Enforcement

The following are reports on new and concluded Commission actions in the courts, settlements requiring court enforceable undertakings (s. 87B) 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.

GST enforcement matters are listed at the end of this section.

Anti-competitive agreements (part IV)

Queensland fire protection cartel

Price fixing and market sharing (s. 45)

On 15 December 2000 in the Federal Court, Brisbane, further penalties and costs of $572 000 were imposed on a company and five individuals for their part in a market-sharing and price fixing arrangement in the Queensland fire protection industry. The court found that Trident Fire Protection Pty Ltd and the five individuals had engaged in price-fixing and market-sharing conduct in breach of s. 45 of the Trade Practices Act.

These penalties, together with those ordered in December 1999, March 2000, June 2000 and October 2000 now total more than $9 million in this case.

The Commission had alleged that an anti-competitive arrangement existed for many years in the markets for both installation of fire sprinkler systems throughout Queensland, and fire alarm systems in and around Brisbane. The Commission alleges that at regular meetings the fire protection companies agreed between themselves to allow certain tender projects to be won by participants, and agreed on tender prices to be submitted for the projects to ensure the selected company won the tender.

The Federal Court had previously dealt with 45 companies and individuals, at hearings in December 1999, March 2000, June 2000 and October 2000, penalising these respondents for their part in the price fixing and market-sharing arrangements.

After admissions by the parties, Drummond J imposed the following pecuniary penalties and awarded payments towards the Commission's costs.

The court also ordered injunctions against the respondents, prohibiting them from engaging in similar conduct for three years. The individuals associated with Trident Fire Protection Pty Ltd and Michael Lewis have undertaken to take part in trade practices compliance training.

Proceedings continue against the remaining respondents.

Mergers (part IV)

Hazelton Airlines, Qantas Airways Limited and Ansett Airlines Limited

Acquisition (s. 50)

On 20 December 2000 the Commission announced its decision to oppose the bids by Qantas and Ansett for the NSW regional carrier, Hazelton Airlines.

Hazelton accounts for almost one-third of all regional passengers carried in NSW and even higher shares on specific routes. It also has more than 450 slots per week at Sydney Airport, including more than 150 during the peak 7–9 a.m. and 5–7 p.m. periods.

If Qantas gained control of Hazelton it would account for 60 per cent of the NSW regional air services market and 55 per cent of permanent regional service slots at Sydney Airport.

If Ansett gained control of Hazelton it would account for 62 per cent of the NSW regional air services market and 51 per cent of permanent regional service slots. Access to regional service slots at Sydney Airport is important because it affects the ability of other operators to enter markets, particularly during peak periods.

The Government has recently announced that it will limit the number of regional service slots during peak hours at Sydney Airport. Existing permanent regional service slots will be 'grand-fathered', but new allocations will be limited to off-peak times. The Commission decided that this will restrict the ability of new entrants to compete with existing carriers by making them operate at off-peak times or from Bankstown Airport, representing a significant barrier to entry.

The existing slot allocation mechanism also provides for airlines to 'swap' their slots within certain limits each scheduling period. Permanent regional service slots in peak periods can be swapped with other slots provided the regional service slot does not move by more than 30 minutes. Over time, it is possible to swap a regional service slot with other slots so that the regional service moves out of the peak period and an additional interstate service moves in. If the merger were to go ahead, the successful bidder would have more than an additional 150 slots during peak periods and this could have potentially serious consequences for competition on inter-capital city services.

On the basis of this information the Commission decided that an acquisition of Hazelton by either Qantas or Ansett would result in a substantial lessening of competition.

Fair Trading (part V)

World Netsafe Pty Ltd and Terence Butler

Pyramid selling (s. 61), referral selling (s. 57), misleading and deceptive conduct (s .52), false representations (ss. 53(aa), 53(c), 53(d)), accepting payment without intending or being able to supply as ordered (s. 58), misleading representations about certain business activities (s. 59)

On 8 December 2000 the Federal Court of Australia, Brisbane, ruled that the International ATTM card scheme marketed and promoted by World Netsafe Pty Ltd and Terence Butler was an illegal pyramid and referral selling scheme. In litigation initiated by the Commission the court has further confirmed that the promoters misled or deceived participants into joining the scheme in various ways.

During 1999 and 2000 World Netsafe and Terence Butler promoted the World Netsafe ATTM card scheme at public meetings, through promotional materials, on the Internet and by email throughout Australia and overseas. World Netsafe and Terence Butler claimed that the ATTM card allowed members to create a world-wide business that could generate lifelong residual income, 24 hours a day, seven days a week, from five different streams of income, without a member leaving their home.

Thousands of consumers paid $2389 to join the ATTM card scheme. Spender J made mention of evidence that demonstrated that World Netsafe and Terence Butler had received more than $4 million in payments in connection with the scheme as at December 1999. The court ordered that within 28 days, World Netsafe and Terence Butler return money to members who paid to take part in the scheme.

The court found that World Netsafe and Terence Butler had misled or deceived consumers by making misrepresentations in connection with the ATTM card scheme that included:

- the card was, or would soon be available, for use by scheme members;
- the card was associated with Visa, MasterCard, Maestro, Cirrus, or utilised some other electronic communication network relating to banking or commerce, so that the World Netsafe ATTM card could be used at ATMs and POS terminals world-wide;
- the card was associated with an account managed by Chase Bank and Australian banks and through which money could be deposited onto the card;
- the card operated on software which would be certified by Price Waterhouse;
- the card has been cleared or approved by Australian regulatory authorities;

- that arrangements had been made to allow people to earn income from becoming a member or holding a card in the scheme, by introducing others to the scheme or from transactions of other cardholders;
- that arrangements had been made so the card could be used to make cheap telephone calls anywhere in the world; and
- that arrangements had been made so the card would record a universal currency called 'Teleminutes' which would convert into any currency.

The court made extensive orders for breaches of various consumer protection sections of the Trade Practices Act. Permanent injunctions are now in place which restrain World Netsafe and Terence Butler from making false representations in connection with this scheme or a similar scheme in the future anywhere in the world.

Spender J also ordered that World Netsafe and Terence Butler publish a notice on the ATTM card scheme at their expense on the Internet, in newspapers and by email, and post it to the Scheme's members. Terence Butler was ordered to undergo a trade practices compliance program. Also, the respondents were ordered to pay the Commission's costs of this matter.

David Zero Population Growth Hughes, trading as Crowded Planet

Misleading or deceptive conduct (s. 52), misrepresentations about the performance characteristics of goods and about sponsorship (ss. 53(c), 53(d))

On 9 November 2000 the Federal Court made interlocutory orders against David Zero Population Growth Hughes, trading as Crowded Planet, restraining him from supplying oral contraceptives to consumers within Australia.

The Commission had instituted proceedings against Mr Hughes on 30 August 2000 alleging that he had engaged in misleading or deceptive conduct in that he had represented on his Internet site that the Commission had approved Crowded Planet's operations. The Commission does not give approval to the operations of individual businesses.

Subsequent to this the Commission became aware that Crowded Planet was supplying Schedule 4 oral contraceptives over the Internet. Because of health risks associated with oral contraceptives, it is illegal to supply them without a prescription in Australia.

The Commission sought orders from the court for:

- declarations that Mr Hughes had engaged in conduct in breach of ss. 52, 53(c) and 53(d) of the Trade Practices Act;
- Mr Hughes to publish a notice on his website stating that the claim that the Commission had approved Crowded Planet's operations was false and a gross misrepresentation of the Commission's attitude to Crowded Planet's operations; and
- Mr Hughes to be restrained from supplying oral contraceptives.

The Federal Court after consideration of the public health issues made:

- a final order that Mr Hughes publish a correction notice on his website about his representation that the Commission approved Crowded Planet's operations;
- an interlocutory order that Mr Hughes not supply oral contraceptives to consumers within Australia; and
- an interlocutory order that Mr Hughes publish on his website a notice stating that Crowded Planet cannot and will not supply oral contraceptives to consumers within Australia.

On 22 November 2000 contempt of court proceedings against Mr Hughes was instituted by the Commission and a final hearing held on 14 December 2000. Judgment on this matter is pending.

Optus Internet Pty Limited and Excite@Home Australia Pty Ltd

Misleading or deceptive conduct (s. 52)

On 20 November the Commission accepted undertakings from Optus Internet Pty Limited and Excite@Home Australia Pty Ltd that they would no longer promote the Optus@Home cable Internet service as an unlimited download service when Internet use is limited.

Consumers had complained to the Commission that, rather than offering unrestricted downloads, Internet access via Optus@Home was effectively capped by an Acceptable User Policy (AUP). The Commission alleged that Optus had relied on this policy to terminate customers from the service. The owners of Optus@Home, Cable & Wireless Optus and Excite@Home agreed to remove all references to 'unlimited' in relation to the service and have now replaced the AUP with a practically focused fair-use policy and a mechanism to track a consumer's use of the service. Optus@Home also agreed to compensate all customers terminated from the service under the previous AUP.

The Commission pointed out that it is concerned about AUPs because they fail to provide consumers with certainty and consumers cannot usefully compare competing product offerings. With the explosion of Internet and other high bandwidth services the Commission is concerned that the telecommunications industry, particularly network owners, understand what does and does not constitute acceptable advertising of an unlimited product which in fact is limited by an AUP.

A Whistle and Co (1979) Pty Ltd, trading as Electrodry Carpet Dry Cleaning

Misleading or deceptive conduct (s. 52), false or misleading representations about the price of goods and services (s. 53(e))

On 21 November the Commission obtained, by consent orders, a Federal Court declaration that A Whistle and Co (1979) Pty Ltd, trading as Electrodry Carpet Dry Cleaning, breached the Trade Practices Act by distributing brochures with GST-exclusive prices. (Wallera Pty Limited trading as Electrodry which operates in the Sydney metropolitan area was not involved in this advertising campaign.)

Many consumers complained to the Commission about the brochures, which displayed the GST-exclusive price on the front page in large type and the total price in much smaller print. Also, coupons at the back of the brochure included large-type, GST-free prices accompanied by small-type, GST-inclusive prices.

The brochures were delivered to household letterboxes and were the primary means by which Electrodry promoted its business in New South Wales, Victoria, Queensland, South Australia and Western Australia.

The Commission attempted to resolve the matter administratively by requesting Electrodry to cease distribution of the brochure and amend future advertising material, but was unsuccessful. Proceedings were instituted in the Federal Court on 18 August 2000. The outcomes of the proceedings included:

- declarations that Electrodry had breached ss. 52 and 53(e) of the Trade Practices Act, relating to misrepresentation and false and misleading conduct;
- corrective advertising in the form of an apology on the front page of Electrodry's next brochure;
- injunctions preventing Electrodry from engaging in similar conduct in the future; and
- an injunction directing Electrodry to conduct a trade practices compliance program.

Purple Harmony Plates Pty Ltd

Alleged misleading or deceptive conduct (s. 52)

On 4 December the Commission instituted court action in the Federal Court, Melbourne, over alleged misleading and deceptive advertising and promotion by a Victorian business, Purple Harmony Plates Pty Ltd, for selling products allegedly claimed to protect against the effects of electromagnetic radiation, to increase health, reduce pain, stress and fatigue, and to promote healing.

The products, made of anodised aluminium, are also allegedly claimed to keep food fresh for longer, produce more complete burning of automotive fuel giving more power and greater economy, reduce fridge odours and running costs, reduce the amount of pool chemicals needed and rejuvenate sick plants. The Commission alleged no substantial evidence had been provided to justify these claims.

The Commission is seeking court orders including:

- declarations that the business has breached the relevant provisions of the Trade Practices Act;
- injunctions preventing the business from engaging in similar conduct in the future;
- corrective advertising; and
- refunds to consumers who believe they were misled by the advertising.

The Commission is also seeking corrective advertising on the website of Purple Harmony Plates Pty Ltd. A further directions hearing has been set down for 7 March 2001.

Australian Institute of Permanent Makeup

Alleged false or misleading representations about goods and services (ss. 52, 53(aa), 53 (c))

On 30 October 2000 the Commission instituted court action in the Federal Court, Brisbane, over alleged misleading and deceptive advertising and promotion by a business trading as the Australian Institute of Permanent Makeup. The Commission alleges the Australian Institute of Permanent Makeup claimed that micro-pigmentation procedures are permanent but documentation supplied to consumers advises that after three to five years further treatment would be required to maintain the desired effect.

The Commission is seeking court orders including:

- declarations that the business has breached the Trade Practices Act;
- injunctions preventing the business from engaging in similar conduct in the future;
- corrective advertising; and
- refunds to consumers who believe they were misled by the advertising.

The Commission is also seeking corrective advertising on the website of the Australian Institute of Permanent Makeup.

Bob Jane T-Marts Pty Ltd

Misleading or deceptive conduct (s. 52)

On 6 December the Commission received court enforceable undertakings from Bob Jane T-Marts Pty Ltd after it had investigated a consumer complaint about the price of wheel alignment services at some Bob Jane T-Marts.

At various times between March 1996 and July 2000, 11 Bob Jane stores offered a thrust wheel alignment at a higher cost than a cheaper front two-wheel alignment. In some cases a thrust wheel alignment cost $45 while a front wheel alignment cost approximately $29. However, the machinery used for the two alignments provided the same level of service and some consumers may have purchased a more expensive thrust wheel alignment when the cheaper front two-wheel alignment would have provided the same alignment. The Commission believed the representation that the machinery provided two different services for which two different prices were payable was likely to mislead consumers.

The stores were:

- Victoria — Box Hill, Ferntree Gully, Fountaingate, Geelong, Prahran and Ringwood during the period from approximately September 1996 to 21 July 2000;
- New South Wales — Coffs Harbour during the period from approximately June 1998 to 21 July 2000;
- Queensland — McGregor during the period from approximately March 1996 to 30 June 1999 and Capalaba and Nambour during the period from approximately February 1997 to 21 July 2000;
- Western Australia — Fremantle during the period from approximately October 1997 to 21 July 2000.

Bob Jane T-Marts undertook to:

- take steps to ensure similar representations are not made in future;
- place a public notice in newspapers offering affected consumers a free wheel alignment; and
- conduct an audit of its trade practices compliance program.

The Commission noted that Bob Jane's assistance with its investigation helped bring about a speedy and positive outcome for consumers and that some consumers affected by the conduct had already been offered a free wheel alignment.

One.Tel, Primus

Misleading or deceptive conduct (ss. 52, 53), unconscionable conduct in taking unfair advantage of consumers (s. 51AB)

On 13 December 2000 One.Tel and Primus gave undertakings to the Commission and consented to Federal Court orders that they would change the way they sold telephone services.

Each company undertook to pay up to $500 000 towards a public awareness campaign aimed at stamping out unauthorised customer transfers, a practice known in the industry as 'slamming'. Agents acting on behalf of One.Tel and Primus had engaged in the conduct. The Commission acknowledged that the door-to-door sellers and tele-marketing agencies were directly involved in gaining new customers but considered it was nevertheless the responsibility of the telecommunications companies to ensure their representatives were adequately supervised to avoid liability under the Act. Both One.Tel and Primus have indicated to the Commission that they will no longer use door-to-door selling methods.

The Commission commenced its investigations in July 2000 following the receipt of many complaints from consumers throughout Australia. Both the Commission and the Telecommunications Industry Ombudsman received complaints. The vast majority of complaints were about the transfer of telephone services to either One.Tel or Primus without the consent or sometimes even the knowledge of the account holder.

The Commission's case showed that the door-to-door sellers used by One.Tel and Primus at times gained signatures of consumers who clearly could not ascertain the effect or meaning of what they were signing. This extended to taking unfair advantage of elderly and infirm members of the community and those with limited understanding of English.

The Commission's investigations and the records of the phone companies clearly showed that the illegal activities of the door-to-door and telephone sales agents occurred within weeks of them being contracted by One.Tel and Primus. Despite the continuation of clearly unacceptable levels of complaint, the companies discontinued use of the agents only after intervention by the Commission.

The Commission obtained orders by consent in the Federal Court against One.Tel and Primus. The injunctions include that they are restrained from:

- engaging in misleading and deceptive conduct;
- fraudulently obtaining signatures or consent over the telephone;
- coercing or harassing potential customers in transferring their phone services; and/or
- failing to notify consumers of applicable cooling-off periods.

One.Tel and Primus have also given undertakings to the Commission that they will:

- write to all affected customers;
- engage an independent assessor to undertake a review of business practices, including marketing methods and complaint handling arrangements;
- adopt all relevant industry codes; and
- pay the Commission's legal costs in the proceedings.

The Commission acknowledged the crucial role of the Telecommunications Industry Ombudsman in assisting the investigations and the cooperation of both Primus and One.Tel in resolving the matter.

Michigan Group Pty Ltd, Imobiliare (trading as the Queensland Juice Company), Yeppoon Pty Ltd and ors

Misleading or deceptive conduct (s. 52), misrepresentation — agreement of particular person to acquire goods (s. 53(bb))

On 18 December 2000 the Commission instituted proceedings in the Federal Court, Brisbane, against various respondents for alleged false and misleading or deceptive conduct in

relation to the promotion, sale and distribution of commercial orange juice machines in Queensland. The respondents are: Michigan Group Pty Ltd, Imobiliare (trading as the Queensland Juice Company), Yeppoon Pty Ltd, Rodney Laski, Peter Semos, Linda Moretto, Charles Cameron, Daryl Doherty and George Semos and a lawyer, Prospero Franzese.

The Commission alleged that:

- from about early 1998 the respondents promoted a scheme under which investors would buy a business of one or more commercial orange juicing machines from Michigan Group Pty Ltd, Imobiliare Pty Ltd and/or Yeppoon Pty Ltd;
- the promoters represented that the machines would be installed in nominated major supermarket chains and retail fruit outlets (all investors needed to do was buy labelled plastic bottles from Michigan Group Pty Ltd and/or Imobiliare Pty Ltd and then profit by on-selling the labelled bottles to the retail fruit outlets;
- the promoters promised that the businesses would take very little time to operate, the machines were 'state of the art', and would be installed in nominated stores very quickly and this would make significant profits;
- Michigan Group Pty Ltd and Imobiliare Pty Ltd had not formed any alliance with any major supermarket chain nor any large fruit and vegetable stores in Australia;
- attending to the business required many hours of work from investors;
- the machines did not produce any significant income for the investors;
- the income investors were able to earn was substantially less than the figures represented; and
- the juice machines were not 'state of the art', but had serious defects.

The Commission is seeking court orders including:

- findings of fact;
- a declaration that the parties have breached the relevant provisions of the Act;
- injunctions restraining the parties from engaging in similar conduct in the future;
- orders that the parties publish advertisements advising of the conduct;
- orders that the parties implement a trade practices compliance program; and
- costs.

A directions hearing is listed for 9 March 2001 in the Federal Court, Brisbane.

Colgate–Palmolive Pty Ltd

Resale price maintenance (s. 48)

On 15 November 2000 the Commission instituted proceedings in the Federal Court, Melbourne, against Colgate–Palmolive Pty Ltd for alleged resale price maintenance.

The Commission alleges that:

- Colgate engaged in resale price maintenance over a period of four years for various market-leading brands, including Colgate toothpaste and Ajax cleansers;
- between 1994 and 1998 Colgate tried to stop the Tasmanian retailer, Chickenfeed Bargain Stores, from advertising various Colgate lines at cheap prices; and
- Colgate received numerous complaints from Woolworths' supermarkets in Tasmania about Chickenfeed's advertising and tried to stop the advertising to avoid a price war.

The Commission is seeking a pecuniary penalty against Colgate, and injunctions restraining the company from engaging in similar conduct. A directions hearing was held at the Federal Court in Melbourne on 13 December 2000. A further directions hearing is scheduled for 18 April 2001.

Goldy Motors

Misleading or deceptive conduct (s. 52), false or misleading representations about the price of goods and services (s. 53(e)), false or misleading representations (s. 53(g))

On 20 December the Federal Court found in favour of the Commission in proceedings against Goldy Motors, a Perth car dealership.

The Commission had alleged that an advertisement encouraging consumers to purchase vehicles before 30 June because it was their 'Last chance to buy ... GST FREE !!' may have misled consumers because the price of new vehicles was expected to, and subsequently did, fall with the introduction of the GST on 1 July 2000.

The Commission also took issue with the use of a very small qualifier 'T.A.P' beneath the statement 'No Finance Application Refused!', claiming that, apart from its minute size, some consumers may have been unaware that the letters T.A.P meant to approved purchasers. They may also have misinterpreted the wording in such a way as to equate acceptance of a finance application with approval of that application.

The Commission considered that the advertisement not only misrepresented the effect of the GST on car prices by inducing consumers to purchase before 30 June, but also misled them as to the likelihood of obtaining finance to do so.

Apart from declarations that Goldy Motors had breached the relevant provisions of the Act, Carr J of the Federal Court also ordered:

- injunctions preventing Goldy Motors from engaging in similar conduct in the future;
- orders that corrective advertising be published;
- refunds or an alternative form of appropriate compensation for consumers induced by the advertisement into purchasing a car and/or applying for finance before 30 June 2000 as a result of the advertisement; and
- costs against Goldy Motors.

Carr J rejected submissions on behalf of Goldy Motors that some of the declarations sought by the Commission were 'an entirely unnecessary exercise'. He also rejected submissions that the Commission should pay Goldy Motors' costs because its case gave rise to a needless and unnecessary dispute and that it had misconducted itself in instituting the legal proceedings.

Product safety (part V)

Spotlight Promotions Pty Limited

Product safety standards and unsafe goods (s. 65C)

On 31 October 2000 Spotlight Promotions Pty Limited, a Queensland based promotional merchandise supplier, recalled sunglasses that failed to comply with the mandatory safety standard for sunglasses, after approaches by the Commission. Testing of the sunglasses by an accredited testing authority, Unisearch, found they could cause blurred vision, misjudgment of depth, position or objects.

The sunglasses were supplied by Spotlight to Carlton and United Breweries (CUB) for promotional purposes and either sold at the CUB merchandising store 'Brewhouse', in Yatala, Queensland, or were given away at various promotion venues in Queensland and to staff of some hotels in the Toowoomba area of Queensland.

As part of the recall, consumers were asked to return the sunglasses to Spotlight for either a full refund or a replacement pair of sunglasses that comply with the standard. Spotlight also provided the Commission with a court enforceable undertaking to implement a corporate compliance program. The Commission noted that Spotlight responded quickly and cooperatively when requested by the Commission to publish a consumer product safety recall notice and provide refunds.

Dimmeys Stores Pty Ltd

Product safety standards and unsafe goods (s. 65C)

On 29 November 2000 the Commission filed criminal proceedings in the Federal Court, Brisbane, against Dimmeys Stores Pty Ltd for allegedly supplying, in Townsville, children's nightwear that did not comply with the mandatory standards.

Currently there are two mandatory standards applying to the supply of children's nightwear, both designed to limit fire risk from these clothes and to provide consumers with information about the level of fire safety of the children's nightwear they buy.

Under the Act, companies can be fined up to $200 000 per offence and individuals up to $40 000 per offence.

A hearing was held on 12 December 2000 in the Federal Court, Brisbane, and a directions hearing will be held on 22 February 2001.

GST compliance and enforcement

Ferry Real Estate (Townsville)

Price exploitation under the New Tax System (s. 75AU)

On 30 November 2000 the corporate owners of Ferry Real Estate (Townsville) provided court enforceable undertakings to the Commission after investigations into management fee increases to client landlords in May 2000.

The Commission's investigations followed complaints from landlords about fees for residential properties that Ferry managed under property management agreements. The complaints were about a rise in Ferry's total property management fees from 7.5 per cent to 8.8 per cent. At the time Ferry advised it would not increase fees again to take into account the GST in July and the new management agreements advised that the 8.8 per cent included GST. The Commission formed the view that Ferry may have anticipated the GST by increasing its fees from 7.5 per cent to 8.8 per cent on 1 May 2000. The Commission believes that Ferry was at risk of breaching the price exploitation provisions of the Act.

Landlords using Ferry Real Estate (Townsville) to manage their properties will get credits of some management fees after Commission intervention.

Ferry acknowledged that its conduct may have raised concerns under the price exploitation provisions of the Act and provided undertakings that included sending corrective letters of apology to landlords who paid the increased management fees and providing credits for the amounts the Commission believes were overcharged.

Ferry also agreed to review its costs to ensure any cost savings arising from the New Tax System changes are passed on to its customers and to institute a trade practices compliance program.

Before 1 July 2000 Ferry Property Management Pty Ltd and Castorina Investments Pty Ltd carried on the business of Ferry Real Estate (Townsville). The Commission has been advised by Ferry Property Management Pty Ltd that the business was sold to Ferry Real Estate (Qld) Pty Ltd as at 30 June/1 July 2000.