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

Alice Car & Truck Rental Pty Limited (trading as Territory Rent-A-Car), N.T. Outback Adventure Rentals Pty Ltd (trading as Hertz Northern Territory), Stafftoy Pty Limited (trading as Thrifty Car Rental), Northaust Auto Hire Pty Ltd (trading as Avis Northern Territory) & Ors

Price fixing arrangement (s. 45)

In June and August 1997, penalties totalling $1 540 000 and costs of $175 000 were ordered against a number of car rental companies in Alice Springs and their management for engaging in a price fixing arrangement in breach of s. 45 of the Trade Practices Act.

The decision followed an extensive investigation by the Commission which involved the collection and analysis of some 40 000 documents and the interviewing of dozens of witnesses.

Justice Mansfield handed down orders and injunctions against four corporate respondents:

- Alice Car & Truck Rental Pty Limited (trading as Territory Rent-A-Car);
- N.T. Outback Adventure Rentals Pty Ltd (trading as Hertz Northern Territory);
- Stafftoy Pty Limited (trading as Thrifty Car Rental);
- Northaust Auto Hire Pty Ltd (trading as Avis Northern Territory);

and five individual respondents:

- Mr Brian Measey, Managing Director of Territory Rent-A-Car;
- Mr David Bennett, Managing Director of Hertz Northern Territory;
- Mr Neville Ivey, former Manager of Avis NT in Alice Springs;
- Mr Robert Hunter, former Alice Springs Manager of Territory Rent-A-Car; and
- Ms Nathalie Keller, former Alice Springs' Manager of Thrifty NT.

The Court found that Mr Measey, Mr Ivey, Mr Bennett and Ms Keller were knowingly concerned in the price fix. Mr Measey, who was considered by Justice Mansfield to be the prime mover and instigator of the price fixing conduct, was ordered to pay an individual penalty of $150 000. Mr Bennett was ordered to pay an individual penalty of $80 000, Mr Ivey, $50 000 and Ms Keller, $35 000.

Mr Robert Hunter was also found to have been knowingly concerned in the price fix. The Court granted injunctions restraining him from being involved in price fixing of car rentals, but accepted submissions that no penalty be ordered against him.

The Commission did not pursue penalties against Mr Hunter because:

- his ultimate cooperation with, and assistance to, the Commission enabled it to join Mr Measey and Mr Bennett; and

- in the Commission's view, his cooperation was a major factor in the decision by the other respondents to withdraw their defences to the action.

The Commission alleged that a number of Northern Territory car rental companies had fixed car rental prices in Alice Springs in contravention of s. 45 of the Trade Practices Act.

The Court found that from late 1994 until around April 1995, the Alice Springs offices of the companies stopped offering tourists travelling in the Central Australian region a car rental discount called an 'Ayers Rock Special' after the companies reached an understanding with their competitors that they would also stop offering these specials.

Ayers Rock Specials were offered to many tourists in the off tourist season in Alice Springs whereby they received an allowance of up to 600 free kilometres per day as part of the rental of a vehicle. After the price fixing arrangement was implemented, most car rental consumers received only 100 free kilometres per day, paying 25 cents per kilometre for every kilometre travelled in excess of the daily allowance. This resulted in some consumers paying many hundreds of dollars more for their rental.

The corporate respondents also gave undertakings to implement a trade practices compliance program for their employees and to compensate all affected customers. The compensation payout is expected to be in the order of $80 000 with several hundred affected customers eligible for refunds. Some customers are expected to receive more than $300, in some cases significantly more, to compensate them for the effect of the price fix.

The fact that the parties withdrew their defences, cooperated with the Commission and agreed to joint submissions was considered by the court in making its final orders.

Transport Workers' Union of Australia

Secondary boycott (s. 45D)

On 22 August 1997 the Commission instituted proceedings in the Federal Court Brisbane against the Transport Workers' Union of Australia, alleging contraventions of the secondary boycott (s. 45D) provisions of the Trade Practices Act.

The Commission alleges that the TWU engaged in boycott conduct against smaller transport companies in Queensland which have not entered into enterprise bargaining arrangements with the union under the Federal Workplace Relations Act. The alleged conduct involves a refusal by union members to load or unload the smaller transport companies' vehicles at the major transport companies' yards.

The seven major transport companies (Brambles Australia Limited, Carpentaria Transport Pty Limited, Finemores Pty Limited, Mayne Nickless Limited, TNT Australia Pty Limited, Toll Holdings Limited, K & S Freighters Pty Limited) have entered into enterprise bargaining arrangements with the TWU under the Workplace Relations Act. In these circumstances, any action taken by the TWU directly against the major transport companies is immune from proceedings under the Trade Practices Act.

However, in so far as TWU members employed by those major transport companies are refusing to load or unload the vehicles of the smaller transport companies at the major transport companies' yards, the Commission alleges they are engaging in a secondary boycott in breach of the Trade Practices Act.

Photography by Arthur Mostead

The Commission has received complaints from a number of smaller companies. It alleges that the TWU's conduct is causing these companies substantial loss or damage.

The Commission is seeking orders, amongst others, that the TWU will:

- cease engaging in the secondary boycott action against the smaller transport companies;
- pay compensation to any smaller transport company which has suffered loss or damage; and
- implement a trade practices compliance program.

These proceedings are the first taken by the Commission under the new s. 45D provisions which were introduced into the Trade Practices Act earlier this year.

Fosseys (Australia) Pty Ltd

Price fixing arrangement (s. 45A)

On 15 July 1997 the Federal Court issued consent injunctions against department store Fosseys (Australia) Pty Ltd to restrain it from engaging in price fixing of soft drinks.

In May 1996 the Commission received a complaint against the Queens St Mall, Brisbane Fosseys store. It was alleged that the store's management had stopped a small business licensee from selling cans of soft drink from a takeaway outlet in the store unless they were sold at a fixed price of $1.25 per can. Store management were alleged to have enforced the agreement by checking the price at which the licensee sold the drinks.

The management of Fosseys stores Australia-wide was taken over by Target Australia Pty Ltd in 1996. When the matter was brought to its attention, the new management cooperated fully with the Commission. It also agreed not to file a defence to the Commission's statement of claim.

Fosseys also provided the Commission with enforceable undertakings to develop procedures to resolve disputes with small businesses with which it deals.

The complainant received a confidential settlement from Fosseys.

Mobil Oil Australia Limited, BP Australia Limited, The Shell Company of Australia Limited and anor

Anti-competitive agreement (s. 45), price fixing arrangement (s. 45A)

In 1994 the Commission instituted proceedings against Mobil Oil Australia Limited, BP Australia Limited, The Shell Company of Australia Limited and anor, alleging that in about 1991 they had entered into a price fixing arrangement.

The Commission alleged that the three oil companies had agreed to raise or maintain retail prices of petrol at their company-owned sites at agreed levels, and to direct their franchisees to set their prices at the same levels. It also alleged that the companies exerted economic pressure on their franchisees to ensure that they followed the prices at the company-owned sites. This economic pressure took the form of either increasing wholesale prices to the franchisee or withdrawing 'price support'.

The Commission sought orders against the companies for pecuniary penalties and injunctive relief.

The Commission's application and statement of claim were amended twice before being struck

Photography by Arthur Mostead

out by Ryan J in September 1996. The Court allowed it to file a further amended statement of claim.

On 5 June 1997 Heerey J of the Federal Court held that the Commission's further amended statement of claim be struck out and refused the Commission leave to replead its case. Heerey J found that the Commission failed to plead sufficient particulars in the statement of claim to support its allegations.

Sundaze Australia Pty Ltd

Resale price maintenance (s. 48)

On 18 June 1997 the Commission instituted proceedings against Sundaze Australia Pty Ltd, a director and a senior employee of the company, and its Queensland agent for alleged resale price maintenance of Oakley Sunglasses.

Sundaze Australia is the sole distributor of Oakley Sunglasses in Australia. The Commission alleges that Sundaze Australia induced, or attempted to induce, retailers to cease discounting the sunglasses.

The Commission is seeking penalties and injunctions. The first directions hearing set down for 6 August 1997 was vacated and consent orders were made regarding a timetable for the matter to proceed. A further directions hearing is scheduled for 17 October 1997.

Garden East Real Estate Development, Adelaide

Third line forcing (s. 47(6))

A recent Commission investigation into a government-owned property development found that the contracts of sale might have breached the Trade Practices Act.

The former East End Fruit & Veg Market in the Adelaide CBD, now a heritage precinct known as Garden East, is being redeveloped into prestige strata-titled residential apartments and penthouses.

The land is owned by the South Australian State Government, and the Minister of Housing and Urban Development appointed the Liberman Group Pty Ltd as the developer. The development is presently about mid-way toward completion, and most of the apartments are being sold 'off the plan'.

In February 1997 a purchaser complained that the contracts of sale for Garden East properties contained a clause which restricted owners to one rental management agent, namely Fenwick Enniss, until June 2005. The complainant submitted that this contractual arrangement was third line forcing and in breach of s. 47(6) of the Trade Practices Act.

Before the introduction of the *Competition Policy Reform Act 1995* this conduct might have been protected by the 'Shield of the Crown'. However, the Crown is now subject to the Trade Practices Act if it carries on a business for profit, such as the development and sale of real estate.

The Commission's Adelaide office raised the matter with the SA Government's MFP Development Corporation. In May 1997, following legal advice, the Liberman Group notified all purchasers that neither they nor the SA Government would seek to enforce the clause and in fact would now treat the contract as if the clause was deleted.

As a result, owners of these properties are now free to negotiate the rental of their properties themselves or through competing real estate agents of their choice.

Mergers

Westpac Banking Corporation and the Bank of Melbourne Limited

Merger (s. 50)

On 25 July 1997 the Commission announced it would not oppose the proposed merger between Westpac Banking Corporation and the Bank of Melbourne Limited, but only after significant undertakings had been given by the

parties. Following the merger, the Victorian operations of both banks will be managed as the Bank of Melbourne by BML management.

The Commission decided to use a multi-product approach in its competition analysis of the merger because it considered that significant changes had occurred in the banking industry since the last time it examined a merger involving one of the four largest banks in September 1995 (Westpac and Challenge Bank).

The undertakings arose because the Commission had concerns about the competition effects of the merger in one of the six product markets it identified, i.e. the transaction accounts market. It was concerned that increased concentration in that market could result in increased charges in transaction accounts. (Transaction accounts are effectively day-to-day banking accounts that include, for example, statement, passbook and cheque accounts.) However, the undertakings offered by Westpac and BML offset these concerns.

The undertakings will maintain various existing benefits for BML customers, including extended trading hours and certain fee exemptions for BML personal current account holders.

The undertakings will make access available on reasonable commercial terms to small and new competitors in Victoria, including interstate based regional banks, building societies and credit unions, so long as they carry on business in Victoria.

This means that it will be possible for Victorian customers of other financial institutions carrying on business in Victoria to be able to use Westpac's ATMs and EFTPOS network (including Challenge and BML) at a reasonable price.

The terms of access for these institutions, including price, will be agreed between the parties where possible. However, any disputes will be determined by an independent expert, approved by the Commission.

The Commission also considered that BML's efficiencies and customer goodwill should help the merged bank compete more effectively against the other three major trading banks — Commonwealth, National Australia Bank and ANZ.

On the basis of the undertakings, the Commission decided not to oppose the merger.

A more detailed assessment of the merger, on which the Commission's decision is based, is available from the Commission's Internet home page.

Foxtel and Australis Media

Merger (s. 50)

On 25 July 1997 the Commission announced it would review the proposed merger of Foxtel and Australis Media.

The Commission's next step is to examine the details of the proposal and seek information from the parties.

CSR Limited and Mackay Refined Sugars Pty Limited

Joint venture (s. 50)

On 30 July 1997 the Commission announced it would not intervene in the proposed joint venture between CSR Limited and Mackay Refined Sugars Pty Limited (MRS) of their Australian sugar refining businesses.

The joint venture will cover purchasing, refining, storage, distribution and sale of refined sugar domestically and internationally. Milling assets are not part of the joint venture.

In 1993 the Trade Practices Commission refused to grant authorisation to a proposed joint venture between CSR and MRS because it was not satisfied that the joint venture would result in a public benefit substantial enough to outweigh its anti-competitive effect.

At that time, the TPC did not consider refined sugar imports to be an effective competitive constraint on domestic refiners. A tariff of $55 per tonne on raw and refined sugar imports, together with high freight costs, placed

imports at a substantial competitive disadvantage.

Since 1993 there have been significant developments in the industry which, in the ACCC's view, have increased the effectiveness of imports as a competitive constraint on domestic refiners.

The removal of the tariff, as recommended by the Commonwealth, Queensland and industry Sugar Industry Review Working Party, was a significant factor in the Commission's decision to now allow the joint venture.

Other factors considered by the Commission were that freight rates had fallen considerably over the previous 18 months and world and regional refined sugar capacity was continuing to expand.

The Commission considered that the pricing decisions of the joint venture would be constrained by a combination of import competition and excess domestic capacity.

CSR and MRS provided the Commission with an enforceable undertaking that the joint venture would make existing import facilities in Western Australia available, at cost, to other Australian refiners and importers. This undertaking is aimed at increasing the competitiveness of refined sugar imports.

The Commission concluded that, in light of the recent changes in the industry, the joint venture was unlikely to substantially lessen competition in the domestic market for the refining and supply of refined sugar.

Merck Sharp and Dohme (Australia) Pty Ltd and Rhone Merieux Australia Pty Ltd

Merger (s. 50)

On 13 June 1997 the Commission announced that it would not intervene in the merger of animal health businesses operated by Merck Sharp and Dohme (Australia) Pty Ltd and Rhone Merieux Australia Pty Ltd.

Merck Sharp and Dohme markets a range of broad-spectrum anti-parasite treatments through its Merck AgVet Division.

The merger proposal follows an in-principle agreement by parent companies Merck and Co., Inc (US) and Rhone Poulenc SA (France) to combine their animal health businesses world-wide.

The Commission concluded that, although the two companies were competitors in the Australian animal health products industry, there was little or no overlap of their respective businesses in market sectors within that industry.

It decided the proposal was unlikely to result in a substantial lessening of competition.

Allied Colloids (Australia) Pty Ltd and Imdex Limited

Acquisition (s. 50)

On 20 June 1997 the Commission announced it would not intervene in the proposed acquisition of the chemical division of Imdex Limited by Allied Colloids (Australia) Pty Limited.

Allied Colloids and Imdex are involved in the supply of synthetic flocculants to the Australian market. Synthetic flocculants are used extensively in mineral processing, pollution control, paper making, water treatment, crude oil recovery and other industries requiring the separation of solids from liquids. Imdex has a manufacturing complex at Kwinana, Western Australia. All of Allied Colloids' supplies of flocculants are imported.

The Commission formed the view that, although Allied Colloids may have a substantial share of the Australian supply of synthetic flocculants, import competition was likely to prevent the merged firm from increasing its prices or margins.

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

Air New Zealand Limited and Jetset Travel and Technology Holdings Pty Ltd

Acquisition (s. 50)

On 18 July 1997 the Commission announced it would not intervene in the proposed acquisition by Air New Zealand Limited of a further 50 per cent ownership interest in Jetset Travel and Technology Holdings Pty Ltd. Air New Zealand will now own and control Jetset.

Jetset is a retail travel agent, tour wholesaler and a consolidator of airline tickets to retail agents. Currently it has preferred supplier arrangements with both Ansett and Qantas. The Commission expects that Air New Zealand will maintain both of these arrangements.

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

Bucyrus (Australia) Pty Limited and Marion Power Shovel Pty Limited

Acquisition (s. 50)

On 11 August 1997 the Commission announced it would not intervene in the proposed acquisition by Bucyrus (Australia) Pty Limited of Marion Power Shovel Pty Limited.

The proposed acquisition is part of a world-wide merger of their respective US parent companies, Bucyrus International Inc and The Marion Power Shovel Company.

The merger parties supply surface mining equipment to coal and iron ore miners for the removal of overburden. Overburden is the earth which covers the mineral being mined. Surface mining typically involves the removal of enormous volumes of overburden in order to reach the mineral.

Bucyrus International Inc manufactures electric draglines, electric mining shovels and rotary blast hole drills for use in the mining industry world-wide. Bucyrus Australia is its distributor in Australia.

Marion Power Shovel Pty Limited tenders for new electric dragline and electric shovel sales, supplies spare parts and services Marion equipment in Australia on behalf of its US parent company.

It appeared to the Commission that the merged firm would face competition from the world market leader, Harnischfeger of Australia Pty Limited, which would constrain it from exercising market power. The Commission also took into account the fact that second-hand draglines were available to be imported from the United States, and that mining contractors were increasingly using electric shovels rather than draglines for overburden removal.

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

Consumer protection

Tasmania Distillery Pty Ltd

False or misleading representations about the place of origin of goods (s. 53(eb))

On 23 July 1997 the Commission obtained orders in the Federal Court Hobart restraining Tasmania Distillery Pty Ltd from making certain misrepresentations about four of its bottled spirit products.

The Commission alleged that Tasmania Distillery had misrepresented that its Sullivans Cove Premium Whisky (a blended Scotch whisky), Classic Tasmanian Mt Wellington Gin,

Photography by Arthur Mostead

Tasmanian Virgin Vodka, and Red Coats Premium Brandy were made or distilled by Tasmania Distillery; that their origin was Tasmania; and that they were distilled using an Alambic Charentais triple distillation pot still process. The Commission alleged that the bottled whisky product was sourced from Scotland and the other products were sourced from producers interstate.

The Court ordered the company to publish corrective advertising and provide refunds to consumers.

This is the first time the Commission has taken legal action concerning alleged misrepresentations as to a regional place of origin.

Buyers Network International Pty Ltd

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

On 25 July 1997 the Commission obtained declarations and orders, by consent, against Buyers Network International Pty Limited, trading as Nu-Life Publications, and its Director, Donald James Scott Finlay, in relation to claims made in their promotion of the publications *Foods That Make You Lose Weight* and *Honey, Vinegar & Garlic — Nature's Miracle Trio.*

Justice Beaumont granted injunctions to prevent Buyers Network International and Finlay from making certain misleading claims about the health and weight loss benefits of honey, garlic and vinegar. These claims included that by using the products as specified in the books people could double their weight loss overnight, and that people could lose weight by eating foods that contained 'negative calories'.

Justice Beaumont also ordered Buyers Network International to publish corrective advertisements, offering refunds to any dissatisfied customers who purchased the publications as a result of the advertisements. If Buyers Network International does not pay the refunds, the Court has ordered Finlay to make good those refunds.

The company was also ordered to implement a trade practices compliance program, including a complaints handling system which complies with the Australian Standard.

Finlay was restrained from exercising control of any company which has not implemented such a trade practices compliance program.

Buyers Network International and Finlay were also ordered to pay the Commission's costs.

Z-Tek Computer Pty Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations about the price of goods or services (s. 53(e)), false or misleading representations in relation to not specifying the full cash price (s. 53C)

On 3 September 1997 the Federal Court handed down orders against Z-Tek Computer Pty Ltd, a Melbourne-based computer products supplier, in relation to advertising of computer products.

The Commission instituted proceedings against Z-Tek on 13 June 1997, alleging contraventions of ss 52, 53(e) and 53C of the Trade Practices Act. It alleged that Z-Tek Computer Pty Ltd placed advertisements in the March and April editions of the computer magazine, *Window Sources Australia,* which listed the prices of computer products without the sales tax payable.

The court orders, to which Z-Tek consented, prevent Z-Tek from advertising the ex-tax price of computer products without also advising consumers of the tax-inclusive price, require Z-Tek to place corrective advertising, and require it to develop a trade practices compliance program.

Club 63 Pty Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations (ss 53, 59), pyramid selling (s. 61)

On 20 June 1997 the Commission instituted proceedings against Club 63 Pty Ltd and its sole director, Mr David Parkes, for the

promotion of an alleged illegal pyramid selling scheme in Townsville from July 1996.

It also alleges that the club and/or Mr Parkes engaged in certain misleading and deceptive conduct and made various representations contrary to ss 52, 53(c) and 59 of the Trade Practices Act.

The Commission alleges that Club 63 held out to consumers that after paying a membership fee, they would receive financial benefits by introducing others to the scheme. Once the club accepted a membership application, the member received an 'Exclusive Club 63 Membership Card', which purported to entitle them to discounts on retail prices at selected stores in and around Townsville.

The Commission is seeking orders from the Federal Court Brisbane:

- to restrain both the club and Mr Parkes from promoting and participating in the trading scheme or engaging in any other similar conduct;
- to have both the club and/or Mr Parkes refund moneys to participants in the scheme; and
- to have the company place advertisements in the *Townsville Bulletin* detailing the contraventions and informing participants that it will provide refunds.

Consent orders have been signed and the parties are now awaiting judicial determination.

Swiss Slimming and Health Institute Pty Ltd (trading as Swisslim)

False or misleading representations (s. 53)

On 26 June 1997 the Commission instituted representative proceedings in the Federal Court against Swiss Slimming and Health Institute Pty Ltd trading as Swisslim, and a director, Gerhard Hassler, in relation to promotions of Swisslim's weight loss and slimming services.

The New South Wales Department of Fair Trading assisted the Commission in the investigation of this matter.

The Commission alleges that Swisslim promotions contained false, misleading or deceptive claims, including that persons using the slimming services:

- could reduce fat deposits in their bodies in the areas they desired and to the degree they desired, without reducing fat from other areas of their bodies and without surgery;
- could lose 10 kilograms of weight in 24 or 25 days and achieve overall weight loss and figure goals without altering their diet or exercising;
- to obtain these benefits, need only regularly undergo a 25-minute treatment or process and invest only one hour of their time per week.

The Commission also alleges that Swisslim misrepresented to consumers that they were not entitled to a refund.

It is seeking declarations and orders that the company:

- be restrained from publishing or broadcasting promotional material that makes the alleged representations;
- pay refunds to consumers;
- place corrective advertising; and
- institute a trade practices compliance program.

Similar declarations and orders are being sought against Hassler.

By way of a representative action under the *Federal Court of Australia Act 1976*, the Commission is claiming damages on behalf of consumers who paid money to Swisslim.

A hearing date has been set for 17 November 1997.

Black on White Pty Limited (trading as Australian Early Childhood College)

Misleading or deceptive conduct (s. 52)

On 1 August 1997 the Commission instituted proceedings in the Federal Court Brisbane against Black on White Pty Limited trading as the Australian Early Childhood College and its principals.

The Commission alleges that the college:

- made false representations in relation to accreditation of its courses by State and national authorities;
- made false allegations in relation to the availability of a deferred payments plan for tuition fees;
- engaged in misleading and unconscionable conduct by initiating court action to enforce rights to tuition fees against students and guarantors who were not aware of the legal import of the college enrolment form; and
- expressly misled guarantors as to liability where a student enrolment was cancelled.

On 15 August 1997 at a directions hearing the Court accepted undertakings from the respondents in terms of the interlocutory orders sought by the Commission until the trial of this action or further order. The next directions hearing is 17 October 1997.

Office Link (Aust) Pty Ltd

Misleading or deceptive conduct (s. 52)

On 15 August 1997 the Commission instituted proceedings in the Federal Court Perth against Office Link (Aust) Pty Ltd concerning the use of fine print conditions in promoting mobile phone and telephone services packages in Western Australia.

The next directions hearing is on 3 October 1997.

Meadow Lea Foods Ltd

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

On 2 June 1997, Meadow Lea Foods Ltd provided enforceable undertakings to the Commission in relation to its advertising of the Gold'n Canola brand of oils, margarine and cooking sprays.

The Commission alleged that Meadow Lea's advertising misled consumers into believing that Gold'n Canola products alone would provide certain health benefits, including the benefits associated with the consumption of Omega 3 fatty acids. Examples of the types of claims that the Commission considered were misleading and deceptive were:

- Gold'n Canola margarine actively lowers the bad cholesterol your body can do without, while maintaining the good cholesterol your body needs;
- Gold'n Canola margarine can actually improve your health and is better for you;
- by using Gold'n Canola products consumers can obtain the same benefits as they can from eating fish;
- the consumption of Gold'n Canola products is solely responsible for treating or reducing the risk of certain health conditions such as diabetes, asthma, arthritis and heart disease.

Meadow Lea has undertaken to stop using all advertising material that suggests that Gold'n Canola products can alone supply health benefits to those who include them in their diet. Meadow Lea has also revised its guidelines used by staff to answer queries on its customer advisory line, and will write to consumers who received advertising by direct mail to correct the alleged misleading statements.

Nestlé Dairy Products

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

On 15 July 1997 the Commission accepted court enforceable undertakings from Nestlé Dairy Products in relation to labelling on its apricot and tropical flavours of Vitari.

The nutritional panel on those two Vitari flavours claimed zero sugar per 100 ml serving. An investigation by the Commission revealed that whilst Vitari contains no added sugar, it does contain naturally occurring sugars present in the ingredients, particularly the fruit, used to manufacture the Vitari. Apricot Vitari contains 13.8 grams of sugar per 100 ml serving and tropical Vitari contains 14.2 grams of sugar per 100 ml serving.

The Commission considered that the incorrect labelling potentially posed a health risk to diabetics and was likely to mislead other health conscious consumers who relied upon the nutritional information panel.

Nestlé moved quickly to alleviate the Commission's concerns. In a negotiated settlement it agreed to:

- amend the nutritional panel on future Vitari packaging;
- stop wholesale distribution of the incorrect Vitari packaging;
- publish notices in national newspapers and diabetic publications to advise the public, particularly diabetics, of the actual level of sugars contained in the product; and
- implement a trade practices compliance program.

It has also written to diabetic associations throughout Australia advising that the labelling may have misled some diabetics as to the latent sugar levels in those products.

Pet food industry guidelines

After discussion with the Commission, the Pet Food Industry Association of Australia has decided to review its current pet food guidelines and fund a consumer education publicity program.

The guidelines review results from talks between the Commission and the industry after consumer complaints about the labelling of certain varieties of pet food being potentially misleading as to which protein was the main one. For example, a product which was essentially a meat product was labelled as a fish product.

During investigation of a complaint, the Commission found that the labelling of other varieties of canned pet food was also potentially misleading or deceptive. It was then agreed by all concerned that some revision of labelling requirements set out in industry guidelines was needed.

The consumer education program includes a flier to be made available in the pet food section of major supermarkets and other pet food outlets. It will deal with the revised guidelines and explain the meaning of different variety names.

In the Commission's view, this type of low-cost, low key approach can be highly effective in addressing consumer protection issues. In this instance, the Commission did not have to resort to court action, and an unsatisfactory situation was resolved cheaply and led to industry-wide change.

Product safety

Atmospherics Corporation Pty Ltd, Candy Point Pty Ltd (trading as Bocam Sales) and Nuline Distributors Pty Ltd

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

On 18 December 1996 the Commission instituted proceedings in the Federal Court Melbourne against Atmospherics Corporation Pty Ltd, the manufacturer of an aerosol dry powder chemical type fire extinguisher branded 'Fireout', and Candy Point Pty Ltd (trading as Bocam Sales) and Nuline Distributors Pty Ltd, distributors of Fireout. It alleged that recent tests indicated that the extinguisher failed to

meet the requirements of the mandatory standard as prescribed under the Trade Practices Act.

On 10 January 1997 interim orders were granted restraining the companies from supplying a fire extinguisher branded 'Fireout'.

Following a Court directed mediation, orders were made in the Federal Court Melbourne on 17 May 1997 prohibiting all the respondents from further supplying for sale within Australia the fire extinguisher branded 'Fireout 400 grams aerosol fire extinguisher' unless they have obliterated, covered over or crossed out the following representations on the cylinder and the packaging:

- all references to 'ABE' powder;
- all references to wood, paper, textiles, plastic or other solid fuel fires; and
- all references to Section 3 Class 1A of the Australian Standard.

The Court also ordered that Atmospherics Corporation Pty Ltd pay for notices to be published in major daily newspapers advising consumers that the Commission had raised concerns about the ability of the fire extinguisher to extinguish solid fuel fires such as wood fires in all circumstances, and in particular in an outdoor windy environment.

Caustic soda labelling

Suppliers of caustic soda products sold across Australia in hardware and supermarket outlets have agreed to relabel their products in response to Commission concern about their product labelling.

The Commission's concern was spurred by the complaint of a consumer who alleged he suffered injuries and property damage as a result of using caustic soda in his home. Caustic soda is both a commonly available household product, and an extremely reactive and volatile substance that has the potential to cause severe burns and serious damage to the eyes. In particular, the Commission was concerned that it should be clearly signalled to consumers that, in order to minimise the risk of harm, caustic soda must be mixed in a cold water solution in specified proportions before use, and that it should not be mixed with warm, hot or boiling water or any other chemical.

Section 75AD of the Act imposes liability on manufacturers for damages caused by defective goods. Goods are deemed defective under the Act if 'their safety is not such as persons are entitled to expect'. The Act requires that the packaging of goods, and any instructions or warnings, be taken into account when considering whether a good is 'defective' for the purposes of the Act.

After becoming aware of their obligations under the Act and the potential for a product liability action to be brought in the case of a defective good, caustic soda suppliers willingly cooperated with the Commission to revise their labelling. This action has assisted the Commission in both its intention to help industry participants avoid or mitigate any future action for damages under the product liability provisions of the Act, and its aim to enhance the welfare and safety of Australian consumers through the provision of better information on the safe use of caustic soda.