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# 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.*

## **Anti-competitive practices (Part IV)**

### **Real Estate Institute of Western Australia Incorporated**

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

On 17 June 1998 the Commission instituted proceedings in the Federal Court Perth against the Real Estate Institute of Western Australia Incorporated (REIWA), its Executive Director, Michael Griffith, and various other parties in relation to an alleged price fixing agreement. In another matter the Commission also alleges that certain of REIWA rules of practice are anti-competitive.

The Commission alleges that in June and July 1997, REIWA distributed an agreement to five colleges of TAFE in Western Australia in relation to a training course known as Certificate III in Property Services.

The agreement contained a clause by which the colleges agreed not to provide the training course to students at a fee less than \$780. Two colleges, South West Regional College of TAFE and West Coast College of TAFE (then known as North Metropolitan College of TAFE), entered into the agreement with REIWA.

The Commission alleges that the agreements contravene the price fixing provisions of the Trade Practices Act and that REIWA's Executive Director, Michael Griffith, and its legal adviser, Conal O'Toole, were involved.

The Commission also alleges that certain of the REIWA rules and rules of practice for member real estate agents are anti-competitive in that they have the effect of:

- requiring that, where any member of a franchise group wishes to become an REIWA member, all franchisees of that group also be members;
- preventing members from approaching vendors who are dealing exclusively with another agent; and
- preventing members from offering certain incentives or inducements to consumers.

It is seeking orders against all parties including declarations, findings of fact, injunctions, costs and orders requiring the publishing of public notices and the institution of trade practices compliance programs. It is also seeking penalties against REIWA, Mr Griffith and Mr O'Toole.

A directions hearing for both matters will be held on 23 July 1998.

### **Mr David Charles Miller**

*Third line forcing (s. 47(6))*

On 3 July 1998 the Commission instituted proceedings against Mr David Charles Miller, a partner of Perth law firm Kott Gunning, in relation to his alleged involvement in a real estate auction program promoted by Sure Sale Systems Pty Ltd and Sure Sale Systems (Australasia) Pty Ltd.

The Commission alleges that Mr Miller:

- aided, abetted, counselled or procured; and/or
- was knowingly concerned in or a party to,

Sure Sale contravening s. 47(6) of the Act, which prohibits third line forcing conduct.

The Commission alleges that Sure Sale contravened the Act by offering to supply or supplying financial and other services known as the Sure Sale System to vendors of property in Western Australia on condition that they acquire services from nominated third parties, including settlement services from Kott Gunning solicitors.

The Commission is seeking orders which include declarations, findings of fact, injunctions, costs and orders requiring Mr Miller to publish a public notice and undertake a trade practices compliance program.

A directions hearing is listed for 30 July 1998 at the Federal Court Perth.

### **N G Farah Real Estate Pty Limited**

#### *Price fixing arrangement (s. 45A)*

The Commission has brought to the attention of N G Farah Real Estate Pty Limited that certain conduct of its manager, Mr Glenn Farah, and other salespersons was at serious risk of breaching the Trade Practices Act.

In the program 'The Squeeze', from the documentary series *Under the Hammer*, aired by the Australian Broadcasting Corporation on 30 October 1997, Mr Farah phoned two competing real estate agents and asked them what level of commission fees they offered in the south-eastern suburbs of Sydney.

Also during the program a salesperson of N G Farah suggested to Mr Farah that he convene a meeting with the directors of competing real estate agents to establish a benchmark of minimum commission fees.

The Commission was concerned that the conduct of N G Farah Real Estate was televised

to a national audience and gave the impression that an attempt had been made to fix the price for real estate commissions. However, it decided not to prosecute, taking into account N G Farah's cooperation and willingness to correct any wrongful impression the program may have given.

On 24 June 1998 the Commission accepted undertakings from N G Farah to publish a public apology in the local *Southern Courier* and to implement a trade practices compliance program.



## **Mergers (Part IV)**

### **Sale of spectrum in the 800 MHz and 1.8 GHz bands**

#### *Acquisition (s. 50)*

On 25 May 1998 the Australian Communications Authority (ACA) concluded the auction for spectrum in the 800 MHz and 1.8 GHz bands, raising approximately \$350 million.

In summary, the outcome of the auction was:

- Telstra Corporation Limited acquired large sections of both the 800 MHz and 1.8 GHz band;

- Optus Mobile Pty Limited and Vodafone Network Pty Limited acquired substantial sections of the 1.8 GHz band;
- spectrum in the 800 MHz band that was reserved for new entrants was split between three players: Hutchison Telephone Pty Limited, OzPhone Pty Limited and AAPT Wireless Pty Limited;
- Catapult Communication Corporation acquired two small sections of spectrum in the 1.8 GHz band; and
- a small quantity of spectrum was left unsold.

All of these acquisitions fell within the boundaries of the competition limits imposed by the Minister for Communications, the Information Economy and the Arts.

The licences under which the spectrum was allocated do not specify how the spectrum must be used; however, the Commission believes that the spectrum is likely to be used for either mobile telephony or wireless local loop applications.

Following the conclusion of the spectrum auction, the Commission examined the acquisitions of the successful applicants to determine whether the outcome of the auction raised issues under s. 50 of the Trade Practices Act. It concluded that the acquisitions were unlikely to raise issues under s. 50 for the following reasons.

- Telstra, Optus and Vodafone will remain as vigorous competitors by virtue of their GSM (digital mobile) systems.
- The effectiveness of the GSM systems operated by Telstra, Optus and Vodafone will be enhanced by their acquisition of spectrum in the 1.8 GHz band.
- Prospective entrants have been successful in acquiring sufficient spectrum to roll out effective mobile telephony networks.
- Telstra is likely to utilise the spectrum it acquired in order to provide some type of mobile or wireless local loop service, the provision of which is likely to foster

vigorous competition with Optus and Vodafone and the new entrants.

The Commission decided to take no further action in respect of the outcome of the spectrum auction. However, it will continue to monitor developments in respect of the 800 MHz and 1.8 GHz spectrum (including transfers of the acquired spectrum) to ensure that issues do not arise under s. 50 of the Act.

### **Parmalat Australia Limited and Pauls Limited**

#### *Acquisition (s. 50)*

On 12 June 1998 the Commission announced it would not intervene in the proposed acquisition of Pauls Limited by Parmalat Australia Limited.

Pauls is a Queensland-based food processing company which specialises in manufacturing and distributing fresh milk and a range of other dairy products. It has substantial fresh milk operations in Queensland (where it has about 50 per cent of the market) and in Victoria (where it has about 40 per cent of the market).

Parmalat Australia is a wholly owned subsidiary of Parmalat Finanziaria S.p.A, a large-scale Italian-based international food processing company with significant dairy manufacturing and distribution operations in Europe, Canada, the United States and South America. It operates from two factories in Albury-Wodonga, and produces a range of fresh milk products, long life milk, dairy desserts, cheeses and cream.

Parmalat presently has a small share (about 2 per cent) of the market for the manufacture and distribution of fresh milk in Victoria. In the Commission's view the proposed acquisition did not raise any competition concerns in that market or in any other Australian markets.

The Commission also noted that Parmalat has a reputation as an innovative and competitive player in those markets in which it operates overseas, and the Commission understood that Parmalat intends bringing a similar approach to the operation of Pauls' businesses in Australia.

Recently, Pauls was also the subject of a takeover proposal by National Foods Limited. The Commission formed the view that certain aspects of the takeover proposal, unless modified, would lead to a substantial lessening of competition. In response National Foods revised its proposal. The Commission agreed not to oppose the National Foods proposal, but only after it had accepted court enforceable undertakings from National Foods which included divestiture of certain Victorian milk processing assets in the merged entity (see *ACCC Journal 14*).

In the current matter the Commission decided that, given Parmalat's small presence in the relevant Australian markets, no such divestitures were required.

### **Steggles and Gourmet Poultry**

#### *Acquisition (s. 50)*

On 4 June 1998 the Commission announced it would not intervene in the acquisition of Adelaide-based Gourmet Poultry by Steggles.

The Commission noted that better packaging and transport had allowed New South Wales, Victoria, South Australia and Queensland chicken processors to extend their supply areas. It also found that, with the expansion of independent producers, there was more competition at each stage of production, from chick hatching to producing innovative marinated and smoked products.

Chicken producers are also preparing for possible new import competition. Some firms expect rationalisation to occur. If this happens, the Commission's role will be to ensure it is done in a way that does not jeopardise competition in the chicken industry.

### **Boral Energy Resources Limited and Allgas Energy Limited**

#### *Acquisition (s. 50)*

Allgas Energy Limited was initially the subject of takeover bids from Texas Utilities and Boral Energy Resources Limited. When Energex, a Queensland based electricity utility, announced its takeover bid for Allgas, Boral decided not to

proceed with its own bid, saying that Energex's bid had gone beyond an amount which it was prepared to bid.

The Commission had also sought an undertaking from Boral not to proceed with its proposal to acquire Allgas. After undertaking extensive market inquiries, it concluded that the acquisition was likely to substantially lessen competition.

The Brisbane domestic and commercial gas loads, together with most industrial loads in the Brisbane metropolitan area, are supplied by Boral on the northern side of the Brisbane River, and by Allgas on the southern side. Boral is a gas retailer and also operates Envestra's gas distribution network. Allgas has a combined gas retail and distribution business. Boral and Allgas have been assigned franchise areas by the Queensland Government. The franchises will be phased out according to the Queensland Government's plan for contestability as follows.

- All loads at or above 100 TJ a year will be contestable after 1 January 2000.
- All customers will be contestable after 1 September 2001.

Natural gas is supplied to the retail market in south-east Queensland from sources in South West Queensland Cooper Basin, as well as the Surat Basin. They are transported to Brisbane via gas pipelines owned by Santos, Epic and AGL, and are then distributed to end users via gas distribution networks owned by Envestra and Allgas.

Market inquiries indicated that there was already competition between Allgas and Boral in the supply of gas, and that this competition would be likely to increase when the market is deregulated. Contracts with customers had already been written in anticipation of deregulation at rates lower than those offered under previous contracts. This competition would be lost if the acquisition were to proceed.

There was evidence of competition between Boral and Allgas to supply industrial end users, and a number of industrial end users had expressed concerns that they would be affected

by a merger between the only two incumbent gas retailers in Queensland.

In the absence of new entry, the effect of the merger on competition appeared to the Commission to be substantial. The Commission identified a number of factors which indicated that barriers to entry were high. For example, there was evidence that sources of competitive gas supplies to new entrants were limited. The Commission also considered that the incumbents' existing long term take-or-pay contracts with gas producers gave them a strong advantage in terms of retaining existing customers. In particular, the Commission considered that the take-or-pay obligations would give the incumbents an incentive to do everything possible to retain their existing customers, and this would have the effect of deterring new entrants.

The Commission concluded that new entry was not likely to occur, or would not occur on a sufficient scale and in a sufficiently short time frame to compensate for the loss of competition between Allgas and Boral when the Queensland market is deregulated. The Commission also considered that the threat of new entry was not sufficiently credible to constrain the merged entity.

## Consumer protection (Part V)

### Swiss Slimming and Health Institute (trading as Swisslim)

*False or misleading representations (s. 53)*

On 19 June 1998 the Federal Court Sydney ordered the Swiss Slimming and Health Institute, trading as Swisslim, and its director, Gerhard Hassler, to pay over \$1 million in compensation to the Commission. The payment will be used to make partial refunds to affected consumers.

Institute advertising claimed that weight loss could be easily achieved by 'body wraps', where a slimmer sat wrapped in cold bandages. In fact, any weight loss achieved could be

attributed to a harsh dieting regime slimmers were encouraged to follow under the program.

The Commission took representative action on behalf of more than 500 former Institute clients who were enticed to join the program through 'hard-sell' tactics by Institute staff which often played on individuals' insecurities about their weight. The Commission has been assisted in this matter by the NSW Department of Fair Trading.

### Golden Sphere International Inc

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

On 1 June 1998 the Federal Court ordered Golden Sphere International Inc, Pamela Joy Reynolds and Victor Michael Cottrill to refund \$550 000 to consumers who suffered financial loss through participating in the Golden Sphere pyramid selling scheme.

The Commission instituted proceedings in 1996 against Golden Sphere, Reynolds and Cottrill alleging that they promoted, or took part in the promotion of, a pyramid selling scheme.

As part of their defence, Reynolds and Cottrill argued that the Commission had no standing to bring the representative proceedings because the interest of the Commission was different to the interest of the consumers who took part in the scheme.

Justice Maurice O'Loughlin rejected that argument stating that the fact that the Commission was acting in the public interest for the protection of consumers whilst the members of the group were pursuing their private interests was not a disqualifying feature.

In addition to the monetary orders, His Honour granted injunctions restraining Golden Sphere, Reynolds and Cottrill from promoting, or taking part in the promotion of, the Golden Sphere scheme or any similar scheme.

The Commission will place advertisements in major national newspapers outlining how affected consumers can claim compensation.

### **Mr Alex Sibir**

*Misleading or deceptive conduct (s. 52), false or misleading representations in relation to land (s. 53A)*

On 24 April 1998 Mr Alex Sibir consented to court orders restraining him from promoting the sale of interests in land at Peppermint Beach Estate, Bremer Bay, Western Australia.

The Commission instituted proceedings on 22 December 1997 against Mr Sibir for false, misleading and deceptive promotion of land sales of 'Pre-subdiv. land titles' during July and October 1997. It was concerned that the promotional material did not make consumers aware that the land was zoned 'rural', which did not permit subdivision into smaller blocks.

The orders prohibit the promotion of the sale of interests in the land unless Mr Sibir is able to produce written proof that the relevant authorities have given consent to the subdivision and/or rezoning of the land. They also place restrictions on claims about travelling times and accessibility of the land.

### **Giraffe World Australia**

*Misleading and deceptive conduct (s. 52), false and misleading representations (s. 53), referral selling (s. 57), pyramid selling (s. 61)*

On 6 May 1998 the Commission instituted proceedings in the Federal Court Sydney against Giraffe World Australia, its directors and other individuals. It alleges that Giraffe World's conduct contravened the referral selling and pyramid selling provisions of the Trade Practices Act. It also alleges that Giraffe World made false representations about its negative ion mats. The proceedings were instituted on behalf of consumers who suffered loss after taking part in the Giraffe World scheme. Giraffe World and the other respondents have denied the allegations and stated that they will strongly defend the proceedings.

The Commission sought various interlocutory orders after a number of complaints from consumers about the alleged scheme. It is understood that more than 5000 consumers

were recruited, with more expected as Giraffe World opened Melbourne and Brisbane premises.

The alleged scheme is believed to have been operating since July 1997. It involves purchasing a device, an Ion-mat, for \$2900. For an additional \$350 consumers can join a 'grow rich' scheme where they receive a commission for recruiting new members who also have to purchase the Giraffe Ion-mat. The commission increases according to the number of members introduced.

On 21 May 1998 Lindgren J made orders to the effect that:

- the respondents can continue to carry on business including the promotion and advertising of the Giraffe World Grow Rich scheme or any similar scheme;
- Giraffe World is restrained from paying any commission to Mr Akihiko Misuma and Mr Robin Han, the second and third respondents respectively;
- Giraffe World, Mr Akihiko Misuma and Mr Robin Han be restrained from removing from the jurisdiction, disposing of, mortgaging, assigning, charging or otherwise dealing with their assets except for legitimate living, business, and reasonable legal expenses; and
- Ms Yukari Misuma be restrained from removing from the jurisdiction, disposing of, mortgaging, assigning, charging or otherwise dealing with her assets, in respect of any amount less than \$300 000.

### **Internic Technology Pty Ltd**

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

On 1 May 1998 the Commission instituted proceedings in the Federal Court Sydney against Internic Technology Pty Ltd and Peter Zmijewski for alleged misleading conduct.

The Commission alleges that Internic Technology Pty Ltd and Mr Zmijewski are misleading consumers by using a domain name

almost identical to that of the official registrar of second level domain names on the Internet (the InterNIC) and by operating a website at <http://www.internic.com>.

The InterNIC is a facility operated by Network Solutions Inc, on contract with the United States Government, and is found at <http://www.internic.net>.

The Commission alleges that:

- consumers looking for the InterNIC often enter 'internic' or 'internic.com' into their web browsers and end up at the site operated by the respondents where the respondents sell domain name registration services;
- the use of the name 'internic.com' is likely to create the false impression that the respondents' business is, or is affiliated with, the InterNIC;
- consumers have been to the respondents' website to register a domain name directly with InterNIC; and
- consumers have used the respondents' services, believing they were using services provided by InterNIC.

The Commission believes the respondents have registered more than 12 000 domain names in the past 12 to 18 months, to consumers from all over the world including Australia, the United States, Canada, France, Norway, Spain, the United Kingdom, Switzerland and Germany. The matter was raised with the Commission by the United States Federal Trade Commission, which had received numerous complaints from consumers in the US, because Internic Software and Mr Zmijewski both reside in Australia.

The Commission is seeking Federal Court orders including declarations, injunctions, refunds to consumers and publication of electronic information notices.

### **Kellogg**

#### *Misleading and deceptive conduct (s. 52)*

Kellogg has agreed not to repeat comparative advertising of a new product, Golden Wheats, after the Commission expressed its concerns.

The short series of print advertisements launching the product featured the National Heart Foundation 'tick' of approval for Golden Wheats and a cross against two similar products, Weet-Bix and Vita Brits.

The Commission considered that some consumers would have been led to believe that Weet-Bix and Vita Brits had either failed, or would fail, to obtain the National Heart Foundation's tick of approval.

In fact both products fell within the nutritional guidelines for breakfast cereals set by the Foundation. Since the campaign, both Weet-Bix and Vita Brits have also obtained the National Heart Foundation's tick of approval.

Kellogg assured the Commission it would not repeat the advertisement, nor engage in any further comparative advertising involving the National Heart Foundation Tick logo.

## **Anti-competitive conduct — telecommunications (Part XIB)**

### **Telstra**

On 28 May 1998 the Commission issued its first competition notice under Part XIB. Telstra and a handful of competing Internet Access Providers (IAPs) offer transmission and interconnection services between different Internet Service Providers (ISPs) and between one another. The competition notice alleged that Telstra contravened the competition rule by charging IAPs for services provided by Telstra whilst not paying for similar services provided by competing IAPs. The notice further alleged that the effect of Telstra's 19 cents per megabyte charge injured downstream ISPs as well as competing IAPs.

The notice was to come into force on 5 June 1998, but the Commission decided to postpone the operative date of the notice to 19 June 1998 to give Telstra and other interested parties an opportunity to make further submissions.

On 16 June 1998 Telstra filed a motion seeking to have the original notice set aside. On 17 June 1998 the Commission decided to revoke the original notice and issue a revised notice with an effective date of 26 June 1998. Telstra subsequently amended its application to refer to the revised notice.

After an initial hearing on Telstra's application on 18 June 1998, the Court adjourned until 23 June 1998. Before the hearing resumed, Telstra and Optus signed a peering agreement with one another. Until that time, Optus had been the only Internet access provider named in the notice that had not reached an agreement with Telstra. Based on the Optus/Telstra agreement, the Commission decided to withdraw the notice as it had achieved the desired effect. On 23 June 1998 Telstra discontinued its application for a stay of the revised notice.