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)

Mr David Charles Miller

Third line forcing (s. 47)

On 7 May 1999 the Commission settled proceedings against Mr David Charles Miller, a partner of Perth law firm Kott Gunning, in relation to his involvement in a real estate auction program promoted by Sure Sale Systems Pty Ltd and Sure Sale Systems (Australasia) Pty Ltd.

The Commission alleged that Sure Sale offered services under the Sure Sale System to vendors in Western Australia on condition that they acquired services from nominated third parties, including settlement services from Kott Gunning solicitors.

Mr Miller, who was legal adviser to Sure Sale, prepared the standard contracts used by the companies and provided advice on promotional material distributed to the public.

By consent, the Federal Court declared that Mr Miller:

- aided, abetted, counselled or procured Sure Sale to breach s. 47 of the Trade Practices Act; and
- was directly or indirectly knowingly concerned in, or a party to, the contravention by Sure Sale of s. 47 of the Act.

Mr Miller was also ordered to pay the Commission's costs.

Mr Miller gave an undertaking to the court not to be involved in conduct prohibited by s. 47 of the Act for three years. He also agreed to publish articles relating to the matter in industry publications.

Remington White Australia

Third line forcing (s. 47)

On 17 June 1999 the Commission accepted an undertaking from Remington White Australia in relation to access to a real estate database.

Remington White had required Flagstaff Real Estate to join the Real Estate Institute of the Northern Territory (REINT) before it could join the Rent Check Database that Remington White operated.

The Commission formed the view that this requirement breached the Trade Practices Act.

Remington White has undertaken to grant Flagstaff membership of the database, and not to refuse any organisation membership of, and access to, the database for the reason that the organisation is not a member of REINT.

The Commission acknowledged Remington White's cooperation in achieving a suitable outcome in this matter.

Baker Bros (Aust) Pty Ltd

Primary boycott (s. 45(2)), price fixing agreement (s. 45A)

On 29 June 1999 the Federal Court imposed pecuniary penalties totalling $60 000 on Baker Bros (Aust) Pty Ltd and its two directors,

Andrew Clive Baker and Guy Edwin Baker, for price fixing and market sharing in relation to the supply of compressors.

The Commission alleged that in 1994, directors of Baker Bros and SIP Australia Pty Limited signed an agreement allowing Baker Bros to exclusively supply assemblers, engineering and power tool distributors with ABAC direct drive compressors and SIP to exclusively supply major retailers and automotive dealers with the compressors. The agreement also stipulated the prices to be charged for the compressors.

The Commission also alleged that between November 1997 and February 1998 Baker Bros and SIP agreed to supply separate sections of customers with direct drive and belt drive ABAC compressors, and that this later agreement involved an attempt to agree on prices.

The Federal Court Melbourne accepted joint submissions from Baker Bros and the Commission regarding injunctions and penalty. The joint submissions took into account the assistance and cooperation that Baker Bros provided to the Commission in its investigations. The court accepted the submitted penalties of $50 000 for Baker Bros and $5000 each for Andrew and Guy Baker. This is the first time the Commission has offered joint submissions using its leniency policy.

The Commission's leniency policy stipulates that leniency is most likely to be considered where companies and individuals:

- come forward with valuable and important evidence of a contravention of which the Commission is otherwise unaware or has insufficient evidence to initiate proceedings;
- take prompt and effective action to terminate their part in the activity upon discovery of the breach;
- provide the Commission with a full and frank disclosure of the activity and all relevant documentary and other evidence available to them and cooperate fully with the Commission's investigation and any ensuing prosecution;
- have not compelled or induced any other corporation to take part in the anti-competitive agreement and were not ringleaders or originators of the activity;
- are prepared to make restitution where appropriate;
- are prepared to take immediate steps to rectify the situation and ensure that it does not happen again; and
- do not have a prior record of Trade Practices Act offences.

In its joint submission to the court, the Commission submitted that Baker Bros had substantially satisfied these requirements and accordingly recommended penalties of a relatively low order.

In handing down his judgment Justice Goldberg stated that, while the court was not bound by the Commission's leniency policy nor required to take it into account in any given case:

> the matters which the policy takes into consideration are matters relevant to a determination of the appropriate penalties to impose for contraventions of Part IV of the Act.
>
> Although the proposed penalties fall at the lower end of the range I am satisfied that it is appropriate that those penalties be imposed having particular regard to the absence of any market power held by Baker Bros, the assets of the company and its directors and the immediate and full assistance and cooperation offered to the Commission.

Baker Bros also agreed to provide s. 87B undertakings to implement a trade practices corporate compliance program and to pay part of the Commission's legal costs.

SIP Australia Pty Limited was not a party to the joint submissions and is required to file a defence in the court by 30 June 1999. A directions hearing has been set down for 22 September 1999.

Construction Forestry Mining Energy Union

Secondary boycott (s. 45D)

On 2 July 1999 Federal Court proceedings against the Construction Forestry Mining

Energy Union (CFMEU) in Western Australia were concluded with consent orders.

The Commission had alleged that between 27 November and 2 December 1997 the CFMEU hindered or prevented operators of crane hire services supplying crane services to Western Portables to unload transportable buildings at a construction site at Collie, Western Australia.

The consent orders include:

- the CFMEU undertaking to the court that, for three years, it will not engage in similar conduct — the undertaking does not apply to conduct protected by the *Workplace Relations Act 1996* or other federal law;
- a payment by the CFMEU to the Commission to reimburse costs incurred by Western Portables in connection with the dispute;
- an undertaking by the CFMEU to implement a trade practices compliance program; and
- an order requiring the CFMEU to contribute to the Commission's costs.

Mergers (Part IV)

The Coca-Cola Company and Cadbury Schweppes

Merger (s. 50)

On 8 June 1999 the Commission announced its rejection of a revised proposal by The Coca-Cola Company to buy the international Cadbury Schweppes soft drink brands.

In March 1999 the Commission opposed a proposal by The Coca-Cola Company to purchase assets of Cadbury Schweppes primarily related to its beverage trade marks in Australia. This proposal envisaged that The Coca-Cola Company would retain only the Cadbury Schweppes international beverage brands (that is, *Schweppes, Dr Pepper, Canada Dry*). All other assets would be divested to an undetermined buyer.

The merger parties lodged a revised proposal in April. The Coca-Cola Company still proposed to acquire the international beverage brands of Cadbury Schweppes, but would license the rights to produce, sell and distribute these brands to its part-owned Australian bottler Coca-Cola Amatil. Cadbury Schweppes's Australian subsidiary, Cadbury Schweppes Australia, would acquire ownership of all carbonated soft drink brands currently owned by Coca-Cola Amatil and not licensed from The Coca-Cola Company. These brands include *Kirks, Halls, Gest, Shelleys, Ecks, Marchants* and *Deep Spring*.

The revised proposal did not address the Commission's competition concerns arising from the original proposal. Its core concern was that the premium *Schweppes* branded drinks remained part of the transaction.

The merger would result in a market structure where Coca-Cola would control the leading carbonated drinks in almost every category. With the Schweppes brand in its portfolio, The Coca-Cola Company's share of the Australian carbonated soft drink market, currently 65 per cent, would increase by several percentage points.

Coca-Cola would possess a pre-eminent range of national premium priced, premium branded carbonated soft drinks, whereas Cadbury Schweppes Australia's portfolio would comprise primarily regional brands with little or no brand strength and a low presence outside the supermarket channel. The Commission was of the view that the effectiveness of the competition provided by Cadbury Schweppes Australia was likely to have been marginalised in the various segments such as milk bars and convenience stores; the vending machine segment; the 'on-premise' segment, which includes pubs, clubs and entertainment venues; and the supermarket segment.

The Commission considered that Cadbury Schweppes Australia, and the *Schweppes* brands in particular, had been a significant force in constraining prices, maintaining service levels and generating innovation in the carbonated soft drink market. It was concerned that small business and consumers would pay substantially more for carbonated drinks if the merger were to proceed.

A number of overseas competition law enforcement authorities have been scrutinising

the proposed Coca-Cola/Schweppes merger. On 24 May 1999 the merger parties announced that they were revising the international transaction to exclude more than 20 European countries, following regulatory resistance in a number of these jurisdictions.

Waratah and Hunter Towage Services

Acquisition (s. 50)

On 4 June 1999 the Commission announced that it would not intervene in the Waratah acquisition of Hunter Towage Services, on the condition that Waratah provides undertakings relating to its future conduct of the towage business.

Waratah Towage is a joint venture between Adsteam Marine and Howard Smith that operates towage businesses in Port Botany, Port Jackson and the Port of Newcastle. In late 1998 Waratah advised the Commission of its intention to acquire Hunter Towage Services, a consortium consisting of BHP and a number of overseas ship operators.

Following extensive market inquiries of shippers, ship operators, agents and other interested parties, the Commission formed the view that the proposed acquisition was likely to substantially lessen competition in the Newcastle market for the provision of towage services.

Waratah subsequently proposed a series of undertakings to address the Commission's concerns. This proposal was put to market participants for their views and, on balance, market participants supported the proposed undertakings subject to a few additional provisions and changes. The Commission sought Waratah's agreement to alter the proposed undertakings in line with the proposals put forward by market participants.

Waratah has given an undertaking for three years to:

- maintain prices for towage services in Newcastle at current levels; and
- not introduce any new charges or increase any existing charges for the provision of towage services in Newcastle.

Waratah also undertook to:

- increase tariff rates in Newcastle after the initial three year period only in accordance with the requirements of the Prices Surveillance Act;
- enter into a service agreement with the Newcastle Port Corporation to ensure that service levels do not decline in the port post acquisition and that the benefits arising from any rationalisation in the port can be fully realised; and
- provide the Commission with financial information about the operation of the Waratah towage business in Newcastle on an annual basis, so that the Commission can monitor the level of efficiencies generated post-acquisition.

Photography by Arthur Mostead

British American Tobacco Plc and Rothmans International BV

Merger (s. 50)

On 2 June 1999 the Commission accepted a court enforceable undertaking in relation to the world-wide merger between British American Tobacco Plc (BAT) and Rothmans International BV. The undertaking addresses the Commission's concerns about the effect on Australian competition of the proposed merger.

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.

In March 1999 the Commission concluded that the proposed merger was likely to breach the

merger provisions of the Trade Practices Act. It had concerns about the likely impact of increased 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 merged group has undertaken to sell a portfolio of cigarette brands, roll-your-own tobacco and cigarette paper brands to Imperial Tobacco. The divestiture will maintain three competitors in the cigarette market, leaving the merged group with a market share of 44 per cent compared to 61 per cent had the merger proceeded without the Commission's intervention.

Imperial Tobacco will have a 17 per cent share of the cigarette market, including a brand in the premium segment that will benefit from the change to the per-stick excise system for cigarettes in November 1999. Also, Imperial Tobacco has Virginia-blend brands in overseas markets which it may introduce to the Australian market. Imperial Tobacco will operate an independent telesales facility for receiving orders from customers and will employ an independent field sales force. It will also implement changes to the divested brands to ensure they remain competitive after the change to the per-stick excise system.

The Commission has agreed to treat the identity of the divested brands as confidential until they are publicly announced by Imperial Tobacco or the merger parties.

Cable & Wireless Optus and AAPT

Acquisition (s. 50)

On 31 May 1999 the Commission noted the Cable & Wireless Optus decision not to proceed with its bid for AAPT.

The Commission had earlier advised Cable & Wireless Optus of its concerns about the effect of the proposed acquisition on competition in a number of telecommunications markets. It had sought and accepted an undertaking from Optus that it would not proceed with the proposed acquisition.

The Commission had concluded there would be a substantial reduction of competition in the following markets:

- the upstream or wholesale market for the provision of a national telecommunications network of line links, switches, points of interconnection, billing and customer support by means of which carriers and carriage service providers are able to provide the range of voice, data, Internet and video telecommunication services to consumers (or end-users); and
- a number of downstream or retail markets, each relating to provision of Internet, data and local access to end-users.

The Commission concluded that the acquisition would increase concentration in the telecommunications markets and would result in the removal of a vigorous and effective competitor.

It considered that the removal of AAPT as one of only three national network service providers would be likely to have substantial effects on competition at the wholesale (or upstream) level as well as at retail (or downstream) levels, given the nature and extent of vertical integration.

The Commission also considered that the scale and scope of AAPT's current operations could not be easily replicated, and new entrants would face significant barriers to entry.

Unconscionable conduct (Part IVA)

Simply No Knead Franchising Pty Ltd

Unconscionable conduct in business transactions (s. 51AC), breach of mandatory code of conduct (s. 51AD)

On 16 June 1999 the Commission instituted proceedings in the Federal Court Melbourne alleging that Simply No Knead Franchising Pty Ltd (SNK) had engaged in unconscionable conduct towards its franchisees and had breached the mandatory Franchising Code of Conduct.

This is the Commission's first action under s. 51AC of the Act involving a franchisor and its first action for alleged breaches of the Franchising Code of Conduct under s. 51AD.

The Commission alleges that SNK acted unconscionably towards its franchisees by:

- systematically refusing to negotiate reasonably and in good faith in relation to reasonable requests and complaints from the franchisees;
- refusing to supply its products to the franchisees;
- failing to address reasonably and/or meet with the franchisees to discuss matters of concern to the franchisees;
- causing the telephone numbers of the franchisees' franchised businesses to be deleted from Telstra's 013 telephone directory assistance service;
- without the consent of the franchisees and contrary to the franchise agreements, either selling and/or offering to sell its products in the territories of each of the franchisees, including supplying SNK products to a third party distributor and to various independent outlets, promoting the availability of SNK products in such independent outlets and advertising SNK's mail order business with free delivery;
- omitting the names of the franchisees from advertising and promotional material distributed in respect of the franchised products;
- failing and refusing to give to the franchisees a current disclosure document in the form of annexure 1 to the Franchising Code of Conduct in response to written requests from those franchisees; and
- failing to disclose to the franchisees at any relevant time that it intended to cease the franchising of the SNK business to the franchisees.

It also alleges that SNK's conduct caused the franchisees to terminate or not to renew their respective franchise agreements. The Commission further alleges that SNK has sought to prevent the franchisees from competing with SNK by instituting legal proceedings against its franchisees, alleging breaches of the restraint of trade clauses in the respective franchise agreements.

The Commission alleges that SNK's reliance on the restraint of trade clauses to prevent the franchisees from selling equivalent products is unconscionable, in the circumstances. It has sought an interlocutory injunction to stay the various SNK proceedings until the case alleged by the Commission is determined.

At the directions hearing on 9 July 1999 the parties consented to adjourn the hearing of the interlocutory application and SNK undertook to take no further steps in its legal proceedings against the franchisees until the determination of such application.

The Commission is also taking action against the director of SNK for allegedly aiding and abetting or being knowingly concerned in the alleged breaches.

The Commission is seeking declarations, injunctions and findings of fact.

Codes of conduct (Part IVB)

Millennium Diagnostics (Victoria) Pty Ltd

Breach of mandatory code of conduct (s. 51AD), misleading or deceptive conduct (s. 52), false or misleading representations (ss 53 & 59), accepting payment without intending to supply (s. 58)

On 30 June 1999 the Commission instituted proceedings in the Federal Court Melbourne against Millennium Diagnostics (Victoria) Pty Ltd, Millennium Solutions (Australia) Pty Ltd and Millennium Solutions Group Australasia Pty Ltd in relation to the promotion of franchises for Year 2000 compliance computer software and technical support services. The Commission alleges that the companies engaged in misleading and deceptive conduct in relation to the promotion.

The Commission alleges that the companies variously misrepresented that:

- they had 350 technical support staff available in 100 locations in Australia as well as full marketing, administration and consultant support infrastructure;
- distributors or purchasers of franchises could earn $600 000 per year;
- they had the sponsorship or approval of Federal Government bodies;
- distributors or purchasers of franchises required only basic computer knowledge and skills;
- distributors or purchasers of franchises would be provided with stock; and
- the products they promoted obviated the need for tailor made Year 2000 compliance programs.

In addition the Commission alleges that Millennium Solutions (Australia) Pty Ltd breached the mandatory Franchising Code of Conduct by failing to provide a current disclosure document in response to a written request. It alleges that the director of Millennium Diagnostics (Victoria) Pty Ltd and Millennium Solutions (Australia) Pty Ltd, Mr Michael Henderson, was knowingly concerned in the alleged breaches.

The Commission has sought an interlocutory injunction, which has been listed for hearing on 26 July 1999. It is seeking declarations, injunctions, findings of fact and refunds to franchisees.

Consumer protection (Part V)

Top Snack Foods Pty Ltd

Misleading or deceptive conduct (s. 52)

On 4 June 1999 the Federal Court awarded damages of over $400 000 to four couples and an individual who were franchisees of Top Snack Foods Pty Ltd.

Justice Tamberlin found that Top Snack Foods had engaged in misleading and deceptive conduct and that George Manera, a director and manager of Top Snack Foods, and Nick Kritharas, General Manager, were knowingly concerned.

The Commission took representative action on behalf of the franchisees, alleging that Top Snack Foods, George Manera and Nick Kritharas had engaged in misleading or deceptive conduct.

The Commission alleged that prospective franchisees were misled by claims that:

- gross profitability would be $300 per day per franchise area;
- the goods could be distributed at a rate of 50 sites per 'short' day;
- the confectionery boxes could be packed at a rate of 20 or more per day;
- no more than 10 per cent of genuine customers would be lost in the first few weeks of operation and there would be no difficulty in obtaining new customers;
- no more than 6 per cent of money would be lost through dishonesty of customers at retail sites and other problems;
- customers and sites made available by Top Snack Foods were genuine;
- the franchisees could not lose the moneys paid for the franchises because the return was fully guaranteed by Top Snack Foods; and
- the relevant achievable figures set out in a four-weekly statement disclosed to the claimants in a Top Snacks Foods information brochure were typical and achievable.

Justice Tamberlin found that important parts of the evidence of George Manera and Nick Kritharas were significantly discredited in cross-examination.

Justice Tamberlin found that the representations were misleading and deceptive and there were no reasonable grounds for making the assertions as to profitability, distribution of goods to 50 sites per 'short' day or loss of customers.

The award of damages includes capital injection lost, trading loss, interest on borrowings and an amount for unrewarded labour and anxiety.

Australian Taxation Services

Misleading or deceptive conduct (s. 52)

On 7 July 1999 the Commission obtained interlocutory orders from the Federal Court against Australian Taxation Services (ATS) and its Director, Michael Phillip Ivanoff. The orders restrain ATS and Ivanoff from distributing forms seeking businesses to register for the GST and pay a fee.

The Commission alleges that the forms sent by ATS appeared to be issued by the Australian Taxation Office, or some other government agency, and misled people into believing that it was compulsory to pay ATS the GST registration fee of $175 for one year or $295 for two years. Businesses receiving these forms advised the Commission that they were misled into believing that the ATS forms were from the Australian Taxation Office because of the similarity between the ATS form and the forms generally used by the Australian Tax Office.

On 9 July 1999 Justice Kiefel continued an injunction restraining the company from sending further forms to businesses and consumers within Australia. The court also ordered a freeze on the company's bank account to ensure that funds gained from the scheme were preserved. If the Commission is ultimately successful in its action, the frozen funds will be refunded to businesses that were misled by the ATS form.

Goldseal Australia Pty Ltd, Specialty Products International Pty Ltd

Misleading representations (s. 53)

On 7 June 1999 the Commission instituted proceedings in the Federal Court Brisbane against Goldseal Australia Pty Ltd, Specialty Products International Pty Ltd and Mr Norman English, a director of both companies, alleging misleading representations.

The respondents have sold franchises and distributor agreements in northern Queensland since 1997. The agreements involve a waterproofing membrane generally known as 'Polyshield SS-100' which is used in many industries such as building, construction and mining.

The Commission alleges that three franchise/distributor agreements have been negotiated to a value of more than $200 000. It alleges that in the course of selling the franchises and distributorships it was represented that the companies:

- developed the waterproofing membrane;
- held intellectual property rights for the product;
- had affiliations with the Housing Industry Association, Waterproofing Industry Council of Australia and Queensland Master Builders Association; and
- had an independent assessment of quality management by Standards Australia.

The Commission alleges that these were false representations. It is seeking injunctions, declarations, findings of fact, orders for a compliance program and public disclosures as to the conduct.

A directions hearing was heard in Brisbane on 25 June 1999. The substantive hearing will be in Townsville at a date yet to be determined.

The Australasian Institute

Misleading or deceptive conduct (s. 52)

On 21 May 1999 the Commission instituted proceedings against The Australasian Institute, an Internet based education facility, alleging misleading and deceptive conduct.

The Commission alleges that the Institute is promoting and teaching some Internet-delivered degrees that it is not authorised to deliver. In addition it alleges that The Australasian Institute has published misleading and deceptive statements about the nature and quality of its services, facilities and teaching staff.

On 27 May 1999 the Institute gave the Federal Court undertakings that it will, for the present, stop promoting a Global Master of Business Administration degree. It has undertaken not to advertise or represent to the public, via its Internet website or otherwise, that:

- the Global Master of Business Administration has the approval, sponsorship, or endorsement of the University of Ballarat;
- the Global Master of Business Administration is an approved Internet version of the University of Ballarat's Master of Business Administration; and
- applications for enrolment can be made, or enrolments will be accepted for, the Global Master of Business Administration.

In addition, it will provide the names and addresses of the students currently enrolled in the Global Master of Business Administration to the Commission.

On 18 June 1999 the court ordered that mediation take place between the parties. The matter is next before the court on 10 August 1999.

Internic Technology Pty Ltd

Misleading or deceptive conduct (s. 52)

On 1 June 1999 the Federal Court accepted undertakings from Internic Technology Pty Ltd and its director, Mr Peter Zmijewski, to conclude legal proceedings brought by the Commission for alleged misleading and deceptive conduct.

The matter was raised with the ACCC by the US Federal Trade Commission, which had received complaints from the United States, because Internic Technology and Mr Zmijewski reside in Australia.

The Commission had alleged that Internic and its director misled consumers by using an almost identical domain name to the exclusive registrar of top level domain names in the .com, .net, .org, .gov, .edu domains (the InterNIC) and by operating a website at *http://www.internic.com*.

The InterNIC is a facility operated by Network Solutions Inc., on contract with the United States government, and can be found at *http://www.internic.net*.

The Commission alleged that:

- consumers looking for the InterNIC often enter 'internic' or 'internic.com' into their web browser and end up at the site operated by the respondents where the respondent acts as a broker in the sale of domain name registration services;
- the use of the name 'internic.com' is likely to create the false impression that the respondents' business is, or is affiliated with, the InterNIC;
- consumers went to the respondents' website to register a domain name directly with InterNIC; and
- consumers have used the respondents' services believing they were using services provided by InterNIC as a result of the respondents' misleading and deceptive conduct.

The fee charged by the respondents was between $US220 and $US250. The fee charged by InterNIC has ranged between $US70 and $US100.

Before May 1998 the respondents had registered about 13 000 domain names to consumers from all over the world.

Internic Technology and Mr Zmijewski gave undertakings to the court to no longer use the name 'internic' or any similar name.

They also agreed to place $A250 000 in an Australian trust fund to be used to refund consumers who were misled by the conduct. Consumers throughout the world who registered a domain name at the internic.com site before May 1998 will be emailed a notice telling them how to claim a refund.

Signal Telecommunications Pty Ltd, Digital Discount Centre Pty Ltd

False or misleading representations (s. 53)

On 17 May 1999 Signal Telecommunications Pty Ltd and Digital Discount Centre Pty Ltd gave court enforceable undertakings in relation to a promotional brochure for a mobile phone package.

From March 1998 to August 1998, Signal Telecommunications, through Digital Discount Centre, promoted a mobile phone package, referred to as the 'Phone Saver Plan 25', through a brochure. The brochure was distributed at more than 50 petrol station sites across Victoria.

The brochure did not disclose several costs that would be incurred by consumers and in particular failed to disclose that a minimum call cost applied during off-peak periods.

Signal Telecommunications and Digital Discount Centre will write a letter of apology to all affected customers informing them that:

- Signal Telecommunications will not take action to recover early termination payments due from customers who chose early termination before the undertaking;
- Signal Telecommunications will give all active customers a $50 credit toward the payment of their account; and
- active customers will have the option to exit the contract during the remaining term of the contract at no penalty. This will include Signal Telecommunications forgoing recovery of the handset.

Both companies will also implement a trade practices compliance program.

The Commission acknowledged the cooperation of Signal Telecommunications and Digital Discount Centre in resolving the matter.

Goldstar Corporation Pty Ltd

Demanding payment for unsolicited goods or services (s. 64)

On 10 May 1999 the Federal Court Brisbane imprisoned Grant Warren Hudson for six months after his company, Goldstar Corporation Pty Ltd, was found guilty of contempt of court.

The Commission brought legal action after it obtained evidence that Goldstar was acting in breach of an injunction ordered by the Federal Court in November 1998.

In the earlier proceeding Hudson was given a two month prison sentence, suspended for two years, and Goldstar was fined $10 000 for breaching an undertaking to the court that they would not seek payment for unsolicited advertising, also known as telefraud.

In the latest proceeding Justice Kiefel ordered Goldstar to pay a fine of $30 000 and the Commission's legal costs, as well as sentencing Hudson to the term of imprisonment.

Hudson appealed to the Full Federal Court, arguing that the six-month sentence imposed by Justice Kiefel was manifestly excessive. On 2 July 1999 the Full Court rejected this appeal.

Viking Office Products Pty Limited

Misleading or deceptive conduct (s. 52), false or misleading representations with respect to the price of goods (s. 53(e))

On 13 May 1999 Viking Office Products Pty Limited, a direct marketer of stationery and office supplies, provided court enforceable undertakings to the Commission in relation to discounts offered in its catalogues.

The Commission investigated three products that were advertised in the Viking catalogues at a discount from the 'regular price'. It found that:

- the products had been offered for sale to a significant number of customers at prices less than the 'regular price';
- only a small percentage of the total sales of these products had been at the 'regular price'; and
- the bulk of sales of these products had been made at prices substantially less than the 'regular price'.

Viking undertook to give clearer information about the discounts advertised in its catalogues. It will also review its compliance program.

Danka Australia Pty Limited

Misleading or deceptive conduct (s. 52)

Following investigation by the Commission after receiving a number of complaints by small businesses, Danka Australia Pty Limited will reinstate the former contracts of some of its

customers in Queensland, South Australia and Western Australia.

Late in 1998 certain Danka customers were asked in writing to sign replacement Equipment Service Agreements so that Danka could update its records. Some customers signed the replacement agreements unaware that the replacement agreements were different in certain respects to the previous agreements.

In particular, the replacement agreements may have contained longer periods of notice of termination that the customer must provide to Danka. Also, in some instances in Queensland and WA the contractual period of the replacement agreement was different to the previous agreement.

Danka has written to each customer affected by the errors, stating that the provisions under the previous agreement remain unchanged, together with an apology for any inconvenience. The Commission noted Danka's cooperation in this matter.

JeansWest

False or misleading representations (s. 53)

On 13 May 1999 the Commission accepted undertakings from JeansWest in relation to a potentially misleading refund policy.

After the Commission advised JeansWest that its refund policy was potentially in breach of the Act, the company arranged for the immediate withdrawal of the policy and the briefing of staff on consumer refund rights.

The Commission noted JeansWest's quick response in this matter.

McDonald's Australia Limited

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

On 16 June 1999 McDonald's Australia Limited gave the Commission court enforceable undertakings in relation to the advertising of its 'grilled chicken burger' after the Commission raised concerns that consumers were being misled about the cooking process of the burger.

The Commission considered the cooking process, when viewed in its entirety, was not a grilling process. The chicken burger was initially cooked in an oven, branded and seared and then cooked between two hot plates.

McDonald's also agreed to implement a trade practices compliance program.

The Commission noted McDonald's cooperation in resolving the matter and that the promotion was in any event to have ceased as soon as pre-existing stocks of the chicken burger were exhausted.

Freedom Furniture

False or misleading representations (s. 53)

On 2 July 1999 Freedom Furniture gave the Commission a court enforceable undertaking in relation to a potentially misleading refund policy.

The Commission believes Freedom Furniture may have breached the Trade Practices Act by in-store representations that:

- there was a time restriction of seven days for refund claims;
- certain items must remain unopened for a refund claim to be made; and
- faulty items may only be exchanged.

Freedom Furniture has undertaken to amend the refund policy and to implement a trade practices compliance program throughout its stores.

Product safety (Part V–VA)

Lay and Sons Organisation Pty Ltd, trading as Asian Importer-Exporter and Company

Failure to comply with product information standard (s. 65D)

Lay and Sons Organisation Pty Ltd, trading as Asian Importer-Exporter and Company, has

withdrawn several brands of cigarettes from sale after advice from the Commission that they fail to meet the requirements of the Consumer Product Information Standard for Tobacco.

The brands include Professional Gudang Garam Filter Kretek cigarettes ('Gudang Garam Professionals'), which were purchased by the Commission and tested for their tar, nicotine and carbon monoxide levels.

Gudang Garam Professionals purchased by the Commission yielded the following average tar, nicotine and carbon monoxide levels:

Tar yield **50.3** ± 4.4 mg **per cigarette**

Nicotine yield **2.11** ± 0.16 mg **per cigarette**

Carbon monoxide yield **33.1** ± 3.4 mg **per cigarette**

None of the packets of cigarettes disclosed these levels as required by law. Consumers were therefore unable to make an informed choice as to the dangers they may risk in smoking these cigarettes. In addition, the cigarettes failed to carry other health warnings as required by the standard, such as 'Smoking when pregnant harms your baby' and 'Smoking causes heart disease'.

The Commission was also concerned that, because these cigarettes have a pleasant aroma of cloves, consumers may be under the mistaken impression that they are less harmful than other cigarettes. In fact, 'clove' cigarettes have substantially higher levels of tar, nicotine and carbon monoxide than other brands of cigarettes available on the Australian market.

On 30 April 1999 the Commission accepted a court enforceable undertaking from Lay and Sons to cease supplying cigarettes which fail to meet the standard and to ensure in the future that all cigarettes supplied by them meet the standard. Refunds will also be available for consumers who wish to return the product to Lay and Sons.

The Commission acknowledged Lay and Son's cooperation in achieving a suitable outcome.

MHG Plastic Industries Pty Limited

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

On 28 June 1999 the Federal Court Sydney ordered MHG Plastic Industries Pty Limited to conduct a recall of all helmets manufactured by it since 1 July 1996. These orders were stayed to argue the mechanics of the recall. On 13 July 1999 the court ordered the recall and that consumers be given a full cash refund.

On 15 June 1999 the Federal Court found that MHG Plastic Industries had manufactured and offered for sale motor cycle helmets which failed to comply with the relevant mandatory safety standard.

The helmets manufactured by MHG are sold under the Eldorado brand of helmets in the open face, full face and motorcross styles.

The Commission alleged that the MHG helmets did not comply with the standard in two respects: resistance to penetration and strength of the retention system. MHG adduced evidence that it carried out tests in accordance with the standard and that the helmets tested passed all tests.

Justice Emmett found that the helmets did not comply with the standard so far as the resistance to penetration performance requirements were concerned, but was not satisfied that the retention system did not comply with the standard.

The court has ordered MHG to advertise the recall in major Australian newspapers.

MHG is expected to lodge an appeal concerning the court's decision and orders on 19 July 1999.