
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

J McPhee & Son (Australia) Pty Ltd

Price fixing arrangement (s. 45)

On 27 March 1998 Justice Heerey of the Federal Court imposed penalties totalling \$4 million on J McPhee & Son (Australia) Pty Ltd and four of the company's executives in relation to price fixing in the freight industry.

The Court found that McPhee and three of its executives had attempted to reach a collusive tendering arrangement with a competitor, Discount Freight Express (DFE), in 1995.

When McPhee sought to increase the price of its freight services to one of its customers, Just Jeans, the customer sought tenders from other freight companies, including DFE. McPhee attempted to induce DFE to submit a tender at prices which would not succeed.

A penalty of \$3 million was imposed on McPhee for this incident. Mr Richard Forde, a director of the company, was penalised \$100 000; Mr Craig Holland, General Manager, \$60 000; and Mr Doug Morton, Business Development Manager, \$80 000.

In another incident the Court found that in 1994 Mr Guy Webb, McPhee's Gippsland Manager, asked a DFE manager to 'cover' the

rates which McPhee was charging ACI. ACI rejected the offer by DFE and continued to obtain freight services from McPhee.

The Court found McPhee had engaged in price fixing and ordered a penalty of \$750 000. Mr Webb was penalised \$15 000 for his involvement in the arrangement.

The respondents have filed an appeal on the decision.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU)

Secondary boycott (s. 45D)

On 18 March 1998 the Commission instituted proceedings against the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU) alleging that it had engaged in a secondary boycott of a fire protection contractor, Enterprise Fire Protection Pty Ltd (EFP).

The Commission alleges that the CEPU hindered or prevented a vehicle carrying sprinkler pipe from entering a Gold Coast building site because EFP had subcontracted the fitting of sprinkler pipe to a labour hire company.

EFP complained to the Commission that the CEPU's alleged conduct has caused it substantial loss or damage. It alleges that building contractors now fear that the CEPU will engage in industrial action on their building sites if they contract with EFP.

The Commission is seeking orders that the CEPU stop engaging in secondary boycott action and that the union publish this decision to its members and to builders.

Ice Creameries of Australia Pty Ltd

Exclusive dealing (s. 4x7), misleading and deceptive conduct (s. 52)

On 26 March 1998 the Commission instituted proceedings in the Federal Court Brisbane against Ice Creameries of Australia Pty Ltd (ICA); former Managing Director, David Atchison; National Marketing Manager, John Berry; and National Products Manager, Jenni Berry.

Ice Creameries of Australia is the franchisor of the national ice cream franchise system Great Australian Ice Creamery (GAIC).

The Commission alleges that ICA, Mr Atchison and the Berrys made misleading and deceptive representations that particular GAIC franchise sites would be suitable and that certain profit levels could be expected.

It also alleges that ICA engaged in exclusive dealing conduct, requiring its franchisees to purchase stock and equipment and ongoing supplies through nominated suppliers, and that ICA then received rebates from these suppliers.

The Commission alleges that as a result of this conduct a number of franchisees found their businesses were unprofitable and lost significant amounts of money.

The Commission is seeking injunctions, a penalty, declarations that the parties engaged in the alleged conduct, findings of fact, injunctions requiring the company to implement a corporate compliance program and orders for compensation under s. 87(1B) of the Trade Practices Act.

Mergers

Carter Holt Harvey Limited/International Paper Company and Continental Cup Company Pty Ltd

Acquisition (s. 50)

On 19 February 1998 the Commission announced it would not take any action over the proposal by Carter Holt Harvey Limited and its US parent company, International Paper

Company, to jointly acquire Continental Cup Company Pty Ltd.

Continental Cup is an Australia-based producer of paper cups and related products.

The Commission decided not to oppose a similar proposal by Carter Holt Harvey to acquire Continental Cup in 1996. It concluded then that the market share of the merged organisation was unlikely to meet the market concentration thresholds used by the Commission.

For commercial reasons this proposal is now proceeding with some minor changes. The Commission re-examined the matter and concluded that circumstances in the market had not changed sufficiently to vary its decision.

UCB Australia Pty Ltd and Orica Australia Pty Ltd

Acquisition (s. 50)

On 2 March 1998 the Commission announced it would not intervene in the acquisition by UCB Australia Pty Ltd of Orica Australia Pty Ltd's oriented polypropylene (OPP) film business.

OPP film is used extensively for packaging in the food and tobacco industries and is the plastic used to make Australia's bank notes. Orica and Shorko Australia Pty Ltd are the two domestic manufacturers of OPP film. Orica's film is largely used by cigarette manufacturers.

The Commission noted the number of importers capable of selling into the Australian market and the additional domestic capacity being installed by Shorko as well as UCB as it establishes a local manufacturing presence.

The Commission noted that many OPP film users already import a wide range of OPP film grades. It considered that the additional capacity coming on-line together with the scope for additional imports should constrain domestic pricing.

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

National Foods Limited and Pauls Limited

Acquisition (s. 50)

On 24 April 1998 the Commission accepted court enforceable undertakings in relation to the proposed acquisition of Pauls Limited by National Foods Limited (NFL).

NFL and Pauls are Australian-owned food processing companies which specialise in manufacturing and distributing fresh milk and a range of other dairy products. NFL and Pauls account for more than 85 per cent of the market for fresh milk in Victoria and over 50 per cent of the national market for yogurts and dairy desserts.

The Commission was concerned that the proposed acquisition would be likely to lead to a substantial lessening of competition in the market for fresh milk in Victoria and the national market for yogurts and dairy desserts.

To address the Commission's concerns, NFL has undertaken to:

- divest to a Commission-approved purchaser certain Victorian milk processing assets in the merged entity; and
- relinquish or assign the Danone Licence to produce yogurts and dairy desserts.

Consumer protection

Farrington Fayre Shopping Centre

Unconscionable conduct (s. 51AA)

On 6 April 1998 the Commission instituted proceedings in the Federal Court Perth against the owners of Farrington Fayre Shopping Centre at Leeming, Perth in Western Australia. Certain directors and the Asset Manager representing the owners have also been joined in the proceedings.

The Commission alleges that the owners dealt with certain tenants in an unconscionable manner in contravention of s. 51AA of the Trade Practices Act.

It alleges that in 1996 and early 1997 the owners refused to grant renewals, variations or extensions of leases to three tenants unless they withdrew from legal proceedings before the WA Commercial Tenancy Tribunal against the owners and/or agreed not to pursue legal rights against the owners in the future.

The Commission is seeking orders against the owners and their representative including declarations, injunctions, the publishing of public apologies and the institution of corporate compliance programs.

The owners, certain directors and the owner's representative may be liable for damages flowing from the alleged conduct should the Commission take representative action on behalf of the tenants or should tenants take damages actions.

Anstar Holdings Pty Ltd

Misleading and deceptive conduct (s. 52), false and misleading representations (s. 53(bb)), unsolicited goods or services (s. 64)

On 7 April 1998 the Federal Court Brisbane granted consent injunctions against Anstar Holdings Pty Ltd (in liquidation) and its director, Patrick Joseph O'Keeffe, in relation to unsolicited advertising.

The Commission brought proceedings in 1996 alleging that both O'Keeffe and Anstar sent invoices to small businesses throughout Australia claiming payment for unsolicited advertising in the following publications: *Union Views*, *Labour Review*, *Industrial Health & Safety Report*, *Environmental Health & Safety News*, *The Union Worker* and *Workplace Safety Review*.

O'Keeffe agreed to consent injunctions restraining him from, among other things, demanding payment for unsolicited advertising in the publications previously named. He also agreed to publish apologies in newspaper advertisements and to pay \$10 000 of the Commission's costs.

Swiss Slimming and Health Institute Pty Ltd (trading as Swisslim)

False or misleading representations (s. 53)

On 22 April 1998 the Federal Court found that the Swiss Slimming and Health Institute (Swisslim) and its director, Gerhard Hassler, had engaged in misleading and deceptive promotions of slimming services.

Extensive advertising by the Institute claimed that weight loss could be easily achieved by 'body wraps', where a slimmer sat wrapped in cold bandages. In fact, any weight loss achieved could be attributed to a harsh dieting regime that slimmers were encouraged to follow under the program.

The Commission instituted representative action in 1997 on behalf of more than 1000 Institute clients.

The Court ordered the Commission to write to all affected clients to ascertain how much they spent on Swisslim services, in order to calculate any refund which may be available.

During the course of the Commission action, the Court agreed to freeze assets held by the Institute and Hassler, which will be available for part-refund of the clients' claims.

Wavequest Pty Ltd (trading as Alice Computers) and Prebeal Pty Ltd (trading as Mobile Phones Etc)

Misleading and deceptive conduct (s. 52), false and misleading representations (ss 53(e), 53(g), 53C)

On 17 April 1998 the Commission instituted civil proceedings in the Federal Court Darwin against Wavequest Pty Ltd (trading as Alice Computers) and Prebeal Pty Ltd (trading as Mobile Phones Etc) alleging misleading and deceptive conduct in relation to the advertising of mobile phones in newspaper advertisements and shop fronts in the Northern Territory.

The companies allegedly promoted 'free' mobile phones without adequately disclosing that they were offering for sale packages comprising a telephone and the requirement to enter into an agreement with One.Tel Pty Limited, a mobile

network service provider. The Commission alleges that these packages were not 'free'.

The Commission has also begun proceedings against Mr Kevin Clerke for being directly, or indirectly, knowingly concerned in the alleged conduct. Mr Clerke is a director of both Wavequest and Prebeal.

The Commission is seeking injunctions, declarations, public apologies, costs, and refunds for consumers.

Franklin Mint Pty Ltd

False and misleading representations (s. 53)

On 19 February 1998 Franklin Mint Pty Ltd agreed to court enforceable undertakings in relation to advertising of its products.

Franklin Mint is the market leader in the United States and Australia in mail order souvenirs and commemorative chinaware. Typical products include porcelain figurines of puppies and dolphins, and models of 'celebrity' figures such as Jacqueline Kennedy and The Three Stooges.

Franklin Mint's advertisements generally included the claim: 'Issued in a hand-numbered limited edition which will close forever after just 45 firing days'.

The Commission considered that this, and other statements, misled consumers into believing that Franklin Mint's collectables were produced in small numbers and were likely to increase in value and esteem.

In fact, firing days might not be consecutive but could be spread over months or years, in some cases producing thousands of identical items.

Franklin Mint cooperated fully with the Commission's investigations. It agreed to be bound for two years by court enforceable undertakings to:

- survey its customers and offer refunds to those identified as likely to have been misled;
- in future, use wording in advertisements which indicates that large numbers of

certain pieces may sometimes be produced, over months or sometimes years; and

- develop a comprehensive trade practices compliance program.

GIO Australia Limited and GIO General Limited

False and misleading representations (s. 53)

On 2 April 1998 GIO Australia Limited and GIO General Limited gave enforceable undertakings to the Commission in relation to claims about its comprehensive motor vehicle insurance made in its brochures and on its website.

The companies admitted that policy holders may have been misled about the benefits offered with comprehensive motor vehicle insurance bought between March 1996 and March 1997.

In early 1997 GIO's website was promoting benefits that had been withdrawn almost a year before, and brochures and other written material which were out of date had not been withdrawn.

GIO will refund excess payments and premiums amounting to about \$1.2 million to consumers who may have been misled by representations about the GIO's reduced female driver excess, family discount, no-fault excess benefits and gold customer scheme. The company also agreed to revise its consumer brochures, policy documents and Internet site.

Furthermore it will ensure that all its consumer brochures and policy documents are in plain English, review its complaints handling mechanisms and compliance system, and publish a consumer information brochure with advice on purchasing motor vehicle insurance.

The Commission warned that companies on the Internet may face fines and damages if information on their website is not updated and becomes misleading.

AAPT Limited

False and misleading representations (s. 53)

On 20 April 1998 telecommunications carrier AAPT Limited gave the Commission undertakings in relation to advertising of its 'Smartchat' product.

In the Commission's view, AAPT's September 1997 ads falsely implied that AAPT long distance call rates to anywhere in Australia were always cheaper than Telstra's rates. The Commission found that Telstra was actually cheaper in a number of significant circumstances.

The undertakings involve the company taking more care in future advertising, especially comparative advertising. It will also contribute \$15 000 toward the education of the industry in compliance with the Trade Practices Act.

Australia Post

False and misleading representations (s. 53)

On 16 April 1998 the Commission accepted undertakings from Australia Post in relation to a bill-paying advertising promotion.

The Commission considered that Australia Post's 'Win the Thrill' campaign, offering a car as a main prize, confused consumers and misled them into believing that they would be in a draw for six cash prizes of \$500 each as well as the car.

In fact, winning one of the \$500 prizes required that one of the two bills be from Citibank, AAPT Telecommunications, Sydney Water, One.Tel, GIO Australia or Optus Communications, which Australia Post nominated as participating companies. Moreover, the prizes were in fact credits with one of the participating companies, not \$500 cash.

These conditions were made in small print. The Commission believed they significantly modified the representations made prominently on other parts of the leaflet and misled consumers.

The Commission acknowledged that Australia Post cooperated fully with it in this matter, once its concerns were made known.

Australia Post has undertaken to:

- ensure all bill-paying customers are eligible for the prizes;
- provide extra cash prizes;
- place corrective advertisements in newspapers;
- review its compliance program to ensure it complies with the new Australian Standard for Compliance Programs; and
- include independent auditing requirements, reporting and response systems and a trade practices compliance committee in its compliance program.



Product safety

Glendale Chemical Products Pty Ltd

Misleading and deceptive conduct (s. 52), false and misleading representations (s. 53), defective goods (ss 75AD, 75AF)

On 25 March 1998 in the Federal Court Sydney, Justice Emmett awarded damages to Mr Michael Barnes after finding Glendale Chemical Products Pty Ltd, the manufacturer and supplier of Glendale Caustic Soda, liable for injuries and damage suffered by Mr Barnes.

Mr Barnes had poured boiling water through the chrome cover of his shower recess waste pipe before sprinkling approximately one third of a 500g pack of Glendale caustic soda (sodium hydroxide) down his bathroom drain hole. He suffered burns to his face and eyes when he was hit by a column of water containing caustic soda. Caustic soda is an extremely reactive alkali which releases considerable heat when dissolved in water.

The Commission had alleged that the instructions and warnings on the product's label were inadequate as to its use.

Justice Emmett declared the warning labelling affixed to the caustic soda containers insufficient. He said:

The nature of the product and the purpose for which it was marked entitled consumers to expect to be warned of the danger or lack of safety in respect of which goods might reasonably be expected to be put. ... The description of the method for using caustic soda ... contains no hint of warning that caustic soda should only be used in that way for cleaning drains. While there is a warning that the contents of the container are corrosive and that contact with eyes and skin should be avoided, that is not adequate having regard to the nature of caustic soda and the purpose for which it was marked.

Justice Emmett also said that the suggested usage of the product could not be construed as a warning by the supplier that it was the only way in which it should be used. He did not consider that the way in which it was used in this case was unreasonable.

The orders given by Justice Emmett included amendments to the instructions on the product label concerning its use. Glendale had at an interlocutory stage given a court undertaking to amend its product labelling to include safety precautions and instructions on the use of the product.

This is the first Commission action brought under the product liability provisions of the Trade Practices Act.

Pumpkin Patch Limited

Non-conformance with the mandatory consumer product safety standard (s. 65C)

In February 1998 Pumpkin Patch Limited began a recall of two styles of children's dressing gowns after the Commission raised concerns that they did not comply with the mandatory Australian Standard 1249-1990, 'Children's nightclothes having reduced fire hazard'.

The garments were sold at the Pumpkin Patch store at Chatswood, Sydney and across Australia through the Pumpkin Patch mail order catalogue.

They were labelled 'Low Fire Danger', but may have been highly flammable. Consumers were advised to stop using the garments immediately and return them to Pumpkin Patch for a full refund.

The Reject Shop

Non-conformance with the mandatory consumer product safety standard (s. 65C)

The Reject Shop has recalled a vehicle trolley jack after the Commission raised concerns that the jack did not meet the relevant mandatory consumer product safety standard.

The Reject Shop, a major discount retailer, imported the jack, described as Hydraulischer Rangierheber, from China and sold it between August 1997 and March 1998.

The Commission found the jack did not comply with the mandatory standard for trolley jacks as it did not have all the required markings,

including adequate instructions for its operation.

The jack also failed to comply with certain performance requirements of the standard, which requires that a jack should be able to withstand twice its nominated capacity. Tests indicated that the jack's nominated capacity of 2000kg should have been around 1750kg.

After the Commission raised its concerns with The Reject Shop, the company withdrew the jack from sale and agreed to publish a recall notice.

The Reject shop has offered a full refund to consumers who purchased the jack.

It is also developing a corporate compliance program to reduce the possibility and incidence of breaches of the mandatory product safety standards. The Commission previously raised concerns with the Reject Shop in respect of failing to comply with the ingredient labelling requirements of the cosmetics standard and failing to comply with the standard for exercise bicycles.

Stop press!

Maritime Union of Australia

Secondary boycott (s. 45D), boycotts affecting trade or commerce (s. 45DB)

On 22 May 1998 the Commission instituted proceedings against the Maritime Union of Australia (MUA). It alleges that the MUA:

- took steps to get the ITF and its affiliates to organise and implement an international ban of ships and shipping lines which are loaded or unloaded by non-MUA labour in Australia;
- threatened ships and shipping lines that they would be the subject of such bans if they used Patrick, PCS or other stevedores using non-MUA labour;

- organised a campaign of domestic boycotts of Patrick operations because it used non-MUA labour, including:
 - withdrawal of labour for tugs and lines to impede ships berthing at Patrick; and
 - blockading Patrick to stop transport companies delivering and picking up cargo.

It alleges that this conduct was done for the purpose, and with the effect of, stopping Patrick and other stevedores using non-MUA labour from engaging in international trade or commerce, in breach of the primary boycott provisions of the Trade Practices Act.

On 12 June 1998 the MUA advised the Federal Court that it would write to the ITF withdrawing any call for the ITF and its affiliates to engage in boycott conduct of ships loaded by non-MUA labour in Australia between 7 April and 10 May 1998. The Commission had been concerned at the apparent ongoing communication between the MUA, the ITF and its affiliates which suggested the continuing involvement of the MUA in the alleged international boycotts of non-MUA loaded ships. The Commission advised the Court that the MUA's withdrawal addressed some of its concerns. The matter will now proceed to a final hearing of the Commission's claim for substantive relief.

The Commission has also begun proceedings against the MUA in relation to the boycott of stevedores serving ships formerly contracted to Patrick Stevedores who refuse to use labour from the Patrick labour hire companies, now in administration. It alleges that, as part of this plan, the MUA boycotted the loading and unloading of the *Althea* and the *Bay Bonanza* at P&O terminals at Newcastle and Port Adelaide. P&O won the right to stevedore the ships, formerly contracted to Patrick Stevedores, when Patrick Stevedores ceased operating in those ports. The Commission claims that this conduct was engaged in for the purpose, and has had the effect, of preventing or substantially hindering shipping lines from engaging in trade or commerce involving the international movement of goods, in breach of s. 45DB of the Act.

It is seeking declarations that the MUA has breached the Act, injunctions restraining the MUA from engaging in such conduct in the future, and findings of fact, which could form evidence in any subsequent private damages action.