

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## DIRECTOR OF CONSUMER AFFAIRS VICTORIA V GIBSON [2017] FCA 240

**Federal Court of Australia, Mortimer J, 15 March 2017**

Misleading conduct in falsely claiming being diagnosed with brain cancer for the promotion of a smart phone application and book for charity regarding brain cancer and natural treatment remedies.

**Key words: Fundraising, Commonwealth and Victorian Jurisdiction, Representations, Contraventions, Trade and Commerce, Misleading and Deceptive Conduct.**

1. This was an application brought by the Director of Consumer Affairs Victoria (the Director) under the provisions of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)* (ACL Vic). Under section 8 of the *Victorian Act*, the *Australian Consumer Law* (ACL) set out in Schedule 2 to the *Competition and Consumer Act 2010 (Cth)* is adopted into Victorian law.
2. The Director alleged that, in the course of developing and promoting a smart phone application and a book, Annabelle Natalie (Belle) Gibson falsely claimed to have been diagnosed with brain cancer, and claimed to have rejected conventional cancer treatments in favour of natural remedies. Gibson promoted herself and the claims which were the subject of this proceeding both under her own name and under a business name 'The Whole Pantry'. It was also alleged that, while she claimed that part of the proceeds of sales of the app and the book would be donated to charities, most of these donations were not made.
3. The Director contended the false claims were made by Gibson personally and by the second respondent, Belle Gibson Pty Ltd, a company incorporated on 17 July 2013, of which Gibson was the sole director and shareholder. That company is now called Inkerman Road Nominees Pty Ltd (the company), a name change effected on 17 July 2016 after liquidators were appointed to Belle Gibson Pty Ltd on 15 April 2016. Gibson, the liquidators and the company took no part in these proceedings.
4. The Director sought injunctions, declarations, pecuniary penalties, publication orders and costs in respect of alleged contraventions by the respondents of sections 18, 21 and 29 of the *ACL* and *ACL (Vic)*. It was held that the Director had proven the alleged contraventions of section 18 of the *ACL* and *ACL (Vic)*, some of the alleged contraventions of section 21, but not the alleged contraventions of section 29.
5. The contraventions of the *ACL* and *ACL Victoria* proceeded via social media and a book as follows:

- a website at the address [www.thewholepantryapp.com](http://www.thewholepantryapp.com);
  - a Facebook account with the identifier @TheWholePantry; and
  - an Instagram account with the identifier 'healing\_belle';
  - an Apple app 'The Whole Pantry' sold through the Apple iTunes App Store between about 5 August 2013 and 16 March 2015;
  - an Android app 'The Whole Pantry' sold through the Google Play store between about September 2013 to around 11 May 2016;
  - a book called 'The Whole Pantry' published in October 2014 by Penguin. It was withdrawn from sale in March 2015.
6. The Facebook (with an alleged 11,800 'likes') and Instagram (with an alleged 99,000 followers) accounts were held by the company, but the website (with an alleged 64,002 views) was directly controlled by Gibson. The Apple app (via the Belle Gibson company) was downloaded over 411,000 times internationally, and over 115,000 times from the Apple Australian App Store, netting \$280,000. The Android app (via the Belle Gibson company) was downloaded about 17,000 times from the Google Play store, for a total of about \$28,000. The book resulted in an advance of \$132,500 being paid.
7. The court considered various statements made on social media, and in Gibson's book which claimed that Gibson had terminal brain cancer, was treating it without recourse to conventional medicine, and was donating proceeds from the app and book to charitable causes, including to children who actually had inoperable brain cancer. These covered a period from 2013 to 2015 (and in the case of the Android app, to May 2016). She later claimed that the cancer had spread to her blood, spleen, uterus and liver. Subsequently, newspaper investigations, and interviews with the Australian Women's Weekly and 60 Minutes unfolded the falsity of the claims made.
8. Section 18 of the *ACL* deals with conduct in trade and commerce which is misleading or deceptive, or is likely to be so. Section 21 of the *ACL* prohibits unconscionable conduct in connection with goods or services. Sections 29(1)(e), (f) and (g) of the *ACL* provide that a person must not make false or misleading representations concerning testimonials or the uses or benefits of goods or services. Sections 21 and 29 are penalty provisions, while section 18 is not.
9. The Court held that there were three representations (relating to having cancer, and its treatment) that breached section 18 *ACL*, made by both Gibson and her company. However, these representations did not breach sections 21 or 29 of the *ACL* or *ACL* Victoria. On the issue of the charitable donations misrepresentations, section 18 was held to be breached. From about \$420,000 in receipts from her activities, Gibson donated at most \$10,000. These misrepresentations also constituted unconscionable conduct under section 21. The court held that Gibson and her company had used vulnerable persons and groups for marketing purposes to their own advantage. Gibson had gained a considerable and uncritical media profile by these misrepresentations (at [241]-[242]):

The Whole Pantry book was promoted by Penguin at the London Book Fair, including through a promotional sales booklet. It was promoted at a sales conference, on Penguin’s website, and on Penguin’s social media accounts, including through Facebook and Twitter. It was a featured title in book stores – in Target, Collins, Dymocks and Leading Edge. Ms Gibson had interviews with numerous publications, including Australian Women’s Health magazine, Cosmopolitan, Elle, Marie Claire, Sunday Life, Sunday Magazine, The Age, the Herald Sun and The Australian. She had a photoshoot with Marie Claire and Elle. She appeared on TV and radio interviews, including on the Channel Seven program, Sunrise. She made blog posts for the websites of online book retailers, and appeared at bookstores. She conducted interviews with book retailers, including Booktopia and Bookworld. She won the “Fun Fearless Female of the Year” award, presented by Cosmopolitan. In securing this public profile, and the financial and personal benefits which came with it for herself and her company, Ms Gibson deliberately played on the genuine desire of members of the Australian community to help those less fortunate. I am satisfied that Ms Gibson contravened s 21 of the *ACL* (Vic) and her company contravened s 21 of the *ACL* and *ACL* (Vic) in relation to the representations about charitable giving.

10. The penalties are yet to be decided.

## IMPLICATIONS



This case illustrates the powers of Consumer Affairs to prosecute deceptive fundraising via the Internet.

## VIEW THE CASE



This case may be viewed at: <http://www.austlii.edu.au/au/cases/cth/FCA/2017/240.html>

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