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# 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 are extracts from the Commerce Commission's newsletters Compliance (February 1998) and Fair's Fair (March 1998), and from Commerce Commission media releases.*

### **Local authorities and the water industry**

In a speech to the New Zealand Water and Waste Association conference, Commission Chairman Peter Allport advised local authorities that their water and waste contracts could risk being anti-competitive and breaching the Commerce Act.

He said that while local authorities were becoming increasingly aware that the Act applied to their trading operations, many still did not understand how it applied.

Features of the contracts which were potentially anti-competitive included:

- bundling together in one contract the expertise and equipment-intensive work of maintaining networks with relatively straightforward connection work — bundling prevents smaller contractors who can do connection work from competing;

- awarding exclusive contracts without competitive expressions of interest in the tendering process — such contracts are often let to in-house business units of local authority trading enterprises; and
- long-term contracts that shut out existing competitors and prevented new competition developing.

He advised that, as changes brought more competition to the water industry, local authorities must understand competition law to protect themselves and their ratepayers.

### **Cross-border commerce**

*The following is an extract from an article on cross-border commerce by Estelle Le Lievre, a Project Officer at the Commission, published in the Commerce Commission's Compliance newsletter.*

From the few complaints that the Commission has received concerning cross-border commerce, it appears that no new forms of misrepresentation are arising. However, technology will mean that it is easier for traders to reach consumers throughout the world, and that it will be more difficult for consumers to identify who they are dealing with. This is also an issue for enforcement agencies.

But perhaps the key issue for consumers and enforcement agencies is that once an overseas trader is located and a breach of the Act is alleged, will the courts have the jurisdiction to hear the matter? For a court to establish that an offence has occurred it must first establish that it has jurisdiction. Even if jurisdiction is established, it may be difficult to enforce any penalties or orders.

To ensure that ethical traders are not unfairly disadvantaged by the increase in cross-border commerce, the Commission has developed a strategy to help ensure awareness, acceptance and compliance with the spirit of the Fair Trading Act. It involves:

- surveillance of all media, including the Internet, for cross-border trading issues;
- working with overseas fair trading enforcement agencies to try to bring about compliance by overseas based traders operating in New Zealand;
- continuing involvement with the Fair Trading Operations Advisory Council (which links New Zealand government and Australian Commonwealth and State government fair trading organisations), and looking at building similar networks, particularly with agencies in North America and Europe; and
- working with service providers and industry associations to bring about awareness of, and compliance with, the Fair Trading Act — traders such as Internet service providers can help prevent the dissemination of misleading representations.

Global commerce provides many opportunities for greater competition through a greater range of products and services at varying prices and quality standards. However, it also provides challenges for consumers seeking redress and enforcement agencies seeking to ensure healthy competition.

To respond to this challenge the Commission is adopting a more global focus by working more closely with equivalent overseas agencies and looking for issues that are raised on the Internet as well as through traditional media. Enforcement, however, works best when industry takes responsibility for itself, such as through the development of industry codes of practice and dispute resolution procedures. For this reason the Commission will work more closely with the industry associations whose members are involved in some way in the promotion of cross-border commerce to ensure healthy competition for the benefit of ethical traders and consumers.

### **Acquisitions in electricity/gas/telecommunications**

On 27 February 1998 the Commission cleared Mercury Energy Limited to acquire 100 per cent of the shares in Power New Zealand Limited. Although the acquisition would result in some aggregation in the national retail electricity market, it would fall within the Commission's safe harbours in terms of market share and there would still be other powerful players in the market.

The Commission has also cleared the acquisition by Rockgas of the LPG stock and fixed assets of Energy Supply Ltd. Rockgas is an LPG wholesaler and retailer throughout New Zealand. Energy Supply Ltd is a wholly owned subsidiary of TransAlta New Zealand Ltd and retails LPG throughout the greater Wellington and Wairarapa areas. The Commission was satisfied that the proposed acquisition would not result in Rockgas acquiring or strengthening a dominant position in either the national wholesale market for LPG or the retail market for LPG in the greater Wellington or Wairarapa areas.

The Commission has decided that it will take no action over the acquisitions of radio spectra by Formus Communications Incorporated and Clear Communications. Formus was the provision winner of management rights to 1450 MHz of the 26 GHz range spectrum and Clear won provisional management rights to the remaining 500 MHz of spectrum in a radio spectrum auction held recently by the Ministry of Commerce. The Commission determined that the markets likely to be affected by the availability of this spectrum were the markets for fixed telephony services, Internet access and television transmission vehicles. It considered that neither acquisition raised Commerce Act concerns.

Telecom Corporation of New Zealand Limited has applied to the Commission to clear a proposed acquisition of Cellnet Mobile Services Limited. Cellnet is a Telecom accredited service provider (TASP) owned by Fisher and Paykel Industries Limited. TASPs sell cellular telephone equipment and cellular connections to, and airtime on, the Telecom cellular network. In the past, the service provider

function for Telecom's networks has been provided by a number of independent TASP's, but in recent years the function has increasingly been taken over by Telecom itself. Cellnet is currently the only independent TASP. The Commission expects to make a decision by 15 May 1998.

## From Canada

*The following article is based on backgrounders from the Competition Bureau, Canada, dated 31 March 1998, and a statement by Konrad von Finckenstein, QC, Director of Investigation and Research, Competition Bureau, to the Standing Committee on Industry on 2 April 1998.*

### Amendments to the Competition Act

#### Background

The Competition Act came into force on 19 June 1986, replacing the Combines Investigation Act. The Act combines criminal and non-criminal law provisions in what is called a 'framework' Act. This means that the law applies to all sectors of the economy, except where relevant industry-specific legislation and regulations are in force.

The Act is administered and enforced by the Competition Bureau, an independent investigative agency in the Industry Canada portfolio. It is led by the Director of Investigation and Research.

Criminal offences under the Act include bid rigging, conspiracy or price fixing, discriminatory pricing, misleading advertising, predatory pricing and price maintenance. The Bureau can refer cases in which it believes a criminal offence has occurred to the Attorney General of Canada for prosecution before the criminal courts. The courts have the power to impose fines, order imprisonment, issue prohibition orders and interim injunctions.

Civil reviewable matters under the Act include abuse of dominant position in the marketplace, refusal to deal, exclusive dealing, tied selling and market restriction. Under these provisions the Director assesses whether anti-competitive activities may result in a substantial lessening of competition.

Parties to large merger transactions are required to give the Bureau advance notification of the proposed merger and the necessary information, and wait a prescribed period before closing the deal. The Bureau will raise any competition issues with the companies involved in order to explore possible remedies. This may result in the sale of assets in one or more markets. The Director may also refer cases to the Competition Tribunal, which has the same powers, rights and privileges as a superior court, with a discovery process, motions and hearings.

#### Amendments to the Act

In March 1998 a Bill proposing amendments to the Competition Act was referred to the Standing Committee on Industry, Canada.

The amendments are designed to modernise the Act so that it is in step with emerging business trends and current enforcement requirements. The amendments will also help to improve enforcement efficiency and clarify the law.

The main proposed amendments relate to deceptive telemarketing, the use of wiretapping with judicial consent, misleading advertising and deceptive marketing practices, regular price claims and the merger prenotification process.

#### *Deceptive telemarketing*

Annual losses borne by Canadian consumers from telemarketing scams is estimated at \$4 billion. This includes prize and recovery pitches, loan scams, investment, fund raising and lottery schemes.

Amendments relating to telemarketing would result in the following changes.

- Illicit interactive telephone communications to promote the supply of a product or a business interest would become a criminal

offence. The maximum penalty would be five years in jail or a fine at the discretion of the courts, or both.

- Telemarketers would be required to disclose certain information during telephone calls to consumers.
- Deceptive practices, such as demanding payment before delivery of products which are offered at prices grossly above their fair market value, will be prohibited.
- The responsibility of corporations, their officers and directors for ensuring compliance with the law will be expanded.
- It will be easier for the courts to issue interim injunctions to halt operations of suspected fraudulent telemarketers.

#### *Judicially authorised wiretapping*

The amendments propose the use of wiretapping, with judicial consent, in cases of suspected deceptive telemarketing, price fixing and bid rigging cases.

#### *Misleading advertising and deceptive marketing practices*

A criminal sanction will remain in place to deal with the most serious misleading advertising cases. However, a new civil regime with a lower standard of proof will be introduced to allow most misleading advertising and deceptive marketing practices to be settled more expeditiously through civil remedies.

Provisions will also allow, in many cases, for misleading advertising messages to be corrected more quickly.

#### *Regular price claims*

Misleading regular price representations will be reviewable matters under the Act.

The legitimacy of regular price claims will be determined after subjecting them to two tests:

- the price or prices at which a substantial volume of recent sales has occurred; and

- the price or prices at which the product was recently offered for sale in good faith for a substantial period of time before the sale.

If a regular price claim fails to meet either of the two tests, but is shown by the advertiser not to be misleading, the court will not make an order.

#### *Merger prenotification process*

The proposed changes to the merger prenotification process are as follows.

- Merger prenotification information that companies give to the Competition Bureau will need to be more relevant.
- The Competition Bureau will have greater flexibility to shorten waiting periods for the completion of merger transactions, when warranted.
- The Bureau will have easier access to interim orders from the Competition Tribunal to delay proposed mergers. This will enable the Bureau to continue its examination when companies refuse to cooperate.

## **From the USA**

### **FTC revises 'Green Guides'**

*The following article is based on a media release from the US Federal Trade Commission dated 22 April 1998.*

The FTC has revised sections of its Environmental Marketing Guides (Green Guides) to expand the terms 'recyclable', 'recycled content' and 'compostable', to reflect current consumer perceptions of what these terms mean.

The guides are intended to help reduce consumer confusion and prevent the false or misleading use of environmental terms in product advertising and labelling.

The revised guides now make clear that 'recyclable' includes the reuse, reconditioning and remanufacturing of products or parts in another product. Previously, 'recyclable' encompassed only those products or packages that were reused in the form of raw materials in the manufacture or assembly of a new package or product. 'Recycled content' has been clarified to include products and packages that contain reused, reconditioned or remanufactured materials, as well as recycled raw material.

The revised Recycled Content guide also provides that if advertisers use the term 'recycled' to describe a product that has been reused, reconditioned or remanufactured, they must disclose the fact that the product has been recycled in this way unless it is clear from the context.

The Compostable guide now makes clear that an unqualified compostable claim can be made if a product or package is compostable at home, even if municipal or institutional composting facilities are not available.

The revisions also confirm that the guides apply to all forms of marketing, including digital or electronic media such as the Internet and email, and the marketing of services as well as products and packages.

### **FTC action against 'cramming'**

*The following article is based on a media release from the US Federal Trade Commission dated 22 April 1998.*

On 22 April 1998 the FTC announced it had filed a complaint against three Los Angeles-based corporations and four individual officers of those corporations in relation to the practice of cramming — charging consumers, either on their actual bills or on look-alike bills, for services they have not purchased. This is the first FTC action against this practice. The corporations are Interactive Auditext Inc. (IAS), American Billing & Collection, trading as ABC Services, and US Interstate Distributing Inc. (USID).

Jodie Berstein, Director of the FTC's Bureau of Consumer Protection, noted that consumers are

increasingly relying on the telephone not just for communication, but also as a medium of electronic commerce. Services provided over the telephone include telephone-based audio information or entertainment programs, such as horoscopes, sports information and adult 'chat' lines, known in the telecommunications industry as audiotext services.

The FTC alleges that, in many instances, the defendants billed the owner of the telephone line used to purchase audiotext services rather than the person who actually purchased the services. The services were acquired through the defendants' 800 number. According to the complaint, consumers cannot block access to 800 numbers from their telephone lines and therefore could not avoid charges for services used by another person using their telephone line.

Also, in some instances, when callers dialled an 800 or 900 number they were directed to call another telephone number beginning with 011 or a 500 number. The FTC alleges that these solicitations do not disclose that by dialling these numbers the caller will be charged for an international long distance call that often costs more than \$4 per minute.

The FTC also alleges that the companies violated the FTC's 900-Number Rule, which prohibits charging for audiotext services accessed through a call to an 800 number unless the caller has a valid presubscription contract with the company.

It alleges that the companies further violated the rule by connecting callers directly to live adult chat lines without first disclosing the costs of the services, explaining that the caller can avoid being charged for the call by hanging up within three seconds of an audible signal, and warning that persons under the age of 18 must have a parent's permission to complete the call.

## FutureNet to provide \$1 million for consumer redress

The following article is based on a media release from the US Federal Trade Commission dated 8 April 1998.

On 8 April 1998 operators of FutureNet, an alleged pyramid scheme, agreed to settle FTC charges that their scheme violated federal law. The stipulated final judgment would settle charges with FutureNet, Inc., FutureNet Online, Inc. and two corporate officers. Three other defendants did not settle and the FTC's case against them will proceed to trial.

According to the FTC's complaint, FutureNet, Inc. claimed that its recruits could earn substantial income for the rest of their lives by joining a multi-level marketing program selling Internet devices. Consumers paid fees ranging from \$195 to \$794 to become FutureNet distributors in the scheme, which was promoted on the Internet.

But according to the FTC a major portion of the promised income depended not on the sale of Internet devices but on the recruitment of new distributors. FutureNet claimed that their recruits, called Internet consultants, would receive \$200-\$400 when they personally recruited another consultant and \$25-\$50 when a person in their downline recruited a new member. Since almost 90 per cent of investors in any pyramid scheme actually lose money, the FTC alleged that the defendants' claims were false and violated federal law.

The settlement provides \$1 million for consumer redress; bans the defendants from participating in any pyramid, Ponzi or chain-marketing scheme; bars them from selling distributorships through multi-level marketing; and requires that they obtain a bond before operating any multi-level marketing program for goods or services in the future.

# Global commerce and ISCAO conferences

In November 1998 the ACCC will host two conferences dealing with issues for consumers and enforcement agencies arising from the global commerce and the borderless marketplace.

## Global commerce

On 9-11 November 1998 the ACCC will host a Global Commerce conference in Sydney to provide a forum for the discussion of global marketplace initiatives by relevant stakeholders. The conference is designed to build on the initiatives addressed in the Commission's discussion paper on the global enforcement challenge, published in September 1997. The paper, entitled *The Global Enforcement Challenge: Enforcement of Consumer Protection Laws in a Global Marketplace*, was circulated to domestic and overseas consumer organisations and others with expertise in this area.

The paper proposed a number of initiatives in three major areas:

- enforcement techniques and international cooperation between enforcement agencies;
- industry action, including complaints handling, compliance and self regulation; and
- the harmonisation and internationalisation of consumer protection standards.

The general purpose of the conference is to engender consumer confidence in the global marketplace through the development of initiatives for enhanced global fair trading and competition. More specifically, it will allow stakeholder involvement in the drafting of action plans for the implementation of initiatives and identification of any new global market issues.

The conference is intended for all those with a stake or interest in electronic commerce or global marketplace issues including:

- State/Territory/international consumer affairs officials and other relevant government officers;
- international non-government and industry bodies concerned with global market issues;
- interested Members of Parliament and Parliamentary staff;
- academics; and
- consumer interests.

The discussion paper and further information about the conference is available from the Commission's website, or from Jacqueline Pearce at the ACCC. (Telephone (02) 6243 1072, email [jacqueline.pearce@acc.gov.au](mailto:jacqueline.pearce@acc.gov.au))

## ISCAO

Directly after the Global Commerce conference the Commission will host the first meeting of the International Society of Consumer Affairs Officials (ISCAO) on 12 November 1998 in Sydney. ISCAO was formed at a specially convened meeting of government officials at the Consumers International Congress held in Santiago, Chile, in November 1997.

The purpose of ISCAO is to encourage strong networking, a cooperative approach to solving consumer problems and a sharing of ideas among consumer affairs officials, so that emerging problems arising from the creation of borderless markets and technological advances can be dealt with effectively.

Issues proposed for discussion at the conference include:

- the global consumer affairs agenda, including the role of consumer affairs officials and harmonisation of consumer protection standards;
- current enforcement issues, such as training of enforcement investigators and enforcement networking;
- consumer affairs administration, including latest developments and the design of a

modern consumer affairs agency office in the global market;

- market based compliance mechanisms, including codes of conduct and compliance initiatives; and
- the latest initiatives in consumer education.

Copies of the first ISCAO newsletter and further information about ISCAO can be obtained from Jacqueline Pearce at the ACCC. (Telephone (02) 6243 1072, email [jacqueline.pearce@acc.gov.au](mailto:jacqueline.pearce@acc.gov.au))

## ACCC bilateral discussions with Japan and Taiwan

The Commission recently held bilateral talks on competition with representatives from Japan and Taiwan. The Japanese delegation, led by FTC Commissioner Mr Shohei Shibata, met ACCC Chairman Professor Allan Fels and others on 24 March 1998. The Taipei delegation, led by Dr Gee San, visited the ACCC on 7 April 1998.

Topics discussed at the meetings included enforcement matters, deregulation, regulation of natural monopolies and recent developments in competition law in the respective countries.