Enforcement

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

Anti-competitive agreements (Part IV)

Leahy Petroleum Pty Ltd & anor

Alleged resale price maintenance (s. 48)

On 20 November 2003 following a review of the evidence available to it, the ACCC has decided to discontinue proceedings alleging resale price maintenance by Leahy Petroleum Pty Ltd and its general manager, Mr Robin Palmer regarding a service station in Buangor operated by Mr Trevor Oliver.

Accordingly, the proceeding has been dismissed by consent of all parties. No orders for costs were made.

Separate proceedings against several corporate and individual respondents, including Leahy Petroleum and Mr Palmer, alleging price fixing in the wider Ballarat area are not the subject of any review and are still being maintained.

In assessing the matter, the ACCC considered all the evidence likely to be led at trial. Considering the model litigant policy and the ACCC's policy objectives the ACCC formed the view it was appropriate to discontinue the proceeding in light of the available evidence.

The ACCC acknowledged that statements made by Mr Oliver in the media just before Easter in 2000 led to a lengthy investigation by the ACCC into the petrol industry in the wider Ballarat area. As a result of this investigation the ACCC instituted proceedings alleging a petrol price fixing cartel in Ballarat. This investigation subsequently led to a similar investigation in the Geelong region which culminated in the institution of further proceedings earlier this month alleging a petrol price fixing cartel in Geelong.

Qantas Airways Limited

Alleged misuse of market power (s. 46)

On 21 November 2003 the ACCC and Qantas Airways Limited have resolved Federal Court litigation concerning allegations that Qantas misused its market power on the Brisbane–Adelaide route after Virgin Blue Airlines Pty Ltd's entry in December 2000.

The ACCC will discontinue the action, following further legal advice and a further review of the domestic airlines market.

Like all section 46 (misuse of market power) cases, final resolution in the courts of this matter would have been extremely difficult, lengthy and expensive. Experience in overseas jurisdictions where similar cases have been instituted shows the uncertainty and delays such litigation faces.

The action's discontinuance follows discussions between the parties. Each party will bear its own costs.

Since the action began, the airlines market had changed and competition has been enhanced. Consumers have benefited from the competition between Qantas and Virgin Blue on this and other routes.

The new entrant, Virgin Blue, continues to operate on the Brisbane–Adelaide route.

Rural Press Limited and ors

Alleged anti-competitive conduct (s. 45), misuse of market power (s. 46)

On 11 December 2003 the High Court of Australia handed down its decision in the Rural Press case, addressing three key matters.

The High Court unanimously overturned the decision of the Full Federal Court and found that an arrangement or understanding between Rural

Press, Bridge Printing and Waikerie Printing House had the intention to prevent or restrict the supply of newspaper services by Waikerie Printing to readers and advertisers in the Mannum area of South Australia (an exclusionary provision) in contravention of the Trade Practices Act.

The High Court affirmed the decision of the Full Court of the Federal Court that the arrangement or understanding substantially lessened competition in the Murray Bridge Market for regional newspapers.

Finally the High Court found that Rural Press and Bridge Printing did not breach the misuse of market power provisions of the Act as alleged by the ACCC. This decision also affirmed the decision of the Full Court of the Federal Court.

High Adventure Pty Limited

Alleged resale price maintenance (s. 48)

On 19 December 2003 the ACCC instituted proceedings in the Federal Court Melbourne against a supplier of paragliders, High Adventure Pty Limited, and its sole director Mr Lee Scott, alleging resale price maintenance in contravention of s. 48 of the Trade Practices Act.

High Adventure Pty Limited is a supplier of Sky Paragliders' products in Australia. Sky Paragliders is a Czech Republic based manufacturer and supplier of paragliders and paragliding accessories.

The ACCC alleges that in July 2003, High Adventure made it known to Walkerjet, a retailer, that it would not supply Sky Paragliders' paragliders and/or accessories to Walkerjet unless it agreed not to sell or advertise the paragliders and/or accessories below the price specified by High Adventure. The ACCC also alleges Mr Lee Scott was directly or indirectly knowingly concerned in, or party to, the alleged contraventions of the Act.

The ACCC is seeking declarations, a pecuniary penalty and injunctions against High Adventure and Mr Lee Scott. The ACCC is also seeking an order that High Adventure Pty Limited offer to appoint Walkerjet as a dealer of Sky Paragliders' paragliders and accessories for a term of no less than three years.

A directions hearing for the matter is listed for 27 January 2004 in the Federal Court, Melbourne.

Fair Trading (Part V)

Multigroup Distribution Services Pty Ltd & ors

Alleged representations as to future events without reasonable grounds (s. 51A), alleged misleading or deceptive conduct (s. 52)

On 2 January 2004 the Federal Court, Brisbane, declared by consent that Multigroup, through its former Townsville manager, Mr O'Neile, engaged in misleading or deceptive conduct, and Mr O'Neile was knowingly concerned in, or party to, Multigroup's contravention. Multigroup agreed to pay $80 000 compensation to Mr Parker and Parker Freight Express, and $20 000 towards the ACCC's costs. By consent, the ACCC's application against Mr Roberts, Multigroup's Queensland state manager, was dismissed.

Proceedings were instituted on 11 July 2001 in the Federal Court, Brisbane. Individuals alleged to be knowingly concerned in the conduct were Mr John O'Neile and Mr Malcolm Roberts.

The ACCC alleged that between January and September 1999, Multigroup Distribution Services Pty Ltd misled or deceived, or was likely to mislead or deceive Mr Wayne Parker, a director of Parker Freight Express Pty Ltd about the provision of a transport contract in North Queensland to Parker Freight Express Pty Ltd.

San Remo Macaroni Company Proprietary Ltd

Alleged misleading or deceptive conduct (s. 52), false or misleading representations as to the standard of goods (s. 53(a)

On 15 December 2003 the ACCC accepted s. 87B undertakings from San Remo Macaroni Company Proprietary Ltd to review its products following ACCC concerns about its GI (glyceamic index) claims.

The Adelaide-based company is a manufacturer, wholesaler and importer of food, primarily pasta and related products. One product, San Remo medium grain couscous, which is made from ground durum wheat, was marketed between March and August 2003 as being 'low GI'.

The ACCC reviewed published tests of couscous products and decided that the GI of couscous is more likely to be medium than low. The ACCC was

concerned that incorrect GI claims, made without a reasonable foundation in scientific knowledge or testing, may amount to misleading or deceptive conduct. There are several ways in which GI levels are thought to be significant to diet, with particular impact on blood sugar, blood lipids, and weight loss.

San Remo stopped distribution of the couscous in packets making the low GI claim in August 2003 and gave enforceable undertakings that it will not, for three years, make a representation about the GI level of any of its food products unless it has a reasonable basis in scientific knowledge or testing. San Remo will also install a corporate compliance program for a minimum of five years.

National Chemical Pty Ltd

Alleged misleading or deceptive conduct (s. 52), false or misleading representations concerning the place of origin of goods (s. 53(eb))

On 30 October 2003 the Federal Court, Melbourne, declared that National Chemical Pty Ltd had engaged in misleading and deceptive conduct over the country of origin labelling of eucalyptus oil.

The 200ml bottles of 'Superior' brand eucalyptus oil were labelled as 'Product of Australia' when the oil was imported from China. The oil was supplied to Woolworths and its subsidiaries and also promoted as a product of Australia in the newspaper, *Fight back for Australia.*

The court ordered, by consent, that National Chemical Pty Ltd:

- be restrained for three years from making the same or similar representations about any product when any significant ingredient of that product is imported or when National Chemical Pty Ltd does not know the place of origin of the ingredients
- place a corrective advertisement in the next issue of *Fight back for Australia*
- appoint a compliance officer to scrutinise and approve all labels affixed to National Chemical's products and all advertising material promoting those products
- pay $10 000 towards the ACCC's legal costs.

Giraffe World Australia Pty Ltd

Alleged misleading and deceptive conduct (s. 52), referral selling and pyramid selling (ss. 57, 61)

On 6 November 2003 the NSW Supreme Court has ruled that liquidators of companies being wound up can reject a creditor's claim for a debt on the grounds of illegality.

The court found that the liquidator of Giraffe World Australia Pty Ltd (in liquidation), could refuse a claim by creditors for ACCC income earned from illegal pyramid selling activity. The pyramid selling conduct had been declared a breach of the Trade Practices Act by the Federal Court in 1999, following ACCC court action for contraventions of the referral and pyramid selling provisions in ss. 57 and 61 of that Act.

The decision confirmed the liquidator's right to deny claims for money derived from illegal activities, such as Trade Practices Act contraventions.

Pyramid selling conduct should not be rewarded in the liquidation process in that ill-gotten gains are recoverable when a company is wound up.

The ACCC acknowledges the assistance of the liquidator, Ferrier Hodgson, in seeking judicial advice from the court to clarify this area of the law.

Sanyo Airconditioners Manufacturing Singapore Pte Ltd

Alleged misleading and deceptive conduct (s. 52), false representations as to the benefits of goods (s. 53(c), mislead the public as to the nature and/or characteristics of goods (s. 55)

On 11 November 2003 the Federal Court, Sydney, declared by consent of the parties that Sanyo Airconditioners Manufacturing Singapore Pte Ltd, trading as Sanyo Airconditioning Australia (Sanyo), engaged in false, misleading and deceptive conduct over the advertising of air conditioning units it supplied.

Sanyo's promotional brochure for the Eco Multi Series air conditioners was distributed to businesses and consumers from about May 2002 to July 2003. It contained environmental marketing claims, such as 'environmentally-friendly HFC "R407C" added' and 'for a new ozone era—keeping the world green'.

The ACCC instituted proceedings against Sanyo alleging false, misleading and deceptive representations about the environmental benefits of the gases used in its air conditioning units, namely

the hydroflurocarbon (HFC) refrigerant R407C and the hydrochlorofluorocarbon (HCFC) refrigerant R22.

The court declared that Sanyo's brochure was misleading and deceptive in representing that its air conditioning units were environmentally friendly when in fact:

- R407C employed in its air conditioning units is a powerful greenhouse gas which contributes to global warming, and does not benefit the environment
- R-22 employed in its air conditioning units is a powerful greenhouse gas which contributes to global warming, is an ozone depleting substance, and does not benefit the environment.

The court also ordered that Sanyo:

- be restrained from engaging in similar misleading conduct in its future promotional activities
- write to businesses and consumers who were supplied the brochure and also members of the Airconditioning Refrigeration Equipment Manufacturing Association enclosing the Federal Court's orders and the statement of agreed facts
- implement a trade practices compliance program
- pay the ACCC's costs.

The court orders were made by consent of the parties.

Esanda Finance Corporation Ltd and ors

Alleged unconscionable conduct (s. 51AB), harassment and coercion (s. 60)

On 7 November 2003 Esanda consented to Federal Court declarations that it:

- acted unconscionably by serving a demand notice in a way that conveyed that it would not, or could not lawfully, re-possess the car without a court order and then had the car re-possessed without an order; and also by failing to stop or suspend orders to its agents to re-possess the car when it had reasonable cause to believe that there may be a physical confrontation if the re-possession was attempted
- acted unconscionably when its agents entered the customer's home by jumping a gate to open the garage from the inside; and by not stopping the re-possession when they had reasonable cause to believe there could be a physical confrontation
- used undue harassment by its agents' or sub-agents' repeated attendances at the customer's home, including surveillance, and its agent approaching the customer's wife at work, claiming the vehicle had been sold, hidden or stolen and demanding its location.

Esanda Finance Corporation Ltd will pay a customer and his wife $20 000 compensation after the Federal Court declared it acted unconscionably and used undue harassment when its debt collectors and tow truck operators entered the customer's home and pinned him to the ground while they re-possessed a car.

The ACCC instituted proceedings against Esanda, Capalaba Pty Ltd trading as Nationwide Mercantile Services (NMS), and six individuals (three debt collectors and three tow truck operators). It was alleged that the customer was subjected to physical force, undue harassment, and unconscionable conduct in breach of the Trade Practices Act. The ACCC also alleged a number of individuals breached the *Western Australian Fair Trading Act 1987*.

NMS consented to a declaration that it used physical force when its tow-truck operators physically restrained the customer while the car was being removed. The debt collectors consented to declarations that they aided and abetted and were knowingly concerned in NMS's use of physical force.

NMS and the three debt collectors consented to declarations that they aided and abetted and were knowingly concerned in Esanda's unconscionable conduct and undue harassment.

After a trial, the tow-truck operators were found to have aided and abetted and to have been knowingly concerned in Esanda's unconscionable conduct by not stopping their attempts to re-possess the car when they had reasonable cause to believe a physical confrontation may occur if they continued.

Two tow-truck operators were found to have contravened s. 23 of the WA Fair Trading Act by physically restraining the customer while the vehicle was being removed.

The court made orders:

- restraining Esanda from engaging in similar conduct in the future
- requiring Esanda to change some of its procedures and instructions to its agents
- requiring Esanda to pay $20 000 compensation to the customer and his wife

- reducing the amount of the loan by $1892.73
- pay the ACCC's costs.

The court restrained the collection agents from engaging in similar conduct in the future, ordered them to attend compliance seminars and pay costs.

This is the first time that the prohibition on the use of physical force in s. 60 has been considered by the courts.

Advanced Medical Institute Pty Ltd

Alleged misleading or deceptive conduct (s. 52), misrepresentations about goods and/or services being of a particular standard or quality (ss. 53(a)/53(aa)),

On 2 December 2003 the Federal Court declared by consent that the Advanced Medical Institute Pty Limited and its managing director, Mr Jacov Vaisman, had engaged in misleading or deceptive conduct when advertising various impotency treatments to its potential patients.

The declarations were made following ACCC action.

Mr Vaisman was declared to be personally involved in the unlawful conduct.

AMI operates a number of impotency clinics in capital cities and regional centres around Australia. From February 2001 until April 2002, AMI made representations in newspaper advertisements and promotional materials about the suitability and effectiveness of its treatments and the nature of its services.

The Federal Court declared that AMI breached the Trade Practices Act by making misleading or deceptive representations, such as:

- treatments would provide guaranteed results when in fact treatments for impotence and erectile dysfunction cannot be guaranteed
- no needles would be involved when in actual fact self-injection treatments were regularly prescribed by AMI to some patients
- treatments were suitable for men of all ages with almost any medical condition when in fact erectile dysfunction is less responsive to treatment in older men and men with certain conditions, such as diabetes
- treating doctors had six years of experience in sexual medicine when many of its doctors did not
- doctors were supervised by Dr Lionel Jacobs, a consulting urologist, when he did not supervise most treating doctors
- providing full refunds of the treatment cost if it was ineffective but refunds were not paid to all patients when the treatment did not work
- a 12-month impotency treatment program was most beneficial for cure when expert evidence indicated that a 12-month course of injection therapy is no more likely to provide a cure than programs of a shorter duration
- the IntraGlans Gel treatment was both simple and convenient to use and acted in just five to 10 minutes when in fact it was not easy to use for some men and took longer than claimed to produce a full erection
- the IntraGlans Gel has no side effects when in actual fact there are a range of potential side effects.

The court made injunctions preventing AMI from engaging in future misleading and deceptive conduct about the impotency treatments it formerly or presently supplies.

It also declared that Mr Vaisman had been involved in the contraventions of the Act by AMI. He has also been injuncted from making such future misrepresentations, whether with AMI or with any other corporation.

The court also ordered that AMI:

- publish corrective notices once a week in various newspapers circulating throughout Australia for six weeks
- implement a trade practices compliance program.

AMI also agreed to provide full refunds to more than 160 patients where the treatment was not effective.

Gary Peer and Associates Pty Ltd

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

On 5 December 2003 the ACCC instituted legal proceedings in the Federal Court, Melbourne, against Gary Peer and Associates Pty Ltd alleging misleading and deceptive conduct regarding the advertising for the sale of the property at 341 Glen Eira Road, Caulfield, Victoria. The property was passed in at auction on 14 September 2003 for $781 000.

The ACCC alleges that in advertisements appearing in various media during August and September this year, Gary Peer and Associates Pty Ltd advertised the property at 'price guide $600 000 plus buyers should inspect' and later at 'price guide $650 000

plus buyers should inspect' which falsely represented the price at which:

- the vendors of the property were prepared to sell
- the vendors of the property had instructed the respondent to sell
- the respondent believed that the property would be sold
- the market value of the property.

The ACCC further alleges that Gary Peer and Associates Pty Ltd did not have reasonable grounds for making the price representations about future matters in these advertisements.

The ACCC is seeking declarations, injunction; a specific trade practices compliance program, findings of fact and costs.

A directions hearing has been set for 2 February 2004 before Justice North.

Commonwealth Bank of Australia

Alleged misleading or deceptive conduct (ss. 52, 53)

On 10 December 2003 the Federal Court, Sydney, made declarations that the Commonwealth Bank of Australia contravened the Trade Practices Act and ordered them to publish television and in-branch corrective advertisements.

The terms and the orders were agreed to by the parties and followed the Federal Court finding on 17 October 2003 that television and in-branch advertising by the bank breached various sections of the Act.

Although the ACCC had sought an injunction restraining the bank from advertising in a similar manner in the future, the court did not consider an injunction necessary in these circumstances.

The Cricket Home Loan Campaign ran from 22 November 2001 to 27 January 2002 as part of the bank's 'no regrets' themed advertising. The advertisements grabbed attention with bold headlines that 'no establishment fee' was payable for a home loan. In fact, customers had to either already hold or obtain additional bank products to take up the offer of 'no establishment fee'.

The court ruled that the advertisements were misleading and deceptive as several customers responding to the 'no establishment fee' campaign did, in fact, have to pay an establishment fee. They incurred a fee because they did not hold additional bank products.

The court made the following orders about the form and scope of the corrective advertising:

- in-branch: corrective posters to be displayed near the front of every branch of the bank for one week
- television: corrective advertising to be aired on 18 occasions in Brisbane, Sydney, Melbourne, Adelaide, Perth and regional Australia.

Heatshield Ductair Pty Ltd

Alleged misleading or deceptive conduct (s. 52), False or misleading representations (s. 53(c)), misleading representations as to the nature, manufacturing process, characteristics, suitability for their purpose or quantity of any goods (s. 55)

On 12 December 2003 the ACCC accepted undertakings from Heatshield Ductair Pty Ltd about false and misleading representations made about the energy efficiency of its flexible ducting products.

The Adelaide-based air conditioning ducting manufacturer is taking corrective action after making misleading comparisons with its competitors' products.

In November 2002 Heatshield Ductair engaged a university-based research group to test the insulation aspects of its flexible ducting against a selection of its competitors' products.

Using the laboratory test results for a print and radio campaign through the summer of 2002–03, Heatshield Ductair promoted the superiority of its ducting and represented, among other things, to distributors, installers and customers that:

- its premium product had been tested against all of its competitors' premium products, whereas the tests were not so comprehensive
- each grade of its flexible ducting had the superior performance characteristics of its highest grade product, whereas each grade does not
- savings of $6000 per installation are achieved by using Heatshield Ductair products instead of those of all competitors, whereas that saving could only be achieved against the products of lesser performing competitors
- a complete range of flexible ducting was tested, whereas some products were not tested.

Further, Heatshield Ductair made an incorrect representation on its price list about the insulation properties of its high grade flexible ducting product.

In cooperating with the ACCC to resolve the matter, Heatshield Ductair provided court enforceable undertakings to:

- stop making the false and misleading representations
- write to its customers and competitors, explaining what has happened and expressing their commitment to future compliance
- implement at its own expense a trade practices compliance program within the corporation designed to ensure that it does not contravene the Act in future.

Radio Rentals Limited and Walker Stores Pty Ltd

Alleged unconscionable conduct (s. 51AB)

On 12 December 2003 the ACCC instituted legal proceedings in the Federal Court, Adelaide, against Radio Rentals Limited and Walker Stores Pty Ltd (which operated as 'in Rent' through Radio Rentals stores) alleging that they had engaged in unconscionable conduct in their dealings with an intellectually disabled man.

The ACCC alleges that:

- between November 1996 and October 2002 the man entered into:
  - 15 rental agreements, two loan agreements and 17 service agreements with Radio Rentals
  - three rental agreements with Walker Stores
- the man paid Radio Rentals and Walker Stores more than $20 000
- the rental and loan agreements were for fridges, televisions, washing machines, microwave ovens, video recorders, a clothes dryer, heater, vacuum cleaner, DVD player and a digital camera
- the service agreements were for a number of products which he had paid for in full under rental agreements with Radio Rentals
- the companies entered into the agreements with the man when they knew or ought to have known that he:
  - was a person with an intellectual disability
  - could not read the agreements
  - could not understand all the terms and conditions of the agreements
  - was unable to understand all the rights, options and benefits he had under the agreements
  - was unable to make a worthwhile judgment about whether entering into the agreements was in his best interests.
- the companies knew or ought to have known from their records that:
  - it was unlikely to be in his best interests to enter into the agreements
  - he received a disability pension as his sole source of income
  - credit applications completed by Radio Rentals' employees contained information that was incorrect, unrealistic and inadequate
  - his monthly liability to the companies ranged up to 40.5 per cent of his income
  - his monthly liabilities to the companies would result in financial hardship
- Radio Rentals raised seven of the service agreements without the prior knowledge or consent of the man after he had overpaid amounts on other service agreements
- four of those service agreements were raised after Radio Rentals had received correspondence from a solicitor, acting on behalf of the man, about his intellectual disability and his dealings with the companies
- on three occasions at about the time the man entered into a rental agreement, he returned similar goods to Radio Rentals. He had made substantial rental payments towards the returned goods and could have within a short period of time exercised an option to purchase those goods
- in November and December 2002 Radio Rentals and Walker Stores unduly harassed the man in connection with payments due under the agreements and the man subsequently entered into a settlement and confidentiality agreement with the companies.

The ACCC is seeking declarations, injunctions and findings of fact and has indicated it will then seek compensation for the man.

NOTE: Radio Rentals Limited operates Radio Rentals stores in South Australia only.

Ixon Japan KK and Ikuson Trading Company Pty Ltd

Alleged misleading or deceptive conduct (s. 52), prohibits false or misleading representations about the quality or composition of goods (s. 53(a)), false or misleading representations about the place of origins of goods (s. 53(eb)).

On 28 November the ACCC instituted proceedings in the Federal Court, Sydney, against a Japanese company, Ixon Japan KK, and a related Australian company, Ikuson Trading Company Pty Ltd alleging misleading country of origin labelling of a honey drink they promoted—the 'Ixon Club Propolis Drink'.

The ACCC alleges that between August 2000 to September 2002:

- Ixon (the Japanese company) marketed and sold the honey drink to customers in Japan who were members of the 'Ixon Club'
- Ikuson (the Australian company) on behalf of and at the direction of Ixon, labelled and packaged the honey drink in Australia and supplied the drink from Australia to Ixon Club members in Japan
- The companies, through product labelling or in promotional brochures, videos or on Ikuson's website represented the honey drink as:
  - a 'Product of Australia'
  - 'A gift from Tasmania'
  - containing 28 per cent Leatherwood propolis extract and 39 per cent Leatherwood honey
  - being manufactured and bottled in Australia.

The ACCC alleges that the honey drink contained no Leatherwood propolis, contained only about two per cent Leatherwood honey and about 38 per cent Chinese honey and that the main ingredients in the honey drink were from China where it was both manufactured and bottled.

- The ACCC is seeking court orders including:
- declarations that Ikuson and Ixon have breached the Act
- injunctions restraining the companies from representing that any Ixon Club product is from Australia unless the product is wholly or substantially produced or manufactured in Australia and comprises wholly or substantially Australian ingredients
- injunctions restraining the companies from representing that any Ixon Club product contains a stated percentage of a particular ingredient when in fact it does not contain or contains less than the stated percentage of that ingredient
- orders that a letter be sent to all members of the Ixon Club between August 2000 and September 2002 informing them of the orders of the court
- orders that the companies publish the orders of the Court on the Ixon website
- costs.

On 16 December 2003 Justice Wilcox granted leave to the ACCC to effect service outside the Commonwealth on the Japanese company, Ixon, in Japan. A directions hearing has been set down for 5 February 2004 in the Federal Court, Sydney.

Medical Benefits Fund of Australia Ltd and John Bevins Pty Ltd

Alleged misleading or deceptive conduct (ss. 12DA, 12DB, 12DF of the ASIC Act)

On 16 December 2003 the Full Federal Court affirmed a decision of Justice Hill that the Medical Benefits Fund of Australia Ltd had used misleading television advertising and billboard posters to entice consumers to join their health fund before the introduction of the Federal Government's 'Lifetime Health Cover' initiatives in the middle of 2000.

The decision also left in place orders requiring MBF to publish corrective advertisements in major metropolitan newspapers. The Full Federal Court confirmed Justice Hill's view that corrective advertisements 'will not merely remind the public that MBF has engaged in conduct which was misleading but also alert consumers to the importance of questioning advertisements and the insurance industry of the importance that their advertising not mislead or deceive consumers'.

The ACCC alleged the television advertisements contained fine print disclaimers that stated members only received health insurance coverage for pregnancy-related services after they had served a 12-month waiting period and these were screened for less than five seconds at the end of the commercial. The ACCC alleged that the fine print did not correct the misleading impression created by the main images.

The Full Federal Court confirmed the earlier decision that the disclaimers were inadequate and unlikely to come to the attention of consumers.

MBF had submitted to the court that even if the advertisements were misleading, later information before a customer joined the health fund would have dispelled any misapprehension. On this point the Full Federal Court said that there is no room under the Act to publish misleading advertising so long as it is corrected at a later stage.

As part of the original decision John Bevins Pty Ltd, the agency which managed MBF's advertising campaign, was found to be knowingly concerned in, or a party to, the contraventions by MBF.

The Full Federal Court overturned the original decision that the advertising agency was knowingly concerned in the contraventions by virtue of its role in creating the misleading advertisements. Justices Stone, Mansfield and Moore agreed that John Bevins Pty Ltd was not knowingly concerned in MBF's contravention. Justice Stone found that the advertising agency would have had to know the advertisements were misleading or deceptive. Justices Moore and Mansfield did not agree with this approach. The respective approaches to the interpretation of what is required to prove accessorial liability in the context of s. 52 of the Act and its analogues is being further considered.

New South Wales fire protection companies

Alleged market sharing (s. 45), price collusion and misleading or deceptive conduct (s. 52)

On 19 December 2003 a penalty amount was recommended to the Federal Court, Sydney, by FFE and the ACCC. However, Justice Wilcox considered the recommended amount unacceptably low.

Justice Wilcox also ordered Mr Vito Fodera, the former NSW contracts manager for FFE, to pay a penalty of $50 000 for his role in one of the incidents of price fixing relating to the fire protection for the Angel Place office tower and recital hall in Sydney in 1997. A penalty amount was recommended to the court by Mr Fodera and the ACCC. However, again Justice Wilcox considered the recommended amount unacceptably low.

Previously on 12 December 2003 the court declared by consent a number of companies and individuals had engaged in price fixing, market sharing and/or misleading conduct in making various 'cover price' arrangements with competitors on fire protection tenders between 1995 and 1999. These arrangements were in contravention of s. 45 of the Act.

A 'cover price' arrangement is where a competitor agrees to submit a tender price they know is higher than that to be submitted by the company who wants the particular fire protection job.

Buildings the subject of the price fixing conduct were: the Angel Place office tower and Recital Hall in Sydney, the Prince of Wales Hospital in Randwick, the Frank Hurley Grandstand at Fox Studios, the Darling Harbour Harbourside Shopping Centre, the Cargill Seed and Oil Plant at Newcastle, and the Garden City Shopping Centre at Newcastle.
No penalties were imposed by the court in relation to the tenders for the Prince of Wales Hospital and the Frank Hurley Grandstand.

Those included in the action are:

- FFE Building Services Limited trading as Fire Fighting Enterprises and an employee, Mr Vito Fodera
- Tyco Australia Pty Ltd trading as Wormald Fire Systems and three employees
- Metropolitan Fire Systems Pty Ltd, which is now a part of the Tyco Group, although was not at the time of the conduct, was also declared to have engaged in the offending conduct.

No penalties were imposed by the court against Tyco Australia Pty Ltd and its employees or Metropolitan Fire Systems Pty Ltd.

As well as imposing penalties on FFE and Vito Fodera, the Federal Court granted injunctions by consent against all the above respondents, including AFFF (Australian Fire Fighting Facilities) Pty Limited (formerly Premier Fire Protection (NSW) Pty Ltd).

Previously on 24 November 2003 Justice Wilcox had also declared by consent that Mr James Bell, a former director of Metropolitan Fire Systems Pty Ltd, had engaged in price fixing conduct regarding a fire protection tender for the Prince of Wales Hospital in Randwick, NSW in 1996.

No penalty was imposed by the court against Mr Bell because of time limits.

In determining the amount of penalty, Justice Wilcox observed that the contravening conduct not only had the potential to deprive building contractors and their clients of the lowest price for fire protection services; but could also undermine the entire tender system in the industry.

Justice Wilcox also said that if the ACCC's approach to leniency led to a perception among colluders that they should confide in the ACCC, it may not be a bad thing.

The Tyco companies and employees provided a very high level of cooperation with the ACCC's investigation and these court proceedings. As a result of Tyco's cooperation, the ACCC did not seek pecuniary penalties against it and its employees.

National Telecoms Group Pty Ltd

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

On 19 December 2003 the Federal Court, Melbourne, declared that the National Telecoms Group had engaged in misleading and deceptive conduct when offering its Synergy telephony package. The court also declared that NTG made false and misleading representations about the price of its telephony services.

The declarations follow ACCC initiated court action.

The ACCC alleged that, among other things, NTG represented to consumers that in accepting the Synergy telephony package they would:

- pay no more or pay less than they were currently paying for telephony services
- pay only a specified additional amount more than they were currently paying to their existing telephony services providers
- be provided with a free telephone system
- receive only one bill for their telephony services.

Investigations made by the ACCC into NTG's conduct indicated that these representations were false.

The court granted injunctions restraining NTG from making the same or similar representations to consumers in the future. NTG has also provided court enforceable undertakings to the ACCC. It has undertaken to:

- contact customers who have complained to resolve their complaints
- review its trade practices compliance program.

Reader's Digest (Australia) Pty Ltd

Alleged misleading or deceptive conduct (s. 52), misrepresentations (s. 53), unsolicited goods (s. 64)

Reader's Digest, one of Australia's largest direct marketing companies and the publishers of a popular monthly magazine, has admitted that it demanded payment for unsolicited mail order products from consumers after an ACCC investigation into a significant number of serious complaints about its marketing practices.

Readers Digest has provided court enforceable undertakings that it will:

- not to engage in misleading or deceptive conduct, not to make false representations and not to demand payment for unsolicited goods without having reasonable cause to believe it is entitled to future payment
- not to infer from a customer's failure to respond to Readers Digest that the customer has agreed to buy goods
- appoint an independent auditor to review its internal operations and implement the recommendations of that auditor
- write to all people on its mailing list acknowledging its failed processes and informing them of the new compliance measures
- produce a direct marketing trade practices training video, to be seen by Reader's Digest staff and made available to all Australian Direct Marketing Association members
- place disclosure notices on its website
- implement a trade practices compliance program
- place corrective advertisements in its magazine and capital city newspapers
- give refunds to two named customers.