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)

Maritime Union of Australia

Secondary boycott (s. 45D), boycotts affecting trade or commerce (s. 45DB)

On 3 September 1998 the Commission reached a mutual settlement with the Maritime Union of Australia (MUA) which was endorsed by the Federal Court of Australia.

The Commission alleged that the MUA had breached the boycott and secondary boycott provisions of the Act, and considered that these breaches damaged small business and exporters. After issuing several warnings to the MUA it instituted proceedings on 22 May 1998 alleging that the MUA had:

- taken steps to get the International Transport Workers' Federation and its affiliates to organise and implement an international ban of ships and shipping lines which were loaded or unloaded by non-MUA labour in Australia;
- threatened ships and shipping lines with the bans if they used Patrick, PCS or other stevedores using non-MUA labour; and
- organised a campaign of domestic boycotts of Patrick operations because it used non-MUA labour.

The settlement provides that a damages fund of up to $7.5 million, funded by Patrick Stevedore Holdings Pty Ltd, will be available for small businesses damaged by the boycotts during the dispute.

In addition, the MUA provided a formal undertaking to the Federal Court not to repeat boycotts alleged to be unlawful by the Commission during the dispute, for two years.

Transport Workers' Union

Secondary boycott (s. 45D)

On 13 August 1998 the Commission settled its two cases with the Transport Workers' Union (TWU) before the Federal Court Brisbane.

On 22 August 1997 the Commission alleged that the TWU engaged in secondary boycott conduct against a number of smaller transport companies in Queensland which had not entered into enterprise bargaining arrangements with the TWU. The alleged conduct involved refusal by TWU members to allow entry to, or to load or unload, the smaller transport companies' vehicles at the yards of the major transport companies.

On 12 December 1997 the Commission instituted further proceedings in the Federal Court Queensland alleging further secondary boycott conduct by the TWU. The Commission

Photography by Arthur Mostead

alleged that TWU members refused to allow entry and/or loading or unloading of transport companies' vehicles whose drivers were not financial members of the TWU.

The Commission and the TWU agreed to consent orders by the Federal Court which included:

- injunctions requiring the TWU not to engage in the conduct referred to above in Queensland for two years, while retaining the right to seek to ascertain whether drivers are members and to communicate with them about membership issues;
- implementation by the TWU of a trade practices compliance program to inform key officers and officials of their obligations under the Act; and
- an agreed contribution by the TWU to the costs of the Commission's proceedings.

Lismore Taxis Co-operative Ltd

Agreements lessening competition (s. 45), primary boycotts — exclusionary provision (s. 45 — 4D), misuse of market power (s. 46)

On 1 July 1998 Lismore Taxis Co-Operative Ltd provided a court enforceable undertaking in relation to by-laws which the Commission believed were in breach of the Act.

The Commission was particularly concerned about the radio network's ban on privately arranged taxi bookings, the points system used to distribute out-of-town trips among drivers, and the roster system which rationed work time available to drivers.

Lismore Taxis has given an undertaking that:

- no taxi operator will be penalised for making a private booking;
- it will not introduce any system which prevents taxi cabs from competing for out-of-town jobs;
- it will not introduce a roster system which keeps cabs off the road at any particular time; and
- it will introduce a trade practices compliance program.

Mergers (Part IV)

Colonial Mutual Life Assurance Society Limited and Legal & General Australia Limited

Acquisition (s. 50)

On 3 July 1998 the Commission announced that it would not intervene in the proposed acquisition of Legal & General Australia Limited by Colonial Mutual Life Assurance Society Limited.

The Commission examined a number of possible markets in the financial services industry and concluded that, even if narrow market definitions were to be adopted, the merger would not breach the Commission's concentration thresholds.

On this basis, it decided that the merger would be unlikely to substantially lessen competition in any relevant market. It considered that the merger might even be pro-competitive, as it would create a mid-size bankassurance company that might be better placed to challenge the large financial services players in both retail banking and retail insurance/superannuation/ investment markets.

Energex and Allgas

Acquisition (s. 50)

On 27 July 1998 the Commission announced that it would not intervene in the acquisition by Energex of Allgas.

Allgas is a gas utility based in south-east Queensland which services approximately 80 000 customers and currently holds the exclusive right to supply natural gas in various franchise areas including the southern part of Brisbane. It was previously the subject of a takeover bid by Boral, which also supplies natural gas in south-east Queensland, notably in the northern part of Brisbane. Boral decided not to proceed with its bid to take over Allgas, saying that Energex's bid had gone beyond an amount which Boral was prepared to bid. The Commission had concluded that the acquisition was likely to substantially lessen competition and sought an undertaking from Boral not to proceed with its proposal to acquire Allgas.

Energex is an electricity utility based in south-east Queensland and services just under one million customers. At present, the only other franchise electricity retailer in Queensland is Ergon Energy. Following reforms by the Queensland Government, the customer franchises held by the existing electricity retailers are being progressively removed to enable users to purchase electricity either directly from generators or from other retailers. The entire Queensland market is expected to become contestable by January 2001.

The Commission noted that the gas and electricity industries in eastern Australia were undergoing substantial regulatory reform, including the move toward a national electricity market, a national code on access to gas pipelines, and ongoing State programs to progressively remove franchises held by incumbent retailers.

The Commission considered that there were, at present, separate gas and electricity markets in Queensland, and that Energex and Allgas did not compete in the same market. It concluded that the merger was not likely to have the effect of substantially lessening competition.

Dulux Australia and the Maxwell Retail Group

Acquisition (s. 50)

On 28 July 1998 the Commission announced it would not intervene in the acquisition by Dulux Australia of the Maxwell Retail Group (MRG).

Dulux is a division of Orica Australia Pty Ltd and is the largest paint manufacturer in Australia involved in the manufacture of architectural and decorative paints, protective coatings, automotive and industrial paints. Dulux markets the Cabots range in the woodstains and finishes market segment.

MRG is a division of Maxwell Chemicals Pty Ltd, which is a subsidiary of Gibson Chemical Industries Limited, a listed Australian chemical manufacturer. MRG's major product lines include Feast Watson solvent-based timber finishes and stains for DIY users and Intergrain water-based timber finishes for DIY users.

The Commission had previously considered the relevant market definitions for the paint industry during the proposed acquisition by Wattyl of Taubmans. In its determination it defined the relevant market as the national market for the manufacture and supply of architectural and decorative paint. In relation to the acquisition of MRG by Dulux it considered the relevant market to be the same.

In the Commission's view the acquisition of MRG would result in Dulux increasing its market share by a very small degree in the relevant market.

It concluded that the acquisition was unlikely to substantially lessen competition.

Australian Society of Certified Practicing Accountants and the Institute of Chartered Accountants in Australia

Merger (s. 50)

On 18 August 1998 the Commission announced that it had decided that there were no competition concerns associated with the proposed merger between the Australian Society of Certified Practicing Accountants and the Institute of Chartered Accountants in Australia.

It concluded that a merger between the Society and the Institute was unlikely to substantially lessen competition in any relevant market, including those for the provision of accounting services.

Presently there is no restriction on the use of the term 'accountant' in the selling of accounting services. Members of the two bodies face increasing competition from a range of other service providers including lawyers, book keepers, management consultants and from the sale and use of accounting software packages.

If the merger is accepted by the membership of the two associations, the merged entity intends to adopt common procedures for accreditation and to establish uniform membership fee structures over time.

It appeared to the Commission that the unification of the two accounting bodies to form the Institute of Chartered Professional Accountants in Australia should enable the new body to better represent the interests of the

Australian accounting profession, both in Australia and internationally.

As a general principle the Commission encourages the amalgamation and rationalisation of professional services associations where they represent members with substantially the same sets of skills and qualifications. The Commission considered that this merger, if it proceeded, would simplify the representation and accreditation of a significant group of professional service providers in Australia.

Frito-Lay Australia and The Smiths Snackfood Company Limited

Acquisition (s. 50)

On 21 August 1998 the Commission announced it would not intervene in the proposed acquisition of The Smiths Snackfood Company Limited by Frito-Lay Australia. This followed the finalisation of the sale of Snack Brands Australia to Dollar Sweet Holdings.

In November 1997 Frito-Lay Australia advised the Commission that its parent, PepsiCo Inc., intended to buy from United Biscuits a number of businesses around the world. These included The Smiths Snackfood Company, the manufacturer of several Australian salty snack food brands such as CC's, Twisties, Cheezels and Smiths Original Potato Chips.

The effect of the acquisition was that the second largest Australian producer of salty snack foods, Frito-Lay Australia, would acquire the largest Australian producer of salty snack foods, The Smiths Snackfood Company.

Frito-Lay informed the Commission that, in order that the acquisition would not result in a substantial lessening of competition in any market, it would agree to divest a package of brands and manufacturing facilities from the Smiths and Frito-Lay businesses. The package, to be called Snack Brands Australia, was to be divested simultaneously with the proposed acquisition.

The Commission's primary concern was that the divested Snack Brands Australia business would become and remain a vigorous and effective competitor for Frito-Lay in Australia and that there would be no substantial lessening of competition. The divestiture was also the subject of a court enforceable undertaking by the Commission.

Snack Brands Australia was acquired by Dollar Sweets Holdings, a manufacturer of food and confectionary products including Players biscuits and Alexanders Chocolates. Thorney Holdings, the investment arm of the Pratt group of companies, had also acquired a substantial shareholding in Dollar Sweets Holdings. The Commission was satisfied that the creation of Snack Brands Australia and its sale to Dollar Sweets would not see a substantial lessening of competition in any market and that Dollar Sweets would remain a vigorous competitor.

Consumer protection (Part V)

Nissan Motor Co. (Australia) Pty Ltd

False or misleading representations (s. 53(a) and (e))

On 28 August 1998, in the Federal Court Adelaide, Justice Von Doussa imposed convictions and fines totalling $130 000 on Nissan Motor Co. (Australia) Pty Ltd. Nissan had pleaded guilty on 27 July 1998 to three counts of misrepresenting the model and price of its Patrol RX Turbo Diesel.

Adelaide advertising agent Thomas Mark Wightman, who had pleaded guilty to having aided and abetted Nissan in some of the conduct, was convicted and fined $10 000. This was the Commission's first prosecution of an advertising agent for aiding and abetting a client in misleading advertising.

The proceedings against Nissan and Wightman were instituted by the Commission in December 1997.

The misrepresentations were made in newspaper and television advertising in late 1996 and took several forms. For instance, a November 1996 television commercial claimed end-of-year savings of $6290 on a new RX Turbo Patrol being sold at $39 990 including free air conditioning, when in fact $39 990 had been the standard price for the past year and the only true saving was the value of the free airconditioning, being $2195. Newspaper advertisements offered the Patrol RX Turbo

Diesel at a price of $39 990 but the accompanying illustration, although appearing with a disclaimer 'pic for illustration purposes only', depicted wider wheels and extended wheel arches, features which were available only as optional extras or were standard on more expensive models. The Commission maintained that although the use of this disclaimer was common for used cars, it was not appropriate for new cars where accurate illustrations were readily available.

In commenting on his decision, Justice Von Doussa said:

> The ACCC accepts that the mistakes which occurred in the advertisements were not deliberate, and that Nissan and Wightman did not intend to mislead or deceive.

However, he continued that:

> An effective compliance program should have included checks which picked up negligent errors and oversights. The shortcomings in the compliance program operating at the time of these offences contributed to the happening of each offence.

Justice Von Doussa also noted '... the absence of a foolproof compliance program had added significance' in this case because Nissan had been convicted in 1979 on misleading advertising charges brought under the Trade Practices Act. 'Nissan therefore had direct experience of the need for a comprehensive compliance program.'

On 28 July 1998 Nissan gave the Commission enforceable undertakings which included offering compensation to consumers totalling $34 000.

On 3 September 1998 Justice Von Doussa made an order for costs in favour of the prosecution against each of the respondents, with the exception of the cost of the prosecutor's attendance on 24 August 1998.

Australian Purchasing and Tender Service Pty Ltd

Misleading or deceptive conduct (s. 52)

On 29 July 1998 the Federal Court Perth restrained Australian Purchasing and Tender Service Pty Ltd, its director, Suzanne Johnston, and another individual, Clinton Andela from promoting registers such as the Government Purchasing and Tender Index.

The Commission instituted proceedings on 2 October 1998 alleging that in August and September 1997 the Government Purchasing and Tender Index distributed forms to small businesses throughout Australia in an envelope bearing the letters OHMS, which the Commission claimed misled businesses that the GPTI form was an official government form. Further, the Commission alleged that the GPTI form was styled in a manner similar to government forms.

The Court found APTS and its promoters had made false and misleading representations that:

- GPTI was a government body or was affiliated with government;
- the businesses receiving the GPTI form were required by law to register with GPTI; and
- the businesses would be able to supply products or services to government departments or other government bodies only if they were registered with GPTI.

Justice Lee made orders including:

- declarations that APTS had contravened the Act and that Suzanne Johnston and Clinton Andela had been involved in the contraventions;
- injunctions preventing the respondents from being involved in any form of register or list in the future; and
- payment of the Commission's costs.

The Commission was also granted leave to seek further orders which might include requiring that Suzanne Johnston and Clinton Andela attend the Court for examination as to their financial capacity to make refunds.

HRJ Financial Services Pty Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations (s. 53(c)), misleading the public as to the nature or characteristics of goods and services (s. 55A), unconscionable conduct in consumer transactions (s. 51AB)

On 10 July 1998 the Commission obtained interim Federal Court orders restraining HRJ Financial Services Pty Ltd and its directors from representing that the company provides

personal loan facilities to customers, or secures or arranges loans on their behalf.

The Commission filed proceedings on 6 July 1998 against HRJ Financial Services and its directors Rowland William Thomas and Helen Elizabeth Lewis alleging that its advertising was misleading people into making an expensive 1900 phone call for a personal loan when all that was being offered was advice on how to secure a loan.

It alleged that the advertising represented that personal loans were available to callers from the operator of the 1900 number or that the operator arranged personal loans on behalf of callers.

The proceedings are continuing.

Cedric Desmond Collinson (trading as CDRC's Financial Network, and/or The Financial Network. and/or SE Financial Network)

Misleading or deceptive conduct (s. 52), false or misleading representations (s. 53(e)), misleading the public as to the nature or characteristics of goods and services (s. 55A), unconscionable conduct in consumer transactions (s. 51AB), accepting payment without intending to supply (s. 58)

On 14 August 1998 the Commission obtained interim orders in the Federal Court to prevent the advertising of a personal loans facility aimed at financially disadvantaged consumers.

The Commission filed proceedings on 12 August 1998 against Cedric Desmond Collinson, trading as CDRC's Financial Network, and/or The Financial Network. and/or SE Financial Network, alleging that financially disadvantaged consumers were being targeted and misled into making expensive 1900 phone calls charged at $5 per minute in the belief that they would obtain a loan.

The Commission alleged that Cedric Desmond Collinson placed newspaper advertisements around Australia representing that personal loans were available to callers from the operator of 1902 numbers, or that the operator arranged personal loans on behalf of callers. It alleged Cedric Desmond Collinson made false or misleading representations to callers as to their prospects of obtaining a loan and, in some instances, that they had been successful in obtaining approval for a credit card when they had not.

The Victorian Office of Fair Trading and Business Affairs alerted the Commission to this matter after receiving a series of complaints. The Commission instituted proceedings on 12 August 1998. Staff of both the Commission and the Victorian Office of Fair Trading and Business Affairs worked closely together in the course of the investigation and the execution of the proceedings.

On 13 August 1998 the Commission obtained interim orders restraining Cedric Desmond Collinson from making such representations.

The interim orders effectively precluded Cedric Desmond Collinson from dealing with his assets or any monies obtained as a result of consumers calling the 1902 numbers and from receiving further monies from this source.

At a hearing on 16 September 1998 Mr Collinson consented to orders permanently restraining him from engaging in the alleged conduct. He also gave an undertaking to the court to relinquish any further claims on monies obtained as a result of consumers calling the 1902 numbers, which were frozen by the court. The matter was adjourned until 30 October 1998 while the Commission considers a refund mechanism for consumers in consultation with other parties.

Mobileworld Communications (Aust) Pty Ltd

False and misleading representations (s. 53(a)), bait advertising (s. 56)

On 5 August 1998 Mobileworld Communications (Aust) Pty Ltd gave the Federal Court undertakings in relation to a mobile telephones promotion.

The Commission alleged that Mobileworld had engaged in misleading and deceptive conduct and bait advertising in a promotion of the NEC Sportz Digital, the Ericsson 218, the Nokia 2010, and the Motorolla 1-888 in a *Crazy John's* newspaper advertisement.

At the time of the sale the company had either none, or limited numbers, of the advertised

phones at its *Crazy John* stores. The company found itself without sufficient stock when an order for discontinued phone models, placed the day before publication of the advertisement, could not be filled by its supplier.

The company consented to court orders not to advertise digital cellular telephones at a special price unless it made reasonable efforts to have sufficient stock at each of the stores referred to in the advertisement. The company also undertook to detail the actual number of units at a store where less than a specified stock base is held, and to maintain a 'rain-check' policy.

The company also consented to orders requiring it to:

- maintain a trade practices corporate compliance program;
- publish an apology in a newspaper; and
- pay Commission costs.

The Commission acknowledged that Mobileworld, when informed of its concerns, acted to contact and compensate customers who purchased a more expensive telephone package than that advertised.

Mobile Innovations Pty Limited

False or misleading representations (s. 53)

On 3 July 1998 Mobile Innovations Pty Limited gave the Commission court enforceable undertakings in relation to a mobile phone promotion.

The Commission received a small number of complaints from consumers who had signed up with Mobile Innovations in response to a promotion it ran during May 1996.

The promotion, which featured a '15-month agreement', failed to mention that the agreement would lapse only if the customer gave three months' notice of their intention to quit.

In late 1997, after the 15 months, some consumers wanted to examine alternative airtime deals, but as they had not given notice Mobile Innovations took the three months' notice to start from the end of the fifteenth month and charged them for the three extra months. These consumers were tied to the agreement for a total period of up to 18 months.

Commission inquiries indicated that the company's telephone marketing staff also failed to inform potential customers of the notice requirement.

The Commission was preparing to take this matter to court earlier this year, but decided not to when Mobile Innovations conceded that its promotion may have had the potential to mislead some consumers and dropped the policy requiring their customers to give notice of termination.

Mobile Innovations undertook to:

- refund affected consumers;
- retrain its telemarketing staff;
- anonymously audit those telemarketing staff;
- review its trade practices compliance program; and
- pre-launch test all new mobile phone promotional material.

Kmart Australia Ltd

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

On 24 July 1998 the Commission instituted proceedings against Kmart Australia Ltd for allegedly misleading consumers through in-store advertising at its Firle store in suburban Adelaide.

The Commission alleges that Kmart had falsely represented the savings to be made on the purchase of a Black & Decker 2-cup expresso machine. There was a series of reductions in the price of the product over many months. In each instance the shelf label compared the current selling price and the original price at which the product was sold, not the immediate past selling price.

The Commission is seeking findings of fact and orders that Kmart will:

- refrain from displaying such misleading representations in its retail outlets;
- publish apologies in newspapers;

- compensate consumers who had been misled; and
- review its trade practices compliance program.

At a directions hearing on 11 August 1998 the matter was adjourned to 3 November 1998.

AAPT Limited

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

On 10 July 1998 AAPT Limited gave the Commission an undertaking in relation to its 'Smartchat' promotion.

The Commission had received a consumer complaint that AAPT's promotional material failed to disclose a material condition.

The promotion said that consumers using AAPT's Smartchat service could call anywhere in Australia between 6 p.m. and midnight any weeknight and the most they would pay would be $3. In fact, if a consumer made a call which began between 6 p.m. and midnight but ended after midnight the entire call was charged at the higher off-peak rate.

The Commission considered AAPT's failure to explain this in its promotional material to be misleading. Also, as AAPT was the only telecommunications carrier to charge in this way, the Commission considered that the misleading effect of the alleged conduct was compounded by representations by AAPT staff that AAPT's $3 deal was just like a deal offered by one of its competitors.

AAPT cooperated fully with the Commission in this matter once the Commission's concerns were made known.

AAPT sent out brochures to its Smartchat customers disclosing full details of the $3 deal. It also introduced a 'period of grace' to ensure that customers whose calls started after 6 p.m. but inadvertently finished just after midnight would be charged only $3.

AAPT undertook to credit the account of customers whose calls started after 6 p.m. but went beyond midnight and who were charged at the higher rate. Those customers will pay only $3 for the portion of the call made between 6 p.m. and midnight.