

Article Information

Author: Mitchell Coidan

Service: Competition & Trade

ACCC getting to the root of the problem - hair smoothing therapy not all that it claimed it was

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An example of the ACCC's ongoing scrutiny in respect of representations about the ingredients in cosmetic products came in the matter of *ACCC v Dateline Imports Pty Ltd & Taylor* and *ACCC v Dateline Imports Pty Ltd (No 2)*, where the Federal Court of Australia fined Dateline Imports Pty Ltd (Dateline) \$85,000 for breaches of s. 52(1), 53(a) and 53(c) of the *Trade Practices Act (Cth) 1974* (TPA) in relation to its sale of a hair straightening product called 'Keratin Complex Smoothing Therapy', used to straighten frizzy or curly hair (Keratin Product).

Background and the Alleged Breaches by Dateline

Dateline represented in magazine advertisements, published between 30 August 2010 and 20 September 2010, that the Keratin Product "infuses over 35% Natural Keratin" into the hair. Between 27 September 2010 and 5 November 2010, the claims in the advertisements were that the Keratin Product contained 40% natural Keratin. Between 4 October 2010 and 9 November 2010, magazine advertisements were published by Dateline stating that the Keratin Product "reduces frizz, curl and styling time for up to 6 weeks by infusing 40% natural Keratin in to your hair" (collectively Keratin Representations).

In his decision dated 30 July 2014, Justice Rangiah found that the Keratin Product contained less than 3% Keratin and was incapable of delivering the stated levels of Keratin directly into hair. The Keratin Representations were therefore false.

The ACCC also alleged that prior to ceasing sales on 27 October 2010, Dateline had sold the Keratin Product in contravention of the TPA, having represented to prospective purchasers that the Keratin Product "...does not contain toxic or dangerous chemicals such as formaldehydes" and that the product was safe and complied with relevant health regulations (Formaldehyde Representations).

The ACCC was unsuccessful in proving that the Formaldehyde Representations were false, with the Court finding that the testing conducted by the experts called by the ACCC was invalid, and could not establish that formaldehyde was present.

Finally, Dateline represented to about 20 potential customers that Dateline considered that a ban on the Keratin Product in Ireland "would" be retracted by the Irish health authorities (Ireland Ban Representations). The Ireland Ban Representations were held by the Court to have been made by Dateline when it had no reasonable grounds to make the representations, in breach of s 52(1) of the TPA, and were therefore misleading or deceptive.

Imposition of Penalty by the Court

A separate hearing was later held for the consideration and imposition of a penalty against Dateline and the managing director of Dateline, Mr Taylor.

Although the parties had agreed the form of the declarations they wished the Court to make, Justice Rangiah rejected that

approach. Considering that the declarations did not go far enough, his Honour formulated his own, which included particularisation of the offending conduct, how the conduct was said to have breached the TPA, and outlining the general findings of the Court.

The Court found that the advertisements were misleading, however it could not be established that consumers sustained any loss as the product was promptly recalled on 27 October 2010. Furthermore, given the Keratin Representations were not a significant part of the advertisements, judged as a whole, the Court found that the Keratin Representations were not the dominant message being conveyed to consumers.

As to the conduct of the managing director of Dateline, Mr Taylor, the Court found that he had believed that the Keratin Product contained 40% natural Keratin, which was the concentration that had been represented to him by the supplier, Copomon Enterprises LLC. Regardless, the failure by Mr Taylor to make enquiries as to the accuracy of those representations, when he was aware of circumstances which suggested the representations may have been false, was unreasonable.

Whilst the Court acknowledged that Dateline had no prior history of contraventions of the TPA, the fact that the senior management of Dateline were complicit in the conduct was considered to be an aggravating factor. Dateline was not considered to be at risk of further contravening behaviour, having retained a specialist consultant in October 2010 to ensure that it continued to comply with its obligations under the TPA.

In imposing sentence, the Court did however take into consideration that Dateline's conduct was not deliberate, that it had voluntarily recalled the Keratin Product and taken other corrective measures showed a level of cooperation.

As to the costs of the proceedings, the Court held that the ACCC was unsuccessful in a number of its claims against Dateline and that those unsuccessful claims added to the costs and length of the trial. It ordered the ACCC to pay one third of Dateline's costs of the proceedings and that Dateline pay one third of the ACCC's costs.

As well as ordering declarations and costs, Dateline was ordered to pay a pecuniary penalty of \$85,000.

Response by the ACCC and Appeal of the decision of Justice Rangiah

In response to this case, on 19 November 2014 ACCC Commissioner Sarah Court said that *"Consumers must be able to trust claims that are made about ingredients and benefits of beauty products ... Credence claims are a current enforcement priority for the ACCC"*. On 10 December 2014, the ACCC filed a Notice of Appeal of Justice Rangiah's decision, and is awaiting hearing.

Takeaway points from the Case

The case serves as a reminder to retailers to ensure the accuracy of claims made by suppliers in packaging and advertising of the products about the composition of the products and their benefits.

Failure by the ACCC to obtain findings that the Formaldehyde Representations were false also highlights the difficulties in credence cases of identifying and properly characterising the chemical components which make up the product. It further highlights the difficulties which can arise in obtaining reliable evidence which proves or disproves claims as to the product's capabilities.

For further information, please contact [Senior Associate, Mitchell Coidan](#).