

Herron, William

From: Keen, Elissa
Sent: Thursday, 28 March 2013 3:20 PM
To: Pro Teeth Whitening
Subject: RE: Your Ref 31871 - C2008/645 [SEC=UNCLASSIFIED]
Attachments: 0411_001.pdf

Dear Mr Harrison

Please find attached Mr Brian Cassidy's decision in relation to your CDDA claim. The original letter has been sent to you by post today.


Regards

Elissa Keen

Deputy General Counsel | Legal Group, Corporate Law Unit

Australian Competition & Consumer Commission

Level 2 | 23 Marcus Clarke Street Canberra 2601 | <http://www.accc.gov.au>

T: +61 2 6243 1072  Please consider the environment before printing this email

From: Pro Teeth Whitening [<mailto:info@pro-teeth-whitening.com>]

Sent: Thursday, 21 March 2013 10:43 AM

To: Keen, Elissa

Subject: RE: Your Ref 31871 - C2008/645 [SEC=UNCLASSIFIED]

WITHOUT PREJUDICE

Hello Ms Keen,

Thank you for your update. I will not file my Claim for damages with the Supreme Court until after 28/3/13, pending your decision.

You may also wish to consider recent events such as the Australian Dental Association (ADA) request to the ACCC to modify the policy which led to the damage caused to my company, and the recent full court Federal Court decision in *Minister for Immigration and Citizenship v SZQRB (2013)* regarding procedural fairness prior to forming your decision.

Sincerely,

Gavin Harrison

Pro Teeth Whitening (Aust) Pty Limited

Confidential communication. Not to be disclosed to anyone other than recipient without prior written permission.

----- Original Message -----

Subject: RE: Your Ref 31871 - C2008/645 [SEC=UNCLASSIFIED]

From: "Keen, Elissa" <Elissa.Keen@accc.gov.au>

Date: Thu, March 21, 2013 9:12 am

To: Pro Teeth Whitening <info@pro-teeth-whitening.com>

Dear Mr Harrison

Thank you for your email. I wish to advise that we anticipate providing you with a decision in relation to your CDDA claim by next Thursday, 28 March 2013.


Regards

Elissa Keen

Deputy General Counsel | Legal Group, Corporate Law Unit

Australian Competition & Consumer Commission

Level 2 | 23 Marcus Clarke Street Canberra 2601 | <http://www.accc.gov.au>

T: +61 2 6243 1072  Please consider the environment before printing this email

From: Pro Teeth Whitening [<mailto:info@pro-teeth-whitening.com>]

Sent: Monday, 25 February 2013 5:35 PM

To: Keen, Elissa

Subject: Re: Your Ref 31871 - C2008/645

Hello Ms Keen,

Please find attached correspondence in relation to the subject matter.

Sincerely,

Gavin Harrison

Pro Teeth Whitening (Aust) Pty Limited

Confidential communication. Not to be disclosed to anyone other than recipient without prior written permission.

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**Australian
Competition &
Consumer
Commission**

EXECUTIVE OFFICE

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28 March 2013

Mr Gavin Harrison
Pro Teeth Whitening (Aust) Pty Ltd
2/16 Mary Street
Birkdale QLD 4159

Dear Mr Harrison

Application for compensation under CDDA Scheme/act of grace/ex gratia payment

1. I refer to your letters dated 11 December 2012 and 25 February 2013, regarding a claim for compensation under the Scheme for Compensation for Detriment caused by Defective Administration (**CDDA**) and/or request for an act of grace payment and/or ex gratia payment on behalf of your company, Pro Teeth Whitening (Aust) Pty Ltd (**Pro Teeth Whitening**), for detriment you allege was suffered as a result of the actions of the Australian Competition and Consumer Commission (**ACCC**).
2. As Chief Executive Officer of the ACCC, I am authorised by the Minister to make decisions under the CDDA Scheme. I have reviewed your CDDA application and reached a decision in relation to your CDDA claim. The purpose of this letter is to advise you of my decision and the reasons for it.
3. In reaching this decision, I have taken into account Finance Circular No. 2009/09 'Discretionary Compensation and Waiver of Debt Mechanisms' (**Finance Circular**), your CDDA application dated 11 December 2012, Ms Keen's letter to you dated 20 February 2013, and your letter in response dated 25 February 2013.
4. Pro Teeth Whitening made an application for judicial review under the *Administrative Decisions (Judicial Review) Act* (Cth) (the **ADJR Act**) against the Hon David Bradbury MP which was heard in the Federal Magistrates' Court on 25 July 2012 (the **Judicial Review Application**). The Court has not yet handed down its decision. In considering your CDDA application, I have also taken into account your amended 'Originating Application for Judicial Review' dated 12 July 2012 and your 'Submission for Hearing' dated 24 July 2012 (**Submission for Hearing**), both filed with the court in relation to the Judicial Review Application.

The CDDA Scheme, act of grace and ex gratia payments

5. As you are aware, the Finance Circular provides guidance on the operation of the CDDA Scheme and the act of grace mechanism, and information on ex gratia payments.
6. The Finance Circular states that:
 - a. the CDDA Scheme enables Government portfolio Ministers and authorised officials in *Financial Management and Accountability Act* agencies to compensate individuals or other bodies who have experienced losses caused by the agency's defective administration, and who have no other avenues of redress;
 - b. the CDDA Scheme is a mechanism of last resort, and does not generally apply 'where it is reasonable to conclude that there is an administrative review mechanism which has the capacity to provide a remedy for the defective administration' (page 10, Finance Circular).
7. Where an application is made in relation to more than one discretionary mechanism, the order in which they are considered is generally the CDDA claim (for which the decision maker is the relevant Department or agency's Minister or their delegate), followed by the act of grace claim (for which the decision maker is the Finance Minister or their delegate). Ex gratia payments are generally only considered after full consideration of all the other available schemes.

CDDA Scheme

Application of the CDDA Scheme to your claim against the Minister and the ACCC

8. In your letter dated 11 December 2012, you make a claim for compensation against both the Hon David Bradbury MP and the ACCC. As explained in Ms Keen's letter dated 20 February 2013, the CDDA Scheme only enables individuals to be compensated for losses caused by an agency's defective administration, and cannot be used to compensate for any losses claimed to have been caused by a Minister. Accordingly, for the purposes of the CDDA Scheme, your claim can only be made in relation to alleged defective administration by the ACCC.

Relationship between your Judicial Review Application and your CDDA claim

9. As noted in Ms Keen's letter dated 20 February 2013, the Judicial Review Application names the Minister as the Respondent, whereas the ACCC is the only relevant agency for the purposes of Pro Teeth Whitening's CDDA claim. Your letter of 25 February 2013 states that as different entities are named in the Judicial Review Application and your CDDA claim, the two should be considered independently of each other, and that the outcome of the Judicial Review Application is not relevant to the alleged defective administration of the ACCC.

10. However, in my view, the facts on which the Judicial Review Application is based are the same as those on which your CDDA claim is based. Both are based on the decision of the Hon David Bradbury MP to issue a recall notice directed to two products sold by Pro-Teeth Whitening on 6 February 2012¹ (following the ACCC's recommendation), the decision to issue the recall notice without delay², and the process that led to these decisions.
11. I also consider that most of the allegations of defective administration that you have made pursuant to your CDDA claim are the same or similar to those made during the course of the Judicial Review Application.
12. For example, in your letter dated 25 February 2013, you say that the CDDA claim against the ACCC should be considered to include the additional ground of defamation because the claims made in ACCC media releases were allegedly defamatory and misleading or untrue in respect of Pro Teeth Whitening's products. Similarly, in its Submission for Hearing, Pro Teeth Whitening alleged that the Minister's decision to utilise subsection 132J(1)(b) of the *Competition and Consumer Act 2010 (the Act)* was 'precipitous and unjustified on the basis of either procedure or substance'. You also state in your amended 'Originating Application for Judicial Review' that the Minister 'unduly caused irreparable damage to the applicant's reputation and financial viability'.
13. You also raise the ground of unlawful discrimination and allege that the ACCC did not take action against other companies providing 'non-compliant products of chemically the same composition [as Pro Teeth Whitening's products] to Australian consumers prior to ACCC media releases'. Similarly, in its Submission for Hearing, Pro Teeth Whitening alleged that it was 'an improper exercise of power to utilise Subsection 132J against only one supplier and take no equivalent action against other suppliers'; that the Minister 'did not act with impartiality'; and accordingly that 'no equity in law was afforded'.
14. I note that in your CDDA claim you have indicated several grounds that do not have direct parallels in the Judicial Review Application. For example, you say that the CDDA claim should be considered to include the additional ground of 'Negligence and/or Breach of Duty of Care, Inequity, Inequity under Law' and 'Possible causes of action in Common Law and other legislation'. However, these do not fundamentally alter the essence of your CDDA claim in a way that clearly differentiates it from the Judicial Review Application, given their identical factual basis and the substantial overlap in allegations made in both contexts.
15. Accordingly, despite different entities being named in the Judicial Review Application and your CDDA claim, I do not consider it would be appropriate to consider your CDDA claim without reference to the Judicial Review Application.
16. I also note your email to Ms Keen dated 21 March 2013, in which you ask the ACCC to 'consider recent events such as the Australian Dental Association (ADA) request to the ACCC to modify the policy which led to the damage caused to my company, and the recent full court Federal Court decision in *Minister for Immigration and Citizenship v*

¹ Pursuant to s.122 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

² Pursuant to s.132J of the *Competition and Consumer Act 2010* (Cth).

SZQRB (2013) regarding procedural fairness prior to forming your decision'. However, these events do not alter the limitations on the application of the CDDA Scheme where an administrative review mechanism is available, as outlined above.

Capacity of the administrative review mechanism to provide a remedy

17. As noted above, the CDDA Scheme does not generally apply 'where it is reasonable to conclude that there is an administrative review mechanism which has the capacity to provide a remedy for the defective administration'.
18. In your CDDA application, in relation to the Judicial Review Application you say that 'no relief [is] claimed or able to be awarded to the Applicant should the claim succeed'. In your letter of 25 February 2013, you say that there is no administrative review mechanism available which has the 'capacity to provide a remedy (financial compensation) for defective administration'.
19. However, remedies are not limited to 'financial compensation'. Remedies encompass both monetary and non-monetary relief.
20. In the Judicial Review Application, Pro Teeth Whitening is seeking both remedies under the ADJR Act as well as 'a prerogative writ or equitable remedy, pursuant to jurisdiction under Sect 39B of the *Judiciary Act 1903 or Constitution* (if ADJR remedies not available) to quash the Respondent's decision' (Submission for Hearing). Accordingly, this Judicial Review Application may result in a remedy, such as the quashing of the original decision.
21. In these circumstances, my view is that the Judicial Review Application constitutes an administrative review mechanism which has the capacity to provide a remedy for the alleged defective administration and hence the CDDA Scheme does not apply.

The CDDA Scheme is intended to compensate individuals on a moral basis, to whom there is no legal obligation

22. As you are aware, the Finance Circular requires that 'payments are approved on the basis that there is a moral, rather than legal, obligation to the person or body concerned' (page 7, Finance Circular). You state in your letter dated 25 February 2013 that 'the opportunity to resolve this matter on a moral basis only exists in the CDDA scheme'.
23. However, this does not alter the limitations on the application of the CDDA Scheme where an administrative review mechanism is available, as outlined above.

Decision regarding your CDDA claim

24. Taking into account all of the considerations outlined above, my decision is that the CDDA Scheme does not apply to your CDDA claim at this time because judicial review is an administrative review mechanism which has the capacity to provide a remedy for the alleged defective administration.
25. However, I note that the applicability of the CDDA Scheme could be reconsidered once the judicial review process is exhausted. If the outcome of the Judicial Review

Application does not provide a remedy for the alleged defective administration, you may wish to contact the ACCC to revive your CDDA claim.

Commonwealth Ombudsman

26. If you are dissatisfied with this decision, you may make a complaint to the Commonwealth Ombudsman. The Ombudsman may investigate and, if the Ombudsman considers it appropriate to do so, propose that this decision be changed.

Act of grace payments

27. The act of grace power allows the Finance Minister or their delegate to authorise payments to individuals if it is appropriate in special circumstances. As with the CDDA Scheme, an act of grace payment will not apply where there is an 'alternative avenue of redress that should be pursued' (page 25, Finance Circular). Based on our understanding, the Judicial Review Application which has been brought by Pro Teeth Whitening is an alternative avenue of redress that should be pursued. However, you may wish to contact the Department of Finance and Deregulation regarding your claim for an act of grace payment if you wish to confirm the Department's position on this point.

Yours sincerely



Brian Cassidy
Chief Executive Officer