Enforcement

The following are reports on new and concluded Commission actions in the courts, settlements involving court enforceable (s. 87B) undertakings, and major mergers considered by the Commission. Other matters still before the court are reported in Appendix 1. Section 87B undertakings accepted by the Commission and non-confidential mergers considered by the Commission are listed in Appendix 2.

Restrictive trade practices

Pacific Dunlop Ltd

Anti-competitive agreement (s. 45)

On 12 December 1997 two Queensland subsidiaries of Pacific Dunlop Ltd (PDL) and an executive of one of them were ordered to pay $2 million in penalties and costs for their role in a price fixing and market sharing arrangement in the industrial flexible polyurethane foam market in Queensland between the mid to late 1980s and early 1996.

PDL admitted that its subsidiaries entered into the arrangement with their major competitor in Queensland.

The Federal Court Melbourne accepted a joint submission regarding injunctions and penalty from Foamlite (Australia) Pty Ltd (trading as Dunlop Flexible Foams (Foamlite)), its Queensland Manager, Peter Dell, and Queensland Sales Manager, Phillip Lait; and Vita Pacific Limited (Vita) and its former Queensland State Manager, Gerard Walsh.

PDL stated that the arrangement arose out of a friendship that developed between Dell and a State Manager of the companies' main competitor.

Justice Finkelstein considered the detailed material put forward by the parties and accepted that the orders as suggested by the parties were appropriate. The penalties, totalling $1.9 million, were apportioned as follows:

Foamlite (Australia) Pty Ltd	$1 200 000
Vita Pacific Limited	$600 000
Mr Peter Dell (former Queensland State Manager of Foamlite)	$100 000

The companies also agreed to pay $100 000 towards the Commission's legal costs.

The Court also issued injunctions restraining Foamlite, Vita, Dell, Lait and Walsh for three years from repeating the offending conduct.

Justice Finkelstein noted that the arrangement was loosely policed and not necessarily all that effective, but endured for many years.

The Commission noted that PDL had been fully cooperative from the time it became aware of the Commission's inquiries. PDL has also volunteered to update its trade practices compliance program to include material relating to this case and the dangers of socialising with competitors.

The Commission's investigation into the alleged conduct of PDL's competitor continues.

Transport Workers' Union of Australia

Secondary boycott (s. 45D)

On 12 December 1997 the Commission instituted proceedings in the Federal Court Brisbane against the Transport Workers' Union of Australia (TWU), alleging contraventions in Queensland of the secondary boycott provisions of the Trade Practices Act.

Previously, on 22 August 1997, the Commission instituted proceedings against the TWU alleging secondary boycott conduct against smaller transport companies in Queensland which had not entered into

enterprise bargaining arrangements with the union under the Federal Workplace Relations Act.

In the current application the Commission alleges that TWU members refused entry to vehicles driven by non-TWU members to a number of transport yards in Brisbane, and refused to load or unload those vehicles.

The Commission is seeking orders that the TWU:

- cease engaging in secondary boycott action against non-TWU members;
- implement a program to promote compliance with s. 45D by its officers, employees and members; and
- publish a notice advising transport companies, transport drivers, and the general public of these proceedings and of the orders of the Court.

Construction Forestry Mining and Energy Union

Secondary boycott (s. 45D)

On 15 December 1997 the Commission instituted proceedings in the Federal Court Perth against the Construction Forestry Mining and Energy Union (CFMEU) alleging contraventions in Western Australia of the secondary boycott provisions of the Trade Practices Act.

The Commission alleges that the CFMEU engaged in secondary boycott conduct against a transportable buildings supplier in Western Australia which had not entered into enterprise bargaining arrangements with the union under the Federal Workplace Relations Act.

The CFMEU conduct allegedly involved hindering or preventing operators of crane hire services from supplying crane services to unload transportable buildings at a construction site.

The Commission received a complaint from the transportable buildings supplier that the CFMEU's alleged conduct caused them substantial loss or damage.

The Commission is seeking:

- a declaration that the conduct contravened s. 45D of the Act;
- an injunction restraining the CFMEU from organising or engaging in conduct which has the purpose or effect of hindering or preventing the supply of crane hire services to Western Portables at the accommodation site;
- an order for compensation for any person who suffered loss or damage by the alleged conduct;
- an order requiring the CFMEU to publish an apology;
- an order requiring the CFMEU to implement a trade practices compliance program; and
- an order for costs.

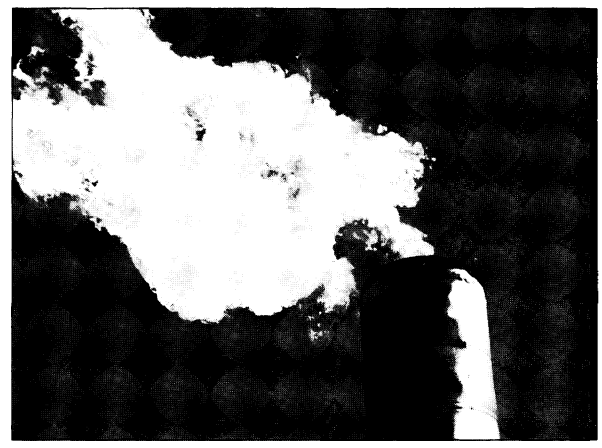
A directions hearing has been set for 5 February 1998.

The Australian Gas Light Company

Misuse of market power (s. 46)

On 28 October 1997 The Australian Gas Light Company and the Commission announced they had agreed on arrangements to promote competition in the newly competitive NSW natural gas market.

On 1 August 1997 the NSW regulator, the Independent Pricing and Regulatory Tribunal (IPART) issued a determination introducing arrangements to facilitate third party access to transmission and distribution gas networks.



Photography by Arthur Mostead

AGL had previously agreed to a transition timetable with IPART, allowing third parties to transport gas through AGL's NSW distribution system.

A small number of industrial gas users terminated their gas supply agreements with AGL in anticipation of the implementation of the IPART determination by 1 July 1997. After termination, those customers were supplied on interim supply arrangements. Concerns were raised with the Commission about the potential application of the Industrial and Commercial Tariff to these users before 1 December 1997. Following discussions with the Commission, AGL agreed to extend interim pricing arrangements for delivered natural gas until 1 December 1997 for those customers.

The Commission commented on the fact that AGL acted quickly and cooperatively to allay its concerns.

Other matters agreed upon by the Commission and AGL were:

- a process to resolve any similar issues which may have arisen with other customers in relation to potential application of the Industrial and Commercial Tariff. AGL will also write to relevant customers;
- before 1 December 1997 AGL shall not make any representations as to the ability, or likely ability, of any of its competitors or potential competitors to obtain and resell gas supplies; and
- other customers will be provided with at least two months' notice of any proposal to supply them at the Industrial and Commercial Tariff Rate.

Mergers

Toll Holdings Limited and certain TNT Australia Pty Ltd businesses

Acquisition (s. 50)

On 14 November 1997 the Commission announced it would not oppose the acquisition of certain TNT Australia Pty Ltd businesses by Australian transport company, Toll Holdings Limited. The businesses are Carpentaria Transport Pty Ltd, TNT Seafast, Refrigerated Roadways Pty Ltd and TNT Logistics.

The proposed acquisition did not exceed the merger guidelines concentration thresholds, and there appeared to be no substantial barriers to entry to the industry.

Brambles Australia Limited and Cockburn Corporation Limited

Acquisition (s. 50)

On 29 October 1997 the Commission announced it would not oppose the proposed acquisition by Brambles Australia Limited of Cockburn Corporation Limited.

Cockburn has an equipment hire operation in Western Australia and the Northern Territory. Brambles' equipment business, Wreckair, operates Australia-wide.

The Commission considered that a merged Wreckair/Cockburn should face competition from Coates and, to some degree, from specialist operators for each type of product it offered for hire.

Barriers to entering the markets appeared to be low. In particular, there appeared to be a number of potential sources of entry to the Western Australian and Northern Territory markets, namely equipment hire firms currently operating on the east coast of Australia and equipment manufacturers that might offer their equipment for hire. In the Commission's view the threat of potential competition should constrain the merged firm.

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

Consumer protection

Office Link (Aust) Pty Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations about the price of goods or services (s. 53(e)), false or misleading representations about the conditions of the contract (s. 53(g)), advertising part of the price of goods without specifying the cash price of goods (s. 53C)

On 21 November 1997, in the Federal Court Perth, Justice Carr, by consent, made declarations, injunctions, and issued orders against Office Link (Aust) Pty Ltd in relation to a mobile phone advertisement.

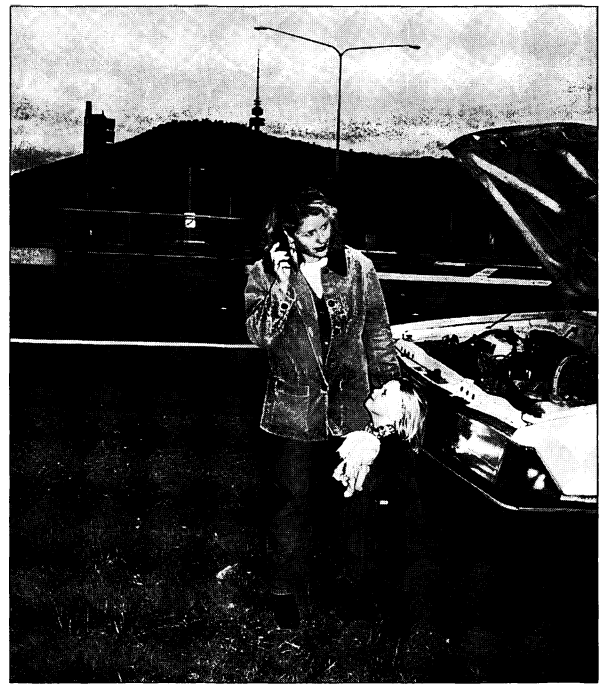
The advertisement appeared to offer a Motorola mobile phone for $9 with the bonus of voice mail access with no monthly access fees. It appeared that the purchaser would pay only for the calls made.

The Commission instituted proceedings on 15 August 1997 alleging that the advertisement used fine print disclaimers which did not disclose, or did not sufficiently disclose, that the Motorola mobile phone was part of a package that included purchasing Vodac telephone services and paying a connection fee. This made the minimum cash price of the package, without the cost of calls, $524. There were additional charges for voice mail access.

The declarations were that Office Link's conduct breached the Trade Practices Act. The injunctions restrain Office Link from advertising prices without clearly disclosing all relevant conditions, and from advertising part of the price of goods and services without specifying the cash price. The orders require Office Link to:

- place corrective newspaper advertising;
- send corrective letters to purchasers;
- provide refunds to purchasers who claimed they were misled;
- review its advertising, before publication, for possible ss 52, 53(e), 53(g) and 53C breaches;
- implement a trade practices staff training program, covering ss 52, 53(e), 53(g) and 53C; and
- pay the Commission's costs.

In his judgment Justice Carr observed that there must be a nexus between the contravention and the injunctions granted. Accordingly the compliance program he ordered related to the provisions of the Act which Office Link had contravened (ss 52, 53(e), 53(g) and 53C).



Photography by Arthur Mostead

Jayco Pty Ltd

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

On 1 December 1997 Jayco Pty Ltd was permanently restrained from making unsubstantiated claims about its weight loss products and aids.

The company was specifically restrained from making claims about:

- *Medex Diet Patch* (a band aid like patch impregnated with iodine);
- *Thermoslim* (a wafer said to contain thermogenetic (calorie burning) properties);
- *E-Z Trim* (tablets said to possess thermogenetic properties);
- *Acu-Stop 500* (an ear piece inserted inside the ear operating through acupressure);
- *Chitoslim 5000* (a powder said to bind fat before absorption by the body); and
- a publication concerning *Negative Calories* (a book claiming that 'negative calories' can offset the weight increasing effect of positive calorie foods).

Justice Goldberg declared that the company, by making various representations about the diet products, had engaged in conduct that contravened ss 52, 53(a), (c) and (g), and 55 of the Trade Practices Act. The company was also ordered to pay the Commission's costs.

The company did not attend the hearing nor did it appear at the first directions hearing on 3 November 1997. Proceedings against the remaining individual respondent were adjourned to a later date.

The Commission acknowledged the cooperation and valuable assistance provided by the Victorian Office of Fair Trading and Business Affairs throughout the investigation and proceedings.

Nissan Motor Co. (Australia) Pty Ltd

False or misleading representations (s. 53)

On 8 December 1997 the Commission instituted criminal proceedings in the Federal Court Adelaide against automotive manufacturer Nissan Motor Co. (Australia) Pty Ltd for allegedly misrepresenting the model and price of its Patrol RX Turbo Diesel. Also joined in the action was Adelaide advertising agent Thomas Mark Wightman, who is alleged to have aided and abetted Nissan in some of the conduct.

The Commission alleges the conduct took several forms, including:

- a television commercial which claimed end-of-year savings on an RX Turbo Patrol when the price advertised had been the standard price for the previous 12 months; and
- a newspaper advertisement for the Patrol RX Turbo Diesel at the standard price, which included an illustration (although appearing with a disclaimer 'pic for illustration purposes only') depicting features that were available only as optional extras or found on more expensive models.

In addition to penalties, the Commission is seeking other orders for civil relief including that:

- affected purchasers will be able to use the findings to launch their own actions to recover any loss or damage resulting from the conduct;
- Nissan will write to purchasers advising them of the findings and their right of private action; and
- Nissan will implement a trade practices compliance training program for staff and management.

Nissan ceased the advertising once the Commission drew the company's attention to its concerns.

A directions hearing is set for 23 February 1998 in the Federal Court Adelaide.

Product safety

Sandra Powell and Associates (trading as The Accessory Company)

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

Sandra Powell and Associates, trading as The Accessory Company, has taken action to address Commission concerns about several models of sunglasses it supplies.

As part of a regular sunglasses survey, the Commission bought and sent for testing a pair of brown-tinted Et Vous sunglasses which the company had supplied to the Myer-Grace Bros chain. It advised the company that it suspected the sunglasses did not meet the mandatory product standard dealing with tinted lenses.

The Accessory Company immediately ceased supply of nine models of brown-tinted sunglasses.

Testing confirmed the Commission's suspicions that the sunglasses should carry a warning for people with defective colour vision as the brown tint could affect colour perception.

The company subsequently voluntarily submitted 42 other models of Et Vous sunglasses for testing. The nine brown-tinted lenses sunglasses all failed the standard. A further 14 failed in other areas. The company volunteered to issue a consumer product safety recall notice for all these sunglasses and a further three which were found to be borderline.

Some of the non-complying models require a warning for defective colour vision and/or the warning for not being suitable for drivers. In some others the field of vision was too small and others had lens properties which could cause blurred vision and misjudgment of depth of field. In the latter cases, the sunglasses could not be labelled so they comply. The company has offered consumers either a refund or replacement sunglasses which comply with the standard.

Genop Pty Limited

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

On 19 November 1997 Genop Pty Limited, a Sydney-based sunglasses distributor, agreed to voluntarily recall the following sunglasses:

- Dakota Smith Sunglass Model 1352 Dust Storm (all colours);
- Dakota Smith Sunglass Model 1353 Flash (all colours); and
- Adidas Sunglass A325 Sugar (all colours).

The Commission found that the sunglasses did not comply with the mandatory product standard for sunglasses, because they had refractive and/or prismatic values greater than was allowed under the standard. This meant a wearer could have blurred vision, misjudge depth and/or position of objects.

Genop Pty Limited, which distributed the sunglasses nationally to various retailers from 16 July 1997 to 29 September 1997, found through independent testing that the sunglasses did not meet the standard.

When the Commission contacted the company over its concerns, the company had already set in train a recall of the sunglasses from its supplier customers. It responded quickly and cooperatively when asked by the Commission to publish a recall of the sunglasses.

Genop has offered consumers either a refund or replacement sunglasses that meet the standard.