
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)

Boral Ltd and Boral Masonry Ltd (formerly Boral Besser Masonry Ltd)

Alleged predatory pricing and misuse of market power in relation to the supply of concrete masonry products (s. 46)

On 7 February 2003 the High Court of Australia handed down its first decision about below cost pricing and section 46 of the Trade Practices Act. By a 6–1 majority, the High Court found that Boral Masonry Limited did not breach the misuse of market power provisions of the Act as alleged by the Commission. This decision overturned a unanimous decision of the Full Court of the Federal Court. The court's decision was based on a finding that Boral Masonry did not have substantial market power.

In February 1994 a small regional manufacturer, C&M Bricks, began new concrete products manufacturing operations on the outskirts of Melbourne, using highly efficient state-of-the-art technology. This increased C&M's production capacity, reduced its production costs significantly, and allowed it to better compete in the Melbourne market. Before this, C&M was a Bendigo-based producer which mainly serviced regional areas. The Commission alleged that Boral Masonry reduced its prices below manufacturing costs to drive C&M Bricks out of the market and to deter other businesses from entering this market. The Commission also alleged that Boral Masonry's pricing forced two other competitors out of the market.

In March 1998 the ACCC instituted proceedings against Boral Masonry Limited and its parent company, Boral Limited, alleging that this predatory pricing was a misuse of market power. At trial the Federal Court found that no contravention of section 46 had occurred. The Full Court of the Federal Court unanimously overturned this decision, holding that Boral Masonry had a substantial degree of power in the Melbourne concrete masonry products market and that it took advantage of this power to deter new entrants and drive competitors out of the market. Boral Masonry appealed to the High Court, which upheld the appeal.

Hoffmann-La Roche, BASF Aktiengesellschaft and Takeda Chemical Industries

Alleged exclusive dealing (s. 47)

On 7 February 2003 the Commission instituted proceedings in the Federal Court, Melbourne, against three of the largest foreign producers of vitamin C used for human consumption.

The Commission alleges that F.Hoffmann-La Roche (Switzerland), BASF Aktiengesellschaft (Germany), Takeda Chemical Industries (Japan), various related companies in the Asia-Pacific region and foreign executives entered into a global price-fixing arrangement of human vitamin C. The Commission also alleges that an integral part of the arrangements was the allocation of global market shares among the foreign companies for the distribution of human vitamin C. None of the Australian subsidiaries have been joined to the action.

The proceedings arise from alleged agreements that were made and implemented overseas between January 1991 and October 1995 and which is part of the broader global vitamins cartel which came to an end in about 1999. In 2001 the Commission was successful in securing record penalties of \$26 million against Roche Vitamins Australia Pty Ltd, BASF Australia Limited, and Aventis Animal Nutrition Pty Ltd for their involvement in arrangements to fix prices and allocate market shares of animal vitamins A and E and pre-mix.

The Commissions has obtained leave of the Federal Court to serve the proceedings on some of the respondents located in Switzerland, Germany and Hong Kong, and is preparing to seek similar leave regarding the remaining respondents.

McMahon Services Pty Ltd, SA Demolition & Salvage Pty Ltd and DCD Enterprises Pty Ltd

Alleged price fixing (s. 45A), misuse of market power (s. 46)

On 24 January 2003 the Commission instituted proceedings in the Federal Court, Adelaide, against McMahon Services Pty Ltd, SA Demolition & Salvage Pty Ltd, DCD Enterprises Pty Ltd (trading as D & V Services) and a number of their representatives for alleged price fixing of a tender for demolition and asbestos removal work.

In late 2000 the Defence Estate Office of the Commonwealth Department of Defence invited a number of companies to tender for a project involving the removal of asbestos and the demolition of structures at its site in Salisbury, South Australia. McMahon Services and SA Demolition were two of the companies invited to tender.

The Commission alleges that in response to the invitation to tender:

- McMahon Services communicated to SA Demolition (through D & V Services), the price that SA Demolition should tender for the project
- McMahon Services advised SA Demolition and D & V Services that if SA Demolition tendered at the price specified and McMahon Services was awarded the tender, it would give the companies \$50 000
- McMahon Services also advised that if it won the tender it would subcontract D & V Services to undertake the asbestos removal component of the project and furthermore, may provide SA Demolition with some work on the project carting materials
- SA Demolition tendered at the specified price
- in or around the time that it was awarded the tender, McMahon Services sub-contracted D & V Services to carry out the asbestos removal work on the project
- soon after, McMahon Services paid \$50 000 to D & V Services and SA Demolition.

The ACCC is seeking orders including declarations, pecuniary penalties, injunctions, findings of fact, the implementation of a trade practices compliance program and costs.

The first directions hearing took place on 27 February 2003. The next directions hearing is scheduled for 1 May 2003 in the Federal Court, Adelaide.

Mr Peter Foster and Chaste Corporation Pty Ltd

Alleged resale price maintenance (s. 48), made false representations (ss. 53, 53(aa), 53(c), 53(g) and 59), engaged in misleading and deceptive conduct (s. 52), unconscionable conduct (s. 51AC), and contravention of an industry code (s. 51AD)

On 3 February 2003 the Commission filed a notice of motion seeking pre-trial orders against Mr Peter Foster before Justice Spender in the Federal Court, Brisbane. The Commission alleged that Mr Foster promoted, planned, controlled, managed and supervised the operations of the Chaste Corporation Pty and the TRIMit weight-loss scheme.

The Commission has sought orders, pending the hearing of its case against Mr Foster and others, restraining Mr Foster from leaving Australia and requiring him to deliver his passport to the Federal Court. It also sought orders to restrain Mr Foster from improperly dissipating his assets.

Mr Foster's legal representative offered an interim undertaking that Mr Foster would give 48 hours written notice to the ACCC's solicitors, if Mr Foster intended to leave Australia. This was accepted by the court.

The notice of motion was heard before Justice Spender on 26 February 2003. Justice Spender has reserved his decision.

The next directions hearing in the matter against all the respondents has not yet been set down.

Schneider (Electric) Australia Pty Ltd

Alleged agreements lessening competition (s. 45), price fixing (s. 45A), primary boycotts (s. 4D)

On 14 February 2003 the Full Court of the Federal Court, Sydney, reduced the penalty against Schneider (Electric) Australia Pty Ltd from \$7 million to \$5.5 million for price fixing and market sharing in the distribution transformer market.

The penalty is still among the highest handed down by the court for a breach of the competition provisions of the Trade Practices Act.

The Full Federal Court decided to reduce the penalty because the trial judge overlooked an alteration to an agreed statement of facts, made to the court by the Commission and Schneider, about future sales by the company. This reduced Schneider's future sales from \$50.8 million to \$29 million.

In May 2002 Schneider Electric (Australia), Wilson Transformer Company and AW Tyree Transformers each made admissions to the Federal Court that they had engaged in extensive market-sharing and price-fixing cartel conduct in the market for distribution transformers during the 1990s which continued until 1999. This market in Australia is estimated to be worth approximately \$100 million per annum. Total penalties in this matter now stand at about \$20.5 million.

Counsel for Schneider stressed the 'parity principle' in arguing for a reduction in penalty. However, Justice Merkel found that even though the penalties imposed on some participants were inadequate it does not follow that the penalties imposed on all participants should be inadequate.

Justice Merkel described the conduct as 'plainly antithetical' to the object of the Act, to enhance the welfare of Australians, and went on to say that the contraventions called for substantial penalties.

Fair trading (Part V)

Alliance WA Pty Ltd

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

On 14 January 2003 the Commission accepted court enforceable undertakings from Alliance WA Pty Ltd over its mobile phone and call plan advertising, including an undertaking to provide misled consumers with refunds.

Alliance admits that its advertising may have misled consumers to believe that the advertised mobile phone(s) and call plan would cost no more than the amount shown in the advertisements as the 'Total cost \$Y. That's it!'. In fact, the amount shown in the advertisements as the 'total cost' was the cost of the mobile phone only and any calls made by consumers were subject to an additional per-second charge.

Alliance has agreed to cancel the contracts and refund any mobile phone instalment payments made

by consumers who believe they were misled by the advertisements, on return of their mobile phone to Alliance.

Alliance has also undertaken to:

- not engage in similar conduct in the future
- explain to all customers who had bought the mobile phone and signed up to the call plan that they may have been misled by the advertisements about the actual call charges and that if they believe they have been misled, they can claim a refund
- implement a trade practices compliance program.

The Commission acknowledged that once this matter was drawn to Alliance's attention the company immediately stopped promoting the relevant advertisements and has cooperated fully.

David Francis

Alleged misleading or deceptive conduct (s. 52), misrepresentation of performance characteristics (s. 53), misleading conduct to which industrial property convention applies (s. 55)

On 17 February 2003 the Federal Court fined a promoter of weight-loss products, Mr David Francis, \$9000 for contempt of court.

The Commission instituted contempt of court proceedings against Mr Francis on 31 October 2002 for failing to comply with orders made by the Federal Court on 3 November 1997. Those orders followed Commission court action against Mr Francis for his involvement in alleged misleading or deceptive claims made in the promotion of a series of products that were represented as being able to assist in weight loss. The orders prohibited Mr Francis from making various representations about those products and other products promoted as methods or aids to slimming.

The Commission alleged that Mr Francis was guilty of contempt of court because during 2001, in promoting three products that were represented as being able to assist in weight loss, he made certain unsubstantiated claims that he was prohibited from making under the previous court orders. The products promoted were:

- a moulded plastic device called ACU-SLIM 2000 which was designed to be inserted into a person's ear. It was claimed that use of ACU-SLIM 2000 could eliminate cravings for food

- a report called 'Foods that cause weight loss' which included a list of 19 foods with 'negative calories' and suggested that the consumption of such foods could cause weight loss by burning more calories than they contribute to the person eating them
- a wafer biscuit called 'ThermoSlim' which was represented as being able to cause weight loss by burning body fat.

Mr Francis did not contest the charges of contempt of court. The court found that the Commission had proven that Mr Francis had committed contempt of court. He was ordered to pay a fine and the Commission's costs of the contempt proceedings.

Dodo Internet Pty Ltd

Alleged misleading or deceptive conduct (s. 52), false or misleading misrepresentations (s. 53(e) and (g)), unconscionable conduct (s. 51AB)

On 6 February 2003 the Federal Court, Adelaide, declared that Dodo Internet Pty Ltd had engaged in deceptive conduct about the cost of connection to its internet service.

It also declared that Dodo acted unconscionably in dealing with consumer complaints. The Commission alleged that Dodo represented to consumers that:

- certain dial-in telephone numbers on Dodo's website, or provided to consumers by its sales representatives, would enable consumers to access unlimited internet access for the cost of a local call when, in fact, some consumers incurred long-distance telephone charges by using dial-in numbers provided by Dodo
- consumers had no right or remedy against Dodo in relation to their purchase of internet access plans when, in fact, rights or remedies exist under the Trade Practices Act and other similar laws that cannot be waived by Dodo.

The Commission further alleged that in relation to some consumers Dodo engaged in unconscionable conduct by, among other things, failing to check the accuracy of the dial-in telephone numbers provided, failing to investigate fairly and properly complaints made to Dodo, refusing to deal with or enter into negotiations with the complainants, and seeking to rely upon unlawful exclusion clauses which may have had fundamental and far-reaching consequences for its customers.

The court also found that two of Dodo's directors, Mark Baranov and Larry Kestleman, were knowingly concerned in the conduct.

The court granted injunctions to restrain Dodo and the two directors from making the same or similar representations to consumers for a period of three years unless Dodo has a reasonable basis for making the representation.

It also ordered Dodo to:

- compensate any consumers who incurred long-distance telephone charges and other liabilities to telecommunication providers as a result of Dodo's conduct
- inform its consumers of the court's findings
- implement and undertake a trade practices compliance program.

The orders were made with the consent of both parties.

Furniture Direct Pty Ltd

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

On 18 February 2003 the Federal Court, Brisbane, found that a furniture retail company trading as Furniture Direct and its director, Mr Monty Khoury, engaged in false, misleading and deceptive conduct over a 'Store Cost Plus \$1' advertising campaign in and around Brisbane.

The Commission had alleged that Redmond Holdings Pty Ltd, formerly known as Furniture Direct Pty Ltd (Furniture Direct), conducted an advertising campaign between about February and April 2001 which promoted the sale of furniture at its stores at 'Store Cost Plus \$1'. The promotion was also conducted for its Lawnton store, owned by Toowoomba Furniture & Electrical Pty Ltd, formerly known as Furnelect Pty Ltd. It included television, radio and newspaper advertisements.

The Commission alleged that the prices advertised were in fact calculated by adding approximately 60 per cent to the prices paid for the items by the stores, plus one dollar.

It was alleged that Furniture Direct breached sections of the Act. The Commission further alleged that Toowoomba Furniture & Electrical Pty Ltd and Mr Khoury were knowingly concerned in, or party to, the alleged contraventions.

On 18 September 2002 the Federal Court made orders by consent of the liquidator of Toowoomba Furniture & Electrica Pty Ltd, including an injunction restraining it for three years from engaging in similar advertising conduct.

On 18 February 2003, following a Commission application for default judgment against Mr Khoury and Furniture Direct, the Federal Court made a declaration that the alleged conduct breached the Act; granted injunctions restraining the parties from similar advertising conduct in the future; ordered Mr Khoury to attend trade practices compliance training; and ordered Mr Khoury and Furniture Direct pay the Commission's costs.

In delivering her judgment, Justice Kiefel further noted that the newspaper and television advertisements contained a fine print disclaimer, but concluded that it was in such fine print and displayed for such a short period that it could not possibly be effective.

Michigan Group Pty Ltd, Queensland Juice Co. and crs

Alleged misleading or deceptive conduct (s. 52)

On 4 February 2003 the Federal Court, Brisbane, made final orders declaring that Michigan Group Pty Ltd, Immobiliare Pty Ltd, Mr Rodney Laski and Mr Peter Semos misled and deceived numerous investors in the promotion, sale and distribution of commercial orange juicing machines.

In 1998 investors were told by the respondents that for an average investment of \$15 000 per machine, they would benefit from the agreements that Michigan Group Pty Ltd and the Queensland Juice Company had in place to site the machines, including agreements with Franklins and Coles. The respondents made various other representations regarding the levels of income that could be produced; the time in which the investors could expect to recover their investment; and the number of orange juice bottles that could be sold.

The Commission instituted proceedings in October 2000 against the above-mentioned respondents, along with Mr Charles Cameron, Mr George Semos, Mr Daryl Doherty, Ms Linda Moretto and Mr Prospero Franzese. The proceedings were discontinued against Mr Franzese before the trial began in December 2001.

Justice Dowsett found that no arrangements existed to site the machines between the respondents and the retail fruit outlets, and that the representations were made without any reasonable basis. Justice

Dowsett did not make any findings of fact against Mr Charles Cameron, Mr George Semos, Mr Daryl Doherty or Ms Linda Moretto.

Justice Dowsett declared that the conduct of Mr Rodney Laski and Mr Peter Semos were knowingly concerned in the conduct of the companies, respectively Michigan Group Pty Ltd and Immobiliare Pty Ltd, in breaching s. 52, and granted permanent injunctions preventing them from making representations in connection with the sale of orange juicing or other dispensing machines, unless the statements are true or have reasonable grounds.

National Telecoms Group Pty Ltd

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

On 13 February 2003 the Commission instituted legal proceedings in the Federal Court, Melbourne, against National Telecoms Group Pty Ltd (NTG).

The Commission has alleged that NTG, and several of its subsidiaries, supply telephony packages, often marketed under the name Synergy, to small and medium-sized businesses. It is alleged these telephony packages generally consist of a lease on a new phone system and involve the transferring of the customer's fixed line telephony services to Direct Telecoms, a wholly owned subsidiary of NTG. Under these NTG telephony packages, the Commission alleges a customer pays rent for a new phone system and may also receive a rebate on their telephone bill.

The Commission alleges that, in the course of marketing these telephony packages, NTG and its agents, made representations to customers that:

- they would pay no more, or pay only marginally more, than they were currently paying for their telephony services, if they signed up to an NTG package
- they would receive a free phone system if they signed up to the NTG package
- the call rates for the telephony services provided in the NTG package would be the same or cheaper than the call rates that customer paid to their existing telephony provider.

The Commission is seeking court orders including declarations; injunctions restraining NTG from engaging in the same conduct in the future; the implementation of a trade practices compliance program and an education and training program for its promoters, marketers and sellers of the NTG package; corrective advertising and costs.

At a directions hearing in the Federal Court, Melbourne, on 19 March 2003 Justice Weinberg made orders setting out particular documents for the parties to file with the court, to progress the matter.

Purple-plates.com

Alleged misleading or deceptive conduct (s. 52)

On 6 February 2003 the Federal Court, Canberra, jailed internet trader Mr Neal Arthur Lyster following his failure to comply with conditions of his suspended sentence.

Mr Lyster was previously found guilty of contempt and the Federal Court issued warrants of committal for a term of imprisonment for one month, suspended on condition that he take all steps necessary to transfer his domain name 'www.purple-plates.com' to the Commission and file in the Federal Court an affidavit of his assets.

On that occasion, Justice Goldberg rejected submissions from Mr Lyster that previous decisions of the court were null and void. Justice Goldberg said Mr Lyster continued to defy the court, maintaining his belief that he had seceded from the Commonwealth of Australia and was not subject to the court's jurisdiction. Justice Goldberg again rejected these submissions noting that Mr Lyster had ignored several court decisions, orders and directions.

Previously, the Federal Court imposed a \$20 000 fine on Purple Harmony Plates Pty Ltd and \$10 000 fines on the company directors. The fines, for contempt, were imposed because the respondents

failed to implement court orders following a decision last year that they were in breach of the Trade Practices Act. That earlier decision related to the making of unsubstantiated health and other claims for products promoted on the internet.

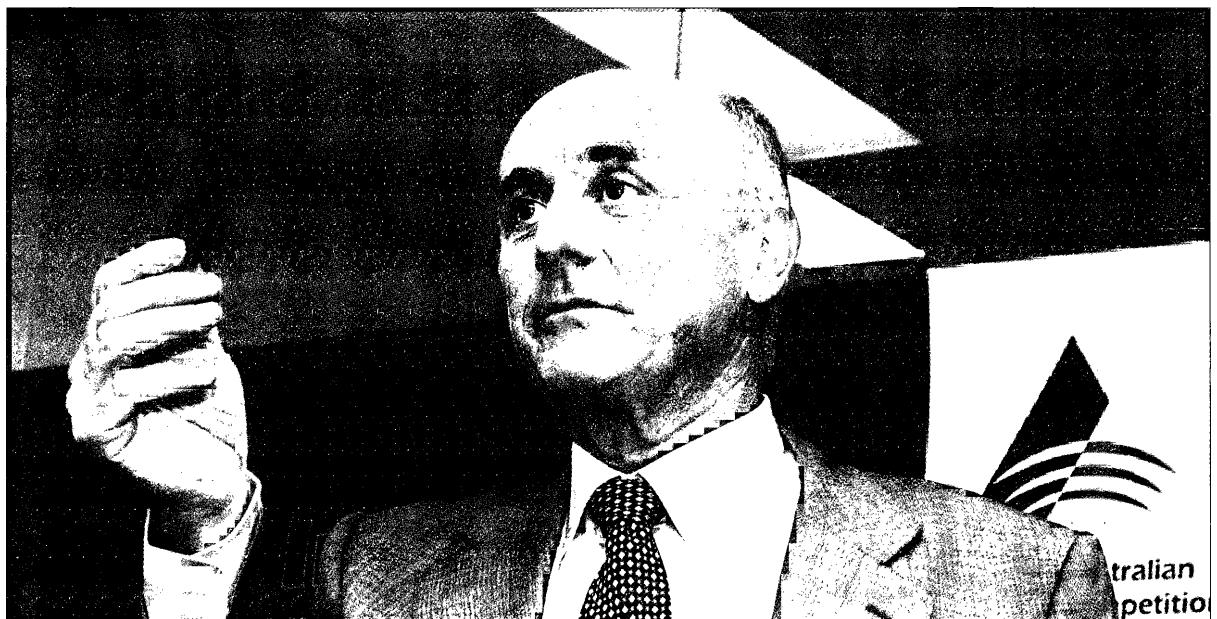
The original Federal Court orders included a direction to publish a corrective notice on the company's website within 14 days. The corrective notice should have been displayed immediately upon accessing the website's homepage and order form. A US registrar of domain names acknowledged the recent Federal Court orders and has transferred the domain name <http://www.purple-plates.com> to the Commission. The website now displays a notice alerting consumers to the misleading nature of representations previously displayed at that website.

On 23 December 2002 Justice Weinberg directed Mr Lyster to undertake an assessment to prepare a pre-sentence report. Mr Lyster was also given a further opportunity to file material in answer to allegations of his failure to comply with earlier court orders. No such material was forthcoming and Mr Lyster failed to attend the pre-sentence assessment arranged by the Federal Court.

Transformation 2012

Alleged misrepresentations as to future matters (s. 51A), misleading or deceptive conduct (s. 52), false or misleading representations (s. 53(c))

On 11 September 2002 the Commission instituted proceedings in the Federal Court, Canberra, against internet trader, Mr Michael Desveaux.



Victorian-based Mr Desveaux will provide refunds to consumers who bought products through his website, Transformation 2012, based on false or misleading representations.

Products sold include O2xyrich Liquid Oxygen, Colloidal Copper, Colloidal Gold, SleepAweigh, Noni Juice, White Powder Gold and Etherium Gold, Olive Leaf Extract, Stevia, Peruvian Maca, Unique Water, Biosun Hopi Candle, and Colloidal Silver makers.

Mr Desveaux marketed the products on his website claiming that such products could treat or cure such diseases and infections as AIDS, cancer, herpes, hepatitis, Epstein Barr, multiple sclerosis, chronic fatigue syndrome, discoid lupus, alcoholism and drug additions, bronchial asthma, dermatitis and immune diseases.

The Commission has accepted court enforceable undertakings by Mr Desveaux to provide the refunds, and the Federal Court, Canberra, has made orders against Mr Desveaux for making false or misleading representations regarding health products on his website. The court orders include permanent injunctions, a trade practices compliance program, placing a corrective notice on his website and declarations. Mr Desveaux is required to incorporate a corrective statement on the offending section of his website.

The Commission began proceedings against Mr Desveaux for misleading or deceptive conduct and false or misleading representations following the worldwide sweep for misleading and deceptive claims about health products earlier this year. The sweep was an official activity of the International Marketing Supervision Network, (now the International Consumer Protection and Enforcement Network) a network of consumer protection law enforcement agencies in 30 countries, whose driving purpose is to prevent and redress cross-border deceptive marketing practices.

Will Writers Guild Pty Ltd

Alleged misleading representation about certain business activities (s 59(2))

On 7 February 2003 the Federal Court, Hobart, fined Will Writers Guild Pty Ltd and its director, Mr Sidney James Murray, a total of \$105 000 and ordered them to pay \$230 000 in compensation after finding them guilty of misleading six small business franchisees.

On 26 September 2001 the Commission instituted criminal proceedings against Will Writers Guild. The court found that between February 1999 and November 1999 Will Writers Guild and Mr Murray sold franchises to operate a will writing business to small business operators in New South Wales, Victoria, Western Australia, South Australia and Tasmania. Franchisees were enticed to pay up to \$65 000 for a franchise territory.

In each state and territory of Australia there is legislation which limits the writing of wills for fee or reward to legal practitioners, and so it would have been a criminal offence for any of the franchisees to engage in the franchise Will Writers Guild had sold them.

In a prosecution brought by the Commission, the court found that the Queensland-based company and its sole director misrepresented the risk of undertaking a will writing business by failing to reveal that it would be illegal for the franchisees to write wills for their customers.

The court also imposed a permanent injunction on the defendants and ordered them to pay the Commission's costs.

The Trade Practices Act prohibits false or misleading representations about the risk or any other material aspect of a business activity. In his judgment against Will Writers Guild and Mr Murray, the Federal Court's Justice Heerey said that he had formed the impression that Mr Murray would say anything to get a sale. In imposing the fine, Justice Heerey said that Mr Murray was reckless as to whether or not the business he was promoting could be lawfully carried on by non-lawyers and noted that the effect on the franchisees had been substantial and lasting and that Mr Murray had displayed no contrition.