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.

Mergers (Part IV)

Service Corporation International Australia Pty Limited and Cremations Newcastle (Australia) Holdings

Acquisition (s. 50)

On 5 March 1999 the Commission accepted a court enforceable undertaking from Service Corporation International Australia Pty Limited (SCIA) in relation to its proposed acquisition of Cremations Newcastle (Australia) Holdings (CNH) in Newcastle.

CNH is a holding company which controls the operations of David Lloyd Funerals and Evans Funeral Services in Newcastle, plus the Beresfield Crematorium and Macquarie Memorial Park (cemetery and crematorium) in Newcastle.

Although the acquisition would increase SCIA's share of funeral sales in Newcastle, the Commission concluded that there remained a significant degree of competition from other funeral directors in Newcastle and the surrounding areas.

The Commission's concern stemmed from the fact that SCIA would acquire control of the only crematorium in Newcastle and the surrounding areas and that it may take advantage of its monopoly position to disadvantage its competitors in the Newcastle funerals market. It concluded that the proposed acquisition was likely to contravene s. 50 of the Trade Practices Act.

In order to address the Commission's concerns, SCIA gave a court enforceable undertaking to operate the Beresfield Crematorium and Memorial Park Crematorium separately to its funeral businesses. It will ensure that:

- no advantage will be given to SCIA funeral businesses, either in terms of prices for cremations, including any discounts or rebates, or in terms of access to the crematoria;
- no details of the next of kin of deceased persons, which might be provided to the crematoria by non-SCIA funeral directors, be used in any way by SCIA, including SCIA crematoria or SCIA funeral businesses, for the purpose of selling pre-paid funerals; and
- there are separate management and staff of SCIA's crematoria and funeral businesses at Newcastle.

SCIA will also notify the Newcastle community of the acquisition by an advertisement in the *Newcastle Herald,* and in all future advertising of the funeral businesses being acquired disclose SCIA's ownership of those businesses.

Email Limited and Southcorp Limited

Acquisition (s. 50)

On 11 March 1999 the Commission announced that it would not oppose Email Limited's proposal to acquire Southcorp Limited's whitegoods business.

Email and Southcorp are major Australian manufacturers of whitegoods products. Both companies submitted that rationalisation of the Australian industry was necessary to achieve international competitiveness in an increasingly globalised industry.

The major brands affected will be Westinghouse, Simpson and Kelvinator (Email); and Chef, Dishlex and Hoover (Southcorp). Some brand and manufacturing capacity rationalisation will follow the acquisition.

The Commission considered the effects of globalisation in this industry and in particular the presence of imports in the major product markets.

Inquiries indicated that Email and Southcorp are strong competitors, as their products are specifically designed for Australian conditions and enjoy a high level of brand recognition.

Although the Commission considered that the acquisition would result in a high degree of concentration, it concluded that the continued presence of a significant competitor in Fisher & Paykel, together with existing and potential import competition within the major product markets, was likely to ensure that the merger did not result in a substantial lessening of competition.

Visy Industries Pty Ltd and Stone Container Australia Pty

Acquisition (s. 50)

On 23 February 1999 the Commission expressed concerns about Visy Industries Pty Ltd's proposed acquisition of Stone Container Australia Pty. After conducting market inquiries it concluded that the proposed acquisition was likely to breach the merger provisions of the Act.

Visy and Stone compete in the corrugated boxes market, which is highly concentrated. There are three main players, with Visy and Amcor being the larger and vertically integrated suppliers.

The Commission was concerned about the likely impact on prices and quality of service if Stone was removed from the market, particularly in an industry with substantial barriers to new entry. Market inquiries indicated that Stone's presence had resulted in more competitive prices and service in the market, particularly with respect to small to medium sized users of corrugated boxes.

The Commission concluded that the acquisition was likely to result in the removal of a vigorous and effective competitor from the market.

Unconscionable conduct (Part IVA)

Samton Holdings Pty Limited

Unconscionable conduct in commercial transactions (s. 51AA)

On 26 February 1999 the Commission instituted proceedings in the Federal Court Perth against Samton Holdings Pty Limited, alleging that the company dealt with the tenant of a lunch bar in an unconscionable manner in contravention of s. 51AA of the Act.

The Commission alleges the tenant bought the business in early 1997 with a three-month lease of the business premises and an option for a further seven-year term. Under the terms of the lease, if the tenant wished to exercise this option he was required to notify the landlords three months before the initial term expired. The tenant failed to formally notify the landlords by the required date. However, the Commission alleges that the landlords were aware, before the option expired, that the tenant wished to continue trading in the long term.

The Commission alleges that the tenant was required to pay Samton Holdings, a company owned by four of the six landlords, $70 000 to acquire the new seven-year lease.

The Commission believes that the tenant was at a special disadvantage when dealing with Samton Holdings because of his financial dependence on extended tenure of the business premises and having regard to his level of debt. The Commission alleges that it was unconscionable for Samton Holdings to take advantage of its superior bargaining position to obtain the payment of $70 000 from the tenant. It also alleges that each of the landlords and their legal adviser were involved in the conduct.

The Commission is seeking orders against Samton, each of the landlords and their legal

adviser including declarations, injunctions, the publishing of public notices, the institution of corporate compliance programs, damages and costs.

Consumer protection (Part V)

Bunnings Building Supplies Pty Ltd

False or misleading representations (s. 52)

Bunnings Building Supplies Pty Ltd has given the Commission a court enforceable undertaking in relation to country of origin claims made during an Australia Day-linked promotion in South Australia, Northern Territory and Western Australia.

In the week before Australia Day 1999 Bunnings put price cards captioned *Do It For Australia — Buy Aussie Made* on products in its stores. In fact, many of these products were not Australian made.

Bunnings acknowledged that the claims were likely to mislead consumers and gave the Commission an undertaking to:

- provide refunds to consumers who believe they were misled by the promotion;
- not misrepresent the place of origin of any products in any of its future promotions;
- place corrective advertisements in newspapers, television and in-store; and
- institute and maintain a trade practices compliance program.

The Commission acknowledged that once the matter was drawn to Bunnings' attention the company promptly removed all price cards from products in all stores and cooperated with the Commission in offering the above undertakings.

Pauls Limited

False or misleading representations (s. 53)

On 25 February 1999 the Commission instituted proceedings in the Federal Court Darwin against Pauls Limited, alleging that the company had made false or misleading claims in an advertising campaign for its white milk products in the Northern Territory.

The Commission alleges that Pauls falsely represented that:

- its milk is 'local' milk — the Commission alleges that most of Pauls' raw milk is obtained from the Malanda dairy in Queensland;
- it employs more than 150 local people to process its milk in its milk processing plant in Darwin — the Commission alleges that persons employed at the Pauls processing plant to process milk products, as distinct from other products, are much fewer than 150, and that those persons are also employed to process milk products for the Malanda dairy; and
- its Fresh Milk has been produced in the Northern Territory for over 35 years — the Commission alleges that Pauls has processed 'fresh' milk in the Northern Territory for just over 13 years.

On 9 March 1999 the Federal Court Perth ordered Pauls not to represent that its milk products are 'local milk' and are processed from raw milk obtained only from Brigalow Farms dairy in Katherine.

The orders remain in place until the full hearing. The Commission is seeking corrective advertising, permanent injunctions and refunds for consumers.

Electricity Supply Association of Australia

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

The Electricity Supply Association of Australia (ESAA) has sought Federal Court declarations that electricity supply companies are not liable to consumers, under the Trade Practices Act, for defective electricity supplies after power surges and brown-outs.

Power surges are short term over-voltages in cases where the fluctuation in voltage supplied exceeds the standard tolerance. They can cause severe damage to appliances. Brown-outs may be short or long term and result in the supply of electricity to consumers which is below the standard tolerance range of household appliances, and can damage those appliances.

Early in October 1996 the Commission received a complaint from a consumer concerning the promotion of an insurance product by Eastern Energy (an electricity retailer in Victoria). The product purported to cover consumers for damage caused by power surges, listed some of the causes of power surges, and claimed that 'Eastern Energy is not responsible for any claim arising from these events'. The Commission advised Eastern Energy of its concern with the insurance product's promotion and that it may breach s. 53(g) of the Act

In early 1997 the Commission obtained legal advice in relation to this matter and, based on that advice, the Commission formed the view that electricity suppliers were bound by the implied warranties specified in s. 71 of the Act in their supply arrangements with consumers and that power surges and brown-outs may breach the warranties that electricity supplied to consumers be of merchantable quality and be fit for a particular purpose.

In late February 1997 the Commission wrote to various electricity supply companies in relation to certain representations as to their liability for power surges and brown-outs. As a result of that, the ESAA and various electricity supply companies then sought advice on the matter. This advice did not agree with the Commission's advice.

The Commission maintained its view in this matter and further took the view that if an electricity supply company engaged in conduct which represented it was never liable for power surges or brown-outs, due to acts of God and acts of third parties (except perhaps where it was negligent), that may be likely to mislead and deceive consumers in contravention of ss 52 and 53(g) of the Act.

On 1 May 1997 the Commission subsequently wrote to the ESAA confirming its view.

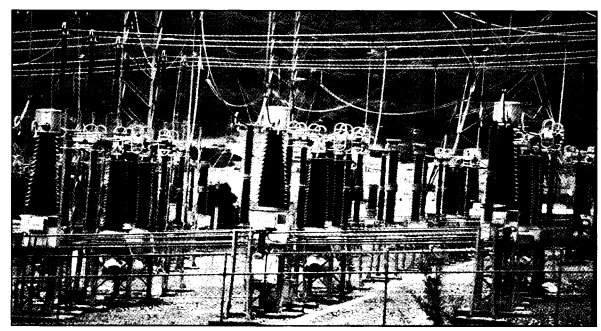
Further, acting on this view the Commission took various steps in relation to certain conduct of electricity supply companies which it considered potentially in breach of ss 52 and 53(g) of the Act, including for example:

- writing to electricity supply companies warning that certain conduct may contravene the Act;
- publicising its view as to the liability of electricity supply companies for power surges or brown-outs; and
- accepting enforceable undertakings (pursuant to s. 87B of the Act) from Energy Australia primarily to provide redress to consumers for damage due to power surges or brown-outs.

The ESAA has adopted the view that the Commission was wrong in law and that its conduct in relation to this issue was improper.

The ESAA demanded an undertaking that the Commission retract its position or the ESAA would take the matter to Court. The Commission's view has not changed.

The issue will now be decided in the Courts.



Photography by Arthur Mostead

Abel Rent-A-Car

Misleading or deceptive conduct (s. 52), false or misleading representations (s. 53), bait advertising (s. 56)

On 24 February 1999 the Commission instituted proceedings in the Federal Court Brisbane against Abel Rent-A-Car and its director, Steven Mark Conn, alleging misleading advertising of car rental services. The advertising is carried on prominent billboards in and around Brisbane, as well as in brochures and on the Internet.

Abel Rent-a-Car's advertisements contain the slogans 'Abel $29*', and 'Rent new cars and trucks $29*'. The Commission alleges this is misleading as Abel Rent-A-Car does not have trucks for rental for $29 a day; does not offer the $29 deal on Fridays, Saturdays or Sundays; and imposes an additional charge of at least 30 cents for each kilometre travelled over 25 kilometres per day.

Some of Abel Rent-A-Car's advertisements also refer to 'free insurance' and 'free delivery'. The Commission alleges this is also misleading, as insurance is subject to a substantial excess, for which either a credit card bond or additional payments have to be provided, and free delivery is not always available.

On 27 March 1999 the Commission obtained interim orders from the Federal Court requiring Abel Rent-A-Car to:

- disclose in its advertising that a mileage charge applies for its $29 rental, the days of the week for which the offer is available, and to remove all references to free delivery, or to trucks being available at that price;
- add the words 'excess applies' to its references to free insurance on its Internet site; and
- cease distribution of a brochure containing advertising that the Commission alleges is misleading.

The orders remain in place until the final hearing. The Commission is seeking permanent injunctions, declarations and orders for corrective advertising.

Nissan Australia

False or misleading representations (s. 53)

In a settlement with the Commission, Nissan Australia will offer a compensation package to consumers who bought a 1998 Nissan Diesel Patrol up to 15 November 1998.

The advertising brochure and the owner's manual had indicated the fuel capacity of the sub-tank to be 40 litres. In fact the fuel capacity of the sub-tank for the diesel models was found to be on average only 32.01 litres.

As from 16 November 1998 all advertising and owners' manuals have been corrected.

The compensation package includes:

- one year extended roadside assistance;
- a free service at 50 000 kms; and
- a free service at 60 000 kms.