Enforcement

The following are reports on new and concluded Commission actions in the courts, settlements involving court enforceable (s. 87B) undertakings, and major mergers considered by the Commission. Other matters still before the court are reported in Appendix 1. Section 87B undertakings accepted by the Commission and non-confidential mergers considered by the Commission are listed in Appendix 2.

Restrictive trade practices

George Weston Foods Limited (trading as Tip Top Bakeries)

Price fixing arrangement (s. 45A), resale price maintenance (s. 48)

On 30 May 1997 the Federal Court imposed a penalty of $1.25 million on George Weston Foods Limited, trading as Tip Top Bakeries, for price fixing and resale price maintenance of bread.

The Commission filed proceedings on 23 December 1996 alleging that the company had stopped supplying retailers in Ferntree Gully and Albury in November 1995 because they were discounting bread.

The company admitted the contraventions and also admitted that it unsuccessfully attempted to have an Albury retailer cease discounting in May 1995. It also admitted that it had reached an agreement with Safeway to increase the retail price of bread sold at the Tip Top store in Preston.

The Commission said that the company had substantially assisted with its investigation from an early stage. It alleged that each of the contraventions by Tip Top arose out of pressure exerted on it by Safeway, an allegation denied by Safeway.

In his decision, Justice Goldberg said:

> When a corporation's commercial activities substantially permeate the commercial and consumer life of the public it is appropriate, in my view, to take that fact into account in determining an appropriate level of penalty for contravention.

The Commission has alleged that Australian Safeway Stores Pty Ltd and two of its employees were involved in the incidents and in others involving other bread manufacturers. Safeway denies the allegations and the matter continues to progress to trial.

Cameron's Management Pty Limited and Jane Cameron

Price fixing agreement (s. 45)

On 7 April 1997 penalties totalling $15 000 were imposed in the Federal Court on Cameron's Management Pty Limited and Jane Cameron, a director, for price fixing in breach of s. 45 of the Trade Practices Act.

The hearing concluded the court proceedings which began in late 1995 against several model agencies and persons and increased the total penalties involved to $100 000.

The Commission had alleged that Cameron's Management Pty Limited, along with Chadwick's Model Agency Pty Limited, Vivien's Model and Theatrical Management, Gordon Charles Management Pty Limited and Priscilla's Model Management Pty Limited, made an arrangement either at, or shortly after, a meeting of the Model Agents & Managers Association Inc in May 1995.

The arrangement was to charge an agency service fee — a set percentage loading of the fee charged for the supply of the talent — to those clients who had not previously paid the fee. Some customers, including advertising agencies, had previously refused to pay the

agency service fee. The arrangement had been motivated by the agencies' desire to have all of their customers pay the agency service fee.

The Court accepted joint submissions from the Commission and Cameron's Management Pty Limited and Jane Cameron regarding injunctions and penalties. The joint submissions took into account factors including that consumers had not suffered significant damage as a result of the conduct and that each of the respondents had admitted that their actions were in breach of the Act. The Court also noted that Cameron's Management Pty Limited agreed to provide s. 87B undertakings to the Commission to develop a trade practices compliance program.

Commonwealth Bureau of Meteorology

Misuse of market power (s. 46)

In December 1995 the Commission instituted proceedings against the Commonwealth Bureau of Meteorology, alleging that the Bureau had taken advantage of its market power to prevent competition in the market for specialised services. In particular, the Commission alleged that the Bureau had refused to provide information to the Meteorological Service of New Zealand Limited (MetService).

MetService is the New Zealand Government's corporatised national weather forecasting service. In addition to providing national meteorological services to the New Zealand Government, MetService provides specialised commercial services to other users, including computer-generated graphical presentations of its weather maps and forecasts to newspapers for their weather pages.

In 1994 MetService introduced its service to the Australian print media and sought data direct from the Bureau to enable it to produce its specialised package. At the time, the Bureau was charging a number of media outlets for similar specialised services. Under the *Meteorology Act 1955*, the Bureau was required to provide a basic weather warning and forecast service to the public free of charge. However, it was able under the Act and its policies to charge for specialised services specifically tailored to a particular client's needs, including some specially formatted weather presentations for the media.

The Bureau acknowledged that it declined direct information access to MetService. It also acknowledged that it progressively extended the provision of free tailored services to the media, under its developing basic service, following MetService's entry to the market.

The Bureau asserted that it acted as it did in the belief that its action was in accordance with its international obligations under the Convention and Resolutions of the World Meteorological Organisation which aim to facilitate the free and open exchange of meteorological information. These resolutions seek to limit the operations of foreign national meteorological services in a domestic market. The Bureau also stated that the change to its basic service to include enhanced graphics was a natural evolution of that service.

The Commission asserted that the refusal to supply direct access to MetService and the changed practice of specialised services was done to disadvantage a potential rival.

On 22 May 1997, following court-sponsored mediation, the Commission and the Bureau of Meteorology announced a settlement which both parties believe promotes the public interest. The Bureau agreed to a consent order, without admission, to provide direct access to an Australian registered subsidiary of MetService. Under the settlement the Bureau also agreed to:

- publish an agreed access policy document which details the basis and rights of access to information held by the Bureau and the considerations that apply; and
- use a model licence agreement which
  - sets out conditions for access to, and use of, information held by the Bureau;
  - provides dispute resolution procedures;
  - specifies termination grounds and rights of parties; and

- provides for the Bureau to offer forecasting elements to the media in addition to its basic service whilst maintaining comprehensive forecasting to the public through the free-to-air and print media.

The Bureau has undertaken not to change these arrangements without consulting the Commission.

The Commission considers the settlement will promote national competition policy objectives and will encourage competition in the market for specialised meteorological services in Australia. The settlement also provides a framework that is applicable to all commercial and industry sectors requiring specialised services including off-shore drilling operations, telephone services, agriculture, tourism, mining, building and construction, insurance, maritime and aviation.

The Commonwealth Director of Meteorology, Dr John Zillman, welcomed the settlement. He believes the outcome will enable the Bureau to continue to fulfil its statutory responsibility to provide a comprehensive official public weather service to the community. It will also enable the Bureau to work within the spirit of World Meteorological Organisation guidelines aimed at maintaining the free and unrestricted exchange of meteorological data and products between nations.

Under the settlement, the Bureau will put in place a program to ensure that the relevant officers are aware of their obligations under the Trade Practices Act.

ACCC Chairman Professor Fels said that the case clearly signalled the need for government agencies to be fully aware of the Trade Practices Act in their business activities and the intention of the Commission to vigorously apply the Act to both private and public sectors.

Darwin Radio Taxi Co-operative Limited

Anti-competitive agreement (s. 45), misuse of market power (s. 46)

On 3 June 1997 the Federal Court Darwin ordered permanent injunctions restraining Darwin Radio Taxi Co-operative Limited from making or enforcing anti-competitive agreements, from misusing its market power to hinder or prevent competition, and from attempting to induce its members to make their lessees operate with the Co-operative rather than a rival.

Justice Von Doussa declared that the rules amounted to an anti-competitive agreement with its members in breach of the Trade Practices Act. The orders and declarations followed legal proceedings instituted on 20 May 1997 by the Commission, which alleged that Darwin Radio Taxi Co-operative was using its rules to prevent members leaving.

The Commission alleged that members who tried to leave the Co-operative to join a rival taxi network were threatened with the loss of up to $10 000 they paid for their shares, and with having to pay base fees to the Co-operative even though they were no longer using its services.

Justice Von Doussa ordered Darwin Radio Taxi Co-operative to allow current members to leave without penalty and to pay the Commission's legal costs.

In view of the fact that Darwin Radio Taxi Co-operative admitted the contraventions and consented to the orders, and cooperated substantially with the Commission's investigation, the Commission did not seek penalties.

In addition to the orders and declarations, Darwin Radio Taxi Co-operative agreed to issue public apologies and undertake a regular trade practices compliance program.

Mergers

Westpac and Bank of Melbourne

Merger (s. 50)

On 3 April 1997 the Commission announced it would examine the proposed merger between Westpac and Bank of Melbourne. The process is expected to take some time.

Caroma and Fowler Bathroom Products

Acquisition (s. 50)

On 26 March 1997 the Commission announced it would not intervene in Caroma's acquisition of the Fowler Bathroom Products Division of James Hardie Industries Ltd.

Caroma is part of the GWA International Ltd manufacturing group. It produces a range of bathroom products, including vitreous china toilets and basins. Fowler is the only other Australian manufacturer of vitreous china toilet bowls and basins.

In reaching its decision the Commission took into account rising import competition, particularly from low-cost producers based in South-East Asia. It also considered that Caroma's selling price was responsive to its competition, and that plumbing distributors could exercise some countervailing power with Caroma after the acquisition by turning increasingly to imports.

The Commission will closely monitor the market over the next few years, giving special attention to any price increases in Caroma products. It will also monitor the development of Caroma's relationship with Australian plumbing distributors.

During its market inquiries, concerns were raised about Caroma's place on the technical committees which draft Australian plumbing fixtures standards. In particular, it was feared Caroma would 'inherit' Fowler's positions on these committees and be able to unduly influence the standards in its favour.

In response, Caroma offered court enforceable undertakings to the Commission to withdraw two representatives from the committees so that its representation is the same as that of importers of toilets and basins. The resignations are to occur within 21 days of the acquisition.

ICI and Auseon

Joint venture (s. 50)

The Commission announced on 27 May 1997 that it would not intervene in a joint venture between ICI and Auseon, producers of PVC. PVC is mainly used in the building industry for pipes but is also found in wire cables, in packaging for consumer and export goods such as food, and in fashion apparel and footwear.

ICI and Auseon said that there were significant imports of PVC and plastic resins are traded as commodities. They said that the joint venture would put their operations on a more even footing with much larger competitors overseas.

The Commission said the joint venture should result in improved efficiency and less waste, leading to increased output and the replacement of some imports. It also noted that for some uses of PVC there was a degree of substitutability between PVC, other plastics and other materials.

Australian National Industries Limited and National Castings Pty Ltd

Acquisition (s. 50)

On 3 June 1997 the Commission announced it would not intervene in the acquisition of National Castings Pty Ltd by Australian National Industries Limited (ANI).

National Castings has foundries in Western Australia and Tasmania. ANI operates a division named ANI Bradken with foundries in Queensland, Victoria, South Australia and Western Australia. ANI Bradken and National Castings manufacture steel and alloy iron cast products for the mining, rail transport, utilities and other industries.

The Commission concluded that, although ANI Bradken would have a substantial share of the manufacture of steel and alloy iron castings following the acquisition, Australian foundries faced significant international competition. Market participants advised the Commission that imported products competed vigorously with Australian foundries, particularly in terms of prices. The Commission considered that this import competition, which had the potential to increase in the future, was likely to prevent the merged firm from increasing its prices or margins.

The Commission concluded that the acquisition was unlikely to substantially lessen competition.

Consumer protection

Network Ten

Misleading or deceptive conduct (s. 52), false or misleading representations in relation to land (s. 53A)

On 9 April 1997 the Commission accepted a negotiated settlement from Network Ten in relation to a land promotion by Gold Coast Property Sales (GCPS) which was broadcast on *Good Morning Australia* in 1993.

In December 1993 the Commission began legal proceedings against GCPS and Television & Telecasters Ltd (Network Ten) after investigating a complaint by a Maryvale resident about the 'advertorials'. The resident had complained to Network Ten about the representations in August 1993, but the 'advertorials' had continued.

The major representations concerned:

- the land's investment potential;
- the proximity of the land to Brisbane, the Gold Coast and other areas (the land is actually 128km south-west of Brisbane); and
- the availability of utility services (electricity, telephone, water, roads etc.).

The Commission reached a settlement with GCPS in June 1995. In August 1996 it began a representative action against Network Ten Ltd on behalf of two consumers who alleged they had suffered loss due to the representations made. After negotiations, the parties reached a settlement which included consent orders providing compensation for the two consumers.

Network Ten has also provided the Commission with legally enforceable undertakings to:

- exercise editorial control over the contents of all advertorials before broadcast;
- institute a revised complaints handling system, including an external audit facility; and
- provide the Commission with a copy of reports prepared by the external auditors.

Furniture Direct (MacGregor) Pty Ltd

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

On 4 April 1997, Drummond J of the Federal Court Brisbane granted consent injunctions against both Mr Khoury and Furniture Direct (MacGregor) Pty Ltd in relation to false and misleading conduct under several provisions of the Trade Practices Act.

At the time of the Commission's investigation, Furniture Direct was a large Queensland furniture retailing company with stores in Brisbane and Cairns. Another company owned by Mr Khoury, Boss Furniture Company Pty Ltd, produced furniture which was retailed by Furniture Direct.

The Commission alleged that in television, radio and in-store advertisements, Furniture Direct and its Managing Director, Mr Khoury, had breached ss 52 and 53(e) of the Act by:

- using slogans such as 'buy direct and save' and 'cut out the middleman', when much of the furniture sold was produced by other furniture suppliers unrelated to Furniture Direct; and
- advertising that goods were offered on a 'cost plus $5' basis, when goods were in fact being sold at approximately 30 per cent above the landed cost of the item. This margin covered various 'in-store' costs.

The injunctions restrain both parties from similar misleading and deceptive conduct.

Mr Bryan Hedges

Misleading or deceptive conduct (s. 52), referral selling (s. 57), pyramid selling (s. 61)

On 23 May 1997 the Commission was granted consent orders relating to a pyramid selling scheme which was allegedly promoted by Mr Bryan Hedges under the auspices of The Christian Support Pen Friend Club.

The Federal Court Melbourne ordered that Mr Hedges:

- be permanently restrained from promoting the scheme or any similar scheme;

- be permanently restrained from making certain alleged misrepresentations in connection with the scheme or any similar scheme; and
- pay the Commission's costs.

The Commission was alerted to the scheme by the South Australian Office of Business and Consumer Affairs. The scheme was promoted through unsolicited mail about The Christian Support Pen Friend Club.

Membership of the club was subject to payment of a fee which entitled members to receive subscriptions to the newsletter. Members were offered commissions and other benefits, based on the number of newsletter subscriptions they sold.

The Commission alleged that the scheme involved a contravention of the pyramid and referral selling provisions of the Trade Practices Act. In addition, it alleged that the promotional material distributed by Mr Hedges contained misleading representations about the profitability of taking part in the scheme.

In 1992–93 the Trade Practices Commission took action against Mr Hedges in respect of another pyramid selling scheme which he promoted under the name Multi-Link International. Mr Hedges entered into a deed of settlement with the Commission in 1993, agreeing to refund subscriptions.

International Technology Holdings Pty Ltd, Europark International Pty Ltd and Australian Technologies Pty Ltd

False or misleading representations (ss 53(a), 53(c), 53(d))

On 14 May 1997 the Federal Court Brisbane handed down orders against International Technology Holdings Pty Ltd, its subsidiaries Europark International Pty Ltd and Australian Technologies Pty Ltd, and director, Garth Eaton, in relation to the promotion of international franchises to produce mechanical car parks.

The Court found that the respondents had engaged in misleading and deceptive conduct by representing that they owned the intellectual property associated with the Europark system and the marketing of the system.

After a detailed examination of the system, the Court found that there was nothing of value that Europark had to offer in consideration of the substantial franchise payment required of potential investors. In addition, the Court considered that the claim by Mr Eaton that a substantial portion of the franchise fee would be tax deductible was untrue.

The ownership of the patent rights is still the matter of a dispute between the respondents and third parties. Consequently, the Commission alleged that the respondents had breached ss 52, 53(c) and 53(d) of the Trade Practices Act.

The Court restrained Mr Eaton, Europark and associated companies from promoting and marketing the Europark system or engaging in the same conduct in relation to similar car parking systems. The Court also ordered Mr Eaton to pay the Commission's costs of the proceedings.

Florida Foods Pty Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations (ss 53(a), 53(eb))

On 22 May 1997 Florida Foods Pty Ltd, a Sydney fruit juice manufacturer, agreed to consent injunctions in the Federal Court Sydney, restraining it from making misleading claims about its 'Florida Fresh' and 'Fresh Premium' orange juice.

Justice Lindgren declared that Florida Foods had breached ss 52, 53(a), 53(eb) and 55 of the Trade Practices Act by supplying on occasion goods labelled as

- 'fresh' when the goods contained reconstituted orange juice and preservatives;
- 'unsweetened' when the goods contained added sugars; and
- 'Product of Australia' when the product contained reconstituted orange juice made from imported orange juice concentrate.

Florida Foods will place corrective advertisements in a major Sydney newspaper and refund consumers who claim to have been misled by the labelling. It will also implement a corporate compliance program, as agreed with the Commission, which incorporates the following elements listed in the consent order:

- the appointment of a senior manager to be responsible for the compliance program;
- the appointment of a suitably qualified person with expertise in food and/or trade practices law, to approve the procedure to be implemented to ensure compliance with the composition and labelling specifications of the product;
- batch testing of finished products, to ensure compliance with the composition and labelling specifications of the product; and
- the appointment of a suitably qualified person with expertise in food and/or trade practices law to provide to the Commission, at the end of the 12-month period from the date of the order, a report on compliance with the program.

This is the first time that essential elements of a trade practices compliance program have been included in court orders in proceedings brought by the Commission.

Florida Foods was also ordered to pay the Commission's agreed costs.

Berrivale Orchards Limited

Misleading or deceptive conduct (s. 52)

On 28 April 1997 the Commission instituted proceedings in the Federal Court Sydney against Berrivale Orchards Limited for alleged misleading labelling of 'GlenPark Cherry Berry 100% Fruit Juice'.

The product is marketed in a one-litre pack and a two-litre plastic container. On the one-litre pack the words 'Cherry Berry 100% Fruit Juice' appear on a red background on the front labels of the pack. In addition, the front labels are filled with true-to-life graphics of cherries and berries. The two-litre container is similarly labelled.

The Commission alleges that the product actually comprises 98 per cent apple juice and 1 per cent each of blackcurrant juice and cherry juice. It considers that the labelling is likely to mislead consumers that the product comprises all blackcurrant and cherry juice when in fact the key constituent ingredient is apple juice.

Orders being sought by the Commission include corrective advertising and removal of the product with the current labelling from shop shelves.

Kresta Holdings Limited

False or misleading representations in relation to the price of goods or services (s. 53(e))

On 18 March 1997 curtain and blind retailer Kresta Holdings Limited gave court enforceable undertakings to the Commission after a Commission investigation into a promotion of blinds.

From December 1995 to March 1996 Kresta offered *Sunban*, *Stardust* and *Platinum* vertical blinds to customers on the basis of 'buy one get one free'. However, inquiries showed that the price of the blinds had been increased to coincide with the introduction of the promotion. Consumers may have been led to believe that they were receiving a greater discount than was actually the case.

Kresta acknowledged that it may have breached the Act and cooperated fully with the Commission. The undertakings include the introduction of a compensation scheme and the development of a trade practices compliance program.

Product safety

Sunglasses survey

During October and November 1996 the Commission conducted a random survey of sunglasses from a variety of retail outlets in Perth, Brisbane and Adelaide, to check for compliance with the mandatory consumer product safety standard for sunglasses and fashion spectacles.

The safety standard for sunglasses and fashion spectacles aims to reduce the risk of damage to eyesight caused by excessive exposure to ultra-violet light and to ensure that sunglasses are labelled with appropriate warnings.

Sunglasses must be classified according to the luminous transmittance properties of their lenses, as follows:

- fashion spectacles
- general purpose sunglasses
- specific purpose sunglasses:
  - type (a) for protection against very intense sun glare; and
  - type (b) for protection against ultra violet radiation in sunlight for specified environments.

Warning labels must be appropriate to the classification of the sunglasses.

The standard also requires that the manufacturer's name, trade name or trade mark, and the classification be marked on the frames of sunglasses and fashion spectacles or on labels attached to them.

A number of suspect sunglasses purchased for the survey were tested in accordance with the standard by Unisearch Optics and Radiometry at the University of New South Wales. Several pairs failed to meet some of the requirements of the standard. The Commission considered that the supply of these sunglasses may contravene ss 53(a) and 65C of the Trade Practices Act.

After raising its concerns with the suppliers of the sunglasses the Commission accepted s. 87B enforceable undertakings from nine suppliers in Queensland and Western Australia:

- Gibson Importing Co. (Aust) Pty Ltd
- Penshire Pty Ltd
- Discount Sunglasses & Accessories Pty Ltd
- Tempel Pty Ltd
- Nobletime Pty Ltd
- Unki Pty Ltd
- Apollo Optical Pty Ltd
- Suntrak Pty Ltd
- Blaze Sunglasses Pty Ltd

The suppliers undertook to cease supply of the sunglasses, withdraw all remaining supplies from sale, establish compliance programs, and, in some cases, place recall notices in newspapers.

In South Australia, the Commission negotiated administrative settlements with three suppliers who reacted swiftly by rectifying the problems the Commission had identified.