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 (Part IV)

SIP Australia Pty Limited and Baker Bros (Aust) Pty Ltd

Primary boycott (s. 45), price fixing arrangements (s. 45A)

On 23 April 1999 the Commission instituted proceedings against SIP Australia Pty Limited and Baker Bros (Aust) Pty Ltd, two suppliers of ABAC compressors, alleging primary boycott and price fixing conduct.

SIP is a Sydney based supplier of compressors and welding equipment. Baker Bros is a Melbourne based supplier of engineering equipment.

The Commission alleges that in 1994, directors of the two companies signed an agreement allowing SIP to exclusively supply major retailers and automotive dealers with ABAC direct drive compressors and Baker Bros to exclusively supply assemblers, engineering and power tool distributors with those products. The agreement also stipulated a certain level of prices that were to be charged by SIP and Baker Bros for ABAC direct drive compressors.

The Commission also alleges that between November 1997 and February 1998, SIP and Baker Bros entered into an agreement to supply discrete sections of customers with direct drive and belt drive ABAC compressors. It alleges that this later agreement also involved an attempt to agree on prices to be charged for those products.

At the 5 May 1999 directions hearing Baker Bros admitted to the conduct. At the penalty hearing on 7 May Baker Bros and the Commission presented the Court with a joint submission seeking injunctions, penalties ($50 000 against the company and $5000 each against its two directors) and a compliance program. The Court reserved its decision.

At the 5 May hearing the Court ordered SIP to file a defence by 30 June 1999. A further directions hearing was set down for 22 September 1999.

Gasgo Pty Ltd

Anti-competitive agreement (s. 45)

On 6 May 1999 the Commission instituted proceedings in the Federal Court Darwin against Gasgo Pty Ltd alleging that provisions contained in a 1985 gas supply agreement are in breach of s. 45 of the Trade Practices Act.

The agreement is between Gasgo and a number of entities collectively called the Mereenie Producers.

Those provisions give Gasgo a pre-emptive right over gas supplied from the Mereenie field. The Mereenie Producers are required to offer to Gasgo in the first instance any quantity of gas that they may be negotiating with a third party on the same terms and conditions, including price, which would be offered to the third party.

In the Commission's view the pre-emptive right is anti-competitive and represents a barrier to entry into the gas market and electricity generation in the Northern Territory.

Mergers (Part IV)

The Coca-Cola Company and Cadbury Schweppes

Acquisition (s. 50)

In December 1998 The Coca-Cola Company (TCCC) announced that, subject to regulatory approval, it proposed to purchase Schweppes on a global basis. On 16 February 1999 the Commission received full details of the proposal from the merger parties when they made their submission to the Commission on the Australian aspects of the merger.

The brands affected by the acquisition in Australia include 'Dr Pepper', 'Canada Dry' and 'Schweppes' branded beverages, including Schweppes mixers, its carbonated soft drinks such as its lemonade and cola, as well as its flavoured mineral waters.

In Australia the acquisition involves the retention by TCCC of these beverage brands, while, as the proposal initially put to the Commission contemplated, the bottling assets and national and regional beverage brands like 'Solo', 'Passiona', 'Woodroofes' and 'Tarax' are to be sold off to an as yet undetermined buyer.

The Commission's inquiries indicated that carbonated soft drinks are close substitutes with one another. The evidence also indicated that juices, milks and other cold beverages are not such close substitutes, and that price rises in carbonated soft drinks do not lead to substantial switching of purchases to other beverages like juices.

The acquisition would result in the addition of the pre-eminent Schweppes brand to TCCC's range of international and national brands, and Coca-Cola Amatil's regional brands, which together include Coca-Cola, Diet Coke, Sprite, Lift, Fanta, Deep Spring, Kirks, Shelleys, Ecks and Marchants.

The proposed acquisition would see the share of the Coke business move from 65 per cent to around 75 per cent in the carbonated soft drink market. Concentration would be even higher in non-supermarket segments of the market, such as the supply of carbonated soft drinks to refrigerators in convenience stores or to hotels, clubs and sporting venues.

There is competition between TCCC's products and the various brands of Schweppes. TCCC (through Coca-Cola Amatil) sells a variety of brands that compete with Schweppes including cola, lemonade, mixers and carbonated mineral waters.

With the Schweppes international brands in particular, the Coke business would have a pre-eminent range of premium priced, premium branded carbonated soft drinks. Besides the direct diminution of competition between TCCC and Schweppes the merger would create a business that would offer a very powerful portfolio of established brands. This portfolio would cover most parts of the market and threaten the capacity of the remaining and/or new participants to compete in supplying retailers. Retailers in turn would have reduced choice as to the source of supply.

The Coke business has an extensive distribution system, with the large majority of Australia's beverage vending machines and glass door refrigerators, and a network of exclusive accounts for the supply of post-mix. The Commission considers that no competitor, even with the national brands of Schweppes (which TCCC does not propose to retain), could provide an effective constraint on the merged firm.

With barriers to entry or expansion on a national scale in the relevant market being very high, the Commission was concerned that the removal of the Schweppes international brands as a vigorous, effective and innovative competitor to the Coke business, would be likely to eliminate any real prospect of effective future competition, potentially giving the Coke business control of the carbonated soft drink market in Australia.

Market inquiries indicated that the presence of the Schweppes brands in the market has been significant in constraining prices, maintaining service levels and generating innovation. Schweppes provides significant competition to the Coke business across all channels of distribution — through supermarkets, convenience stores, vending machines and in such places as hotels, clubs and sporting venues.

On 8 April 1999 the Commission announced that the proposed acquisition was likely to

breach the merger provisions of the Trade Practices Act. The parties have put to the Commission a revised proposal and the Commission is currently making inquiries of the marketplace about the effect on competition of this proposal.

British American Tobacco Plc and Rothmans International BV

Merger (s. 50)

On 28 January 1999 the British American Tobacco Plc (BAT) notified the Commission that it proposed to enter into a world-wide merger with Rothmans International BV.

BAT has a 67 per cent interest in the Australian cigarette manufacturer WD & HO Wills Holdings Limited, and Rothmans International BV has a 50 per cent interest in the Australian cigarette manufacturer Rothmans Holdings Limited.

Following extensive market inquiries the Commission concluded that the proposed merger was likely to substantially lessen competition in the Australian cigarettes market.

The Commission's view reflects its concern about the likely impact of the increase in market concentration and the merged group's control of major Australian cigarette brands, in a market where import competition is negligible and barriers to new entry are substantial.

The proposed merger would give the merged group a 62 per cent share of the Australian cigarettes market. The merged group would have a 96 per cent share of the premium cigarette segment, 49 per cent share of the mainstream segment and 61 per cent share of the value segment. It would control nearly all of the major Australian cigarette brands, including Benson & Hedges, Winfield, Holiday and Horizon. Independently distributed imports have market share of only about 0.6 per cent, of which Philip Morris accounts for approximately 0.5 per cent.

The Commission considered submissions by the parties that proposed changes in tax arrangements would lead to an increase in import competition. However, its inquiries among market participants suggested that the potential for increased import competition was limited by:

- barriers to establishing retail distribution links independently of incumbent suppliers;
- existing trading arrangements between manufacturers and retailers that would restrict the opportunities for new entrants to gain brand visibility, brand recognition and brand loyalty among smokers; and
- restrictions on advertising that limit opportunities to build brand images.

The Commission found no evidence of planned imports of house-brand or generic cigarettes by wholesalers or retailers.

It was also concerned about the effect of the proposed merger on the supply of 'roll-your-own' tobacco and on the acquisition by the merged group of tobacco leaf from Australian growers.

On 31 March 1999 the Commission advised the merger parties that the proposed merger was likely to breach the merger provisions of the Trade Practices Act.

Pirelli Cables Australia Limited and Metal Manufactures Energy Cables Division

Acquisition (s. 50)

On 31 March 1999 the Commission announced that it would not intervene in the proposed acquisition of Metal Manufactures Energy Cables Division by Pirelli Cables Australia Limited.

The acquisition will result in two key domestic manufacturers controlling just over 80 per cent of the Australian energy cables market.

The Commission was concerned to discover, during market inquiries, the existence of an agreement between Metal Manufactures Limited and BICC plc (a UK based cable manufacturer with extensive cable manufacturing facilities in the region) which prevented BICC from competing in Australia.

To overcome these competition concerns Metal Manufactures Limited gave the Commission a court enforceable undertaking to formally release BICC plc from the no compete

provisions of the agreement and not to enforce the no-compete obligations (if any) arising from any other arrangements with BICC.

The Commission still has concerns that the agreement existed in the past and is considering any issues it raises under other parts of the Trade Practices Act.

The Commission was satisfied that the existence of competitor Pacific Dunlop Cables Group and a number of smaller manufacturers/importers, combined with the ability of BICC plc to compete in Australia, was likely to ensure that the merger did not result in a substantial lessening of competition.

Adelaide Brighton Limited

Acquisition (s. 50)

On 30 March 1999 Adelaide Brighton Limited (ABL) publicly announced a major restructuring of ABL in which The Rugby Group PLC would acquire a controlling interest in ABL.

On the basis of inquiries the Commission has made so far, which were limited by confidentiality requirements imposed by the parties, it has advised the parties that the proposed acquisitions may raise competition issues especially in the Western Australian market for cement.

The parties have indicated that they intend to lodge an authorisation application in respect of the restructuring.

Consumer protection (Part V)

Instant Document Retrieval Pty Ltd

Misleading and deceptive conduct (s. 52), false and misleading representations about work-at-home schemes (s. 59)

On 13 April 1999 the Commission instituted proceedings in the Federal Court Brisbane against Instant Document Retrieval Pty Ltd and its Directors, Mr Earl Woolley and Mr William McIntosh, for alleged misleading and deceptive conduct in relation to distributorships for its doctrieve product.

It alleges that IDR made false representations in relation to:

- the role of prospective master distributors of the doctrieve product;
- the training provided to master distributors;
- the computer experience required by prospective master distributors;
- the projected income of master distributors; and
- the full establishment costs of a master distributorship.

A directions hearing has been set down for 11 June 1999.

Product safety (Part V–VA)

Dimmeys Stores Pty Ltd and Starite Distributors Pty Ltd

Alleged non-compliance with the mandatory consumer product safety standard for pedal bicycles (s. 65C)

On 21 April 1999 the Commission instituted criminal proceedings in the Federal Court Melbourne against Dimmeys Stores Pty Ltd and Starite Distributors Pty Ltd for supplying pedal bicycles that allegedly did not comply with the mandatory standard for pedal bicycles.

MHG Plastic Industries Pty Ltd

Alleged non-compliance with the mandatory consumer product safety standard (s. 65C)

On 13 May 1999 the Commission instituted proceedings in the Federal Court Sydney against MHG Plastic Industries Pty Ltd for selling motor cycle helmets that allegedly did not comply with the mandatory safety standard relating to protective helmets for vehicle users.

MHG is the sole Australian manufacturer of motor cycle helmets and manufactures Eldorado brand helmets in open face, full face and motocross styles. MHG is disputing the manner in which the testing was conducted.

The Commission is seeking declarations and injunctions.

Anti-competitive conduct — telecommunications (Part XIB)

Telstra

On 13 April 1999 the Commission issued another competition notice against Telstra in respect of its failure to implement an efficient and effective local call transfer process (known in the industry as 'commercial churn'). The commercial churn process relates to the transfer of local call customers from Telstra to other carriers.

The Commission has now issued four notices against Telstra in relation to its local call transfer service.

On 2 December 1998 the Commission issued three competition notices against Telstra alleging that Telstra's commercial churn conduct was anti-competitive. The Commission instituted proceedings in respect of two of the three notices in the Federal Court on 24 December 1998.

The Commission alleges that Telstra has required other carriers wanting to transfer customers from Telstra to act as Telstra's debt collector. Further, where carriers choose not to collect Telstra's debts, Telstra imposes a fee of $15 per line, irrespective of whether the carrier is transferring one line or a number of lines.

The third competition notice, which came into force on 25 January 1999, alleges that Telstra requires other carriers wanting to transfer customers from Telstra to use a manual process that is slow, inefficient and cumbersome. The Commission instituted proceedings in relation to the third notice in the Federal Court on 23 April 1999.

The fourth notice alleges that the package of conduct that is continuing, along with the price charged by Telstra for churn, is cumulatively a breach of the competition rule. The Commission instituted further proceedings in relation to this notice on 23 April 1999.

Telstra may be liable for penalties of up to $10 million for each of the alleged offences and $1 million per offence per day for each day that the conduct has continued while the competition notices have been in force.