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# Enforcement

*The following are reports on new and concluded Commission actions in the courts, settlements involving court enforceable undertakings (s. 87B) 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.*

*GST enforcement matters are listed together at the end of this section.*

## Anti-competitive agreements (part IV)

### **Geoff Clegg Enterprises Pty Ltd (formerly trading as Watergear Distributors Pty Ltd)**

*Agreements lessening competition (s. 45), price fixing (s. 45A)*

On 21 July 2000 penalties of \$100 000 were ordered in the Federal Court, Brisbane against Geoff Clegg Enterprises Pty Ltd (formerly trading as Watergear Distributors Pty Ltd at the time of the conduct) for anti-competitive behaviour. This was the final penalty in the proceedings instituted by the Commission against various companies for their role in price fixing, tender rigging and market sharing in the supply of fittings and valves for use with ductile iron cement lined pipe. These products are used in water supply, irrigation and sewerage systems, including connections to new housing developments. Previously penalties had been ordered against Tubemakers of Australia Ltd and its former subsidiary, Coastline Foundry (Qld) Pty Ltd for \$1.75 million and against Associated Water Equipment Pty Ltd for \$1 million. Tubemakers had also agreed to implement a compensation program totalling \$1.23 million to affected customers.

Watergear entered into the agreements between December 1993 and May 1994. The Commission did not allege that Watergear implemented the agreements made. The court accepted a joint submission on injunctions and penalties after Watergear admitted it had entered into the agreements with its major competitors.

The penalties related to the conduct of Mr Geoff Clegg, shareholder and a Managing Director of Watergear. Mr Clegg admitted to meeting competitors to agree maximum discount levels off list prices, to agree to increase the list prices in their companies and to agree pricing strategies for particular tenders. The Commission did not allege that Mr Clegg gave effect to the agreements made. The Commission alleged that Watergear agreed to collude with Associated Water Equipment through Mr Patrick McAuliffe, and Tubemakers and Coastline through Mr Peter Pittard.

The court also issued injunctions restraining Watergear for three years from engaging in similar conduct.

### **ACCC v AMA (WA) and Mayne Nickless Ltd**

*Agreements lessening competition (s. 45), price fixing (s. 45A)*

On 21 July 2000 the Commission instituted proceedings in the Federal Court, Perth against the West Australian branch of the Australian Medical Association (AMA) and Mayne Nickless Ltd when it became aware that the AMA (WA) had, on behalf of visiting medical practitioners at Joondalup Health Campus, entered into negotiations with Mayne Nickless to determine terms and conditions under which the medical practitioners would provide their services for the care of public patients at the Joondalup Health Campus. It was alleged that during the negotiations the AMA (WA) told Mayne Nickless that the practitioners would withdraw their services unless Mayne Nickless agreed to their terms.

It was alleged that the negotiations led to an agreement which, among other things, fixed the price at which the practitioners provided their services for the care of public patients.

As well as the action being taken against the AMA (WA) and Mayne Nickless Ltd, the Commission has alleged in its proceedings that the AMA (WA) Chief Executive, Mr Paul Boyatzis, and former president, Dr David Roberts, were knowingly concerned in the AMA's contraventions.

The action by the Commission resulted in the AMA (WA) publishing a notice to its members and staff warning them to 'stay informed on competition law obligations and compliance'.

The notice also advised that it openly acknowledged that its conduct breached the competition provisions of the Act and that Dr David Roberts and Mr Paul Boyatzis openly acknowledged that they were knowingly concerned in the contraventions by the AMA(WA) and other parties.

Having acknowledged the problems, AMA (WA), Dr David Roberts and Mr Paul Boyatzis agreed to court orders including declarations of breaches; payment of civil pecuniary penalties; injunctions preventing future conduct; and a commitment to pay a contribution to the Commission's legal costs.

AMA (WA) also agreed to put into practice a trade practices compliance program.

The notice concluded as follows:

Our message to all medical practitioners and association staff members for the future is — do not ignore trade practices issues. Rather identify the issues early, and fix the problem fast instead of risking extensive and time-consuming litigation.

**ABB Power Transmission Pty Ltd; Alstom Australia Limited; Wilson Transformer Company Pty Ltd & Ors**

*Agreements lessening competition, primary boycotts (s. 45), price fixing agreements (s. 45A)*

On 1 October 1999 the Commission instituted proceedings in the Federal Court, Melbourne for alleged market sharing and price fixing conduct by ABB Power Transmission Pty Ltd, Alstom Australia Limited, Wilson Transformer Company Pty Ltd and several former and current senior executives of these companies, including Mr Douglas Pitt, Mr RG Elliot and Mr Robert Wilson.

The Commission alleged that from the early to mid-1980s through to late 1995 there was a high-level arrangement or understanding between the three principal Australian manufacturers and suppliers of power transformers to maintain market shares at particular levels.

The companies allegedly involved in the conduct in the 1990s were ABB Power Transmission Pty Ltd, Wilson Transformer Company Limited and Alstom Australia Limited.

The Commission alleged that regular meetings between senior executives of the relevant companies were held to maintain market shares. This was done by monitoring market shares and agreeing on how to allocate forthcoming tenders for the manufacturing and supplying of power transformers. The tender-allocation arrangement and ultimately the market-share arrangement were implemented for individual tenders in a specific manner. A senior executive from the company, which was allocated the tender, would contact relevant senior executives from each of the other companies, usually by telephone shortly before the closing date of the tender. The senior executive would agree separately with each of the executives from the companies on how his company would bid for the allocated tender. The selected company could then bid at a total cost below the other companies' bids.

The Commission is seeking various forms of relief including pecuniary penalties and injunctions. The trial date is yet to be set.

## Consumer protection (part V) and unconscionable conduct (part IVA)

### **Australian Industries Group Pty Ltd t/a Half Price Shutters**

*Contravention of industry codes (s. 51AD),  
misleading or deceptive conduct (s. 52),  
misleading representations about business  
earnings generally (s. 59(2)) and  
unconscionable conduct (s. 51AC)*

On 4 August 2000 the Commission instituted proceedings in the Federal Court, Perth against Australian Industries Group and its National Manager, Tony Gullotti. It alleged that the false representations were made to prospective licensees about the potential profitability of installation businesses, there was unconscionable conduct towards the company's licensees and that it breached the Franchising Code of Conduct.

The first directions hearing in the matter was held on 8 September 2000. The Commission's application to amend the Statement of Claim and Application to join Robert Keirle, former director, to the action and to add particulars for Danro Pty Ltd, third complainant, was granted. The Commission is seeking orders against the company, Tony Gullotti and Robert Keirle including declarations, injunctions, orders requiring the payment of compensation, institution of a trade practices compliance program and costs. Programming orders have been adjourned until the next hearing in the matter set down for 7 December 2000.

### **Cash Return Mercantile Pty Limited and Sharyn McCaskey**

*Misleading or deceptive conduct, harassment  
and coercion, misrepresentation — warranties  
(ss. 52, 53(g), 60)*

On 1 August the Federal Court, Perth held that Cash Return and its former agent Ms Sharyn McCaskey engaged in undue harassment, coercion and misleading conduct while collecting debts from consumers. This was the first case taken by the Commission under s. 60.

French J found that Ms McCaskey and Cash Return had, while collecting debts from consumers, made an excessive number of telephone calls to debtors which were threatening and abusive, and had misled debtors about debt recovery procedures.

French J found that a supplier of goods or services or a debt collector, should ask the question:

Are the content, the timing, the location, and other circumstances of my demand for payment reasonably calculated to remind the debtor of his or her obligations, specify a time within which it must be satisfied and indicated that civil proceedings for recovery will be instituted if payment is not made.

French J went on to say that:

... if the frequency, nature, or content of the approaches and communications associated with them are such that they are calculated to intimate or demoralise, tire out or exhaust a debtor rather than convey the demand and associated legitimate threat of proceedings, the harassment will be undue.

The court granted injunctions restraining Cash Return and Ms McCaskey from engaging in similar conduct in the future. It also ordered Ms McCaskey to attend a trade practices compliance seminar; Cash Return to publish a notice in the West Australian newspaper; and both parties to pay the Commission's costs.

## Unconscionable conduct (part IV)

### **Lux Pty Ltd**

*Unconscionable conduct (s. 51AB),  
harassment and coercion (s. 60)*

On 27 July 2000 the Commission instituted legal proceedings in the Federal Court, Perth against Lux Pty Ltd and one of its door-to-door sales agents, Mr Dennis Podger. The Commission alleged that, in securing the sale of a Lux vacuum cleaner to an intellectually impaired couple who could not read or write, the parties had engaged in unconscionable conduct and had also used undue harassment or coercion.

The Commission alleged that in August 1999 Mr Podger visited the residence of the couple in

Port Pirie South Australia and, in seeking to secure the sale for a new top-of-the-range Lux vacuum cleaner, used his position of power to obtain the sale.

The Commission has also taken action against Lux Pty Ltd as Mr Podger was an agent working on their behalf and is therefore knowingly concerned with the actions of their agents.

The Commission is seeking from Lux declarations, injunctions, a corrective notice, the implementation of a trade practices compliance program, the voiding of the contract that the couple entered into with Lux and costs. The Commission is seeking from Mr Podger declarations, injunctions and costs.

Lux instituted proceedings to transfer the matter interstate. The application was denied. A directions hearing will be held on 13 October 2000.

## Fair Trading (part V)

### Paul Storer

*Misleading or deceptive conduct (s. 52), misrepresentations about the performance characteristics of goods (s. 53(c)), sponsorship (s. 53(d)), misrepresentations about need for goods or services (s. 53(f))*

On 4 August 2000 the Commission instituted legal proceedings in the Federal Court, Perth against Mr Paul Storer. The Commission alleged that Mr Storer made false and misleading representations about the benefits of using a probiotic called OMX when used in isolation as a cure for chronic fatigue syndrome. The Commission alleged that Mr Storer claimed that there were more than 1000 published articles which supported the use of probiotics in treating the syndrome; represented that sufferers needed the product; and claimed that the product had a 60 to 70 per cent success rate. The Commission also alleged that Mr Storer claimed to be a 'doctor' with a PhD in microbiology from the University of Western Australia.

The Commission is seeking declarations, corrective advertisements, refunds for affected consumers, a compliance program, costs and court orders restraining Mr Storer from making the representations.

A directions hearing was held on 8 August 2000.

### Skybiz 2000 Scheme

*Pyramid selling (s. 61), referral selling (s. 57)*

On 4 August 2000 the Commission instituted proceedings in the Federal Court, Perth against Kevin Ryan of Perth, a participant in a scheme called Skybiz 2000 Home Based Business.

The Commission alleged that Mr Ryan attempted to induce others to become participants in the trading scheme, promoted by Skybiz.Com.Inc, and to pay Skybiz.Com.Inc US\$100 per website to obtain the prospect of participating in the scheme.

The Commission is seeking declarations that Mr Ryan was involved in a pyramid selling scheme, injunctions restraining him from further involvement, and orders requiring him to attend a trade practices compliance seminar and to inform others that the scheme is a pyramid selling scheme.

A directions hearing was heard on 8 September 2000 in the Federal Court establishing some programming orders. A further directions meeting will be held at a date to be determined.

### Abel Rent-A-Car Pty Ltd

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

On 24 February 1999 the Commission instituted proceedings in the Federal Court, Brisbane against Abel Rent-A-Car and its director, Steven Mark Conn, alleging misleading advertising of car rental services. The advertising was carried on prominent billboards in and around Brisbane, as well as in brochures and on the Internet.

On 24 March 1999 Drummond J made interim orders requiring Abel Rent-A-Car to disclose on its billboards, vehicle signs and Internet site that a mileage charge applies for its \$29 rental, the days of the week for which the offer is available, and to remove all references to free delivery, or to trucks being available at that price. In addition, Abel Rent-A-Car was ordered to add the words 'excess applies' to its references to free insurance on its Internet site. Abel

Rent-A-Car was also ordered to cease distribution of any brochures containing the slogan 'Abel \$29\*' which did not also state that mileage charges applied, or the days of the week for which the offer was available, or which referred to free delivery.

On 19 April 2000 Abel Rent-A-Car and Steven Conn were found in contempt of those court orders. The court declared that Abel Rent-A-Car had committed contempt of court because it had not, by 11 June 1999, altered its signage which contained a rental price to include prominent text stating 'plus mileage' or alternatively the number of kilometres included in the rental price. It also found the company in contempt for not, by 11 June 1999, altering its billboard signage in Cairns to delete any reference to trucks being available for rental at \$29 per day.

The court found Steven Conn in contempt for taking no or inadequate steps to ensure Abel Rent-A-Car was not in contempt of court in the ways referred to above.

Steven Conn was fined \$10 000 and ordered to pay the Commission's legal costs. The Commission did not seek a penalty against the company, which was placed in a creditors' voluntary liquidation on 26 July 1999.

On 17 July 2000 by consent, the court ordered declarations, injunctions and a payment of \$100 000 towards the Commission's costs in the matter against Steven Conn. The proceedings against Abel Rent-A-Car (in liquidation) have been discontinued with no order as to costs.

### **Taj Food Sales Pty Limited**

*Misleading or deceptive conduct (s. 52),  
misrepresentation of place of origin (s. 53(eb))*

On 10 July 2000 the Federal Court, Sydney found, by consent, that Taj Food Sales Pty Limited and its managing director, Mr Sah Dev Varma, had made false representations about the country of origin of its basmati rice.

The Commission alleged that for the past four years Taj Food Sales had been importing basmati rice from Pakistan and packaging the rice in one-kilogram bags marked with the words 'Produce of India'.

Taj Food Sales sold the packaged rice to Woolworths Limited for sale through its supermarkets. The rice was sold under the brand name Taj Premium Long Grain Pure Basmati Rice. Woolworths was unaware that the rice was from Pakistan.

Taj Food Sales and Mr Varma agreed to injunctions to prevent them from engaging in the offending conduct in the future. Taj Food Sales will also publish corrective newspaper advertisements and notices advising affected consumers of their rights to a refund from the company.

### **Emerald Ocean Distributors Pty Ltd, Slendertone Health and Beauty Pty Ltd**

*Misleading or deceptive conduct (s. 52),  
misrepresentations about the performance  
characteristics of goods (s. 53(c)),  
representations as to future events without  
reasonable grounds (s. 51A)*

The Commission instituted legal proceedings in the Federal Court, Perth against Emerald Ocean Distributors Pty Ltd, Slendertone Health and Beauty Pty Ltd and their director, Mr Sean O'Donoghue, on 19 July 2000. The Commission has alleged that Mr O'Donoghue, through his companies, made false and misleading representations about the benefits of using his electronic muscle stimulation products generally referred to by the trade name, 'Slendertone'.

The Commission has alleged that the firm represented in the magazines, Women's Health and Ultrafit and in the firm's pamphlet and website, that the Slendertone product could have beneficial weight loss and cosmetic benefits to users without any effort being required or a change to lifestyle or diet.

The Commission is seeking declarations, corrective advertisements, refunds for affected consumers, a compliance program, costs and court orders restraining Mr O'Donoghue and his companies from promoting the supply of Slendertone products using these claims.

A directions hearing was held on 8 August 2000.

### **Dimmeys Stores Pty Ltd**

*Misleading or deceptive conduct (s. 52),  
misrepresenting warranties (s. 53(g))*

On 28 June 2000 the Commission accepted court enforceable undertakings provided by Dimmeys Stores Pty Ltd after the Commission raised concerns over potentially misleading refund signs in Townsville, North Queensland.

The signs in question stated that Dimmeys would not provide refunds on ladies' lingerie, swimwear, bras and briefs. However, where a product is faulty, not fit for its purpose or does not meet its description, consumers are entitled to certain remedies which may include refunds.

Dimmeys removed the signs, printed corrective advertising in a Townsville newspaper and implemented a trade practices compliance program.

## **GST compliance and enforcement (part 75AU)**

### **DCH Legal Group**

*Misrepresenting prices in relation to the New Tax System (s. 53(e))*

On 10 July 2000 the Commission accepted court enforceable undertakings from a Perth law firm over representations made in a Perth newspaper article about the effect of the New Tax System on legal fees. This closely followed the Commission instituting proceedings against a Melbourne accountant and is the only s. 87B undertaking to be obtained by the Commission from a law firm.

The Commission alleged that partners of the DCH Legal Group misrepresented the effect of the New Tax System on legal fees in an advertorial published in a Perth newspaper. It was stated that:

- GST will make it more expensive to divorce;
- unlike businesses, divorcing couples will not be able to write off their legal fees as a tax deduction and this will add 10 per cent to their legal fees; and
- if couples want to avoid paying GST, they should contact lawyers straight away for advice because the GST would apply to all legal services provided after July 1.

In the context of the representation referred above, an example used in the article stated that a divorce that would usually cost \$20 000 would cost \$22 000 as a result of the GST.

The Commission was concerned that the statements created the impression that consumers could expect the cost of divorce proceedings to increase by 10 per cent from 1 July 2000 and that consumers could avoid paying the GST by acting quickly to seek legal advice. In fact, the cost of legal fees for divorce proceedings was expected to rise by less than the full 10 per cent. The Commission was concerned that consumers would be misled into believing that divorce proceedings would be completed before 1 July 2000 if they were started as a result of representations made in the published article.

DCH Legal Group undertook to:

- acknowledge that the representations may have misled consumers;
- avoid engaging in similar conduct in the future;
- place a corrective notice in the relevant newspaper offering compensation to consumers affected by the misrepresentations; and
- have partners of the firm take part in a trade practices compliance program.

The Commission acknowledged the cooperation of DCH Legal Group.

### **A Whistle and Co (1979) Pty Ltd, trading as Electrodry Carpet Dry Cleaning**

*Misleading or deceptive conduct (s. 52),  
misrepresenting prices in relation to the New Tax System (s. 53(e))*

The Commission has instituted proceedings in the Federal Court, Melbourne against A Whistle and Co (1979) Pty Ltd, trading as Electrodry Carpet Dry Cleaning.

The Commission alleged that, in a brochure distributed by Electrodry in Queensland, New South Wales, Victoria, South Australia and Western Australia, the GST-exclusive component of the price was in large, prominent print with the total price including GST in substantially smaller print. It considers the brochure likely to mislead consumers about the

total price payable for Electrodry Carpet Dry Cleaning services.

On 18 August 2000 the Commission obtained an interim injunction restraining Electrodry from further distribution of the brochure, pending further orders from the court. This injunction was extended by the court at a directions hearing today.

The Commission is seeking court orders including:

- declarations that Electrodry has breached the relevant provisions of the Trade Practices Act;
- injunctions preventing Electrodry from engaging in similar conduct in the future;
- corrective advertising; and
- an injunction directing that Electrodry conduct a trade practices compliance program.

A further directions hearing is listed for 16 October 2000.

### **Rod Turner Consulting Pty Ltd**

*Misleading or deceptive conduct (s. 52), misrepresenting prices in relation to the New Tax System (s. 53(e))*

The Commission has instituted legal proceedings on 3 July 2000 in the Federal Court, Melbourne against an accountancy firm and its principal, Mr Rod Turner, over representations about how the New Tax System will affect residential rents and water rates.

The Commission alleged that the firm, Rod Turner Consulting Pty Ltd, wrote to a client's tenant advising of a proposed rental increase. The Commission alleged the letter stated that from 1 July 2000 an extra 10 per cent would be payable on rent charged by the landlord but the landlord was including a GST component in the increased rent from 20 June 2000. It is also alleged that the firm represented that water rates for the rented premises would carry a GST cost to the landlord.

The Commission alleged the statements in the letter amount to a false or misleading statement about the price of services, namely rent for a residential unit. It has also alleged misleading and deceptive conduct because the supply of leased residential premises by way of lease is an

input-taxed supply under the New Tax System legislation and therefore not a taxable supply for the purposes of the GST and also because water rates are GST-free.

The Commission seeks declarations that the conduct is unlawful, injunctions restraining the respondents from making similar statements, and orders that the respondents take corrective action and apologise to the tenant concerned.

### **Discount Electrical Centre (Australia) Pty Ltd**

*Misleading or deceptive conduct (s. 52), misleading representations as to future supply (s. 51A)*

The Commission instituted proceedings on 16 June 2000 in the Federal Court, Melbourne. On 13 July 2000 Discount Electrical gave undertakings to the Federal Court that it would not make representations that the price of televisions and DVD players would increase as a result of the New Tax System.

Discount Electrical also agreed to compensate customers who suffered any loss as a result of the representations, to place corrective advertising and to institute a trade practices compliance program. Discount Electrical was ordered to pay the Commission's costs.

Discount Electrical had placed an advertisement and issued a catalogue containing statements that the Commission considered misrepresented the effect of the New Tax System on the price of electrical goods. Televisions and DVD players in the advertisement and catalogue were previously subject to WST of 22 per cent and the Commission believed prices would decrease as a result of the tax changes.

### **Queensland Motorways Limited**

*Price exploitation in relation to the New Tax System (ss. 52, 53(e), 75AU, 75AYA)*

On 25 July 2000 the Commission and Queensland Motorways Limited (QML) announced a settlement to the controversy surrounding price increases on toll roads in and around Brisbane.

The Commission had received many complaints from consumers pointing out that the increase in tolls at three toll plazas — Kuraby, Loganlea

Road and Stapylton Road — were all greater than 10 per cent after the GST was introduced. Prices rose between 11.4 per cent and 20 per cent. The average increase was about 13 per cent.

Public notices issued by QML advising motorists of the toll increase stated:

The modifications to the price will reflect the introduction of the Commonwealth Government's 10 per cent Goods and Services Tax and minor rounding of coinage.

After the rises were investigated by the Commission, QML acknowledged that the actual increase from the GST was 9.94 per cent. Part of the increase was to cover a proportion of costs flowing from:

- additional capital works totalling \$230 million since the last toll increase; and
- increased operating costs since the last toll increase.

Toll rates are set under legislation that requires price changes to be approved by the Minister for Main Roads. QML's franchise agreement with the State of Queensland specifically allows and anticipates toll increases in accordance with CPI, and so a formal pricing mechanism is in place to allow for CPI increases as well as GST increases. The Commission was, however, concerned that QML's notices were misleading, as the increase was not entirely attributable to GST and rounding.

QML gave court enforceable undertakings to the Commission to:

- provide consumers with a toll-free day on the Southern Brisbane Bypass, Loganlea Road and Stapylton Road (this took place on Wednesday, 16 August 2000);
- not seek a further toll increase on any toll road (including the Gateway Bridge) for 12 months from 1 July 2000;
- publish a series of corrective advertisements aimed at advising Brisbane motorists of the true nature of the price rises implemented on 1 July 2000; and
- implement a trade practices compliance program.

The Commission noted the effort made by QML to reach a speedy resolution and an appropriate settlement.

### **Goldy Motors Pty Ltd**

*Misleading and deceptive conduct (s. 52), misrepresenting prices in relation to the New Tax System (s. 53(e))*

On 26 July 2000 the Commission instituted proceedings against Goldy Motors Pty Ltd in the Federal Court, Perth. The Commission alleged false and misleading conduct by Goldy Motors in its advertising about the effects of the GST on new motor vehicles and about the approval of applications for finance for new and used motor vehicles. It sought declarations, injunctions, corrective advertising and refunds for consumers who may have suffered loss as a result of the advertising.

The Commission acted because of a newspaper advertisement on 14 June 2000 that displayed both new and used vehicles and which encouraged consumers to buy vehicles before 30 June 2000 because it was their 'Last chance to buy...GST FREE !!'. The Commission alleged that this advice may have misled consumers, because the price of new vehicles was expected to, and indeed has, fallen with the introduction of the GST.

The Commission also took issue with the use of a very small qualifier 'T.A.P.' (to approved purchasers) beneath the statement 'No Finance Application Refused!' contending that the qualifier was insufficient because:

- it may not be readily seen;
- consumers may be unaware of the meaning of the letters T.A.P.; and
- consumers may misinterpret the wording in such a way as to equate 'acceptance' of a finance application with 'approval' of that application.

Directions hearings were held on 9 August 2000 and the first hearing before Carr J scheduled for 13 September 2000