

Wrap up of ACCC vs Drs Ranu, Crowe & Stankevicius

By Garry Pammer

Justice Heerey of the Federal Court ruled on 5 December 2007 and finds the Orthodontists engaged in price fixing and market sharing.

As discussed in our update in the Sep/Oct edition (Page 40), the ACCC had instigated legal proceedings against three associate orthodontists practising in Tasmania. Drs Ranu & Ors had several associate agreements in place for some 15 years. The agreements included direct reference to and a quantification of, pricing, client referral, retention and allocation and also the geographical area in which they could practice, including strong restraint provisions. In fact, the agreements even went on to outline methodology preventing other orthodontists setting up competing practices in northern Tasmania.

Justice Heerey ruled that the orthodontists had entered into repeated and various illegal and anti-competitive arrangements to:

- i. Fix the price of orthodontic services;
- ii. Restrict supply of patients to those orthodontists with more patients than the others;
- iii. Stop other orthodontists from setting up practices in competition to the associates; and
- iv. Restricted the associates working with other practices or from separate premises.

The associates breached Section 45 of the Trade Practices Amendment Act 1997 (the TPA Act), namely that:

- If a provision of a contract made before the commencement of the TPA Act:
- a) is an exclusionary provision; or
 - b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;
- that provision is unenforceable.

Clearly an associateship agreement that includes clauses such as those noted above breaches the TPA Act.

Where did they go wrong?

Dr Ranu & Ors sensibly put an associateship agreement in place when they decided to share expenses and premises to practice under the one roof. Their agreement included standard clauses like entry and exit provisions for the associateship to protect each other commercially from loss or risk should one of the practices/associates wish to leave in a hurry. The problem was that the lawyers and accountants that were advising the associates gave other advice and directions to Dr Ranu & Ors tantamount to anti-competitive clauses in the agreement.

Are these problems common?

There is a misconception amongst some advisers that an associateship agreement can make reference to price and patient allocation for each of the practices. Regardless of your advisers opinion, an agreement that fixes fees and patient allocation is illegal.

What if our agreement doesn't fix fees, but we all charge similar rates?

Then your agreement probably complies with the TPA Act but now is a good time to see a dental specialist lawyer or accountant to review it.

Where three orthodontic practices sharing premises and expenses happen to have similar rates and fees schedules for patient services does this constitute price fixing ?

No it doesn't. Orthodontic practices, like general dentistry practices, all run on similar profitability rates and margins. The corollary of this is that scheduled rates are very similar across the whole industry. A good example would be the charge out rates of two accounting practices, both

small firms, both in Sydney CBD, sharing some office space and a reception area. Both charge out partners at \$300 per hour. Is this price fixing? No it isn't, it's just industry rates for standard professional services in the CBD. Further, the practices are run separately by the professionals with little to no input from the associated practice.

What does this mean for your practice?

As noted above, all associateship practices should be reviewing their agreements and business practices for what may be construed to be anti-competitive clauses or behavior. Please contact myself or Heath Stewart at Clark & Jacobs on (02) 9264-1111 if you wish to discuss your position.