
International developments

From New Zealand

New Zealand's Commerce Commission enforces both the Commerce Act 1986, which contains restrictive trade practices provisions, and the Fair Trading Act 1986, which deals with consumer protection matters.

The following items were extracted from July and September issues of the Commerce Commission's newsletter Fair's Fair.

Annual Plan 1997-98

The Commerce Commission's annual plan 1997-98 sets out how the Commission intends to best achieve compliance with the two Acts for which it is responsible. The Commission will use a mix of enforcement action, surveillance and education to further increase compliance with the Acts.

The plan also lists priority areas for the Commission in the 1997-98 financial year. Under the Commerce Act, these are health, wholesale gas contracts and emerging communications technologies. Under the Fair Trading Act, these are bait advertising, small print, 'normal' selling price claims, claims about rights to guarantees and remedies, food and diet claims, cross-border issues, the toy safety standard, statutory defences, court orders and claims concerning the need for any goods or services.

Links between Fair Trading and Consumer Guarantees Acts

One of the key areas identified in the Commerce Commission's annual plan is to

develop the law linking the Fair Trading and Consumer Guarantees Acts.

The Fair Trading Act prohibits false or misleading claims about rights, guarantees and remedies. The Consumer Guarantees Act gives customers the right to guarantees and remedies that must be provided.

There is limited case law in this area, the main case being the Commission's recent prosecution of Commoditcorp Investments (NZ) Limited, trading as PC General.

PC General pleaded guilty to three breaches of the Fair Trading Act after selling Microsoft software labelled: 'Due to licence agreements open software is not refundable'.

The Consumer Guarantees Act gives consumers the right to choose a refund, a replacement or compensation when a problem with goods is serious or cannot be fixed.

The Commission has also warned a number of power companies that their contracts with domestic consumers risked breaching the Fair Trading Act. It was concerned that the contracts tried to limit the companies' liability should something go wrong.

A key legal issue here is whether electricity is covered by the Consumer Guarantees Act. The Commission's view is that it is, and therefore the guarantees and remedies in the Act must apply to domestic electricity consumers.

The Commission is not limiting its work in this area to computer and electricity retailing businesses, but is actively monitoring how guarantees and remedies are described to customers overall.

As work in this area progresses the Commission will form its opinions as to how the law operates and, where necessary, will test these opinions by taking prosecutions.

A decade of fair trading in New Zealand

To mark the 10th anniversary of the Fair Trading Act the Commerce Commission has published *A Decade of Fair Trading in New Zealand, the Fair Trading Act 1987-97*.

The publication discusses the development of consumer protection legislation in New Zealand, the Commission's role in enforcing the Fair Trading Act, key issues established by the courts and the framework that courts use for assessing penalties, private actions under the Act, the development of self-regulation in industry and how it has embraced fair trading principles, and the consumer's view of the Act.

The authors are from the Commission and the Ministry of Consumer Affairs and also include Advertising Standards Executive Director Glen Wiggs and Consumer's Institute Chief Executive David Russell.

Chief Investigator seconded to ACCC

Chief Investigator Ross McPherson from the Commerce Commission's Wellington office has been seconded to the ACCC for six months. This secondment is part of a longstanding exchange between the Commerce Commission and the ACCC (and its predecessor the TPC).

It allows the two organisations to share the skills and experience of each other's staff in enforcing competition law in their respective countries.

The exchange also helps to maintain close Trans-Tasman links which are becoming increasingly important as Australia's and New Zealand's economies become increasingly intertwined.

From the USA

The following item was extracted from a media release of the US Federal Trade Commission dated 6 August 1997.

Nu Skin to pay \$1.5 million settlement over fat loss claims

Nu Skin International Inc. has agreed to pay a \$1.5 million civil penalty to settle Federal Trade Commission charges over claims it made in relation to its nutritional supplements.

The FTC alleged that Nu Skin could not adequately substantiate its claims and therefore violated a 1994 FTC order requiring the firm to have competent and scientific evidence to support benefits claims for any product it sells.

The claims included fat loss, increased metabolism and muscle maintenance benefits of five products containing chromium picolinate and L-Carnitine.

Unsubstantiated claims for products containing chromium picolinate and L-Carnitine have been the subject of several recent FTC cases.

The settlement, if approved by the court, would require Nu Skin to make the \$1.5 million payment within 10 days, permanently enjoin the firm from further violating the 1994 consent order, and impose various record keeping and reporting requirements on the firm that are designed to assist the FTC in monitoring compliance.

From Canada

The following item was extracted from a media release of the Competition Bureau dated 10 March 1997.

Land surveyors association fined \$50 000 for price maintenance

On 10 March 1997 the Director of Investigation and Research under the

Competition Act announced that Fédération des arpenteurs-géomètres du Québec, a land surveyors association, pleaded guilty to price maintenance in relation to professional fees set by its members.

This is the first time a Canadian professional federation or association has pleaded guilty with respect to an agreement to enhance, maintain or discourage the reduction of professional fees among its members.

The offence involved an agreement by members of the Federation to enhance and maintain fee levels, and to prevent their reduction, in various regions of Québec. Certain services offered by land surveyors are, by provincial law, exclusively supplied by members of the profession. The corresponding tariffs for these services were formerly regulated by the government until a few years ago when regulation ended.

The agreement would have directly affected those who required certain services before obtaining a building permit or purchasing a residential, commercial or industrial property. This includes home buyers and any buyers or users of commercial and industrial buildings. Other related entrepreneurs, such as real estate agents, notaries and builders, who depend on the competitiveness of land surveyors to provide their own services, would also have been affected.

Associate Chief Justice Desjardins, who imposed the sentence in the Superior Court of Québec, also issued a prohibition order requiring the Federation to comply with the Competition Act.

From the UK

The following item was extracted from a media release of the UK Department of Trade and Industry dated 7 August 1997.

Competition law reform

On 7 August 1997 Margaret Beckett, President of the Board of Trade, published a draft Bill to reform competition law in the UK.

The proposed legislation, to be brought forward this year, will introduce a prohibition-based approach to competition law. It is designed to provide a strong deterrent against cartels and other anti-competitive agreements, and against abuses of market power. Remedies will include fines for serious abuses, the right of competitors and customers damaged by anti-competitive behaviour in breach of the prohibition to seek damages, and, where necessary, the halting of anti-competitive action pending detailed investigation.

Ms Beckett said:

Present competition law is not working well. Its reform is long overdue. Consumers need a better deal. We need to prevent and remedy anti-competitive behaviour more effectively. We also need to do so efficiently, avoiding placing any unnecessary burdens on business.

The first prohibition, against anti-competitive agreements, cartels and concerted practices is being introduced to address deficiencies in the present regime operated under the Restrictive Trade Practices Act. Problems identified included time spent in registering and scrutinising agreements of little or no competitive concern and inadequate investigatory powers to tackle cartels.

The new prohibition will be closely based on Article 85 of the EC Treaty. However, some departures from European practice may be necessary, such as the exclusion of most vertical agreements from the scope of the prohibition. Current legislation dealing with anti-competitive agreements — the Restrictive Trade Practices Act 1976 and the Resale Prices Act 1976 — would be repealed.

The second prohibition, covering abuse of a dominant market position, is intended to strengthen the existing regime operated under the Fair Trading Act. The proposed new prohibition is based closely on Article 86 of the EC Treaty. At present, serious anti-competitive behaviour can continue unchecked throughout an investigation, and competitors who have been damaged by the conduct have no redress or compensation.

To enforce the prohibitions, Ms Beckett is proposing that the Director-General of Fair Trading be given strong investigatory powers

and the power to set fines. The same powers would be given to utility regulators within their special areas.

Ms Beckett also proposes the establishment of a new Competition Commission to which decisions made in relation to the prohibitions can be appealed. The new body will replace the Monopolies and Mergers Commission. However, the current framework for considering mergers would continue, essentially unchanged, within the new Commission.

Copies of the draft Bill are available on the Internet at
<http://www.dti.gov.uk/competition/bill>