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 (Part IV)

NSW anaesthetists and the Australian Society of Anaesthetists

Price fixing agreements (s. 45A)

On 17 December 1998 Justice Hill accepted undertakings from four NSW anaesthetists and the Australian Society of Anaesthetists (ASA) and made consent orders to conclude legal proceedings brought by the Commission for alleged price fixing.

The Commission instituted proceedings in October 1997 alleging that anaesthetists at St George Private Hospital, Kareena Private Hospital and Greenoaks Private Hospital (now Bankstown Private Hospital) had reached unlawful agreements to charge $25 per hour for on-call services. The on-call services ensured an anaesthetist, although not on site, was available for emergency and after hours anaesthetic services at the hospitals.

The Commission also alleged that on 3 April 1996 certain anaesthetists reached an unlawful agreement to tell the St George Hospital administrators that, unless the hospital agreed to pay for the supply of on-call services from 1 May 1996, those anaesthetists would not supply such services (a 'boycott agreement'). Further, it alleged that a report from a sub-committee of the ASA (NSW section) circulated to members in 1995 said that the ASA should 'recommend and set an appropriate on call fee to be paid by private hospitals to on call anaesthetists' and that this fee should be $25 per hour.

It alleged that the sub-committee's recommendations were endorsed by the ASA (NSW) Committee of Management in September 1995 and further endorsed at the annual general meeting of the NSW ASA in March 1996.

The Commission alleged that the anaesthetists, through their medical practice companies, arrived at agreements with other anaesthetists to charge a $25 per hour on-call service fee. It also alleged that the ASA and its NSW chairman induced or attempted to induce and were knowingly concerned in, or a party to, one or more of the agreements.

The *Competition Policy Reform Act 1995*, and State/Territory application law, extended the restrictive trade practices provisions of the Trade Practices Act to those engaged in unincorporated business, including (unincorporated) medical practitioners, from 21 July 1996. Since July 1997, penalties of up to $10 million per contravention for companies and $500 000 for individuals have applied to contraventions by firms and individuals covered by the Act for the first time as a result of the CPR Act.

In this case, the Commission did not seek penalties as it was the first enforcement action against medical professionals following the CPR Act. However, it stated that it will not hestitate to seek penalties in the future.

The anaesthetists and the ASA gave undertakings to the Court that they would not engage in similar conduct in the future.

The ASA also undertook to develop and implement a trade practices compliance

program, based on the Australian Standard. The Court ordered the respondents to pay $60 000 toward the Commission's costs.

George Weston Foods Limited and ors

Anti-competitive agreement (s. 45), resale price maintenance (s. 48)

On 28 October 1998 the Commission instituted proceedings in the Federal Court Melbourne against biscuit manufacturer George Weston Foods Limited and two of its employees with respect to alleged attempted price fixing and resale price maintenance.

The Commission alleges that in June 1997, following price discounting of one of Weston's biscuit lines in Tasmania by Tasmanian retailer Chickenfeed Bargain Stores and national retailer Woolworths, Weston attempted to induce Chickenfeed and Woolworths to:

- enter an arrangement with each other and Weston to increase their retail prices on the biscuit line to the pre-discount level; and
- comply with Weston's directions not to sell the product below that price.

The Commission is seeking orders against Weston including pecuniary penalty, injunctions, declarations and findings of fact.

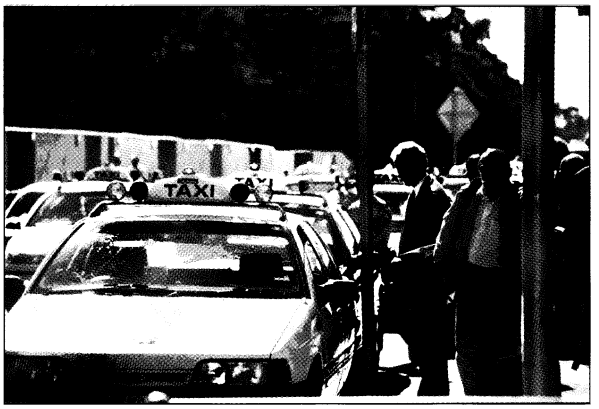
The next directions hearing is scheduled for 10 March 1999.

Radio Cabs Wagga

Agreements lessening competition (s. 45), primary boycotts — exclusionary provision (s. 45), misuse of market power (s. 46)

On 23 December 1998 Radio Cabs Wagga provided a court enforceable undertaking in relation to rules and by-laws which the Commission believed were in breach of the Act.

The Commission was concerned at a decision of the radio network to penalise drivers who privately arranged taxi bookings, its maintenance of a 'trip board' system to allocate out-of-town work amongst drivers, and a roster system which rationed work time available to drivers during the week.



Photography by Arthur Mostead

Radio Cabs Wagga has given an undertaking that:

- no taxi operator will be penalised for making a private booking;
- it will not introduce any system which prevents taxi cabs from competing for out-of-town jobs;
- it will not introduce a roster system which keeps cabs off the road at any particular time; and
- it will introduce a trade practices compliance program.

Mergers (Part IV)

Mobil Oil Australia Limited and Shell Australia Limited

Acquisition (s. 50)

On 21 January 1999 Mobil Oil Australia Limited and Shell Australia Limited announced that their proposed joint venture would not proceed.

The proposal was for a joint venture of the refining assets of Mobil and Shell and a new company to be jointly owned by the two petroleum manufacturers. Mobil and Shell lodged a submission with the Commission on 15 September 1998.

The Commission conducted extensive market inquiries and advised the parties of its concerns about the effect on competition. On 23 October 1998 the Commission advised the parties that its preliminary view was that the proposed joint venture was likely to result in a substantial lessening of competition.

On 7 December 1998 BP and Caltex announced plans for a similar joint venture at the refining level. This added to the Commission's concerns.

The Commission was concerned that the proposed joint venture between Mobil and Shell would increase market concentration in refining and thereby lessen competition in an important element of the process of refining and marketing of petroleum products. It considered that there would also have been likely flow-on effects to downstream marketing.

The Commission was also concerned that imports, at 3 per cent of the market only, would not be a significant constraint on the reduced competition.

At the end of 1998, Shell and Mobil advised that they would draw up an outline of undertakings intended to overcome the Commission's concerns. A number of meetings were held in January 1999. The Commission did not reach a final position on the proposed undertakings; however, it was uncertain that the undertakings could resolve its competition concerns. This was not resolved.

Mobil indicated that the refining joint venture could not proceed because the approval processes for the Australian joint venture and the Exxon-Mobil global merger would overlap.

Unconscionable conduct (Part IVA)

Leelee Pty Ltd

Unconscionable conduct in business transactions (s. 51AC)

On 4 February 1999 the Commission instituted proceedings in the Federal Court Adelaide alleging that Leelee Pty Ltd, the landlord of the Adelaide International Food Plaza, acted unconscionably towards one of its tenants. This is the first action by the Commission under the new s. 51AC of the Trade Practices Act.

The Commission alleges that Leelee had breached the unconscionable conduct provisions of the Act by:

- increasing the rent contrary to the terms of the lease;
- failing to act to protect the tenant's rights under his lease; and
- forcing the tenant to charge not less than a particular amount for certain food dishes while allowing his competitors to charge less for their food dishes.

The Commission is also taking action against Pua Hor Ong, the Managing Director of Leelee Pty Ltd, for allegedly aiding or abetting or being knowingly concerned in the breaches.

It is seeking injunctions, declarations that the tenant has suffered loss or damage, findings of facts, and orders for payment of damages.

A directions hearing has been set down for 1 March 1999 in the Federal Court Adelaide.

Consumer protection (Part V)

Westco Jeans (Aust) Pty Ltd

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

On 24 December 1998 the Commission obtained orders in the Federal Court Melbourne against Westco Jeans (Aust) Pty Ltd, in relation to alleged misrepresentation of consumer rights to refunds.

The Commission instituted action after Westco Jeans prominently displayed signs stating 'No Cash Refunds' and 'No Returns on Sale Items' in two of its stores.

This is the second time the Commission has taken action following complaints from consumers that Westco was misrepresenting the right of consumers to obtain refunds.

The Court ordered Westco to:

- publish corrective notices in local newspapers;
- display the same corrective notice clearly and prominently near each cash register counter in a number of its stores; and
- not display signs that state, without any qualification or exception, that there are no returns on sale items.

The corrective notice alerts customers that the signs had been wrongly displayed and provides

them with a contact name and telephone number at Westco if they believe that they are entitled to a refund or exchange.

Davids Limited

Misleading and deceptive conduct (s. 52)

On 12 October 1998 the Commission accepted undertakings from Davids Limited in relation to alleged misleading representations that subsidiary company Jewel Food Stores P/L was an Australian owned company.

Davids Limited, the sole owner of Jewel Food Stores P/L, passed into majority foreign ownership in December 1997. Store-front signs, plastic bags and 'Jewel' brand products carried claims that the company was '100% Australian Owned', or 'Proudly an Australian Company', until September 1998.

Davids Limited acknowledged the seriousness of the conduct and undertook a program to promptly remove the misleading representations.

Berri Limited

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

On 21 January 1998 Berri Limited gave a court enforceable undertaking to the Commission in relation to labelling and advertising practices in relation to its new 'Frusion' product.

In advertising and on labels, Berri claimed the Frusion product was made from 100 per cent whole fruit, whereas in fact the product is a blend of reconstituted juices and purees.

The Commission was also concerned about the descriptions on the front labels of the Frusion drinks, for example 'strawberry raspberry frusion' when the principal ingredient in the products is actually reconstituted grape juice.

The Commission was of the view, and Berri acknowledged, that consumers may have been misled about the product's contents.

Berri has undertaken to:

- not advertise Frusion as being produced from whole fruit;
- change the label by 10 February 1999;
- publish corrective notices in newspapers, acknowledging that consumers may have been misled about the contents and offering refunds;
- remove all currently displayed point of sale advertising; and
- pay a contribution to the Commission's costs.

The Commission acknowledged that, once this matter was drawn to Berri's attention, Berri acted quickly in ceasing advertising for the Frusion product and in cooperating with the Commission in offering the undertakings.

The Commission previously took action against Berri in relation to the misleading labelling of fruit juice products in 1996 and 1997.

Product safety (Part V)

Shercind Pty Ltd (trading as Eyetastique) (in liquidation)

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

On 15 October 1998 the Commission instituted criminal proceedings in the Federal Court Brisbane against Mr Victor Wagih Farid and Mr Joshua Matta. It alleges that a range of sunglasses manufactured by Eyetastique in Queensland did not comply with the mandatory standard for sunglasses and fashion spectacles (AS1067.1-1990).

The matter is listed for mention on 26 March 1999 and is set down for trial on 18–19 October 1999.

Morientaz Pty Ltd (trading as Sinia Imp & Exp Company)

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

On 18 December 1998 Morientaz Pty Ltd, trading as Sinia Imp & Exp Company, agreed to recall a combination wooden toy abacus and clock following a request by the Commission. The Victorian company is an importer and distributor of the toy abacus.

The Commission had the abacus tested to the requirements of the mandatory safety standard for toys for children under the age of three years.

A key requirement of the standard is for the toy not to include or produce small parts or components that may constitute a choking or inhalation hazard to small children. During testing, the toy abacus and clock broke and released small counting beads which could constitute a choking or inhalation hazard.

After being advised that the toy had failed the safety standard test, the importer took action to cease further supply and recall the toy from retailers and consumers. It also agreed to provide for retailers to refund consumers the full cost of the toy or to provide a replacement toy to the same value.

Anti-competitive conduct — telecommunications (Part XIB)

Telstra

On 24 December 1998 the Commission instituted proceedings in the Federal Court against Telstra, alleging that its local call transfer process (known within the industry as 'commercial churn') is anti-competitive.

The Commission alleges that:

- Telstra has required other carriers wanting to transfer customers from Telstra to use a process that requires carriers to be Telstra's debt collector; and
- where carriers choose not to collect Telstra's debts, Telstra imposes a fee of $15 per line, irrespective of whether or not the carrier is transferring one line or a number of lines.

The Commission alleges that the use of a process that requires carriers to be Telstra's debt collector imposes costs on those carriers and substantially hinders the ability of carriers to compete with Telstra in the local telephony market.

It further alleges that, by imposing a $15 fee per line, Telstra does not allow any quantity discount for transfers of services comprising a number of lines. Where an account comprises a number of lines, the total cost of transferring can be substantial.

These allegations were set out in two competition notices issued by the Commission that came into force on 9 December 1998. In the Commission's view, Telstra has not modified the conduct described in the competition notices. Telstra faces penalties of up to $20 million plus $2 million for each day the contraventions continue.