafood rings under the brand name "Kalamari". The ACCC objected to this because the name suggested that the rings were made

predominately of calamari or squid, whereas in fact only 4% of the seafood rings consisted of squid.

The supplier withdrew the packaging, dropped the product name and promised not to supply seafood products with labelling suggesting that the product had a significant proportion of a particular seafood ingredient when that was not the case. It also agreed to publish corrective advertising and to implement trade practices compliance training.

This case illustrates the point that a misleading impression created by any feature of marketing or packaging, creates a trade practices problem, even if ingredients lists or other small print gives the full picture. It is the overall impression that matters.

You should have all promotional material checked by someone (in-house or external) not involved in its preparation, who can comment independently on the impression it gives. Those who have prepared the material, or are close to that process, are often blind-sided to other possible meanings.

If you need assistance vetting marketing material, contact:

Stephen Booth  
Phone: 9895 9222  
Email: [sbooth@colgreig.com.au](mailto:sbooth@colgreig.com.au)  
or  
Matt Rowe  
Phone: 9895 9270  
Email: [mrowe@colgreig.com.au](mailto:mrowe@colgreig.com.au)