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

Sydney anaesthetists, Society of Anaesthetists

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

On 13 October 1997 the Commission instituted proceedings against five Sydney anaesthetists and the Australian Society of Anaesthetists (ASA) alleging price fixing of after-hours anaesthetic services. It alleges that the anaesthetists agreed to charge $25 per hour for on-call services to three Sydney metropolitan hospitals and threatened to boycott those services at one of the hospitals.

The Commission alleges that the conduct arose out of a series of meetings of the departments of anaesthetists at the three private hospitals — St George, Kareena and Greenoaks (now Bankstown) — between November 1995 and April 1996.

In 1995 a subcommittee of the ASA circulated a report to its members recommending that the ASA set a fee of $25 an hour for on-call anaesthetic services to private hospitals.

The Commission alleges that Dr Maxwell Lyon, Dr Alan Stern and Dr Phillip Tong, through their medical practice companies, arrived at agreements with other anaesthetists to charge the fee, and that Dr Paul Ferris was knowingly concerned in the making of the agreements.

It also alleges that the ASA and its NSW Section Chairman, Dr Alec Harris, were knowingly concerned in, or party to, one or more of the agreements.

A directions hearing has been set down for 24 November 1997 in the Federal Court Sydney.

Garden City Cabs Cooperative Limited

Anti-competitive agreement (s. 45), misuse of market power (s. 46)

On 8 October 1997 the Commission reached a settlement with the Garden City Cabs Cooperative Limited of Toowoomba, resolving proceedings in relation to its 'five-day' rule. The Commission had alleged the rule breached ss 45 and 46 of the Trade Practices Act.

Under the 'five-day' rule, only one taxi driver was allowed to operate a taxi over a five-day period. This effectively prevented double-shifting of taxis. If the taxi operators did not comply with the rule their radio services were suspended.

The settlement was facilitated by Garden City Cabs' withdrawal of the 'five-day' rule in December 1996.

As part of the settlement, Garden City Cabs consented to injunctions restraining it from refusing to supply radio services to its members and commission drivers for the reason that its members have engaged a commission driver for a number of consecutive days. The consent injunctions effectively restrain Garden City Cabs from re-introducing the 'five-day' rule or introducing any similar rule.

Garden City Cabs also provided the Commission with an enforceable undertaking to implement a trade practices compliance program. It will also pay the Commission's costs.

Photography by Arthur Mostead

Mergers

Foxtel/Australis Media

Merger (s. 50)

On 14 October 1997 the Commission sought a Federal Court injunction to block the proposed merger of Foxtel/Australis Media on the grounds that it was likely to damage competition in the local telephony market and in the pay TV market.

The Commission alleges that the merger will reduce competition in the local telephony market by weakening the capacity of Optus to compete in that market with combined pay TV and telephony services.

The Commission alleges that the merger would give a combined Foxtel/Australis Media business a high market share, a factor which is of especial importance in the pay TV industry, particularly with respect to the ability to obtain and retain programming.

The Commission raised its competition concerns with Foxtel, Telstra and Australis Media and sought undertakings from them that they would not take further steps to complete the merger without advance notice to the Commission. The parties would not give the undertakings requested.

Following a directions hearing on 29 October 1997 the Federal Court set a date of 24 November 1997 to begin hearings on an interlocutory basis. On 17 November 1997 Australis announced that it had received notices from News Limited and Telstra (the Foxtel partners) of their intention to terminate the merger. On 20 November 1997, the Commission was advised that the merger was terminated. The Court gave the Commission leave on 24 November 1997 to file a notice of discontinuance of the proceedings and ordered by consent that each party pay its own costs.

Taubmans and Bristol Paints

Merger (s. 50)

On 11 July 1997 the Commission announced it was unlikely to intervene in the proposed merger of Taubmans and Bristol Paints.

In May 1996, the Commission had refused to authorise Wattyl's proposed acquisition of Taubmans as it would be anti-competitive. The Commission was concerned that a reduction in the number of large paint manufacturers to two would probably result in price increases.

In August 1996, Barlow Limited acquired Taubmans through a wholly owned subsidiary. Barlow Limited is a South African industrial company.

Taubmans and Bristol approached the Commission recently, on a confidential basis, for its view about the proposed merger.

The Commission believes that the proposed merger may well be pro-competitive since it should create a third major player in the market to compete with Dulux and Wattyl.

Dulux and Wattyl are the largest manufacturers of paint in Australia. They have approximately 40 per cent and 28 per cent of the market for architectural and decorative paint in Australia, respectively. Taubmans and Bristol have market shares of approximately 14 per cent and 8 per cent, respectively.

Dulux and Wattyl enjoy a competitive advantage over both Taubmans and Bristol with a national presence and significant market shares in every Australian State. Taubmans is relatively weak in Victoria/Tasmania and South Australia/Northern Territory. Bristol is a significant player in Victoria/Tasmania only.

The merged firm will be the third largest paint supplier in all States except Queensland where it will be second behind Dulux. The parties argued that the merged firm would be able to better compete with the two other firms through its combined brand names, rationalisation of production costs, and enhanced distribution network.

TNT Australia Pty Limited and Port of Hastings

Acquisition (s. 50)

On 8 September 1997 the Commission announced it would not oppose TNT Australia Pty Limited managing the port of Hastings.

The Victorian Government had invited the Commission to assess the competition consequences of the various bids for the port's management. In June 1997 it announced that TNT Australia had won a 10-year contract to manage the port, on Westernport Bay, south-east of Melbourne.

TNT Australia addressed the Commission's concerns by providing court enforceable undertakings to prevent misuse of market power and to preserve inter-port competition.

According to the undertakings, TNT Australia will:

- provide non-discriminatory access to the Hastings port to current and future users; and
- notify the Commission of any intention to vertically integrate into the provision of other services at Hastings.

The Commission's involvement follows its work in the privatisation of the ports at Geelong and Portland in 1996. In each case it was invited by the Victorian Government to assess the competition consequences of the various bids.

Photography by Arthur Mostead

Netcomm Limited and Banksia Technology Pty Ltd

Acquisition (s. 50)

On 1 September 1997 the Commission announced it would not oppose the proposed acquisition by Netcomm Limited of Banksia Technology Pty Ltd. Netcomm Limited sought the Commission's approval for the proposed acquisition.

Although Netcomm/Banksia will be the leading supplier of modems in Australia with a very substantial market share, the Commission considered that import competition should be an effective check on the exercise of market power by Netcomm/Banksia. The Commission noted that there are highly capitalised, global suppliers of modems which will compete on price and technical performance with Netcomm/Banksia.

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

Austereo Pty Limited and radio stations PMFM and 94.5FM

Acquisition (s. 50)

On 2 September 1997 the Commission announced it would not oppose the acquisition of radio stations PMFM and 94.5FM in Perth by Austereo Pty Limited.

Austereo is a wholly owned subsidiary of Village Roadshow Limited. PMFM and 94.5FM are Perth's highest rating radio stations.

To comply with the Broadcasting Services Act, and to address Commission concerns, Austereo provided the Commission with undertakings to sell its Perth Triple M station after it acquires PMFM and 94.5FM. Triple M (Perth) is part of Austereo's Triple M network which broadcasts in most mainland capital cities. Austereo has also undertaken not to:

- have any ongoing involvement in the day-to-day running of Triple M after it is sold;
- license the new owner and/or operator of Triple M or the owner and/or operator of any other radio station in Perth to use the Triple M call sign and/or trademark;
- enter into any agreements with the new owner of Triple M to provide such services as sales representation, programming or promotion; and
- acquire an ownership interest in any further radio stations in Perth unless it gives seven days notice to the Commission.

Also, Austereo must require as a condition of sale that the new owner of Triple M change the call sign. If Austereo wishes to continue its Triple M presence in Perth, it has the option of converting one of the two stations it is acquiring into a Triple M station.

Subject to these conditions, the Commission decided that Austereo's ownership of two of the five Perth commercial radio stations would not substantially lessen competition in the market for radio advertising in Perth.

Consumer protection

Australian Business Reports Pty Ltd

Misleading or deceptive conduct (s. 52), unsolicited goods or services (s. 64(2A))

On 29 October 1997, in the Federal Court Canberra, Australian Business Reports Pty Ltd and a director, Gary John Solah, were restrained from operating, publishing or promoting any form of directory, register or list of businesses.

Justice Finn also made orders that all moneys currently held by the company, through its agent Pacific Mercantile Pty Ltd, be returned to consumers.

The Commission had alleged, and the Court had previously accepted, that correspondence promoting a 'register' controlled by the company and Mr Solah — the Consumers Business Register — contained representations that were likely to mislead or deceive many small businesses. The most important of these was that the register existed when it did not.

Justice Finn also awarded costs against the company and Mr Solah.

Reef Distributing Company Pty Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations about the price of goods or services (s. 53(e)), unsolicited goods or services (s. 64)

On 31 October 1997 the Commission settled its long running action against the fertiliser company Reef Distributing Company Pty Ltd and its director Russell Loel. The case was originally instituted by the Trade Practices Commission in Melbourne in 1995.

Reef admitted making false and misleading representations in relation to the supply of fertiliser and chemical products to farmers in New South Wales, Victoria, Queensland and South Australia during the early 1990s.

In some cases, Reef had represented to farmers that the product would be supplied at no charge

or that payment would be required only if farmers increased output through use of the products. In other cases, Reef supplied the products on consignment or unsolicited. That is, Reef supplied more of the product than the farmer had agreed to accept, or supplied other types of product which the farmer had not agreed to accept. Reef then demanded payment from such farmers, including those where no increase in yield had been achieved, and instituted numerous claims in the Manly Local Court, ranging from $100 to $40 000.

Justice Einfeld of the Federal Court Sydney accepted consent injunctions that Reef and Loel be restrained from:

- prosecuting 112 court proceedings currently in train;
- seeking payment for goods supplied on a trial basis;
- seeking payment for goods supplied on the basis of an increase in crop yield unless there is evidence of such increase;
- seeking payment for goods supplied on consignment unless there is evidence that the quantity claimed has been used; and
- seeking payment for unsolicited goods.

Email Ltd and Lovelock Luke Pty Ltd

False or misleading representations in relation to the origin of goods (s. 53 (eb)), misleading or deceptive conduct (s. 52)

On 24 October 1997 Lockhart J of Federal Court Sydney handed down his decision concerning the country of origin claims made by Lovelock Luke Pty Ltd in relation to Emailair air conditioners.

The Commission instituted proceedings against Email Ltd and Lovelock on 22 August 1996, alleging that they had falsely represented that Emailair air conditioners were made in Australia. The Commission had discontinued the proceedings against Email Ltd.

Lockhart J did not accept the Commission's contention that because the compressor was imported the air conditioners should not be described as made in Australia. Lockhart J said:

> In the 1990s markets and manufacturing processes are becoming increasingly global and in the case of some manufactured goods there is an increasing tendency for them to be made in a number of countries. Purchasers expect that in such an environment it is unlikely that a sophisticated good consisting of many components would be wholly manufactured in Australia. In these circumstances it is unlikely that purchasers would understand the expression 'Made in Australia' to mean that the air conditioners are wholly made within Australia.

He said that the question to be asked was whether the good was substantially manufactured in Australia. He looked at where the air conditioners were designed, where assembled and where the components were made and found that the 'made in Australia' claim was not misleading or deceptive conduct (for the purposes of s. 52) or a false or misleading representation under s. 53(eb).

Jayco Pty Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations (ss 53(a), 53(c) & 53 (g)), misleading the public (s. 55)

On 3 November 1997 a promoter of a series of weight loss products, Mr David Francis, consented to orders restraining him from in the future making unsubstantiated representations about a series of weight loss products and any other products promoted as methods or aids to slimming.

The Commission instituting proceedings against weight loss product supplier, Jayco Pty Ltd, and a number of individuals on 6 October 1997 alleging that they had engaged in misleading or deceptive conduct and made false or misleading representations in the promotion of six weight loss products:

- Medex Diet Patch (a bandaid-like patch impregnated with iodine);
- Thermoslim (a wafer said to contain thermogenetic (calorie burning) properties);
- E-Z Trim (tablets said to possess thermogenetic properties);

- Acu-Stop 500 (an ear piece inserted inside the ear operating through acupressure);
- Chitoslim 5000 (a powder said to bind fat before absorption by the body); and
- a book about negative calories (claiming that 'negative calories can offset the weight increasing effect of positive calorie foods').

The Commission alleges that:

- the weight loss claims made in the promotional material are untrue;
- the claims about the products are not based on or supported by appropriate scientific or other recognised and accepted research or studies; and
- guarantees given to consumers about refunds were in many instances not observed.

The Commission has worked closely and cooperatively with the Victorian Office of Fair Trading and Business Affairs in its investigation of this matter.

The proceedings against the company and the remaining individual respondent have been set down for further hearing on 1 December 1997.

Camile Trading Pty Ltd (trading as Marina Forrestville) and Truckstop 31 Pty Ltd

Misleading or deceptive conduct (s. 52)

On 25 September 1997 the Commission instituted Federal Court criminal proceedings against Camile Trading Pty Ltd, trading as Marina Forrestville, and Truckstop 31 Pty Ltd for alleged misleading and deceptive conduct.

The Commission alleges that between January and August 1997 in New South Wales the companies, on three separate occasions, represented fuel as diesel or distillate when in fact it was not diesel or distillate.

It also is seeking injunctions against each company to prevent them offering for sale, or representing, fuel as diesel when it is not diesel or distillate.

On 10 October 1997 the matter was transferred from the Federal Court Canberra to the Federal Court Sydney with the agreement of all parties.

Mobileworld Communications (Aust) Pty Ltd

Misleading and deceptive conduct (s. 52), bait advertising (s. 56)

On 5 September 1997 the Commission instituted proceedings against Mobileworld Communications (Aust) Pty Ltd in relation to a mobile phone offer.

The action follows a 2 July 1997 newspaper advertisement featuring the NEC Sportz Digital, the Ericsson 218, the Nokia 2110 and the Motorolla 1-888. The advertisement offered the phones for $49 with a connection fee of $65 and 12 months access at $20 per month.

The Commission alleges that Mobileworld engaged in false and misleading conduct and bait advertising, as it had no stock or insufficient stock at many stores, and that it failed to offer the advertised items at most of its Melbourne stores.

The orders sought by the Commission include that Mobileworld will:

- provide refunds to affected customers;
- clearly state in future advertisements:
  - any restrictions on offers;
  - if any of its stores have less than 20 of the advertised telephones for sale;
  - if the offer is for less than seven days, the duration of the offer;
- offer the advertised products or equivalents for the duration of the advertisements;

- retain a list of customers who sought advertised phones but were unable to purchase them;
- apologise to persons who responded to the advertisement and were not supplied with one of the four telephones; and
- institute a trade practices compliance program.

Directions hearings were held in the Federal Court Melbourne on 15 September 1997 and 3 November 1997. A trial date has been set for 3 August 1998.

Australian Purchasing and Tender Service Pty Limited

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

On 2 October 1997 the Commission instituted proceedings in the Federal Court Perth against the Australian Purchasing and Tender Service Pty Limited (APTS), trading as the Government Purchasing and Tender Index (GPTI).

The Commission alleges that in August and September 1997, APTS distributed forms to small businesses throughout Australia inviting them to join an index which was purported to be distributed to government departments.

The form, under the title of GPTI, was sent to businesses in an envelope bearing the letters 'OHMS' which the Commission claims may have created an impression that the form was an official government form. Further, the Commission alleges that the form was styled in a manner similar to government forms.

The Commission alleges that APTS made false or misleading representations, including that GPTI was a government body or affiliated with government.

An interlocutory hearing was heard before Justice Lee, Federal Court Perth, on 9 October 1997. APTS was ordered to provide the Commission with details about the companies' accounts and about the persons who may have applied for registration with APTS, and to give the Commission 24 hours notice before disbursing any funds.

APTS also provided undertakings to stop distributing the forms or any substantially similar forms before the next hearing.

On 23 October 1997, the Court made further orders and noted further undertakings from APTS. The matter is set down for hearing on 6 March 1998.

Toys "R" Us

False or misleading representations (s. 53)

On 1 October 1997 the Commission instituted proceedings in the Federal Court Sydney against children's toy retailer Toys "R" Us (Australia) Pty Ltd for allegedly misrepresenting consumers' warranty rights. The alleged misrepresentations were made on signs in Toys "R" Us stores and on stickers attached to video games and computer software packaging.

The Commission alleges the signs and stickers told customers they would not be given a refund unless the goods were returned in sealed, unopened packaging. It alleges that this policy effectively misled consumers about their statutory warranty rights.

The Commission is seeking orders that Toys "R" Us will:

- remove misleading signs and incorrectly labelled packaging in all retail outlets;
- apologise to its customers through in-store signs over the next three months;
- provide refunds to affected customers; and
- implement a corporate compliance program.

Following a directions hearing on 31 October 1997, a further directions hearing is set for 19 December 1997 in the Federal Court Sydney. Meanwhile, the company has already corrected its in-store signs.

Riviana Foods Pty Ltd

False or misleading representations regarding origin of goods (s. 53(eb))

Riviana Foods Pty Ltd has given the Commission court enforceable undertakings including that it will make a public apology to customers. Commission investigations revealed that some of Riviana's Mahatma brand white long grain rice was being represented as Australian-grown when it was imported from Thailand.

As a result of lower yields of Australian rice, in September 1996 Riviana supplemented its supply with white long grain Thai rice. In March 1997, it exhausted its supplies of Mahatma brand packaging labelled 'Packed in Australia from imported rice' and began using labelling stating 'Product of Australia' during the shortfall period. This constituted misleading and deceptive conduct under the Act.

The Commission acknowledged that as soon as Riviana became aware that its conduct breached the Act, it took quick and extensive remedial action to either relabel the rice or remove it from retail outlets, and provide refunds to consumers where required.

Further, the Commission accepted that Riviana did not benefit financially or competitively from the conduct, and that Riviana cooperated promptly with the Commission. Under the enforceable undertakings Riviana will:

- place a public apology in major metropolitan newspapers;
- publish an information page in food industry magazines to raise the industry's awareness of the Act, especially in relation to the duty of care imposed on company directors; and
- implement a corporate compliance program.

Riviana has also compiled a product label register to keep track of the labels it uses and to ensure that they correspond with the provisions of the Act and other relevant food labelling legislation.

Product safety

Belic Tools & Machinery Pty Ltd

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

On 3 October 1997 the Federal Court Melbourne granted orders preventing Belic Tools & Machinery Pty Ltd from supplying vehicle and trolley jacks in breach of mandatory consumer product safety standards.

On 10 September 1997 the Commission instituted proceedings against Belic Tools & Machinery Pty Ltd for alleged breaches of the prescribed consumer product safety standards for vehicle and trolley jacks.

The Commission alleged that Belic, a Melbourne-based supplier and retailer of tools and machinery, had supplied the vehicle and trolley jacks at both retail and wholesale levels during 1997.

The Commission alleged that:

- the base and head cap dimensions of the vehicle jacks were less than those required by the Australian mandatory standard;
- the trolley jack's stated capacity was over-stated by approximately 300 kg; and
- both the vehicle and trolley jacks lacked the markings and operating instructions required by the relevant mandatory Australian standards for such products.

The orders, to which Belic consented, require Belic to provide refunds to consumers who purchased the jacks. They also require Belic to institute a trade practices compliance program which includes a condition that it test a representative sample from every batch of jacks it imports to Australia for compliance with the standard. Belic is also required to destroy the vehicle jacks the subject of the court orders.

In consultation with the Commission, Belic published a recall notice on 1 October 1997 advising consumers of refunds and collection of the jacks.

The Reject Shop (Aust) Pty Ltd

Non-compliance with mandatory product information standard (s. 65D)

On 11 November 1997 the Commission accepted court enforceable undertakings from The Reject Shop (Aust) Pty Ltd that it will supply cosmetic products with ingredient labelling in accordance with the mandatory product information standard for cosmetic products.

The undertakings were offered after the Commission found that the company, which has about 70 discount retail outlets in Victoria, New South Wales and South Australia, was selling a number of cosmetic products without their ingredients listed on the containers. The Commission noted that it had previously raised similar breaches of the standard with the company.

The Reject Shop also undertook to provide consumers with a list of ingredients of recently sold products which did not comply with the standard, where a list of ingredients was available, and to provide a refund where there was no list of ingredients available.

The Reject Shop will also implement a trade practices corporate compliance program to remain in force for five years.