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 conduct (Part IV)

Joyce Corporation Ltd

Anti-competitive agreement (s. 45)

On 27 November 1998, penalties and costs of $1.15 million were imposed on the Queensland subsidiary of foam manufacturer Joyce Corporation Ltd and two managers for their role in a price fixing and market sharing arrangement.

The Commission had instituted proceedings following a three-year investigation into alleged price fixing and market sharing in the flexible polyurethane foam market in Queensland between the mid to late 1980s and early 1996. In December 1997 the Federal Court Melbourne imposed $2 million in penalties and costs on Foamlite (Australia) Pty Ltd and Vita Pacific Limited, subsidiaries of Pacific Dunlop Limited, and Peter Dell, Foamlite's Queensland Manager, for their part in the arrangement. (See *ACCC Journal* 12.)

Joyce admitted that its subsidiary entered into the arrangement with its Queensland competitors, Foamlite and Vita Pacific. The arrangement followed a friendship that had developed in the mid-1980s between Ronald Windebank, acting in his role as Queensland State manager of Cablemakers (Cablemakers was acquired by Joyce in 1988), and the State managers of Foamlite and Vita. They agreed to compete on non-price matters such as style and delivery, but not to compete for each others' customers on price.

The Court accepted joint submissions and ordered penalties totalling $1 million on Joyce Corporation Limited ($850 000), Ronald Windebank ($100 000), and John Pike, Joyce's commercial manager ($50 000). It also issued injunctions restraining them from repeating the conduct for three years. The company agreed to pay $150 000 toward the Commission's costs.

The Commission noted Joyce's cooperation and its agreement to upgrade its existing trade practices compliance program.

Ice Creameries of Australia Pty Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations about performance characteristics (s. 53(c)), misleading representations about business earnings generally (s. 59(2)), exclusive dealing (ss 47(6) and (7))

On 27 November 1998 the Federal Court Brisbane issued consent injunctions against Ice Creameries of Australia Pty Ltd (ICA) in relation to alleged exclusive dealing conduct and misrepresentations about the profitability of its franchises.

The Commission instituted proceedings on 26 March 1998 against ICA and three individuals alleging that they had made misleading and deceptive representations that particular franchise sites would be suitable and that certain profit levels could be expected. The individuals were former Managing Director, David Atchison; National Marketing Manager, John Berry; and National Products Manager, Jenni Berry.

It also alleged that ICA engaged in exclusive dealing conduct, requiring its franchisees to

purchase stock and equipment and ongoing supplies through nominated suppliers, and that ICA then received rebates from these suppliers.

The Commission alleged that, as a result, a number of franchisees found their businesses were unprofitable and lost significant amounts of money.

Following the liquidation of ICA on 22 May 1998, proceedings were settled against all respondents on the basis of consent injunctions.

The injunctions restrain the company from repeating the alleged conduct in the future.

Visy Paper Pty Ltd and the Amcor Printing Papers Group Ltd

Anti-competitive agreement (s. 45)

On 4 December 1998 the Commission instituted proceedings against Visy Paper Pty Ltd and the Amcor Printing Papers Group Ltd (formerly Australian Paper Ltd) in the Federal Court Sydney, alleging collusion.

The Commission alleges:

- Visy Paper and the Amcor Printing Papers Group had a market sharing arrangement; and
- Visy Paper attempted to induce Northern Pacific Paper, a waste collection company, to enter into a market sharing agreement.

Visy Paper and Amcor are the principal acquirers of recyclable waste paper in Australia. The recyclable waste paper is used in their paper and packaging manufacturing operations.

The Commission alleges that Amcor withdrew a competitive quote to acquire recyclable waste paper from Flagstaff, a sheltered workshop in the Wollongong area, NSW, around August 1996. The quote was allegedly withdrawn in accordance with an agreement between senior executives of Amcor and Visy Paper.

The Commission also alleges that between 1996 and 1997 Visy Paper attempted to enter into a market sharing agreement with Northern Pacific Paper by providing it with a number of draft agreements specifying that Northern Pacific Paper would not collect or offer to collect recyclable waste paper from customers or prospective customers of Visy Paper.

The Commission is seeking orders against Visy Paper and Amcor, including declarations, injunctions, costs and orders requiring the institution of trade practices compliance programs. It is also seeking penalties against these companies and five senior employees. The first directions hearing for both matters will be held on 4 February 1999.

Moduplay and Megatoy Play Systems Pty Ltd

Anti-competitive agreement (s. 45)

On 30 October 1998 the Commission accepted undertakings from Moduplay, and Megatoy Play Systems Pty Ltd in relation to an alleged anti-competitive agreement regarding the supply of playground equipment.

It is alleged that in 1996 the companies entered into an agreement whereby Megatoy Play would not bid for contracts to supply playground equipment to local councils when Moduplay intended to bid. The Commission believed the agreement was potentially in breach of s. 45 of the Act.

The Commission noted that Moduplay and Megatoy had acted promptly and cooperatively to address its concerns. The companies have agreed to implement a trade practices compliance program and provide playground equipment, worth thousands of dollars, to affected local councils.

Mergers (Part IV)

Goodman Fielder and Bunge

Acquisition (s. 50)

On 23 November 1998 the Commission noted that Goodman Fielder Limited had signed an agreement to purchase the Australian milling and baking assets of Bunge International Limited.

This proposal was put to the Commission some time ago. It has advised Goodman Fielder and Bunge that it does not intend to oppose the sale, provided Goodman Fielder enters into enforceable undertakings to divest certain milling

assets to ensure the relevant flour markets remain competitive.

Details of the proposed undertakings are, at this stage, commercially confidential.

United Medical Protection and Medical Defence Union Limited (UK)

Acquisition (s. 50)

On 27 November 1998 the Commission announced it would not intervene in the proposed merger between United Medical Protection and Medical Defence Union Limited (UK).

These organisations provide medical indemnity cover for medical practitioners in a number of Australian States. They offer both discretionary (or claims incurred) and insurance products.

The Commission took into consideration the findings and recommendations of the Tito Report into Compensation and Professional Indemnity in Health Care issued in 1995. Of particular relevance was the recommendation that 'health professional indemnity must be contractually based, not discretionary, and fully funded from premiums collected for this purpose'. In this regard, the Commission noted that three medical defence organisations are now offering an insurance product to medical practitioners.

The Commission also noted that commercial insurers are seeking to compete with medical defence organisations by offering a professional indemnity insurance product to medical practitioners throughout Australia.

There was evidence to suggest that medical practitioners are becoming more aware of the different types of professional indemnity cover available in the market. Price issues are becoming more relevant for medical practitioners in deciding what type of cover they need as well as from where to obtain it.

There also appeared to be significant benefits arising from the merger in terms of the ability of the merged organisation to reduce the overall cost of reinsurance, which is a significant factor in determining subscription rates.

The Commission sought assurances from the parties that the accrued benefits of Medical Defence Union members would not be affected by the merger. It also sought to confirm that there would be no obstacles to members of either organisation switching to competing medical defence organisations or commercial insurers if they chose.

PBL and Foxtel

Acquisition (s. 50)

On 3 December 1998 the Commission announced it would not intervene in PBL's acquisition of a 25 per cent interest in Foxtel.

In its analysis of the broadcasting industry, the Commission has taken the view that the entry of PBL into Foxtel will not in itself lead to a substantial lessening of competition in any market.

However, it would be concerned if the alliance of the interests of PBL, News and Telstra in pay TV were used to lessen competition in pay TV and related broadcasting and telecommunications markets in the future. It is particularly concerned about the acquisition of programming rights, especially sports programming rights, for both pay TV and free-to-air broadcasting.

The Commission will therefore closely monitor any cooperative behaviour flowing from this acquisition.

Consumer protection (Part V)

Golden Sphere International Incorporated

Referral selling (s. 57), pyramid selling (s. 61)

On 11 December 1998 Golden Sphere International Incorporated was ordered to pay $550 000 into a trust fund to provide refunds to consumers who invested in its pyramid selling scheme.

On 1 June 1998 the Federal Court Brisbane found that Golden Sphere International Incorporated and two Australian promoters had breached the Trade Practices Act in promoting the scheme. Establishing the trust fund was part of the Court's orders. (See *ACCC Journal* 15.)

The fund is being managed by the Insolvency and Trustee Service of Australia (ITSA). Over $250 000 has been recovered and the Commission is attempting to locate further funds.

The Commission has published notices in newspapers and on its website to inform consumers about how to obtain refunds from ITSA.

Goldstar Corporation Pty Ltd

Misleading and deceptive conduct (s. 52), telefraud (s. 64)

On 6 November 1998 the Federal Court imposed a two month prison sentence, suspended for two years, on Grant Warren Hudson for breaches of undertakings he had given to the Court in July.

The Commission had sought orders preventing Hudson and his company, Goldstar Corporation Pty Ltd, from seeking payment for unsolicited advertising in three publications: the *National Federal State and Local Government Advertiser*, the *Municipal Trades and Services Directory* and the *Child Abuse Review*.

It alleged that Hudson and Goldstar had falsely represented that companies they approached had previously ordered advertising from Goldstar. In response, Hudson had given a written undertaking to the Court that he would not engage in the alleged conduct.

The Commission instituted further action in September after obtaining evidence suggesting that Hudson and Goldstar were continuing to engage in the alleged conduct.

In sentencing, Mr Justice Drummond said it was a 'wilful, deliberate and serious contempt'. Justice Drummond ordered Goldstar to pay a fine of $10 000 as well as the Commission's legal costs.

Several weeks after this proceeding was determined, the Commission received a complaint from a company alleging that it had received a further demand for payment for unsolicited advertising from the *National Federal State and Local Government Advertiser*. Consequently, on 11 December 1998 the Commission filed a notice of motion alleging a further contempt by Goldstar and Hudson. A directions hearing was held on 16 December 1998 and the trial has been set down for 19 January 1999.

A1 Mobile Radiator Repairs Pty Ltd

False or misleading representations (s. 53)

On 25 November 1998 the Commission obtained interim orders in the Federal Court restraining Adelaide based franchisor A1 Mobile Radiator Repairs Pty Ltd and its director, Norman Sidney Trayling from representing the extent of the client base, estimated earnings or profits, and availability of work in relation to its franchising operation, unless based upon reasonable grounds.

The action follows allegations by four franchisees that A1 Mobile Radiator Repairs, through a series of advertisements, oral representations and promotional material, misrepresented the profitability, risk and other aspects of its business so as to recruit franchisees. The allegations concern only the franchising operation, not the business, of repairing radiators.

The Commission is also seeking declarations of fact and orders that include freezing of corporate and personal assets, costs, compensation and damages. A further directions hearing will be held on 11 January 1999.

Billbusters Pty Limited

Misleading or deceptive representations (s. 53)

On 23 November 1998 the Commission obtained interim orders in the Federal Court restraining Billbusters Pty Limited and its director Miles Kendrick-Smith from:

- representing that it performs audit services on accounts or invoices of Telstra;
- using or dealing in any manner with moneys received from its customers for the purpose of paying accounts or invoices of Telstra; and
- representing that the Commission has the power to prevent Telstra from disconnecting telephones of Telstra customers.

Pending the trial of the matter, Billbusters and Miles Kendrick-Smith are restrained from dealing with their assets.

Westco Jeans (Aust) Pty Ltd

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

On 11 December 1998 the Commission instituted further action in the Federal Court Melbourne against Westco Jeans (Aust) Pty Ltd for allegedly breaching court orders made in February 1998 year.

The Commission instituted proceedings in 1997 following complaints from consumers that Westco was misrepresenting consumers' rights to refunds. (See *ACCC Journal* 13.)

The Commission alleges that Westco, a Melbourne based clothing retailer with stores nationally, continues to misrepresent, in store signs, the rights of consumers to obtain cash refunds.

The Commission seeks to ensure that Westco complies with the court orders, namely to refrain from making false representations about consumers' rights to a refund, and that it improves the trade practices compliance program instituted following the Commission's earlier action.

Kmart Australia Ltd

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

On 15 December 1998 the Commission settled its Federal Court litigation with Kmart Australia Ltd.

The Commission had alleged that in 1997–98 the Firle Kmart store in Adelaide and other Kmart stores throughout Australia had falsely represented the savings possible on a Black & Decker 2-cup espresso machine.

There was a series of price reductions on the product over many months. In each instance the shelf label claimed savings based on a comparison of the current selling price and the original price at which the product was sold, not the immediate past selling price. The Commission alleged this breached the two-price advertising and misleading and deceptive conduct provisions of the Act.

Kmart understood the Commission's concerns and worked constructively to resolve this proceeding. The settlement reached involves consent orders by the Federal Court. Kmart has agreed to:

- place corrective advertisements in Australian daily newspapers;
- compensate consumers who claim they were misled by the representations; and
- contribute to the Commission's costs.

Kmart has given an undertaking to the Court that it will not, for three years, represent that purchasers would save a specified amount by a price reduction, unless the saving is calculated in relation to a price that has applied for a reasonable period before the reduction.

It has also given a court enforceable undertaking to review its current trade practices compliance program and introduce changes to ensure that it complies with the Australian standard.

The Commission acknowledged the cooperation of Kmart, a member of the Coles Myer Group, in reaching a productive outcome.

Go-Lo

Failing to meet labelling standard (s. 66C)

On 30 October 1998 the Commission accepted undertakings from Go-Lo in relation to the labelling of cosmetic goods sold in Go-Lo's stores.

The Commission considered that the company had potentially contravened s. 66C of the Act as some of its labelling failed to meet required standards.

Go-Lo agreed to ensure that its goods would be labelled appropriately and to implement a trade practices compliance program.

Golden Circle Limited

Misleading and deceptive conduct (s. 52), false and misleading representations about origin of goods (s. 53(eb))

On 19 November 1998 the Commission accepted court enforceable undertakings from Golden Circle to change its labelling of certain apple and orange fruit juice and drink products.

The labels said the beverages were 'Australian Grown', 'Australian Made' and 'Made in Australia from quality local and imported ingredients subject to seasonal availability'. In fact, from 1995 to 1997 all these products contained substantial amounts of imported orange and/or apple juice concentrate.

The Commission believes the high levels of imported concentrate made it misleading to use the company logo containing 'Australian Grown' and 'Made in Australia' or 'Australian made' labels. It also believes the 'Made in Australia from quality local and imported ingredients subject to seasonal availability' was misleading as the use of imported concentrate occurred over three years and shortfalls in Australian production would not have been unexpected.

Golden Circle has agreed to:

- review and amend, where necessary, the labelling of its products;
- publish a corrective notice explaining its conduct to consumers Australia-wide; and
- implement a trade practices corporate compliance program.

The Commission acknowledged Golden Circle's cooperation and assistance in resolving this matter.

The Commission's assessment of the matter occurred before the enactment of new laws covering country of origin. Under the new law a corporation has a country-of-origin defence if the goods are substantially transformed in the country that is the subject of the claim **and** 50 per cent or more of the cost of production/manufacture occurred in that country.

Harris DE Pty Limited

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

On 21 October 1998 the Commission accepted court enforceable undertakings from Harris DE Pty Limited in relation to a Moccona promotion. Harris is a leading coffee distributor and seller.

In 1997 a Harris supermarket promotion of Moccona coffee offered prizes of 1000 mobile phones. Although the promotion said it was the consumer's responsibility to pay monthly telephone charges, the Commission believes Harris did not make available, at the point of sale, adequate details of the terms, conditions and overall price of entering into the mobile telephone contracts.

Harris agreed to offer mobile phone prizewinners three options, including a $100 credit against a mobile phone handset and/or service plan of the consumer's choice. It will also review its trade practices compliance program.

The Commission noted Harris' cooperation in this matter.

EnergyAustralia

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

On 10 December 1998 the Commission accepted court enforceable undertakings from EnergyAustralia in relation to the power company's statements that it was not liable for damage to consumers' property caused by defects in the power supply. The Commission believes this was in breach of s. 52 of the Trade Practices Act.

The Commission was particularly concerned that consumers may have had claims for compensation wrongly rejected or may have been discouraged from lodging a claim with the company, as a result of the misinformation.

The Act defines electricity as a good and provides that goods supplied must be fit for the purpose intended. If a power surge causes damage, the electricity supply is not, in the Commission's view, fit for the purpose intended and therefore the supplier is liable under the Act.

EnergyAustralia has undertaken to pay compensation to customers who suffered loss or damage to property as a result of defects in the power supply since 1 March 1996, unless it can prove the damage was a result of problems in the customer's own installation. It has also undertaken to:

- fund an independent review of claims for compensation which are rejected, or where disputes over the amount of compensation arise;

- write to its customers informing them of its Guaranteed Customer Service Standards and the rights of consumers to make claims under the Trade Practices Act in relation to the quality of electricity supply;
- review its complaints handling procedure for compliance with the Australian Standard; and
- review its trade practices compliance program for compliance with the Australian Standard.

The Commission commended EnergyAustralia for setting an example to industry by its swift action.

Product safety (Part V–VA)

Glendale Chemical Products Pty Limited

Misleading and deceptive conduct (s. 52), false and misleading representations (s. 53), defective goods (ss 75AD, 75AF)

On 11 December 1998, in the Full Federal Court Sydney, Justices Wilcox, Tamberlin and Sackville dismissed an appeal by Glendale Chemical Products Pty Limited against Justice Emmett's earlier decision in March 1998 to award significant damages to a man burned by caustic soda. (See *ACCC Journal* 14.)

Glendale argued that it was not the manufacturer of the product — which carried the label 'Glendale Caustic Soda' — but merely the supplier in that the product was packed by Glendale.

The Court dismissed this argument, indicating that Justice Emmett's decision that Glendale was the deemed manufacturer was consistent with the philosophy of the two Law Reform Commissions upon which Part VA of the Act is based. The Court was of the view that, if this approach was not taken, it would be easy for a person putting a product on the Australian market to frustrate the liability regime proposed by the Commissions.

The Full Court upheld Justice Emmett's decision that the Glendale Caustic Soda had a defective label and that the injured consumer did not contribute through his acts or omissions to the injury that he suffered.

Although not required to do so, the Full Court expressed a reservation about Justice Emmett's decision that there was no false or misleading representation as to the safety of the product. It was of the view that 'there is no textual or policy reason to give a narrow construction to the expression "performance characteristics" in s. 53(c)' of the Act.

Anti-competitive practices — telecommunications (Part XIB)

Telstra

On 2 December 1998 the Commission issued three new competition notices regarding Telstra's local call transfer process (known within the industry as 'commercial churn').

The new notices expose Telstra to penalties of up to $30 million plus $3 million for each day the contraventions continue.

The Commission is concerned about the difficulties confronting other telecommunication carriers in having to use Telstra's manual transfer process, which it considers to be cumbersome, slow, inefficient and costly.

Carriers must use this manual system or, alternatively, use an automated process that requires carriers to be Telstra's debt collector. This requirement imposes large internal costs on the carriers.

In the Commission's view the ability of carriers to offer local calls is critical to ensuring a competitive telecommunications market.

Concerns about the transfer process were first raised in August 1998 and the Commission issued a competition notice on 10 August. Telstra made a number of changes to the transfer process in September. But the Commission continued to receive complaints from industry and considered further action was necessary in order to prevent anti-competitive conduct in the local call market.