

or European authorities. Even if they are anti-competitive in some overseas countries, they may not be in Australia, depending on market circumstances such as the state of import competition and the structure of the market.

If they are, on the other hand, anti-competitive in Australia there is normally jurisdiction under the Trade Practices Act to deal with them. Where undertakings are appropriate, practical commercial solutions are usually available. Appropriate policy offsets may also be applied such as the reduction of tariffs to neutralise the anti-competitive effect.

Finally, the Commission's approach to competition law enforcement was recognised last year by a study reported in *The Economist* (16 May 1998, p. 121) which stated that 'Australian laws are the best in the world at preventing unfair competition' and ranked Australia's competition laws as the fairest.

Note: The Commission's decisions on the Coca Cola/Cadbury Schweppes and British American Tobacco/Rothmans International mergers will be published in full in *ACCC Journal* issue no 21.

Section 80 injunctions and section 80A orders — corrective advertising

This article by Kylie Sturtz of the ACCC's Brisbane office gives a brief summary of the type of injunctive relief that can be obtained under the Trade Practices Act. In particular it focuses on orders for corrective advertising and gives an example of the type of orders that may be made under ss 80 and 80A of the Act.



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The power to grant injunctions to prevent conduct that contravenes Part IV, IVA, IVB or V of the Trade Practices Act

lies within s. 80 of the Act. Section 80 allows the Minister, the Commission, or any other person, regardless of whether they have suffered loss or damage, to bring an application for an injunction.¹ The Court's power to grant a s. 80 injunction is broad and:

designed to ensure that... the Court should be given the widest possible injunctive powers, devoid of traditional constraints, though the power must be exercised judicially and sensibly.²

Traditionally the grant of an injunction as an equitable remedy involved the Court exercising its discretion in making such an order. While the above from the case above demonstrates that the Court continues to be guided by equitable principles when deciding whether to grant s. 80 injunctions, it also suggests that it will not be limited to the consideration of these alone. Where s. 80 injunctions are sought, the public interest is also a highly relevant factor. Where conduct which is the subject of an application includes allegations of misleading conduct, or an application is brought to prevent some anti-competitive practice, there is a clear public interest issue.

Section 80 is sufficiently broad to extend to the granting of mandatory injunctions, compelling the party against which they are ordered to undertake some positive remedial act, as well as prohibitory injunctions preventing a party from engaging in particular conduct.

In addition to this s. 80A allows the Court, on the application of the Minister or the Commission, to make orders requiring a person involved in a contravention to publish advertisements at his or her own expense, in a manner and form which comply with the court order.

However, it should be noted that the purpose of corrective advertising is not to impose punishment on the offending party. Rather, it is to protect the public interest by correcting a misrepresentation.³ Consequently, if the Court is satisfied that the respondent has taken sufficient steps to rectify or correct the misleading representations, or if a lengthy period of time has passed between the misrepresentation and the application, the Court may exercise its discretion not to order corrective advertising.

The following elements are taken into account when determining whether an order for corrective advertising will be made:

- assessment of the degree to which consumers were misinformed;
- assessment of the degree to which consumers may act on the misinformation to their detriment; and
- the degree to which corrective advertising is required.⁴

Only the Minister or the Commission can apply for an order for corrective advertising under s. 80A. In addition, s. 80A statutory orders for corrective advertising apply only to conduct in contravention of the provisions of Part V of the Act.

However, s. 80A does not limit the application of s. 80, and applicants which are neither the Minister nor the Commission may seek, by way of s. 80 injunction, orders for corrective advertising that have the same practical outcome or effect as a statutory order made under s. 80A. For example, in both *Janssen Pharmaceutical Pty Ltd v Pfizer Pty Ltd* and *Makita v Black & Decker (Australasia) Pty Limited*,⁶ the respondents were restrained under s. 80 from using an advertisement that gave a misleading impression about the efficacy of their product in comparison to the applicants'. In both cases the respondents were ordered to place a prominent ad in an industry publication and a national daily newspaper to correct any misleading impression formed.

There are a number of cases in which the court has ordered corrective advertising to be published by the respondents. A recent example may be found in *ACCC v Patrick Joseph O'Keeffe and Anstar Holdings Pty Ltd* (unreported).

In *O'Keeffe* the Commission instituted proceedings against the respondents, alleging they had engaged in conduct in contravention of ss 52, 53, and 64 of the Act. It alleged that the respondents had engaged in misleading conduct known as 'blowing'. Anstar's agents approached businesses with a request for payment for the placement of advertising in magazines published by Anstar — *Union*

Views, Labour Review, Industrial Health and Safety Report, Environmental Health and Safety News, The Union Worker and Workplace Safety Review. However, none of the businesses approached for payment had ordered the ads.

Section 64 of the Act prohibits a corporation from asserting the right to payment for unsolicited services, unless it has a reasonable cause to believe that there is a right to payment.

The Commission sought injunctive relief under s. 80 to prohibit further conduct, and orders for corrective advertising under ss 80 and 80A. The proceedings were settled by consent and the Federal Court ordered, amongst other things, that the respondents were:

- restrained from asserting a right to payment for unsolicited advertisements; and
- within 14 days of the date of the order, to publish, at its own expense, an apology on pages 3, 5, or 7 of one Saturday edition of the *Courier Mail* and *Weekend Australian* in the following terms:

APOLOGY

During the period 1994 until 1997 Anstar Holdings Pty Ltd (now in liquidation) and its director, Mr Patrick O'Keeffe, were responsible for approaches made to businesses throughout Australia in order to secure advertising in the following publications — *Labour Review, Union News, Environmental Health & Safety Report, Industrial Health & Safety News, Union Worker, Workplace Safety Review*.

In August 1996 the Australian Competition and Consumer Commission commenced Court action against Anstar Holdings Pty Ltd (now in liquidation) and Mr O'Keeffe alleging that invoices and demands for payment were sent to businesses for advertising which customers had not authorised, in contravention of sections 52, 53(bb) and 64 of the *Trade Practices Act 1974*.

On 6 April 1998 Justice Drummond of the Federal Court, Brisbane granted injunctions

restraining Mr O’Keeffe from such conduct in respect of the abovementioned publications.

Anstar Holdings Pty Ltd (now in liquidation) and Mr O’Keeffe wish to apologise to any persons or companies who may have received an invoice or demand for payment in relation to the above publications for advertising which they did not authorise or approve.

Any further queries should be made to Calabro Partners on (07) 3229 8733 or Patrick O’Keeffe on (041) 770 3188.

This advertisement appears at the request of the Australian Competition and Consumer Commission.

By securing such an outcome the Commission achieves several of its enforcement goals: obtaining redress by causing the respondents to apologise and offer refunds to victims, deterring similar conduct by companies, and preventing recurrences by informing the public.

NOTES

1. *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181.
2. *ICI Operations Pty Ltd v TPC* (1992) ATPR 41-185 per Lockhart J at 40,524.
3. *ACCC v Hungry Jacks* (1996) ATPR 41-358; *ACCC v On Clinic* (1996) ATPR 41-517.
4. *Ibid.*
5. (1986) 8 ATPR 40-654.
6. (1990) 12 ATPR 41-030.