

# TRADE PRACTICES LAW JOURNAL

Volume 16, Number 4

December 2008

## EDITORIAL

**Restraining the mighty pen** ..... 247

## ARTICLES

**Representative actions: A review of 15 years of product liability class action litigation in Australia – Part 2** – *Dr Jocelyn Kellam, S Stuart Clark and Christina Harris*

The early 1990s saw the introduction of both a class actions procedure and a strict liability regime for product liability claims in the Federal Court of Australia. Part 1 of this article ((2008) 16 TPLJ 165)) examined whether class actions are fulfilling their intended purpose in product liability cases, and reviewed the increasing case law concerning such actions in Australia. Part 2 continues to draw together the case law – focusing on procedural and practical aspects of class litigation beyond the threshold requirements for commencement – and demonstrates the willingness of Australian courts to facilitate such litigation. The article concludes by suggesting that, despite recent civil liability reforms which have made it more difficult to commence product liability actions involving lower value personal injury claims, other factors – notably the increased availability of commercial litigation funding – are encouraging the continued and perhaps increased prosecution of class actions generally. .... 249

**Asserting a monopoly in a colour for marketing purposes – the colourful saga of the Cadbury-Darrell Lea litigation** – *Peter Gillies*

This article reviews the litigation between Cadbury and Darrell Lea concerning the use of the colour purple in marketing chocolate products in Australia. At the time of the conduct in question, Cadbury had not registered uses of the colour purple as trade marks; indeed, Cadbury has yet to succeed in registering purple, given Darrell Lea's continuing opposition. The litigation concerned unsuccessful actions in passing off and for breach of s 52 and s 53(c)-(d) of the *Trade Practices Act 1974* (Cth), in which Cadbury, in substance, sought to maintain a monopoly over purple in retailing chocolate. The general principles governing the use of and legal protection of colour in marketing are commented upon, as are the utility and limitations of expert evidence in this class of case. .... 276

**Abuser pays – compensating the victims of cartel conduct** – *Trevor Lee and Hank Spier*

Much has been said about cartels and their evils, as well as the amendments that have been made to the *Trade Practices Act 1974* (Cth) (TPA) to make participating in cartels a criminal offence. What is often forgotten in the media hype surrounding cartels is the victims of cartel conduct. This article seeks to bring the victims into the foreground and examine what is needed to prove damages and what those seeking compensation can expect by way of tactics from cartel members. The TPA has, from its inception, provided for a damages action for victims. This policy has failed and the article seeks to initiate a debate to amend the TPA to devise a policy that works. .... 285

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Editorial inquiries:  
**Tel: (02) 8587 7000**

**HEAD OFFICE**  
100 Harris Street PYRMONT NSW 2009  
Tel: (02) 8587 7000 Fax: (02) 8587 7100



**THOMSON REUTERS**

© 2008 Thomson Reuters (Professional) Australia Limited  
ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 1039-3277

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW