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# 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.

## Anti-competitive practices (Part IV)

### Real Estate Institute of Western Australia

*Anti-competitive agreements (ss 45, 45A)*

The Commission has settled proceedings against the Real Estate Institute of Western Australia (REIWA) and its Executive Director Mr Michael Griffith in the Federal Court, Perth. REIWA and Michael Griffith consented to a range of orders including declarations that they had breached the anti-competitive trade practices provisions of the Trade Practices Act and are restrained by injunctions from engaging in similar conduct in the future.

REIWA is an association of real estate agents who provide real estate services within Western Australia. While not itself a participant in the Western Australian real estate services market, its rules and rules of practice governed the manner in which its members, who comprise some 80 to 85 per cent of the real estate agents operating in the Western Australian market, could operate.

In June 1998 the Commission instituted proceedings alleging that the following REIWA's rules and rules of practice were anti-competitive:

- rule 39 which required all franchisees of a particular group to become REIWA members;
- rule of practice 9.2 which prevented member real estate agents from offering certain incentives to the public; and
- rules of practice 2.1.2, 2.1.3 and 2.6 which restricted member real estate agents from approaching vendors who had entered into exclusive listing agreements with other agents or in the case of 2.6, a property management agreement.

Rule 39 was, and other rules of REIWA are, supported by ancillary rules of a disciplinary nature which provide for expulsion, suspension, fining and reprimanding of members.

The Commission also alleged that REIWA, its Executive Director, Michael Griffith, and two colleges of TAFE, entered into a price fixing agreement for a training course known as Certificate III in Property Services. The agreement contained a clause by which the colleges agreed not to provide the training courses to students at a fee less than \$780. The agreement was entered into with the South West Regional College of TAFE and the West Coast College of TAFE (then known as North Metropolitan College of TAFE).

It was the Commission's belief that, in distributing and entering into the agreement, REIWA contravened the price fixing provisions of the Trade Practices Act and that the agreement had the purpose or effect of fixing the price students would pay for the training course. The Commission also alleged that the two colleges had entered into illegal agreements and that REIWA's Executive Director Michael Griffith and REIWA's legal adviser, Conal O'Toole, were involved in the agreements.

The recent settlement has resulted in REIWA consenting to declarations, injunctions, publishing a deterrent publicity notice, and

entering into a trade practices compliance program. The range of orders consented to by REIWA include the following:

- Declarations that a number of its rules and rules of practice, in particular rule 39 of the rules and rules of practice 2.1.2, 2.1.3, 2.6, and 9.2, constituted a contract or arrangement between REIWA and its members and between the members themselves, and had the effect of substantially lessening competition in the Western Australian real estate market.
- Declarations that provisions of the Licence of Copyright agreement between REIWA and the South West Regional College of TAFE and the West Coast College of TAFE respectively, had the purpose, or was likely to have the effect of fixing the price for the supply of the real estate training course Certificate III in Property Services. The making of the contracts is agreed to have been in contravention of s. 45(2)(a)(ii) of the Act.
- Declarations that Michael Griffith was, directly or indirectly, knowingly concerned in or party to the contraventions of the anti-competitive provisions of the Act, including the provisions prohibiting fixing prices.
- Injunctions and/or orders requiring REIWA to remove the anti-competitive rules of practice mentioned above and restraining REIWA and Michael Griffith from engaging in conduct the subject of these proceedings.
- Orders requiring REIWA to notify, in its publication *REIWA Review*, all its members of the terms of the court orders within seven days of the order being made.
- An order requiring REIWA and Michael Griffith to publish a deterrent publicity notice in the *West Australian* and *REIWA News*.
- An order requiring REIWA to implement a trade practices compliance program and to maintain that program for six years.
- Costs.

REIWA and Michael Griffith also amended their defence to admit all the relevant facts in the Commission's Statement of Claim.

Mr Conal O'Toole, who was REIWA's legal adviser for the agreement with the Colleges of TAFE, consented to orders declaring that he was knowingly concerned in a breach of the restrictive practices provisions of the Act. In February 1999 Mr O'Toole consented to injunctions not to engage in similar conduct in the future. In April 1999 the Colleges of TAFE also provided undertakings to the court not to enter into, or induce other parties to enter into, agreements fixing the prices of training services.

A significant outcome of these orders is that the court acknowledged it had the power, and used that power, to order the publication of a public notice expressly intended to have a deterrent effect and not just as a corrective notice. Justice French indicated that:

...it is important that such advertisements are seen to do more than merely announce a 'win' for the ACCC and the contrition of the respondent. Such advertisements in cases involving contraventions of Part IV are within the power conferred by s. 80 if they are directed to informing the relevant markets of the outcome of the litigation so that those in the market have at least a broad understanding of the ways in which the contraveners have had to change their conduct. This will at least alert those in the markets to question or inquire about the lawfulness of conduct in the future which may seem to contravene the Act...

The removal of anti-competitive rules and rules of practice means that member agents can now compete more actively by, for example, allowing REIWA real estate agents to provide information about their services to homeowners — even if the sellers have already signed up with another agent. Thus homeowners will be better informed about their options. Agents may also offer consumers incentives such as prizes and reward points that were previously not allowed. Finally, the changes give greater flexibility to franchised real estate agents in deciding if they want to be REIWA members.

**Ithaca Ice Works Pty Limited,  
Queensland Ice Supplies Pty Limited,  
Ansonguard Pty Limited**

*Alleged Price Fixing and Market Sharing in  
Queensland Ice Market (s. 45)*

On 12 August 1999 the Commission filed proceedings in the Federal Court, Brisbane

against Ithaca Ice Works Pty Limited, Queensland Ice Supplies Pty Limited, Ansonguard Pty Limited, Kenneth John Smith, Anthony John Mee, Gregory Paul Mee, Brian Bradley, Leo Grevis, Gary John Grevis, Roderick Ian Matheson and Jack Numan Berry.

The Commission alleges that the respondents promoted price fixing and market sharing arrangement in the ice industry in south-east Queensland between August 1993 and September 1996. Directions hearings were held on 3 September 1999 and 5 November 1999. Penalty proceedings in relation to some respondents have been set down for 31 March 2000. The matter has been set down for trial, in relation to other respondents, for 4 December 2000.

### **Baldwins Tractor and Truck Wreckers Pty Ltd ss 45 and 4D**

*Anti-competitive agreement (s. 45)*

The details of this case are in the Legal notes.

## **Mergers (Part IV)**

### **ACCC not to oppose merger of NRMA/RACV insurance**

*Merger (s. 50)*

On 23 August the Commission announced it would not oppose the merger of the insurance operations of the NRMA and the RACV.

The merger combines two of the largest suppliers of comprehensive motor vehicle insurance in Australia. NRMA is the largest in NSW and RACV the largest in Victoria. The two firms compete in Victoria but not in NSW. Independent estimates indicate that the merged firm will have around 40 per cent of Victorian comprehensive motor vehicle insurance.

The Commission paid particular attention to the effect of the proposed merger of the personal lines insurance operations of RACV and NRMA on competition in the supply of motor vehicle insurance in the Victorian market. However, it formed the view that for most insurance products the merged group would not have a market share sufficient to

raise competition concern. After making market inquiries the Commission found that competition from other insurance companies and the potential for companies not currently providing motor vehicle insurance to supply such services would ensure healthy competition in the market.

The merger is likely to enable the parties to achieve cost savings and diversify their operations across more insurance products and a larger geographic area.

## **Consumer protection (Part V)**

### **Clint's Crazy Bargains**

*Misleading or deceptive conduct (s. 52), false or misleading representations (ss 53(a), 53(b)), conduct liable to mislead about the nature of goods (s. 55)*

On 24 August 1999 the Commission accepted undertakings from Clint's Crazy Bargains to withdraw from sale potentially dangerous mock antique telephones. Investigations by the Commission and the Australian Communications Authority had shown that the phone:

- did not adequately insulate the user from a power surge up to 7000 volts — the minimum safety levels mandated under the *Telecommunications Act 1992*;
- had not been approved for connection to a telephone network; and
- would fail technical performance tests needed for compatibility with the telephone network.

Clint's has undertaken to withdraw the product from sale, place corrective advertising, place warnings in all its stores and implement a trade practices compliance program.

The Commission noted Clint's cooperation in acting quickly to recall the phones and alert purchasers not to use them.

## Product safety (Part V-VA)

### **Dimmeys Stores Pty Ltd and Starite Distributors Pty Ltd**

*Non-compliance with a mandatory consumer product safety standard (s. 65C)*

On 26 August 1999 the Federal Court in Melbourne fined Dimmeys Stores Pty Ltd \$60 000 for supplying children's bicycles that failed to comply with the mandatory consumer product safety standard for pedal bicycles. The importer of the bicycles, Starite Distributors Pty Ltd, was also fined \$30 000.

The Commission instituted two criminal proceedings on 21 April 1999 alleging that the bicycles, which were sold under the brand name of *Star Wheel* between August and November of 1998, were not fitted with two brakes (they were only fitted with a back-pedal brake), a bell and wheel reflectors nor supplied with a manual for their use and maintenance, as required by the standard. The bicycles, which were styled to look like off-road bicycles, also did not carry the required warning that they were not designed for off-road use or for stunting.

It was also alleged that the drive chain, seat adjustment clamps and handlebar assembly of one of the bicycles that the Commission had tested failed to comply with the performance requirements of the standard.

Dimmeys and Starite pleaded guilty to the charges.