
Enforcement

The following are reports on new and concluded Commission actions in the courts, settlements involving court enforceable (s. 87B) undertakings, and major mergers considered by the Commission. Other matters still before the court are reported in Appendix 1. Section 87B undertakings accepted by the Commission and non-confidential mergers considered by the Commission are listed in Appendix 2.

Restrictive trade practices

Telstra

Misuse of market power (s. 46)

On 18 February 1997 Telstra gave court enforceable undertakings to the Commission ensuring third party access to the data it collects. The Commission believes that this will enhance competition in the telephone directories market.

To enable it to discharge its obligations under its licence as a general telecommunications carrier, Telstra collects, maintains and verifies business and government customer names, addresses and telephone numbers (and also some occupation information) on a database. The undertaking will allow firms seeking to set up their own directories to access this data. Residential data is excluded because of privacy concerns.

According to the undertaking Telstra will charge the licensed third parties no more than \$0.18 per entry, a fee for the initial supply, and a fee for each subsequent supply. The Commission said these charges were significantly lower than those which the carrier was first proposing. The licence agreement will be for five years, unless a licensee requests a shorter term.

The undertaking follows Commission negotiations with Telstra over access to Telstra's information database on fair terms to all parties. The negotiations were concurrent with a Commission investigation of allegations that Telstra had refused to supply the data on reasonable terms to a number of market participants.

The Commission believed that such conduct risked breaching s. 46 of the Trade Practices Act, which prohibits misuse of market power, and was considering litigation. However, the Commission is satisfied that the undertaking has advanced its objective of ensuring a framework for access to directory data on reasonable and sustainable terms. The undertaking is for two years.

The Commission said that this outcome should be viewed in the context of the new access regime embodied in Part IIIA of the Trade Practices Act as well as the new regulatory regime which is to come into effect in the telecommunications industry this year.

Radio Cabs of Wollongong Co-operative Society

Anti-competitive agreements (s. 45)

On 26 February 1997 Radio Cabs of Wollongong Co-operative Society and its directors signed a court enforceable undertaking following Commission intervention.

The company had introduced a rule banning its drivers from using or carrying a mobile phone in their cabs. Drivers found breaking the rule risked suspension from the radio network.

The Commission believed that the rule was likely to breach s. 45 of the Trade Practices Act, because it would restrict dealings and affect competition.

Radio Cabs of Wollongong, and its directors, have undertaken to:

- notify all owners and drivers that no action would be taken against them for carrying or using a mobile phone in their cabs;
- ensure that no driver who carries or uses a mobile phone in his/her cab is denied access to the radio network of Radio Cabs of Wollongong by reason of having carried or used a mobile phone;
- hold an Extraordinary General Meeting to rescind the rule; and
- introduce a trade practices compliance program.

Nice Man Merchandising (Australasia) Pty Limited and Concept Sports Pty Ltd

Resale price maintenance (s. 48)

On 28 February 1997 the supplier of official Ferrari merchandise, Nice Man Merchandising (Australasia) Pty Limited, and its Melbourne agent, Concept Sports Pty Ltd, gave the Commission undertakings in relation to discounting on their products.

The companies had sought the agreement of two persons to sell the products at the recommended retail prices, contained in a price list issued by Nice Man, at both the wholesale and retail level.

The Commission wrote to both companies in late February 1997 expressing its concern that two terms contained in the *Terms and Conditions — Ferrari Merchandise* document issued by them breached the resale price maintenance provisions of the Trade Practices Act.

In response to the Commission's concerns, Concept Stores, on behalf of Nice Man, wrote to the recipients of the document advising them that part of the document's terms breached the Act, and that they were not obliged to sell at these prices.

At the Commission's request, Nice Man also wrote to all its retail customers advising that they were not obliged to sell the merchandise at the recommended retail prices.

Both companies also gave undertakings to the Commission that none of their customers would have supply terminated or be supplied on disadvantageous terms should they sell official Ferrari merchandise below the recommended retail price. Nice Man also undertook to implement a trade practices compliance program.

Mergers

Brambles and Ausdoc Group

Acquisition (s. 50)

On 21 February 1997 the Commission announced that it would not oppose the proposed acquisition of the Ausdoc Group by Brambles. Brambles issued a cash Part A takeover offer for Ausdoc in January 1997.

Ausdoc is involved in the provision of document exchange and records management services. Brambles participates in the provision of records management services through its divisions Recall and Intershred.

Despite high market concentration in the physical records management and electronic information management markets, the Commission decided not to oppose the proposed acquisition because it considered the barriers to entering these markets were not high.

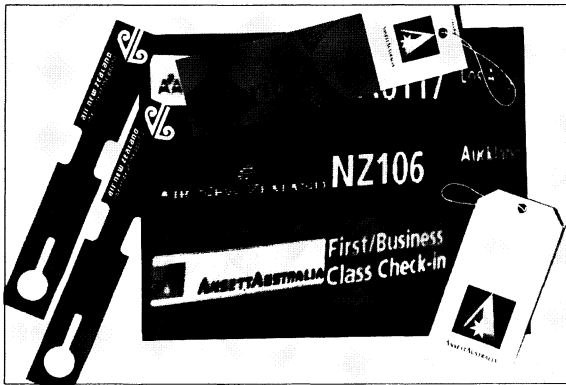
Competitors advised the Commission that they were experiencing significant growth and that there remained further growth opportunities in the market.

In the longer term, the Commission believes that new technology, such as televaulting and imaging, will create further opportunities for new entrants.

Concorde International Travel Pty Ltd and Metro Travel Pty Ltd

Acquisition (s. 50)

The Commission will not intervene in the acquisition of Metro Travel Pty Ltd by Concorde International Travel Pty Ltd. Concorde and Metro are wholesalers (or consolidators) of airline tickets to retail travel agents.



The Commission concluded that, although Concorde/Metro would have a substantial share of the consolidation business in Australia, there were a number of competitive constraints that were likely to prevent the merged firm from increasing its prices or margins.

These competitive constraints include:

- competition from existing consolidators;
- the ability of accredited retail agents to obtain tickets from airlines via the International Air Transport Association (IATA) system;
- the opportunity for non-IATA retail agents to be accredited by IATA or join a retail franchise or buying group; and
- the ability of some retail groups which have substantial buying power to vertically integrate into consolidation.

The Commission concluded that the acquisition was unlikely to substantially lessen competition.

Bunge Cereal Foods Pty Ltd and Defiance Mills Limited's flour/bread operations

Acquisition (s. 50)

On 5 March 1997 the Commission indicated it would not intervene in the proposed acquisition of Defiance Mills Limited's flour or bread operations by Bunge Cereal Foods Pty Ltd.

Based on its extensive knowledge of the flour milling and baking industries, the Commission concluded that the proposed acquisition was unlikely to lead to a substantial lessening of competition in either the flour or bread markets.

The Commission considered that there was little overlap in the flour operations, and no overlap in the baking operations, of Bunge and Defiance. However, it will make limited market inquiries into the manufacture and sale of premixes.

Bunge submitted to the Commission that the takeover would have a pro-competitive effect as it would create a 'third force' in milling and baking in Australia. It claimed that the combined Bunge/Defiance would be able to compete more effectively with Goodman Fielder Limited and George Weston Foods Limited. The Commission considered these submissions to be persuasive.

Consumer protection

Biometrics Contour Treatment

Misleading or deceptive conduct (s. 52), false or misleading representations (s. 53(c)), misleading the public as to the nature of the characteristics of goods and services (s. 55)

On 14 February 1997 Peter Foster withdrew his defences and consented to injunctions in relation to his promotion of a 'high contour treatment' marketed as Biometrics.

The Commission began court action against Foster, his mother Louise Poletti, and three others in 1995. At that stage, Foster had fled Australia to the United Kingdom, where he was

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subsequently jailed for his part in a diet scam there. The Commission recommenced proceedings against Foster in 1996 when he was arrested in Darwin and subsequently jailed following proceedings brought by the Australian Securities Commission.

Foster consented to court orders restraining him from:

- making any further representations about the physiological or therapeutic effects of the alleged 'thigh reducing cream';
- selling distributorships for the cream; and
- making misleading statements about similar weight control or weight loss products.

He will pay the Commission's costs of \$15 000.

Louise Poletti consented to similar orders, but no orders were made as to costs. The other parties, Peter Harrison, Donna Moscardo and Preferred Sales and Marketing Pty Ltd (in liquidation), had all previously consented to injunctions proposed by the Commission.

Destiny Telecomm International Inc.

Referral selling (s. 57), pyramid selling (s. 61)

On 27 February 1997 the Commission obtained *ex parte* injunctions against a US-based multi-level marketing phonecard company Destiny Telecomm International Inc. and a number of Australian representatives.

In the Federal Court Sydney, Justice Lehane ordered that the parties be restrained from:

- promoting the scheme or any similar scheme known as *Destiny Telecomm International's Binary Marketing Program*;
- signing up new participants; and
- using credit card details provided in relation to the scheme.

The scheme involves consumers purchasing a phonecard for \$100 for international, STD and/or mobile telephone use. If those consumers introduce further customers to the scheme, they receive a commission. The

amount of commission increases according to the number of customers introduced.

The Commission had approached the company seeking clarification of the scheme to determine whether it breached the Trade Practices Act. The scheme was due to begin on 1 March 1997, and the Commission was concerned that Destiny Telecomm not start up until it had had an opportunity to fully review the scheme. When the company did not respond, the Commission instituted proceedings.

The Commission was concerned that consumers were providing credit card details and debit authority to an overseas company whose activities may have breached the Act. It had received more than 100 inquiries from consumers concerned about the scheme, and had been informed that more than 14 000 consumers had been signed.

On 7 March 1997 the Court continued the injunctions against the respondents, restraining them from promoting the scheme.

The Commission has been assisted in its inquiries by the US Federal Trade Commission, the Canadian Bureau of Competition Policy, and the Department of Justice in North Carolina, which has already taken action against similar schemes promoted by Destiny Telecomm. The Californian District Attorney has also instituted proceedings against the company, which is based in Oakland, California, and a receiver has been appointed by the court.

Johnson & Johnson Pacific Pty Ltd

Misleading or deceptive conduct (s. 52)

On 10 February 1997, Johnson & Johnson Pacific Pty Ltd offered the Commission legally enforceable undertakings in relation to a \$2 cash back offer on its Stayfree Meds tampon packets.

The Commission considered that the offer, contained on a promotional sticker on the packaging, concealed the following material conditions:

- that consumers had to buy two entirely different Johnson & Johnson products to claim;

- the closing date of the promotion; and
- a limit of one claim per household.

After Commission intervention, Johnson & Johnson took prompt action to remove the stickers from packets on supermarket and pharmacy shelves. It will honour all claims made by the closing date of the promotion by consumers who send in a barcode from either the packaging to which the sticker was attached, or from the 'new Meds' packaging. The company has advertised in daily newspapers in each State and Territory and written to individual claimants to advise consumers of their right to make claims.

Nestle Australia Pty Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations (s. 53(a))

After a Commission investigation, Nestle Australia Pty Ltd has agreed to relabel the Salmon and Oceanfish variety of its Friskies Go-Cat cat food.

Currently, the product's labelling says 'Salmon and Oceanfish' in large letters. The Commission believed that consumers would think that salmon and oceanfish were the major ingredients. In fact its major ingredients are chicken and beef, with small percentages of oceanfish and approximately 0.5 per cent salmon.

The Commission considered the labelling risked breaching ss 52 and 53(a) of the Trade Practices Act. It did not consider the listing of the ingredients in a descending order on the rear of the label corrected the more prominent representation on the front of the product.

In addition to relabelling the variety as 'Oceanfish and Salmon flavour' (thereby reversing the order of the prominent representation), the company will advertise fortnightly in major daily newspapers informing consumers that the amount of meat in the product exceeds the amount of fish.

The Commission, together with major manufacturers and the Pet Food Industry Association of Australia, are currently reviewing the code of practice used in the industry.

Product safety

Linens Unlimited Pty Ltd

Non-compliance with mandatory consumer product safety standard (s. 65C)

After Commission intervention, Linens Unlimited Pty Ltd has agreed to recall children's dresses/nightdresses carrying the labels *The Lace Lady* or *Linens Unlimited*.

The Commission considered that the garments distributed by Linens Unlimited breached the maximum length requirements of the mandatory standard for children's nightclothes prescribed under the Trade Practices Act. Although the garments carried a fire warning label, the Commission considered that the length of the garments might have increased fire hazard.

In addition to recalling the garments, the company will provide consumers with free alterations to those garments and, in some circumstances, offer a replacement.

The Commission first contacted Linens Unlimited on 29 January 1997, advising it that certain children's garments on sale in retail stores appeared to be in breach of the mandatory standard for children's nightclothes.

Linens Unlimited immediately ceased supply and advised its retail customers to do the same. The company also agreed to permanently cease supplying the dresses/nightdresses in their current design.

The Commission said that Linens Unlimited had acknowledged that it may have breached the Act, and that it had cooperated fully with the Commission by acting promptly to minimise any risk to consumers.