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)

Mayo International Pty Ltd & Ors

Resale price maintenance (s. 48)

On 21 August 1998 the Federal Court Brisbane imposed penalties totalling $68 500 on Mayo International Pty Ltd, Managing Director Alan Jon Le Court, and sales representative Alexandra Shaw, in relation to resale price maintenance of hair care products.

Mayo is a national hair-care product manufacturer and wholesaler.

The Commission instituted proceedings on 6 November 1996 alleging that Directors Jon Le Court and Brian Thom, and Alexandra Shaw, attempted to induce, and induced, Price Attack franchisees to prevent Mayo products being sold at less than Mayo's recommended retail price.

No contraventions were found against National Sales Manager and Director Brian Thom.

The company and Mr Le Court were ordered to pay 75 per cent of the Commission's costs and the Commission was ordered to pay the personal costs of Mr Thom.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union

Secondary boycott (s. 45D)

On 13 October 1998 the Commission settled its litigation with the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU) through consent orders by the Federal Court.

The Commission instituted proceedings on 18 March 1998 alleging that the CEPU engaged in secondary boycott conduct against a fire protection contractor, Enterprise Fire Protection Pty Ltd, and Advanced Fire Protection Pty Ltd, the company to which Enterprise subcontracted the fitting of sprinkler pipe at the La Sabbia building site on the Gold Coast.

The CEPU opposed subcontracting of works by fire protection companies. The conduct included the picketing of the La Sabbia site, preventing vehicle access, and the suspension of members involved in subcontracting.

The consent orders require CEPU:

- not to engage in the conduct referred to above for the reason that sprinkler fitting is being carried out by a subcontractor or non-member of the CEPU;
- to implement a trade practices compliance program for its Queensland branch;
- to notify its sprinkler fitter members, fire protection contractors and builders that the conduct has ceased;
- to reinstate members who were suspended for involvement in subcontracting; and
- to contribute to the Commission's costs.

The Fitness Generation Pty Ltd

Resale price maintenance (s. 48), price fixing (s. 45A)

On 30 October 1998 the Federal Court Melbourne made orders against The Fitness Generation Pty Ltd and its National Sales and Marketing Manager Commercial Division, Martin Cowling, in relation to alleged resale price maintenance and price fixing in relation to the supply of fitness equipment.

The Commission instituted proceedings after The Fitness Generation sent a letter to its retail distributors — with whom it also competes in the same market — offering supply of Monark fitness equipment and including a list of retail prices.

The letter stated that The Fitness Generation would closely monitor the retail prices offered by the distributors and would not look favourably upon discounting. Those retailers found discounting would most likely not enjoy a long term relationship with The Fitness Generation.

The letter also advised that The Fitness Generation would be selling the Monark equipment at retail prices as per the enclosed price list. The letter was signed by Mr Cowling.

The Commission alleged that such conduct contravened the resale price maintenance and price fixing provisions of the Trade Practices Act.

The court orders restrain the company and Mr Cowling for three years from engaging in resale price maintenance in respect of fitness equipment, and from attempting to enter into a price fixing arrangement between retail sellers of fitness equipment in Australia.

The company was also ordered to implement a trade practices corporate compliance program, publish an apology notice in two national fitness journals, and send a letter to all distributors of its products advising of the court orders.

The Commission acknowledged that both the company and Mr Cowling cooperated with it to quickly resolve the matter.

Mergers (Part IV)

AMP and GIO

Acquisition (s. 50)

On 14 September 1998 the Commission announced that it would not oppose the proposed acquisition of GIO by AMP.

The acquisition consolidates AMP's number one position in life insurance and elevates it to second in retail investment products and third in general (non-life) insurance. In all of these areas, however, the Commission noted that there remained a substantial number of strong competitors and there did not appear to be any problems with concentration.

The acquisition crossed the Commission's merger concentration thresholds in only one line of general insurance, namely workers' compensation, in New South Wales. However, premiums in this State are regulated by the State WorkCover Authority in accordance with the Workers' Compensation Act 1987.

The Commission noted the increasing number of mergers in the financial services industry and is monitoring developments to ensure that the drive for scale and efficiencies does not disadvantage consumers.

Norwich Union Financial Services and Portfolio Partners

Acquisition (s. 50)

On 18 September 1998 the Commission announced that it would not intervene in the acquisition of Portfolio Partners by Norwich Union Financial Services.

The Commission concluded that, while the acquisition placed Norwich Union near the top 10 Australian funds managers, a substantial number of strong competitors remained and the proposed merger did not appear to cross the Commission's concentration thresholds.

RGC Limited and Westralian Sands Limited

Acquisition (s. 50)

On 8 September 1998 the Commission announced that it would not oppose the merger of mineral sands miners RGC Limited and Westralian Sands Limited.

The companies both mine titanium-rich minerals (ilmenite, rutile and leucoxene) and process them into feedstocks used in the manufacture of titanium dioxide pigment. This pigment is used to colour numerous products, predominantly paint, plastics and paper. The feedstocks are sold to large local and overseas pigment manufacturers including Millennium, Tioxide, DuPont and Kerr-McGee.

The parties also mine zircon, which is used primarily in the ceramics industry and for refractories in the steel industry.

Australia is the world's largest producer and exporter of titanium feedstocks and zircon.

The Commission noted that, while the merger will reduce from two to one the number of non-integrated suppliers of titanium dioxide feedstocks to domestic pigment manufacturers, the merged firm would compete in a world market against strong overseas competitors. It also considered that potential import competition in both titanium dioxide feedstocks and zircon was likely to provide an effective constraint on the merged firm.

Consumer protection (Part V)

Yakka Pty Limited/Isuzu and General Motors Australia Limited

False and misleading representations (s. 53)

On 3 September 1998 the Commission accepted court enforceable undertakings from Yakka Pty Limited in relation to a joint promotion of Yakka clothing by Yakka and Isuzu — General Motors Australia Limited.

The promotion ran between 16 November 1997 and 31 January 1998. It said Holden Rodeo buyers would receive Yakka clothes worth $300, based on recommended retail prices. Purchasers would receive 100 points which were redeemable for Yakka clothing. Each item of clothing had a point value.

The Commission alleged the promotion was misleading as the points assigned were based on 'notional' or 'expected' prices, not recommended retail prices. In fact, Yakka had no recommended retail prices and Commission inquiries indicated that the goods sold for less than the expected value assigned. As a result the value of the clothing offered amounted to between $200 and $250 only.

The Commission acknowledged that Yakka and Isuzu cooperated fully with its investigation. Yakka acknowledges it was responsible for the pricing problem and that Isuzu relied on its advice. Yakka undertook to:

- write to all affected purchasers offering an apology and an extra 50 points redeemable for Yakka clothing (equalling an additional $100 to $115 of value); and
- implement a trade practices compliance program.

The promotion was advertised nationally. The Commission believes many purchasers live in regional Australia or are in small business. Both consumer groups are a Commission priority area.

Austcomm Tele Services Pty Ltd

Unconscionable conduct (s. 51AB), misleading or deceptive conduct (s. 52), false and misleading representations (ss 53(c) and (d)), falsely asserting a right to payment for services (s. 64(2A))

On 11 September 1998 the Commission instituted proceedings in the Federal Court Perth against Austcomm Tele Services Pty Ltd, a Western Australian telephone services reseller; Mr Les Aris, a company director; Mr Greg Erskine, a company manager; and four of its marketing agents — Vision Direct (WA) Pty Ltd, Cheville Corporation Pty Ltd in WA and ADS Marketing Pty Ltd and Kobra Pty Ltd in Victoria.

The Commission alleges they have engaged in the unauthorised transfer of customers from one telephone company to another, or 'slamming' as it is known in the industry.

The Commission alleges that, in the course of reselling telephone services to householders, Austcomm claimed:

- it was offering an auditing or bill checking service;
- its services provided savings in circumstances where savings were not available; and
- it was part of, a branch of, subsidiary or an authorised agent of Telstra when this was not the case.

The Commission also alleges that Austcomm:

- engaged in unconscionable conduct by signing up a person with a special disability who could not read the contract; and
- rendered accounts without a reasonable cause to believe it had a right to payment.

The Commission is seeking orders which include declarations, findings of fact, injunctions to restrain the conduct, costs, orders requiring refunds to be offered, the implementation of verification processes, and a trade practices compliance program.

At a directions hearing on 24 September 1998, by Minute of Consent Orders, Austcomm consented to interlocutory orders restraining itself, its directors, servants or agents or otherwise from engaging in misleading or deceptive conduct or making representations in trade or commerce that:

- persons who became Austcomm customers would continue to have their telephony services supplied by Telstra or other service provider;
- Austcomm was in some way affiliated with or represented Telstra;
- Austcomm provided some form of clerical or auditing service on behalf of a carrier; or
- persons would make savings in circumstances where the person would not make such a saving.

Austcomm was also restrained from:

- asking a person to sign an Austcomm application form where that person advised they were unable to read the form;
- asserting a right to payment unless Austcomm had reasonable cause to believe there was a right to payment; and
- seeking to recover any monies for services provided to Austcomm customers when those customers had transferred to Austcomm as a result of any conduct alleged by the Commission in the statement of claim.

Further, Austcomm was to introduce a range of verification procedures which had to be followed before processing any application forms.

By Minute of Consent Orders, Vision Direct and Cheville consented to interlocutory orders restraining themselves, their directors, servants or agents or otherwise from engaging in misleading or deceptive conduct or making representations in trade or commerce to the effect of the representations alleged by the Commission in the statement of claim.

Vision Direct and Cheville were to also introduce verification procedures which were to be followed prior to executing by any potential customer of an Austcomm application form.

By Minute of Consent Orders ADS consented to interlocutory orders restraining itself, its directors, servants or agents or otherwise from asking a person to sign an Austcomm application form where that person advises they are unable to read it.

Negotiations regarding suitable consent orders are continuing with Kobra.

A further directions hearings is to be held on 4 December 1998.

This action follows a warning on 13 August 1998 by the Commission that it would act quickly against telephone companies that transfer customers from other companies without proper authorisation.

Wavequest Pty Ltd (trading as Alice Computers) and Prebeal Pty Ltd (trading as Mobile Phones Etc)

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

On 30 September 1998 Justice O'Loughlin of the Federal Court found that mobile phone ads by Wavequest Pty Ltd (trading as Alice Computers) and Prebeal Pty Ltd (trading as

Mobile Phones Etc) breached the Trade Practices Act. The ads appeared in print and on shop windows. Mr Kevin Clerke, a director of both companies, was found to have been directly or indirectly knowingly concerned in, or party to, the contraventions.

The advertising offered 'free' mobile phones when, in fact, consumers were required to enter into 15 to 18 month contracts with minimum charges from $336 up to $6300 as a condition of obtaining their 'free' phone.

The Commission instituted Federal Court proceedings in Darwin after consumers and businesses complained that the advertising was misleading.

The provider, One.Tel Pty Limited, will write to affected consumers to give them the option of cancelling their contract. The Court also ordered the traders to pay the Commission's legal costs.

Darling Downs Bacon Co-operative Association Limited

False and misleading representations (ss 52, 53(eb) and 55)

On 5 October 1998 Darling Downs Bacon Co-operative Association Limited, producer of KR Darling Downs brand ham, bacon and smallgoods, gave the Commission an undertaking to refrain from representing that all of its products are made from 100 per cent Australian pork while they are not.

The undertaking follows a Commission investigation into claims made by Darling Downs in television and newspaper advertisements that all KR Darling Downs products were made from 100 per cent Australian pork.

In fact, only KR Darling Downs refrigerated products are made from 100 per cent Australian pork. Between December 1996 and February 1998, KR Darling Downs canned leg ham and shoulder ham products were made in the USA from pork grown in the USA.

In February 1998, Darling Downs ceased producing canned leg ham and shoulder ham products in the USA under the KR Darling Downs label but holds sufficient stock to last until approximately early 1999.

Darling Downs was quick to suspend its advertising and cooperated fully with the Commission in achieving a swift resolution of the matter.

Darling Downs has undertaken to:

- qualify future advertising until sufficient time has passed after the last release in Australia of the USA made canned leg ham and shoulder ham products to allow for them to have left the retail market;
- publish corrective notices in newspapers apologising to consumers and offering refunds to those who may have been misled; and
- implement a trade practices compliance program compliant with Australian Standard AS-3806.

Kenman Kandy Australia Pty Ltd

False and misleading representations (ss 52, 53(eb))

On 22 October 1998 Kenman Kandy Australia Pty Ltd gave a court enforceable undertaking to the Commission to recall products labelled 'Australian Made Australian Owned' or '100% Australian Owned' as the company is no longer Australian owned.

Kenman Kandy is a manufacturer and wholesaler of Kenman, Kenman Best Value, Kenman Dinkum Aussie, Meadowsweet, Meadowsweet Best Value and Hellas confectionery.

On 1 December 1997 Kenman Kandy was acquired by Effem Foods Pty Ltd, an Australian company that is ultimately owned by US-based Mars Incorporated. Kenman Kandy's products are all made in Australia.

After the acquisition, Kenman Kandy began amending its packaging. However, the Commission was concerned that incorrectly labelled products were still being distributed to retail outlets.

Kenman Kandy has undertaken to:

- recall any incorrectly labelled stock still in the marketplace;
- refrain from distributing additional stock in packaging which represents that Kenman

Kandy is Australian-owned, or from making further representations to that effect;

- publish corrective notices in Australian newspapers apologising to consumers and offering to respond to any claims they may have;
- establish a mechanism for affected consumers to raise and resolve any claims they may have against Kenman Kandy as a result of the incorrect labelling; and
- take steps to ensure future compliance with the Trade Practices Act.

Anti-competitive conduct — telecommunications (Part XIB)

Telstra

On 14 October 1998 the Commission issued a further competition notice regarding Telstra's customer transfer process (known within the industry as 'commercial churn').

The notice replaces one issued on 10 August 1998 (to come into force on 30 September 1998). The notices relate to the transfer process provided by Telstra between 4 August 1997 and 27 September 1998.

Following complaints from industry, the Commission launched an extensive investigation. It formed the view that Telstra's transfer conditions substantially hindered the development of local call competition and the further development of long distance competition.

Of most concern to the Commission were the transfer fees and conditions regarding pre-transfer debt. Unless Telstra's competitors paid an additional fee of $23 per service, they inherited pre-transfer debt owed by the customer to Telstra. In addition, the Commission was concerned about the complex transfer form which Telstra imposed on its competitors, the time taken to process debt-free transfers and the transfer reject conditions.

The reason for replacing the previous notice is that on 28 September 1998, two days before the notice was to come into force, Telstra made a number of changes to its commercial churn arrangements. Although it covers the same conduct, the new notice was issued because the Commission still believes that Telstra had previously contravened the competition rule, which prohibits anti-competitive conduct in telecommunications markets.

The Commission has also written to Telstra seeking a response to its concerns about Telstra's new churn arrangements. It is concerned that, in introducing the new arrangements, Telstra had imposed a new cost structure without any consultation with industry.

The Commission is also presently considering industry's comments on the changes to the transfer process. Once it has had an opportunity to consider these comments and Telstra's response, it will consider whether there has been a further breach of the competition rule.