
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 5 October 2000 the Federal Court, Brisbane, imposed penalties and costs of \$719 000 on two companies and seven individuals in the Queensland fire protection industry for price fixing and market-sharing arrangements. The penalties, when added to those previously imposed on 38 other companies and individuals in December 1999, March 2000 and June 2000, increase the total penalties imposed by the court to more than \$8.7 million.

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

The Federal Court found that The Asset Group (Brisbane) Pty Ltd and Firevac Pty Ltd engaged in price-fixing and market-sharing conduct in breach of s. 45 of the Trade Practices Act.

The court also ordered injunctions against the respondents, prohibiting them from engaging in similar conduct for three years. Individuals associated with the two companies have agreed to undertake trade practices compliance training.

National Australia Bank Limited

Price fixing (s. 45A)

On 31 August 2000 the Commission instituted proceedings in the Federal Court, Sydney against National Australia Bank Limited for alleged price fixing of credit card fees.

The Commission investigated credit card fees after receiving a complaint in October 1997 and sought information and submissions from banks in April 1998. In September 1999 it used its compulsory information-gathering powers under the Act to seek further details from banks and credit card schemes.

The Commission informed the banks and credit card schemes in March 2000 that it believed the process for setting interchange fees contravened the Act. It then negotiated with banks and credit card schemes to reform the rules to benefit the public. While the banks initially offered to review some issues, they were not prepared to review arrangements in each of the areas that affect participation in credit card schemes and interchange fees. In the Commission's view the overall system has resulted in higher costs to merchants and higher costs to consumers. It is estimated that banks charge interchange fees of about \$600 million per annum.

Since the Commission instituted proceedings, the banks have agreed to review aspects of fee setting that concern the Commission by January 2001. The Commission believes that the most effective way to resolve this matter is for the banks to seek authorisation for the arrangements that are put in place as a result of this review (see articles in the pricing section on pages 8 and 9 for further information).

The case against NAB is continuing. A further directions hearing took place on 5 December 2000 in the Federal Court in Sydney.

Unconscionable conduct (part IVA)

Simply No Knead Franchising Pty Ltd (SNK)

Unconscionable conduct, contravention of industry codes (ss. 51AC, 51AD)

On 22 September 2000 in the Federal Court, Melbourne, Sundberg J concluded in a landmark decision that the conduct by SNK disclosed 'an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour' against five franchisees. He made declarations that Cameron Bates, the Managing Director of SNK, was a person involved in the contraventions of ss. 51AC and 51AD of the Trade Practices Act by SNK. Sundberg J also made an order that Bates pay the Commission's court costs. The Commission did not seek final orders against SNK.

The decision by Sundberg J followed his earlier interlocutory decision on 24 December 1999 in which he dismissed SNK's application seeking to dismiss or forever stay the Commission's proceedings on the grounds that it was vexatious, oppressive and/or abuse of process. The court also upheld the Commission's application for interlocutory relief and ordered that SNK be restrained from further prosecution of its State court proceedings against its ex-franchisees until the hearing and determination of the Commission's proceeding. The order was given on condition that the Commission file undertakings by the ex-franchisees that they will not prosecute their counterclaims in the various State court proceedings until the hearing and determination of the Commission's proceeding. The undertakings were filed with the Federal Court on 3 February 2000.

On 17 May 2000 the Supreme Court of Victoria ordered that SNK be wound up in insolvency. The State Court proceedings between SNK and four of its ex-franchisees were settled between each franchisee and SNK's liquidator. The fifth franchisee chose not to settle. The Commission did not seek leave under the corporations law to continue its claim against SNK and pursued its action against Cameron Bates.

SNK, a Melbourne based company, supplied training and material for making bread and

related products in the home. The Commission had alleged that SNK contravened the Act by:

- refusing to deliver franchised products to the McKinnon, Heidelberg, Canterbury and Ferntree Gully franchisees;
- deleting the telephone numbers of the McKinnon, Heidelberg and Canterbury franchisees from Telstra's 013 telephone directory assistance service without the consent or the knowledge of the franchisees;
- unreasonably refusing requests from the franchisees to negotiate matters in dispute with SNK and to discuss matters of concern to the franchisees;
- producing and distributing advertising and promotional material that omitted the names of the franchisees and their franchised businesses;
- selling and offering to sell its products in the territories of the franchisees and in nearby areas; and
- refusing to provide current disclosure documents to the McKinnon, Heidelberg and Canterbury franchisees in response to written requests. This item was also alleged to contravene s. 51AD of the Act by failing to comply with an applicable industry code, namely, the Franchising Code of Conduct.

The Chairman of the Commission, Professor Allan Fels, commented that

... in making his decision Justice Sundberg has helped to clarify the interaction between the three provisions in Part IVA of the Act which all deal with unconscionable conduct.

National Australia Bank Limited

Commercial unconscionable conduct, misleading or deceptive conduct (ss. 51AA, 52)

On 3 November 2000 the Commission instituted proceedings against the National Australia Bank and its business banking manager in Hobart. It alleged that the bank had been unconscionable, misleading and deceptive in obtaining personal guarantees from a Tasmanian woman as security for a business loan to a company of which the woman's husband was a director. At the time the personal guarantees were executed, the woman's husband was seriously incapacitated.

The Commission is seeking orders against the bank including declarations, injunctions, an order that the personal guarantees obtained from the woman are of no force or effect, findings of fact, review of the bank's trade practices compliance program, damages and costs. The matter was listed for hearing on 5 December 2000.

Fair Trading (part V)

Medibank Private Limited

Misleading or deceptive conduct (s. 12DA of the ASIC Act), false or misleading representations (ss. 12DB(1)(c), (e), (g) of the ASIC Act), misleading representations (s. 12BB of the ASIC Act), certain misleading conduct in relation to financial services (s. 12DF of the ASIC Act)

On 26 October 2000 the Commission instituted proceedings against Medibank Private Limited in the Federal Court, Melbourne, alleging false, misleading and deceptive advertising of its health insurance products. The proceedings have been instituted under sections of the *Australian Securities and Investments Commission Act 1989* (ASIC Act) as opposed to the Trade Practices Act. Health insurance as it falls within the definition of a financial product is regulated through the ASIC Act. However ASIC has, since December 1998, formally delegated the regulation of all consumer protection aspects of health insurance to the Commission.

The Commission alleged that in one advertising campaign Medibank Private advertised 'no rate increase in 2000' in relation to its Package Plus insurance products when the rates for those products increased on 1 July 2000. It further alleged that Medibank Private's call centre staff made representations to consumers that the rates for its Package Plus products would not increase until next year.

It also alleged that, during a second campaign in August 2000, Medibank Private advertised an offer to consumers switching to Medibank Private of waiving 'any waiting periods' and 'get 30 days free if you change to Medibank Private' in newspaper advertisements, but:

- failed to disclose, or adequately disclose, that only the 2-month general waiting period and the 6-month optical waiting period were waived; and
- failed to disclose, or adequately disclose, that conditions applied to the offer of 30 days free health insurance.

The Commission is seeking court orders including:

- declarations that Medibank Private has breached the relevant provisions of the ASIC Act;
- injunctions restraining Medibank Private from advertising in the same way in the future;
- that Medibank Private waives all waiting periods for those consumers who switched from another fund and purchased private health insurance from Medibank Private during and after the August advertising campaign;
- that Medibank Private offers 30 days free health insurance to those consumers who switched from another fund and purchased private health insurance from Medibank Private during and after the August advertising campaign;
- that Medibank Private provides a refund or credit to consumers who purchased a Package Plus health insurance product on or before 30 June 2000 for the difference between the pre-1 July 2000 premium or rate and the post-1 July 2000 premium or rate for the period 1 July 2000 to 31 December 2000;
- that Medibank Private publishes corrective advertising on television and in national daily newspapers;
- that Medibank Private reviews its compliance program; and
- costs.

A directions hearing was set for 4 December 2000 in the Federal Court, Melbourne.

Target Australia Pty Ltd

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

On 5 September 2000 the Commission instituted proceedings against Target Australia Pty Ltd in the Federal Court, Perth, alleging false, misleading and deceptive conduct in television and newspaper advertising of its discount sales.

The Commission alleged that Target's '25% off every stitch of clothing' and '15-40% off housewares' television and newspaper advertising:

- promoted a category of goods available at discounted prices without disclosing, or without adequately disclosing, that certain items were excluded from the sale; and
- failed to inform that its rainchecks were not available on goods at these and other sales.

The Commission is seeking court orders including findings of fact; a declaration that Target has breached the Act; injunctions restraining Target from advertising in the same way in the future; that Target publish corrective advertising; that Target review its trade practices compliance program; and costs.

The next directions hearing is on 9 March 2001.

Pocket Money Limited

Misleading or deceptive conduct (s. 52), false or misleading representations about the price of goods and services (s. 53(e)), cash prices to be stated in certain circumstances (s. 53C)

On 26 September 2000 the Commission accepted court enforceable undertakings from Pocket Money Limited (PML), a promoter and seller of phone cards for alleged misleading advertising.

PML had advertised international call rates for its phone card service in the May-September edition of *Sydney — the official guide* and on its Internet site. The Commission is concerned that in both its print and Internet advertising PML failed to draw the readers' attention to the application of a 10 cent per minute surcharge and 55 cent connection fee, which significantly altered the cost of the service. It was further alleged that the offer of \$5 worth of free calls in its print advertisement was conditional on a minimum number of calls being purchased and this condition was not disclosed to consumers.

PML gave court enforceable undertakings to alter the format of its Internet site and to inform consumers responding to its print advertisement about the application of a 10 cent per minute surcharge and 55 cent connection fee. They further undertook not to advertise in fine print important terms that significantly alter the value and/or character of the promoted product and to ensure that terms and conditions are easily accessible to consumers.

Khad Pty Limited (trading as the Professionals Edge Hill)

Alleged misleading or deceptive conduct (s. 52), false or misleading representations (s. 53(g)), harassment and coercion (s. 60)

On 6 September 2000 the Commission accepted court enforceable undertakings from a Cairns real estate agency after the agency had sent letters to ex-tenants that the Commission believed were possibly false, misleading and coercive.

Earlier this year Khad Pty Limited, trading as the Professionals Edge Hill, sent out two letters to ex-tenants requesting payment for alleged debts. The letters also advised tenants that their names would be placed on a tenants' information database. The letters made a number of misrepresentations about the effect of being listed on the database and specifically that:

- the database was worldwide, when it was not;
- the listing would affect the tenant's credit rating when in fact it would not; and
- the listing would result in future tenancy applications being denied through other agencies when not all real estate agencies use the database and, in any event, agencies are generally able to choose who they deal with regardless of the listing.

The Commission was concerned that in sending the letters Professionals Edge Hill made false or misleading representations and may have engaged in undue harassment or coercion in relation to the payment for goods or services.

The company gave undertakings that include corrective letters of apology, a commitment not to repeat the misrepresentations and the implementation of a trade practices compliance program.

Product safety (part V)

ZG Pty Ltd

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

On 12 October 2000 an Adelaide-based wholesaler agreed to recall a vehicle trolley jack after testing by the Commission found it failed the mandatory standard. The jack which was labelled 'Macho Pty Ltd' was primarily supplied to wholesalers and retailers in South Australia and Victoria.

The jack failed to meet some performance characteristics, in one instance becoming unstable when subjected to a load test. It also failed to meet the mandatory requirements for labelling including a warning notice, clear and adequate operating instructions and details of the manufacturer or importer.

ZG Pty Ltd published recall notices asking consumers to return the jacks to the place of purchase for a full refund. ZG Pty Ltd also gave a court enforceable undertaking to implement a compliance program to ensure the risk to consumers is reduced and the likelihood of repeat conduct minimised.

Stephen Frederick Grant, director Furniture Wizard Pty Ltd

(in liquidation)

Misleading or deceptive conduct, misleading misrepresentations about business earnings (ss. 52, 59(2))

On 29 October 1999 proceedings were instituted in the Federal Court, Adelaide, against Stephen Frederick Grant, director of Furniture Wizard Pty Ltd (in liquidation). On 9 November 2000 the court granted injunctions against Mr Grant ordering that for three years he be restrained from making false or misleading representations in businesses the same or similar to Furniture Wizard Pty Ltd. The court also found that franchisees had been misled and therefore suffered loss or damage. It made orders for refunds totalling \$169 000 plus interest and the Commission's costs.

GST compliance and enforcement (part VB)

Michael Hill Jewellers

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

On 18 October 2000 Michael Hill Jewellers agreed to donate \$10 000 to the Starlight Foundation after overcharging Wholesale Sales Tax on watchbands.

The Commission conducted extensive checking of retailers' prices to ensure the benefits of removing the WST were passed on to consumers. In July 1999 the WST rate on watchbands was reduced from 32 per cent to 22 per cent. In July 2000 it was reduced to zero and a 10 per cent GST applied to the retail price.

Michael Hill Jewellers advised the Commission that because of computer errors it failed to pass on the WST reduction from 32 per cent to 22 per cent on watchbands sold through its stores.

The Commission acknowledged it would be impractical to refund customers because of the size of the refund and the difficulty in identifying the individuals. Further, there would have been significant administrative costs.

It was satisfied that the donation by Michael Hill Jewellers to the Starlight Foundation had effectively divested the company of any benefit it may have gained. It considered that such donations to charity are not an ideal remedy from a consumer protection perspective, but comprised an appropriate resolution in the circumstances. The Commission felt it was unlikely any affected consumer would object to the donation. It noted though that its first priority was always to ensure consumers are fully and quickly refunded for any GST overcharge.

The Islanders' Board of Industry and Service (IBIS)

Alleged price exploitation in relation to the New Tax System (s. 75AU)

In September 2000 IBIS agreed to offer communities in the Torres Strait Islands refunds and a one-month 5 per cent discount period on

all items at 14 of its grocery stores for GST-related pricing mistakes.

After discussions with IBIS the Commission formed the view that IBIS had increased some of its prices more than it should have and were at risk of breaching the price exploitation provisions of the Act.

IBIS immediately acknowledged these concerns and agreed to fix the problem. Court enforceable undertakings include an agreement to institute a trade practices compliance program to ensure that future conduct is less likely to contravene the Act. The Commission is pleased with the outcome because it demonstrates its commitment to protecting consumers in rural and remote communities as well as in large cities.

Wollongong City Council

Price exploitation in relation to New Tax System (s. 75AU)

On 24 October 2000 the Wollongong City Council agreed to provide refunds and a free sports day for overcharging GST. The council had rounded the effect of the GST above 10 per cent on various services, including room bookings, waste disposal services and the use of sporting facilities.

After complaints about the price increases for sporting facilities and waste disposal, the Commission investigated the council's post-1 July 2000 price calculations. It found the council had used an incorrect rounding method for GST-inclusive prices. The council applied the 10 per cent GST to the services that it provided which were subject to the GST, and then rounded these amounts up above the 10 per cent.

After discussions with the Commission the council immediately reduced the prices for services where the incorrect method had been used. It agreed to take corrective steps including refunds to consumers, a free sports day on 5 November 2000 at the Beaton Park Leisure Centre, Lakeside Leisure Centre and Illawarra Regional Athletics to compensate casual users of these facilities who were overcharged. It would also publish notices to notify consumers of the free sports day.

Clarendon Homes (NSW) Pty Ltd

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

On 12 September 2000 Clarendon Homes agreed to waive more than \$1 million of claimed GST charges affecting 208 Clarendon customers after a Commission investigation.

The Commission had received complaints from Clarendon NSW customers. They claimed that Clarendon sales staff had advised them in mid-1999 to early 2000 that the contracts for the construction of new homes was GST-inclusive and then subsequently invoiced them for an additional amount due to GST.

The Commission was concerned that such conduct may breach the misleading and deceptive conduct provisions of the Trade Practices Act. The Commission raised its concerns with Clarendon and the company agreed to waive the charges of about \$1.09 million for 208 new home buyers. Clarendon also offered court enforceable undertakings to write to all 208 customers advising them that their GST charges had been waived and also agreed to undertake a trade practices compliance program.

Cuisine Courier Pty Limited

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

On 21 September 2000 a restaurant delivery service signed court enforceable undertakings to stop advertising prices that did not include GST and to carry out other corrective measures.

Cuisine Courier Pty Limited operates a restaurant meal delivery service in the Sydney and Melbourne metropolitan areas. After intervention by the Commission Cuisine Courier agreed to immediately stop distribution of all menu booklets that did not contain GST-inclusive prices and associated fees, and amend all menu prices and associated fees on its website so that they are GST-inclusive.

Other measures include corrective advertising in the national press; and re-voicing telephone recordings and other operation procedures to alert customers as an interim measure until all the booklets containing GST-inclusive prices and associated fees have been circulated. They also undertook that future advertising and promotional material will contain GST-inclusive menu prices and associated fees. Cuisine Courier will also implement a trade practices compliance program.

In addition to the above measures each of the restaurants that have their meals delivered by Cuisine Courier were sent a letter by the Commission asking them to review their pricing display practices.

Aus-Care Townsville, Aus-Care Cairns, Aus-Care Upper Mt Gravatt, Aus-Care Indooroopilly

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

On 25 September 2000 the Commission accepted court enforceable undertakings from four medical centres in Queensland. The undertakings provide refunds and apologies to any patients who were charged GST on hepatitis B vaccinations for children in circumstances that meant they should not have been.

The offer of refunds follows a complaint made to the Commission's North Queensland office.

The four medical centres undertook to ensure that the price of vaccinations of hepatitis B do not include a GST component when they should not and to review their billing practices to ensure there is no GST component on any GST-free services. The medical centres will distribute a corrective policy, a refund of the GST and implement a trade practices compliance program.

Lander Toyota (AC McGrath & Co Pty Ltd)

Price exploitation in relation to the New Tax System (s. 75AU)

On 12 September 2000 the Commission accepted undertakings from Lander Toyota, part of the AC McGrath Motor Group, to provide

refunds to new car buyers who did not receive the full benefit of Wholesale Sales Tax reductions on new motor vehicles.

AC McGrath & Co Pty Ltd, the parent company of Lander, responded quickly to the Commission's concerns. It conducted an extensive review of all transitional new car contracts across its group. It identified that a small number of errors had been made at two dealerships in calculating the effect of the GST on new motor vehicles ordered before 1 July 2000 but delivered after that date.

AC McGrath immediately agreed to offer full refunds or the difference between the price charged and the correct price to all affected customers. The total of the refunds is more than \$23 000. Lander Toyota also agreed to provide each customer with an additional \$250 scheduled maintenance service voucher. AC McGrath has agreed not to recover the amounts undercharged on 14 Lander Toyota transactions, totalling \$9282.

Before the start of the GST, AC McGrath had implemented an extensive training program for its sales staff on the effects of the GST on new car prices and on transitional contracts. Because a limited number of sales staff misunderstood the effect of the New Tax System changes on the contracts already in existence at 1 July 2000, the McGrath Motor Group has undertaken to conduct further trade practices compliance training for all sales staff.