# Enforcement

*The following are reports on new and concluded Commission actions in the courts, settlements requiring court enforceable undertakings (s. 87B) and mergers opposed by the Commission. Other matters currently before the court are reported in appendix 1. Section 87B undertakings accepted by the Commission and non-confidential mergers not opposed by the Commission are listed in appendix 2.*

## Anti-competitive agreements (Part IV)

### American Golf Supplies Pty Ltd

*Resale price maintenance (s. 48)*

On 2 May 2001 American Golf Supplies Pty Ltd and its director, Mr Paul Roser gave the Commission court enforceable undertakings that they will:

- not engage in conduct that constitutes resale price maintenance;
- not require their retail customers to refrain from selling or advertising PING golfing products at prices other than its suggested retail prices;
- develop a corporate trade practices compliance program; and
- undertake corrective advertising.

American Golf Supplies began circulating its memorandum of trading terms for PING fitted accounts to its retail customers in June 2000. One of the clauses was that retail customers could not advertise a price for PING products other than at American Golf Supplies' suggested retail prices.

When a major Sydney golf retailer advertised PING products at a discount, American Golf Supplies cut off its bonuses and rebates until the retailer agreed to sign the memorandum. American Golf Supplies reversed those decisions and re-instated the benefits after being contacted by the Commission. It also wrote to its retailers advising them to ignore the offending clauses in its contracts.

Requiring a customer not to advertise goods at a price less than that specified by the supplier constitutes resale price maintenance. The principle underlying this provision of the Act is that the ability to advertise discounts is essential to retailers who wish to engage in price competition.

The Commission noted its concern that other similar practices may be occurring in the golf products market in which prestige is considered a major factor in maintaining sales at the top end of the market.

### Trevor Davis Investments Pty Ltd, Mans Davis Holdings Pty Ltd, Trevor Davis and Daniel Mans

*Alleged attempted price fixing (s. 45) and attempted inducement to enter a price fixing arrangement for supplying casual Internet access (s. 45A)*

On 2 July 2001 the Federal Court in Melbourne found that the operator of an Internet café business, Mr Trevor Davis, wrote to a nearby rival Internet cafe on 22 October 2000, asking it to agree upon a minimum hourly rate of $5 for Internet access. The letter threatened that Idle Gossip would begin to compete more aggressively if its rival did not agree to set its public price at $5 per hour.

The Commission had instituted proceedings for attempted price fixing in November 2000. The court penalised Mr Davis $5000 for attempting to fix the price of Internet services with a competitor. The court also declared that Mr Davis had engaged in illegal conduct and granted injunctions restraining him from engaging in similar conduct for three years. On 28 June 2001 judgment was handed down.

In deciding on a penalty of $5000 the court took into account Mr Davis' poor health and that he had shown remorse and admitted the conduct.

# Mergers (Part IV)

### Medical Imaging Australasia/Benson Radiology

*Acquisition (s. 50)*

On 22 May 2001 the Commission announced it would oppose the bid by Medical Imaging Australasia (MIA) to acquire Benson Radiology.

Benson Radiology is one of three main private radiology practices operating in the Adelaide region along with Perrett Medical Imaging and Dr Jones & Partners. MIA is already the owner of another Adelaide based private radiology practice in Perrett Medical Imaging.

In February this year, MIA approached the Commission about the possible acquisition of Benson Radiology.The Commission conducted extensive market inquiries into the proposed acquisition, consulting with public and private hospitals, government agencies as well as private health insurance funds. Overall, the Commission found that the proposed acquisition would lead to a substantial lessening in competition for the provision of radiology services to private patients in the Adelaide region. The proposed acquisition would have given MIA a market share greater than 50 per cent for private patients in Adelaide. The Commission was concerned that barriers to entry for the provision of radiology services are high.

It found there was limited competitive overlap between private radiology practices and public hospital radiology departments and concluded it unlikely that public hospital radiology departments would provide an effective competitive constraint against the conduct of the merged entity.

Ultimately, the Commission was concerned that the proposed acquisition by MIA would result in higher prices for the provision of radiology services for private patients in Adelaide. Therefore it decided to oppose this acquisition.

### Dairy Farm Management Services Ltd, Franklins and Woolworths Limited

*Acquisition (s. 50)*

On 4 June 2001 the Commission accepted court enforceable undertakings from Dairy Farm Management Services Ltd, Franklins and Woolworths Limited on the sale of Franklins supermarkets.

The undertakings addressed the Commission's concerns that the proposal by Dairy Farm may result in a substantial lessening of competition in the supermarket industry. As the undertakings would underpin a significant boost to the market share of independent grocery retailers, the Commission would not oppose the proposal. The undertakings deal with the process by which stores would be transferred from Franklins to independent operators via a structure known as the joint independent divestiture alliance (JIDA).

The Commission agreed to Woolworths acquiring 67 Franklins stores, half of the initial number. Where Woolworths acquires a Franklins store, Woolworths must, within three months of each acquisition remove reference to the store having been a Franklins store and stop selling No Frills and First Choice brands.

To promote competition, Woolworths is required to divest its stores at the following locations: North Strathfield, Newport, Leichhardt, Waterloo, Newtown and Forestville. These stores will continue to operate as Woolworths outlets until sold through an independent broker.

# Unconscionable conduct (Part IVA)

### Medibank Private Limited (re Toowong Private Hospital)

*Unconscionable conduct in business transactions (s. 51AC)*

On 21 May 2001 Medibank Private Limited provided court enforceable undertakings to the Commission after investigations about unconscionable conduct in its hospital purchaser provider agreement (HPPA) dealings with

Toowong Private Hospital, an independent, specialist, psychiatric hospital in Brisbane.

HPPAs are agreements between private health funds and private hospitals by which hospitals agree to provide services to members of health insurance funds at agreed rates of contribution from the funds.

The Commission began to investigate the HPPA after the Australian Private Hospitals Association complained about the attempted imposition of a unilateral variation clause. The clause would have allowed Medibank Private to vary the terms of an HPPA without the consent of the Toowong hospital.

The Commission believes Medibank Private might have engaged in unconscionable conduct because:

- it is Australia's largest health fund and in the relevant period had HPPAs with more than 90 per cent of private hospitals in Queensland;
- Toowong is a small, 54-bed, independent specialist hospital;
- an HPPA with Medibank Private was extremely important to Toowong for commercial reasons; and
- Toowong's main competitors had HPPAs with Medibank Private.

Also, for an extended time, Medibank Private did not discuss the reasons for the clause or negotiate on it, and Toowong had the impression that the clause was a standard one. Toowong probably incurred significant costs and delays in dealing with the HPPA because of the clause. The Commission notes that there was a disparity of bargaining power between the parties and that the clause, in the Commission's view, was not reasonably necessary to protect Medibank Private's commercial interests, especially given that the proposed HPPA had two consensual variation clauses.

Medibank Private acknowledged it may have led Toowong to believe it was trying to impose a unilateral variation clause and in doing so may have acted unconscionably.

Medibank Private agreed to:

- refrain from including such a clause in future HPPAs with any private hospital;
- reimburse Toowong's costs incurred from dealings arising from the clause;
- contribute to the Commission's investigation costs;
- review its trade practices compliance program; and
- have the reviewed compliance program independently audited.

To help prevent unconscionable conduct the Commission urges parties in the health sector to adopt the voluntary code of practice that is aimed at enhancing the process of contract negotiations and has been agreed to by the Australian Private Hospitals Association and the Australian Health Insurance Association.

## National Australia Bank Limited

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

On 3 November 2000 the Commission instituted proceedings in the Federal Court, Hobart, against the National Australia Bank and a business banking manager in Tasmania, Carlton Dixon. The Commission alleged that the bank had engaged in unconscionable conduct in obtaining and enforcing personal guarantees for $200 000 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 guarantees were executed, the woman's husband was seriously incapacitated with amnesia after an accident.

On 5 June 2001 the court made orders by consent:

- declaring NAB had acted unconscionably in obtaining and enforcing the guarantee;
- restraining the bank in Tasmania and its manager Carlton Dixon from obtaining guarantees without properly explaining their nature and the need to obtain independent legal advice before the guarantee is signed; and
- requiring the bank to notify all lending staff in Australia of new lending requirements.

NAB also annulled the guarantee, paid $28 500 in damages to the Ashtons, and repaid monies recovered in excess of amounts owing on the mortgage.

# Consumer protection (Part V)

## Centrebuy Direct Pty Ltd and Peter Edgar Riley

*Misleading representations (s. 52), misrepresentations as to performance characteristics (s. 53(c)), and breach of s. 87B undertakings*

On 21 March 2001 the Commission instituted proceedings against Centrebuy Direct Pty Ltd and Peter Riley, a director of the company, over advertisements for BodyTone, an electronic muscle stimulation machine.

It was alleged advertisements for the BodyTone machine implied that the user could obtain benefits from its use without further effort on their part. It also claimed the advertisements breached s. 87B undertakings given by Centrebuy Direct on 25 June 2000 not to make the same representation in relation to an identical machine, marketed as MuscleTone.

The Commission sought declarations admitting to the contravention of ss. 52 and 53(c) and breach of the s. 87B undertakings; injunctions; placing of corrective advertisements; and an offer of refunds.

On 5 June 2001 in a development unrelated to the Commission's action, Centrebuy Direct went into voluntary liquidation. Consequently, consent orders were obtained on 27 June 2001 that:

- Mr Riley would not promote or sell electronic muscle stimulation machines either personally or in his capacity as a director of a company or as an employee of, or consultant to, a company or individual;
- within three months he would attend a seminar approved by the Commission on compliance with the consumer provisions of the Trade Practices Act;
- he would pay the Commission's agreed costs of $7500 within 28 days; and
- the application against Centrebuy Direct would be otherwise dismissed with no order as to costs between the parties.

## Quality Bakers Australia Limited (Buttercup)

*Representations as to future matters (s. 51A), misleading or deceptive conduct (s. 52), offering gifts and prizes (s. 54)*

On 8 May 2001 the Commission instituted court proceedings seeking interim orders in the Federal Court, Canberra, against Quality Bakers Australia Limited (Buttercup) in relation to its promotion 'Help Buttercup to Help Our Babies'.

It alleges that the advertising does not adequately draw the consumer's attention to a qualification and is seeking court orders for Buttercup to:

- declare that it engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s. 52(1) of the Act;
- increase the size of the fine print qualification to a size that is similar to the size of the font in which the representation is made;
- place corrective advertisements in newspapers circulating within the relevant area and in all stores that receive Buttercup products within this area;
- donate 30 cents to the Canberra Hospital for each Buttercup loaf of bread sold between 17 March and 1 June 2001; and
- implement a trade practices compliance program.

## Axxes Australia Pty Ltd

*Consumer unconscionable conduct (s. 51AB), misleading or deceptive conduct (s. 52), false or misleading representations (ss. 53(d), 53(e), 53(g))*

On 25 May 2001 the Commission instituted proceedings in the Federal Court in Melbourne against door-to-door sales agent company Axxess Australia Pty Ltd.

It alleged Axxess and its door-to-door agents illegally obtained signatures from consumers by:

- falsely advising them that in signing or initialling a form they were simply requesting further information or expressing an interest in the product;
- telling them to sign a form simply to 'show my boss I've been to the house' when they were actually signing a transfer form;

- signing up elderly and vision-impaired people;
- giving consumers the impression they were representing the telephone carrier the consumer was already connected with and there would be no change to their service provider; and
- unconscionably insisting the consumer sign the transfer document immediately without having the opportunity to read or comprehend it.

The Commission is seeking:

- injunctions restraining Axxess and its door-to-door selling agents from engaging in or being otherwise involved in similar conduct;
- orders to implement a trade practices compliance program and attend trade practices seminars;
- orders to publish information; and
- costs.

## Greenstar Co-operative Ltd

*Misleading and deceptive conduct (s. 52), false representations (ss. 53(c), 53(d), 53(e), 53(g)), bait advertising (s. 56), referral selling (s. 57), pyramid selling (s. 61)*

On 4 June 2001 the Commission instituted proceedings against Greenstar Co-operative Ltd and some related companies and associated directors. The other companies are Bio Enviro Plan Pty Ltd, Buyplus Commodities Brokers Pty Ltd and Greenstar Management Pty Ltd.

The Commission alleged they were involved in an illegal pyramid and referral selling scheme and that the companies misled consumers and made false representations about the attributes of a transaction card and an earthworm farming program which were part of the scheme.

The Greenstar scheme has been extensively promoted on the Internet and at public meetings in capital cities across Australia. The Commission alleged consumers were induced by Greenstar to join the scheme by promising members a worldwide business that could generate lifelong, residual income, 24 hours a day, seven days a week, from seven different streams of income, without members leaving their homes.

Further, the Commission alleged Greenstar and the directors have claimed to prospective members that:

- Greenstar members who paid US$30 per month for 36 months and who wished to leave the scheme would receive their money back in full;
- Greenstar was in negotiations for 'transaction cards' which would shortly be in use and these cards could be used by companies for paying employee payrolls, to pay their commission agents and by charity and non-profit organisations, and that the transaction charge from these users would be returned to the members 'world pool' providing the potential for huge returns to members; and
- Greenstar is the major shareholder in Australian Environmental Technologies and that dividends from these shares would flow into the profit–share pool, with Australian Environmental Technologies anticipating an April/May 2001 float.

On 14 June 2001 the Federal Court, Perth, granted interim injunctions against Greenstar Co-operative Ltd and four of its directors and an associated company, Greenstar Management Pty Ltd that prevent them from:

- inducing persons into becoming members of the Greenstar Scheme; and
- representing that persons would be paid a commission in return for assisting the companies to provide goods or services from Greenstar to other consumers.

The injunctions also prevent the respondents from making representations that the companies have for supply, whether alone or as part of the scheme, a Greenstar Card and that:

- the card is of any assistance in making telephone calls;
- any record of any currency is kept in relation to the card;
- any arrangement has been made with any bank or financial institution in relation to the card;
- a deposit can be made to the credit of any card;

- the card can help in making purchases via an electronic communication network;
- the card possesses any debit card facilities;
- the card is of any help in obtaining cash from an automatic teller machine;
- the card has any association with any debit platform or with any other network using electronic communication for banking or commerce; and
- it is possible for a member of the Greenstar Scheme to earn money from their membership.

### Target Australia Pty Ltd

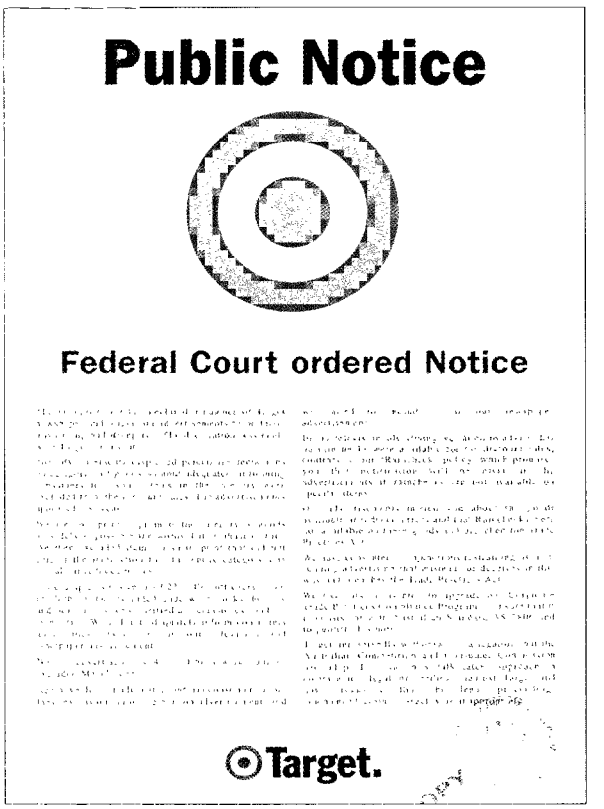
*Misleading and deceptive conduct (s. 52), false or misleading representations on prices (s. 53(e))*

The Commission instituted proceedings in Perth on 5 September 2000 alleging that Target advertisements stating in large print that substantial percentage price reductions applied to a broad category of goods also used small print to exclude items from the discount sales.

Target television advertising promised 25 to 40 per cent off 'every stitch of clothing'. However, in small print, it excluded underwear, socks and hosiery and failed to mention that other clothing items, such as ties and scarves it classified as accessories, were also excluded. In similar style television advertisements, Target also advertised 15 to 40 per cent off housewares and again used small print to exclude manchester (e.g. towels, sheets and pillowcases) from the sale. A related newspaper advertisement failed to include any reference to the exclusion of manchester goods.

At the time, Target had in place a raincheck policy that promised to advertise when rainchecks were not available on specific items. Contrary to this policy Target's television advertisements failed to advise consumers that rainchecks were not available for the discount sales.

On 25 June 2001 Lee J in the Federal Court, Perth, declared that television and newspaper advertisements, which appeared nationally last year, were false, misleading and deceptive. Lee J ordered Target to broadcast a corrective advertisement nationally on 88 television stations and to publish corrective notices in


Public Notice

Federal Court ordered Notice

Target.

37 newspapers across metropolitan, regional and rural Australia. The orders were made with Target's consent.

Lee J also issued injunctions restraining Target from advertising in the same way for four years; ordered Target to review its trade practices compliance program; and ordered Target to pay Commission costs of $65 000.

## GST compliance and enforcement (Part VB)

### Oasis Credits Pty Ltd (trading as Holdfast Finance Corporation)

*Price exploitation under the New Tax System (s. 75AU), prohibition on misrepresenting the effect of the New Tax System changes (s. 75AYA), misleading or deceptive conduct (s. 52)*

On 12 April 2001 Oasis Credits Pty Ltd (trading as Holdfast Finance Corporation) provided court enforceable undertakings to the Commission after investigations of GST liability for lease payments.

The Commission's investigations followed a complaint about GST being charged on a lease agreement for a motor vehicle with Oasis Credits Pty Ltd. Investigations revealed the agreement was in fact not a leasing agreement, but a hire purchase agreement, which does not attract GST. If supply occurred before 1 July 2000, subsequent payments for the supply would not attract GST.

Oasis Credits advised the Commission that a further 170 customers had incorrectly been charged amounts for GST on their hire purchase contracts.

The corporation acknowledged that its conduct might have breached the price exploitation and misleading and deceptive conduct provisions of the Trade Practices Act.

Oasis Credits has agreed that by way of reimbursing the incorrectly charged GST it would give affected customers a choice of:

- an offset against the next payment to Oasis Credits;
- a cheque/cash refund for the amount overcharged by Oasis Credits; or
- a credit against the customer's account for the amount overcharged.

It also agreed to institute a trade practices compliance program and retain an independent auditor to ensure that all amounts incorrectly collected are identified and correctly refunded.

In May 2001 Oasis Credits Pty Ltd completed its audit as required under the s. 87B undertakings and advised that a total of $30 541.40 was refunded to consumers.