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)

SIP Australia Pty Ltd and Baker Bros (Aust) Pty Ltd

Alleged primary boycott (s. 45(2)), price fixing and resale price maintenance (s. 45A, s. 48)

On 16 April 2003 the Federal Court, Melbourne, penalised SIP Australia Pty Ltd and its director Filippo Ippaso a total of $700 000 for conduct breaching the price-fixing and market-sharing provisions of the Trade Practices Act.

The court found that SIP had in 1994 made and given effect to a contract that fixed the price for compressors supplied by SIP and Baker Bros (Aust) Pty Ltd. It also found that SIP had given effect to a market sharing agreement at that time and that Mr Ippaso was knowingly concerned in both contraventions. A penalty of $580 000 was imposed on SIP and $120 000 on Mr Ippaso.

The court also found that SIP had attempted to make a later contract with the same competitor between November 1997 and February 1998 to prevent the supply of compressors and compressor parts to classes of persons by the companies in contravention of s. 45 of the Act. Mr Ippaso was found by the court to have attempted to induce this later attempted contravention.

In his reasons for judgment, Justice Goldberg stated he was satisfied that the contraventions by SIP of the Act were the result of a deliberate and well considered course of conduct by Mr Ippaso to insulate SIP from competition.

Justice Goldberg was satisfied that a consequence of the 1994 agreement was that the market for compressors was distorted and purchasers and potential purchasers were denied the benefit of competitive conduct from Sip and Baker Bros. He found that the conduct was intended to ensure prices were maintained above those that would otherwise have prevailed in a competitive market. He stated that Mr Ippaso's conduct was continuous from the later part of 1993 through to March 1998 when his attempt to enter into a further agreement with Baker Bros finally collapsed. He concluded that some purchasers of compressor equipment had purchased at higher prices than they would have obtained in the absence of the conduct.

He noted that five separate and distinct contraventions had been established and stated that the conduct was rendered all the more serious by the compounding of the price fixing conduct with the market sharing conduct.

He also noted that there was little in the conduct of SIP and Mr Ippaso that could be claimed as cooperation with the regulator to mitigate the level of the imposed penalty.

Berwick Springs Medical Practice

Alleged primary boycotts (s. 45(4D))

On 5 March 2003 the Federal Court, Melbourne, declared that a Melbourne doctor attempted to induce a boycott of bulk-billing and after-hours services by doctors wanting to practice at a Berwick Springs medical centre.

The Commission alleged Dr Abraham Freund and his company, AK Freund Pty Ltd, attempted to make or induce an arrangement or understanding with a competitor to boycott bulk-billing and boycott after-hours medical services.

In December 2002 the Commission instituted proceedings against AK Freund Pty Ltd and Dr Freund alleging that they insisted upon the incorporation of 'rules' in any leases of the Berwick Springs Medical Practice which among other things, imposed obligations on general practitioners operating

separate business in competition with AK Freund Pty Ltd and Dr Freund not to provide:

- bulk-billing services to patients, other than to pensioners, Health Card holders or to the GPs immediate family members
- medical services to patients after 8 pm Monday to Saturday or after 1 pm on Sundays.

The Commission alleged that it was AK Freund Pty Ltd and Dr Abraham Freund's intention that, by incorporating the 'rules' into leases for medical centre suites, anyone who leased a suite would be subject to these rules.

It was also alleged that it was the parties' primary concern that any general practitioners practicing from the centre in competition with Dr Freund be obliged not to bulk-bill generally without the company's consent and that practice hours be restricted.

The court declared that AK Freund Pty Ltd attempted to make and induce a contravention of the exclusionary (primary boycott) provisions of the Act by agreeing that in its lease of premises at the Berwick Springs Medical Centre, there was a requirement to include certain 'rules' in all other medical centre leases. Two rules effectively required that other general practitioners at the medical centre:

- not bulk bill for services they supplied except to patients who were pensioners, holders of health cards or members of the GP's family
- not supply services from those premises before 8 am or after 8 pm on Mondays and Saturdays, nor before 9 am or after 1 pm on Sundays
- getting an undertaking from the premises lessor that no medical centre leases would allow a contravention of these rules
- instituting and pursuing proceedings in the Victorian Civil and Administrative Tribunal, Retail Tenancies List against the lessor which sought to injunct the lessor from entering into any medical centre leases which would allow contravention of the rules
- proposing to a prospective tenant that they make an agreement so that the prospective tenant supplied services within the rules and rejecting amendments to the rules which would have allowed bulk-billing and after-hours services.

AK Freund Pty Ltd and Dr Freund have provided undertakings to the court that they will not, for five years, attempt to restrict hours or bulk-billing at Berwick Springs in the way previously attempted.

AK Freund Pty Ltd and Dr Abraham Freund wil pay the Commission's costs, agreed at $10 000. Settlement of the matter followed mediation.

No pecuniary penalties were sought against AK Freund Pty Ltd or Dr Freund.

Tasmanian Salmonid Growers Association, Tassal Ltd

Alleged agreements lessening competition (s. 45), exclusionary conduct (s. 4D)

On 24 April 2003 the Commission instituted proceedings in the Federal Court, Hobart, against the Atlantic salmon farming business, Tassal Ltd, and the Tasmanian Salmonid Growers Association (TSGA) for alleged anti-competitive production arrangements.

The Commission alleges that in early 2002, Atlantic salmon farmers in Tasmania, including Tassal Ltd, entered into an arrangement under the auspices of their trade association to restrict production of Atlantic salmon. The Commission alleges that the production restrictions were adopted to avoid oversupply and a consequent price drop, and were in contravention of s. 45 of the Act.

The Commission is seeking orders including declarations, injunctions, penalties, findings of fact, the implementation of trade practices compliance programs and costs.

The first directions hearing is listed for 3 June 2003 in the Federal Court, Hobart.

Fair trading (Part V)

The Buyers Group Pty Ltd

Alleged misleading or deceptive conduct (s. 52), misrepresentations about the performance characteristics of goods (s. 53(c))

On 8 April 2003 by consent of both parties, Justice Cooper of the Federal Court, Brisbane, declared that the representations made by The Buyers Group in relation to the Feminique Slimming System were misleading or deceptive and in breach of the Trade Practices Act.

Following action by the Commission, The Buyers Group has agreed to make a fund of $1.2 million available to refund consumers who were misled or deceived by the promoters of a health and fitness product.

The Buyers Group Pty Ltd broadcast 'advertorials' promoting an electronic muscle stimulation machine called the Feminique Slimming System from October 1999 to August 2001. The advertorials were broadcast on Network Ten's *Good Morning Australia* and *Bright Ideas* programs and Seven Network's *Morning Shift*. The Feminique was also promoted on the company's website at <http://www.buyersgroup.com.au>.

The Buyers Group represented that the Feminique had the following performance characteristics. It can:

- exercise, tone, firm or pull back into shape any part of the user's body without effort by the user
- burn up fat
- flatten the user's stomach without any effort by the user
- result in the user losing three kilograms in weight and reducing the user's waist measurements by three centimetres in a matter of four weeks
- be ideal for those who want to see effective and immediate results.

The Federal Court has ordered that corrective advertisements be broadcast on Network Ten's *Good Morning Australia* program and on the company's website for two weeks.

Consumers who believe they have been misled regarding their purchase of the Feminique will have 28 days from the conclusion of the advertisements to apply for a refund.

The court also found that The Buyers Group's sole director, Mr Josephus Schoonenberg, and an employee, Ms Marianne Schoonenberg, were knowingly concerned in the conduct.

Further, the court ordered by consent:

- permanent injunctions restraining The Buyers Group Pty Ltd and the two individuals from representing that the Feminique has the claimed performance characteristics
- each of the individuals knowingly concerned attend a trade practices compliance seminar to ensure compliance with the Trade Practices Act.

Consumers who bought a Feminique from The Buyers Group because of these misleading and deceptive claims can contact the ACCC Infocentre on 1300 302 502 or refer to the ACCC website for more information.

Australian Icon Products Pty Ltd

Alleged misleading and deceptive conduct (s. 52)

On 4 April 2003 the Commission instituted proceedings in the Federal Court, Brisbane, and obtained interim orders to restrain Australian Icon Products Pty Ltd until trial from describing or referring to its range of hand painted or hand carved Indigenous oriented souvenirs as 'Aboriginal art' or 'Authentic' unless it reasonably believes that the artwork or souvenir was painted or carved by a person of Aboriginal descent.

The orders, which were by consent, included an order requiring Australian Icon to send a letter to its retail customers and to post that letter on its website correcting those representations.

One of Australia's largest manufacturers of Aboriginal-style souvenirs, Australian Icon claims to supply over 1700 retailers nationally and export to 38 countries around the world.

The Commission alleged that Australian Icon represented that some of its hand painted Aboriginal-style souvenirs were 'authentic', 'certified authentic' and/or 'Australian Aboriginal art'. The Commission alleges that these representations were likely to mislead because the majority of Australian Icon's pool of artists who produced the souvenirs were not Aboriginal or of Aboriginal descent.

It is further alleged that a statement by Australian Icon on its website that the pool of artists who paint these souvenirs are 'Australian, Aboriginal by descent or Aboriginal' is in itself misleading.

The Commission's allegations do not apply to souvenirs that Australian Icon buys or produces as final products from Indigenous artists.

The Commission is also seeking final orders that include:

- declarations that the alleged conduct breaches the misleading or deceptive conduct provisions of the Act
- permanent injunctions restraining Australian Icon from engaging in similar conduct in the future
- further corrective notices to be sent to retailers and displayed on Australian Icon's website
- a community service order requiring Australian Icon to supply public notices to retailers alerting customers that they should read the labels carefully as they should not assume products featuring Aboriginal designs are designed or

made by Aboriginal people unless the label clearly says so

- the implementation of a trade practices compliance program.

The matter was set down for further directions on 23 May 2003.

Collagen Aesthetics Australia Pty Ltd

Alleged misleading or deceptive conduct (s. 52), false representations about the composition of goods (s. 53(a)), misrepresentations about the performance characteristics of goods (s. 53(c))

On 11 April 2003 the Federal Court, Adelaide, found that Collagen Aesthetics Australia Pty Ltd engaged in misleading and deceptive conduct when advertising its Collagen Instant Therapy and Hylagenesis products.

The advertisements appeared in several magazines including *Vogue, Harpers Bazaar, Marie Claire* and *Cosmetic Surgery Magazine* from January 2001 to March 2002 and made the following claims:

- Collagen and Hylagenesis products are registered on the Australian Register of Therapeutic Goods and are therefore safer than the competitor's products which are merely listed
- Collagen and Hylagenesis products are safe
- treatment with the Collagen products is painless
- Collagen products are natural
- three different types/forms of the Hylagenesis products are available to consumers.

The Commission alleged that each of the claims were false or misleading because:

- products registered on the Australian Register of Therapeutic Goods are not necessarily safer than listed products
- the application of the Collagen and Hylagenesis products has caused adverse health reactions in some people and accordingly, they are not necessarily safe
- pain is experienced by recipients of the Collagen products after injection and before the anaesthetic takes effect
- Collagen products contain a synthetically derived anaesthetic and accordingly cannot be considered to be natural
- only one type/form of the Hylagenesis product was available to be supplied to consumers at the time the advertisements were printed.

The Federal Court has made injunctions prohibiting Collagen Aesthetics Australia from making the same claims in the future and required the company to issue corrective advertisements in various magazines including *Vogue, Harpers Bazaar, Marie Claire* and *Cosmetic Surgery Magazine*. All orders were made with the consent of Collagen Aesthetics Australia and the Commission.

CG Berbatis Holdings t/a Farrington Fayre Shopping Centre

Alleged unconscionable conduct in relation to leasing arrangements (s. 51AA)

On 10 April 2003 the High Court of Australia dismissed the Commission's appeal to restore a trial judge's finding that some shopping centre landlords had acted unconscionably by requiring particular lessees to abandon legal claims against the landlords as a condition for renewal of their lease.

It was the first time the High Court was asked to interpret the unconscionability provisions of the Trade Practices Act. The appeal turned on the application of s. 51AA. The central issue of the Commission's appeal was the appropriate commercial application of equitable principles of unconscionability for the purposes of that section.

The Commission originally took action in the Federal Court, Perth, in April 1998 alleging that the landlords of the shopping centre, formerly known as Farrington Fayre, had engaged in unconscionable conduct towards three tenants, Mr and Mrs Roberts, Mr and Mrs Ternent and Mr and Mrs Raitt, in contravention of s. 51AA. The alleged conduct involved, among other things, the landlords stipulating that as a condition of a lease renewal or extension the tenants withdraw their action regarding charges and outgoings against the landlords which was then before the WA Commercial Tribunal.

On 20 September 2000 the Federal Court declared that the landlords had engaged in unconscionable conduct towards Mr and Mrs Roberts, but found that the conduct towards the Ternents and Raitts was not unconscionable.

The landlords appealed, with the Commission cross-appealing, and on 27 June 2001 the Full Federal Court upheld the landlords' appeal and dismissed the Commission's cross-appeal.

The Commission then sought leave to appeal to the High Court regarding the Roberts case in the interests of clarifying the law. In taking the proceedings the ACCC sought to explore the effectiveness of s. 51AA of the Act in protecting tenants and other small business.

Although the High Court appears to adopt a restrictive interpretation the decision has helped to clarify the application of s. 51AA of the Act. This is one of the three provisions in the Act dealing with unconscionable conduct.

While this matter was taken under previously existing provisions of the Act, a new provision, s. 51AC, which came into effect from 1 July 1998, provides an improved level of legal protection for small businesses. It does not rely simply upon the 'unwritten law'.

Section 51AC mirrors for small businesses the rights previously enjoyed by consumers and incorporates a range of additional matters that the courts can consider to ensure that small businesses are protected from unconscionable conduct in their dealings with larger businesses.

In dismissing the appeal, by a four–one majority, Chief Justice Gleeson said:

> In the context of s 51AA ... unconscionability is a legal term, not a colloquial expression. In everyday speech, 'unconscionable' may be merely an emphatic method of expressing disapproval of someone's behaviour, but its legal meaning is considerably more precise ... A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.
>
> Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence.

In concluding that the Roberts's were not at a 'special disadvantage' as required by the relevant equitable principle, Chief Justice Gleeson said:

> ... The critical disadvantage from which the [Roberts] suffered was that they had no legal entitlement to a renewal or extension of their lease; and they depended upon the [landlords'] willingness to grant such an extension or renewal for their capacity to sell the goodwill of their business for a substantial price. They were thus compelled to approach the [landlords], seeking their agreement to such an extension or renewal, against a background of current claims and litigation in which they were involved. They were at a distinct disadvantage, but there was nothing 'special' about it.

In dissent, Justice Kirby, who would have restored the trial judge's decision, said:

> ... It is the serious or 'gross inequality of bargaining power' in the relationship between parties that refines and sharpens issues of conscience and the need to provide remedies, whether in equity or under provisions such as s. 51AA of the Act. The special position of the Roberts enlivens the need to consider the complaint of unconscionability in the conduct of the respondents. Their position as small traders involved precisely the kinds of circumstances that the legislature had in mind when enacting s. 51AA ... A particular purpose of the inclusion of s. 51AA in the Act was to afford more effective remedies to small operators in the marketplace, such as the Roberts ... A corporation dealing with such a small player would normally be entitled to assume that it could take advantage of the comparative weakness of that player without any real fear that it would be rendered accountable in a court of law or equity.

Global Pre Paid Communications Pty Ltd and In-Touch Networks Pty Ltd

Alleged misleading and deceptive conduct (s. 52), false or misleading representations about the profitability or risk or any material aspect of any business activity (s. 59).

On 19 March 2003 the Commission instituted legal proceedings in the Federal Court, Sydney, against Global Pre Paid Communications Pty Ltd, In-Touch Networks Pty Ltd and several of its directors and employees.

The Commission is concerned about the alleged misrepresentations made by Global Pre Paid Communications about the level of projected profitability, location support and maintenance of vending machines that sell pre-paid telephone cards. Additionally, the Commission is concerned about alleged misrepresentations made by Global Pre Paid Communications and In-Touch Networks regarding the sale of Swisscom easyRoam SIM card distributorships.

The Commission has alleged contraventions of ss. 52 and 59 of the Trade Practices Act. The Commission has also alleged that the

relationship of Global Pre Paid Communications with its vending machine operators is a franchise relationship and that Global Pre Paid Communications is in breach of the Franchising Code of Conduct. The Commission is seeking injunctions and other orders against Global Pre Paid Communications, In-Touch Networks and the other named respondents.

The Commission is taking representative action on behalf of consumers who have suffered loss from the alleged conduct.

A directions hearing will be held in Sydney on 17 July 2003 before Justice Gyles.

Greenstar Cooperative Ltd

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

On 26 March 2003 the Federal Court, Perth, found that Greenstar Co-operative Ltd, Bio Enviro Plan Pty Ltd, Buyplus Commodities Brokers Pty Ltd, Greenstar Management Pty Ltd and their directors Kevin Robert Smith, Paul Anthony Haigh and Trevor Sampson had promoted an illegal pyramid and referral selling scheme known as Greenstar, and had also engaged in false and misleading conduct in relation to the scheme.

In his reasons for judgment Justice Nicholson said that the parties to the Greenstar scheme had breached a number of the consumer protection provisions of the Trade Practices Act.

The Commission has previously been successful in securing orders in the Federal Court against two other pyramid selling schemes, World Netsafe Pty Ltd, which was an international AATM Card Scheme, and Skybiz 2000, which was an illegal home-based business pyramid scheme.

In June 2001 the Commission instituted court action against the Greenstar group of companies and associated directors for promoting the scheme which involved a transaction card and earthworm farming program that formed the basis for enticing members of the public to join the illegal pyramid and referral selling scheme.

From August 2000 Greenstar and the directors promoted the Greenstar scheme at public meetings in capital cities across Australia, through promotional materials, on the internet and by email throughout Australia and overseas. Greenstar and the directors claimed to be able to deliver to members a worldwide business that could generate lifelong, residual income, 2-hours a day, seven days a week, from seven different streams of income, without the member leaving his or her home.

The court advised that, subject to receiving submissions from the parties by 10 June 2003 as to the structure of the orders, it would make extensive orders including declarations, injunctions, findings of fact, corrective notices and refunds.

Justice Nicholson stated that the companies and directors misled prospective and existing members by making false representations in connection with the Greenstar scheme, including the following:

- Greenstar was buying 1kg of worms each month on behalf of its members, and members who paid US$30 per month for 36 months and who wished to leave the scheme would receive their money back in full when this was not the case
- the Greenstar scheme had been approved by the Western Australia Ministry of Fair Trading when it had not
- Greenstar was in negotiations for 'debit 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 when this was not the case
- Greenstar was the major shareholder in Australian Environmental Technologies and dividends from these shares would flow into the Profit-Share pool, with AET anticipating an April/May 2001 float, which was not the case.

The court heard evidence that since 1998 thousands of consumers in Australia and worldwide paid millions of dollars to join the Greenstar companies. Some invested their entire life savings based on the false promises by the organisers of this scam.

In assessing the injunctions sought by the Commission, Justice Nicholson said they were appropriately cast without geographical restriction given the international scope of the scheme and its promotion on the internet.

Haier Australia Pty Ltd, Retravision Pty Ltd

Alleged misrepresentation about the performance characteristics of goods (s. 53(c))

On 28 April 2003 the Commission accepted court enforceable undertakings from Retravision Pty Ltd and Haier Australia Pty Ltd, in relation to the sale of Haier brand washing machines.

The undertakings follow a Commission investigation of allegedly false energy rating claims on Haier brand washing machine models XQJ50-31 5kg and XQJ100-96 10kg. The undertakings provide for a full refund to consumers who bought the machines.

Retravision will send letters to all consumers who bought one of the machines offering the refund. Haier will provide the refunds. Both companies cooperated with the Commission and have undertaken to implement comprehensive trade practices compliance programs.

The matter was referred to the Commission by the Australian Greenhouse Office under a cooperation agreement between the two agencies to refer potentially misleading energy efficiency claims made regarding electrical appliances.

In conjunction with the undertakings the Commission has requested that Haier Electrical Australia Pty Ltd (formerly Ai Xin International Trading Pty Ltd, trading as Higher Electronics Australasia) have all whitegoods distributed by it tested at a National Association of Testing Authorities Australia (NATA) accredited, or equivalent testing laboratory.

When tested at the claimed capacity, the machines failed soil removal, water extraction and energy consumption tests. The tester stated that in the 10 years that check testing has been undertaken to verify manufacturers' energy consumption claims, this is the worst failure on record. The tester noted 'very little movement of clothes during the wash and rinse cycles' and that some sections of the test load failed to get wet at all.

This was the first matter referred by the AGO to the ACCC under the cooperation

Karmy Pty Ltd t/a Schots Restoration Emporium

Alleged misleading or deceptive conduct (s. 52), misrepresentation about the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (s. 53(g))

On 17 April 2003 the Commission filed proceedings in the Federal Court, Melbourne, against Karmy Pty Ltd trading as Schots Restoration Emporium.

The Commission alleges that Schots has engaged in misleading and deceptive conduct by making a range of misrepresentations in various media about consumers' rights to refunds.

The Commission alleges that Schots falsely stated in an advertisement published in the *Sunday Age* TV Magazine on 6 April 2003 that consumers are not entitled to refunds on sale items. It alleges Schots also displayed in-store signs and misrepresented on its website that consumers are not entitled to a refund if goods they buy are faulty and/or that such refunds would be at the company's discretion.

The Commission is seeking declarations, injunctions, corrective advertising, the implementation of a trade practices compliance program and costs.

A directions hearing has been listed for 2 May before Justice North in the Federal Court, Melbourne.

Mitre 10 Australia Limited

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

On 7 May 2003 Mitre 10 admitted that aspects of its television and radio advertising for an annual clearance sale were misleading and deceptive. The advertising stated that it was a '15% Off Everything' sale.

On 21 September 2001 the Commission instituted proceedings against Mitre 10 Australia Limited in the Federal Court, Melbourne.

The Commission alleged that Mitre 10's '15% Off Everything' television and radio advertising campaign failed to disclose or to disclose adequately that not everything at Mitre 10 outlets was reduced by 15 per cent.

By consent of the parties the proceedings instituted by the Commission have been settled.

Mitre 10 Australia Limited gave undertakings to the court that it would not, for two years, advertise

goods at a discounted price when no discount applies to some or all of those goods, or without clearly and prominently disclosing any qualification or exclusion relating to the availability of that price for those goods. It also agreed to contribute to the Commission's court costs.

Billbusters Pty Limited

Alleged misrepresentations in relation to the supply of telephone bill-paying services (s. 53)

On 8 May 2003 Justice Kenny granted summary judgment declaring that Miles Kendrick-Smith, a director of Billbusters Pty Ltd (now in liquidation) was knowingly concerned in, or party to contraventions of s. 52 of the Trade Practices Act by falsely representing:

- it had developed methods of reviewing and checking telephone accounts issued by Telstra
- it had reasonable grounds for believing that its systems, methods and procedures were able to identify errors in telephone accounts and to determine the nature and extent of the overcharging
- its systems, methods and procedures were able to calculate the adjustments, credit and refunds to which customers were entitled in respect of the identified errors and overcharging
- its systems, methods and procedures were able to provide the necessary information to negotiate with Telstra on behalf of customers in relation to the identified errors and overcharging
- its systems, methods and procedures were able to ascertain, in relation to any customer of Telstra who engaged Billbusters to review and check his or her telephone account, the net amount payable by the customer to Telstra or payable to Telstra by the customer, after proper allowance for the adjustments, credits or refunds which the customers were entitled to receive from Telstra in respect of any identified errors or over-charging
- the systems, methods and procedures operated by Billbusters involved collecting money from customers and holding the money on trust until due payment to Telstra
- the systems, methods and procedures operated by Billbusters involved paying to Telstra all amounts properly due by the customers in respect of their telephone accounts.

The court also granted injunctive relief restraining Mr Kendrick-Smith from:

- representing to members of the public that he performs audit services on accounts or invoices of Telstra
- being knowingly concerned in representations by another person to members of the public that he, she, it or they perform audit services on accounts or invoices of Telstra unless the Commission is provided with written notice 14 days before the first publication of details of:
  - the business name of each person intending to make the representation
  - the principal place of business of each such person
  - the intended mode of publication of the representation to members of the public

The Commission felt it necessary to obtain summary judgment against Mr Kendrick-Smith given his history of making similar claims, the course of this action and the Commission's concerns that he would do so again in the future.

On 13 November 1998 the Commission instituted court proceedings in the Federal Court, Melbourne, against Billbusters Pty Limited and its director Miles Kendrick-Smith.

On 23 November 1998 the Commission obtained interim restraining orders against Billbusters and its director, restraining them from making certain representations and dealing with their assets. Those orders were discharged on 8 November 1999.

IMB Group Pty Ltd, Logan Lions Ltd & ors

Alleged third line forcing (s. 47(6)), misleading or deceptive conduct in relation to financial planning and property development (s. 52)

On 20 February 2003 the Full Court handed down its appeal judgment on a matter involving alleged third line forcing and misleading and deceptive conduct regarding the sale of investment policies to consumers. The funds accrued over the life of the policies were to be used to fund the development of a major sporting club facility.

On 6 September 1993 interlocutory proceedings were instituted by the Commission against IMB Group Pty Ltd, Logan Lions and others.

The Federal Court consolidated this and *ACCC v National Mutual Life Association of Australasia Ltd* (QG No. 77 of 1994) on 12 March 1996.

National Mutual admitted that certain conduct alleged in the statement of claim contravened s. 52 of the Act and that it was indirectly involved in the conduct through its agent. National Mutual and the Commisson agreed to a settlement.
The Commission discontinued proceedings against National Mutual on 3 June 1996.

The matter initially went to trial in September 1998, was adjourned until September 1999 and eventually concluded in December 1999. Judgment was delivered on 5 April 2002 and Justice Drummond found that IMB and various individuals had contravered s. 52 in respect of many of the allegations; however, he did not conclude that there had been a contravention of s. 47.

The Commission then lodged an appeal on 26 April 2002 relating to the s. 47 finding and two particular s. 52 findings, and a cross appeal was lodged by the respondents regarding all of the s. 52 findings. This was heard by the Full Court on 12–15 November 2002.

In February 2003 the Full Court agreed with the conclusions drawn by the primary judge that the application of s. 47 did not apply in the circumstances. The Full Court also dismissed the appeal points lodged by the Commission regarding some of the s. 52 findings made by the primary judge, and reversed the primary judge's findings about other s. 52 findings. The Full Court also made a costs order against the Commission.

Product Safety (Part V)

Proton Cars Australia Pty Limited, Audi Australia Pty Ltd and Daewoo Automotive Australia Pty Ltd

Alleged contravention of product safety standards (s. 65C)

On 15 April 2003 the Commission accepted court enforceable undertakings from Proton Cars Australia Pty Limited, Audi Australia Pty Ltd and Daewoo Automotive Australia Pty Ltd. The undertakings set out the steps the companies are taking to remedy their failure to meet fully with the mandatory product safety standard for vehicle jacks.

A product safety survey conducted by the Commission disclosed that the vehicle jacks supplied with a range of models of new Proton and Audi motor vehicles failed to comply with the jack warning labelling and safe usage instructions contrary to s. 65C of the Trade Practices Act. The same survey also disclosed that a range of new Daewoo vehicles failed to comply with the jack warning labelling requirements of the same mandatory standard.

The three companies will recall non-compliant jacks. All affected Proton and Audi vehicle owners are being contacted, provided with replacement warning labels and safety instructions and, in Audi's case, the company will rectify jack performance problems. All affected Daewoo vehicle owners are being contacted and provided with replacement warning labels.

Proton, Daewoo and Audi have also published notices in major national daily newspapers and are issuing a service bulletin to all authorised dealers. The undertaking also provides for each company to implement a trade practices corporate compliance program. Further, Proton and Audi agreed to post a safety warning notice on their websites for 30 days.