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# Enforcement

*The following are reports on new and concluded Commission actions in the courts, settlements requiring 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 at the end of this section.*

## **Anti-competitive agreements (part IV)**

### **Queensland fire protection cartel**

*Price fixing and market sharing (s. 45)*

On 28 February 2001 the Commission concluded court proceedings against the largest price-fixing cartel in Queensland history. It resulted in penalties and costs of more than \$15 million.

The case involved 38 individuals and more than 20 companies in the Queensland fire protection industry.

The Commission alleged that an anti-competitive arrangement had existed for many years in the markets for the installation of fire sprinkler systems throughout Queensland, and fire alarms systems in and around Brisbane. The Commission alleged that the fire protection companies agreed between themselves to allow certain tender projects to be won by participants, and agreed on tender prices to be submitted for the projects to ensure the selected company won the tender.

Professor Allan Fels said the Commission was pleased to announce that the proceedings against this cartel have now been finalised.

This culminates four years of investigation and 18 months before the courts.

## **Mergers (part IV)**

### **PaperlinX Limited/Spicers Paper Ltd**

*Acquisition (s. 50)*

On 30 January 2001 the Commission accepted a court enforceable undertaking from PaperlinX to address the Commission's concerns about the proposed acquisition of Spicers by PaperlinX.

The undertakings include the divestiture of the Edwards Dunlop and Commonwealth Paper merchant businesses. It also secures the transfer to the divested entity of a major brand name to the Edwards Dunlop business. PaperlinX has also agreed in the undertakings to a process for assessing the merits of future anti-dumping complaints.

The undertakings follow the Commission's decision late last year that the original proposed acquisition was likely to breach s. 50 of the Trade Practices Act by substantially lessening competition in the market for the supply of fine paper by merchants.

For the next three years the undertakings stipulate that before PaperlinX can lodge an anti-dumping application, it has to obtain an opinion from an independent adviser on the application's prospect of success. The undertakings also stipulate that the independent adviser must certify that the proposed anti-dumping application is made bona fide and not frivolously or vexatiously.

The Commission has sought these undertakings to ensure that the divested entity will be a viable and vigorous competitor in the fine paper industry.

## Unconscionable conduct (part IVA)

### Cheap As Chips Franchising Pty Ltd and Mr Peter Hudousek

*Unconscionable conduct (s. 51AC),  
contravention of industry code (s. 51AD)*

On 14 March 2001 the Federal Court, Melbourne, made orders by consent against Cheap As Chips Franchising Pty Ltd and Mr Peter Hudousek, its director, in relation to their dealings with three franchisees.

The unconscionable conduct included:

- terminating a franchise over a dispute about the payment of \$803.75;
- threatening to terminate franchises rather than negotiating disputes about issues such as monies owed and attending seminars unrelated to carpet cleaning;
- refusing to allocate cleaning jobs to franchisees rather than negotiating disputes about issues such as the distribution of promotional leaflets and the quantities of chemicals and equipment to be carried in franchisees' vans;
- threatening to suspend franchisees about issues such as associating with other franchisees;
- requiring franchisees to attend seminars unrelated to carpet cleaning;
- refusing to negotiate matters in dispute between franchisees and Cheap as Chips, in contravention of the Franchising Code of Conduct; and
- unreasonably refusing franchisees access to Cheap As Chips records to verify that all payments to which these franchisees were entitled had been paid to them.

The court declared that Cheap As Chips contravened the code by failing to negotiate with franchisees in accordance with the procedures set out in clause 29 of the code and terminating a franchise without following the procedures outlined in clause 21 of the code. The court declared that Mr Hudousek was knowingly concerned and involved in these contraventions.

It also declared that Cheap as Chips attempted to contravene clause 11 of the code by attempting to induce a franchisee not to associate with other franchisees for lawful purposes.

The court ordered by consent that Cheap As Chips and Mr Hudousek be restrained from engaging in similar conduct for three years. They also have to provide franchisees with reasonable access to records, notify all current franchisees about the outcome of the proceedings, pay \$82 000 in compensation, pay \$9000 in interest and pay \$86 000 of the Commission's legal costs. Cheap As Chips also offered the Commission a court enforceable undertaking to implement a trade practices compliance program.

## Fair Trading (part V)

### Australian Guarantee Corporation Limited

*Misleading or deceptive conduct (s. 52)*

In December 2000 the Commission received court enforceable undertakings from Australian Guarantee Corporation Limited to refund \$100 000 in interest applied on account-keeping fees to its CreditLine customers.

The Commission was concerned that the interest was being applied to a number of accounts that were promoted as having a 'guaranteed interest free' period and that this raised misleading and deceptive conduct implications.

AGC introduced an Australia-wide monthly account-keeping fee of \$2.50 as part of new fees and charges to apply to customers using CreditLine, a personal finance product. CreditLine customers complained that AGC had charged interest on the account-keeping fee. Most of the complaints came from customers who had signed up to CreditLine to obtain interest-free finance on household purchases.

AGC advised the Commission that the interest was charged as a result of a computer problem and that it never intended to charge interest on the fees. AGC's computer system is expected to be fixed by the end of March 2001.

### **Info4pc.com Pty Ltd**

*Misleading or deceptive conduct (s. 52), bait advertising (s. 56), accepting payment not intending to supply (s. 58)*

On 23 January 2001 the Commission instituted proceedings for an interim injunction in the Federal Court, Adelaide, against a Perth-based computer retailer, Info4pc.com Pty Ltd for allegedly advertising but not delivering very cheap computers, mainly on the Internet.

A hearing on 24 January 2001 removed the matter to the WA Federal Court. The *ex parte* interim injunction restrains the company from advertising and accepting orders for computers and/or upgrades. The injunction gives national protection to consumers. Authorities in the UK and Canada have investigated similar schemes with direct links to Info4pc.com in Australia. The companies share a common director, Mr Johnson E. Williamson.

Initially Info4pc.com priced its basic computer package at \$299 but later raised this price to \$499. Buyers agreed to complete a monthly questionnaire for two years, providing personal lifestyle information to offset the low price. This information is then collated and sold as market research. Investigations revealed that the claimed value of these computers is \$1899. It is unlikely that the income from the market information sales will be adequate to meet this cost.

The injunctions also freeze the business bank account of Info4pc.com. The director resident in Australia, James Rae, has provided undertakings to the Federal Court that he will provide his passport to the court, not leave the country and not remove fixtures, fittings, furniture or equipment from the office of Info4pc.com. He will also not require employees to pay cash amounts to others as a condition of receiving their wage and not sell his residential home.

The injunctions remain in place until this matter has been determined. A further directions hearing is scheduled for May 2001.

### **Loyalty Pacific Pty Ltd (Fly Buys)**

*Misleading or deceptive conduct (s. 52)*

On 1 January 2001 the Commission accepted court enforceable undertakings from Loyalty Pacific Pty Ltd, operator of a Fly Buys loyalty scheme, for alleged misleading terms and conditions of a special promotion in mid-2000.

The promotion offered members 2000 bonus Fly Buys points for shopping at Shell and Big Western. It was, however, not clear that expenditure was required at both Shell and Best Western to qualify for the bonus points. Loyalty Pacific acknowledged that the terms and conditions of the promotion were ambiguous.

Loyalty Pacific has agreed to credit the affected Fly Buys members with the 2000 bonus points. This will give about 34 000 members bonus points valued at about \$700 000.

The Commission noted that Loyalty Pacific had acted quickly to resolve the Commission's concerns.

### **Medical Benefits Fund of Australia Limited**

*Misleading or deceptive conduct (s. 52), representations as to future matters (s. 51A), misrepresentation of performance characteristics, accessories, uses or benefits (s. 53(c)), misrepresentation of warranties, conditions, guarantee, right or remedy (s. 53(g)), certain misleading conditions in relation to services (s. 55A)*

On 5 February 2001 the Commission instituted proceedings in the Federal Court, Sydney, against Medical Benefits Fund of Australia Limited alleging false, misleading and deceptive advertising of its health insurance products.

The advertising agency that formulated MBF's campaign, John Bevins Pty Ltd, was joined in this action. It is alleged that the agency was knowingly concerned in the contraventions.

The Commission alleges that the MBF print and television advertisements falsely represented that pregnant women who joined or transferred to MBF would be covered for hospital and medical expenses arising from pregnancy. It did not disclose that a 12-month waiting period always applies for pregnancy-related

services. The 12-month waiting period disclaimer was referred to in the advertisements in fine print that was inadequate and unlikely to come to consumers' attention.

The Commission is seeking court orders including:

- declarations that MBF has contravened the relevant provisions of the Australian Securities and Investment Commission Act;
- publication and broadcast of corrective advertisements in the same newspapers and on the same television stations as the original advertisements appeared;
- waiver of the 12-month waiting period for pregnancy-related services for women or families who transferred or joined MBF between 28 May 2000 and 16 September 2000;
- restraining the making of similar misrepresentations in the future; and
- requiring MBF to review its compliance program.

The Commission is seeking similar orders against the advertising agency. A directions hearing is scheduled for 23 March 2001 in the Federal Court, Sydney.

### **The Institute of Taxation Research Pty Ltd and Wayne Levick**

*Misleading or deceptive conduct (s. 52), misrepresentation of performance characteristics, accessories, uses or benefits (s. 53(c)), misrepresentation concerning the need for any goods or services (s. 53(f))*

On 21 February 2001 the Commission obtained final orders in the Federal Court, Brisbane, to prevent the Institute of Taxation Research (ITR) and Wayne Levick from engaging in misleading and deceptive conduct in providing taxation advice.

ITR and Levick have instituted several cases in the Federal and High Courts arguing that the various Income Tax Acts, including the recent Goods and Services Tax legislation, were illegal. More than 35 cases have been rejected by the courts.

ITR and Levick started these actions on behalf of consumers and small businesses who were led to believe that they could avoid paying tax and successfully defend legal action against them by the Australian Taxation Office. ITR and Levick never explained to consumers that none of their arguments have been successful.

On 19 December 2000 the Commission instituted proceedings against ITR and Levick. Up till then, both have maintained websites dedicated to their arguments that changes in Australia's international sovereignty since 1901 have meant that thousands of laws passed by parliaments were illegal. The Commission was concerned that ITR and Levick were raising false hopes in not informing potential customers that the courts have rejected all their arguments.

### **Commercial and General Publications Pty Ltd**

*Alleged asserting of a right to payment for unsolicited services without reasonable cause to believe that there is a right to payment (s. 64(2A)), accepting payment without intending or being able to supply (s. 58)*

On 17 January 2001 proceedings were instituted against Commercial and General Publications Pty Ltd (CGP) and its Director, Anthony Robert Hassett, in the Federal Court, Hobart. It is alleged that CGP asserted a right to payment from a number of Tasmanian small businesses for advertising services in publications produced by CGP without reasonable cause to believe that there was a right to payment.

It is also alleged that CGP accepted payment from a number of Tasmanian small businesses for advertising services in a proposed publication when CGP was aware, at the time of accepting payment, that it would be unable to supply the advertising services.

The matter was listed for first mention on 27 March 2001.

## Product safety (part V)

### **Shinn-Fu (Australia) Pty Ltd, Jutco Pty Ltd, Super Cheap Auto Pty Ltd**

*Product safety standards and unsafe goods (s. 65C)*

In January and February 2001 the Commission received court enforceable undertakings from two distributors of imported vehicle and trolley jacks, Shinn-Fu (Australia) Pty Ltd and Jutco Pty Ltd, and one retail supplier, Super Cheap Auto Pty Ltd, after a national product-safety survey.

The three suppliers have undertaken to implement trade practices compliance programs after it was determined that they supplied stock that did not comply with the information and/or labelling requirements of the relevant mandatory product safety standards for vehicle and trolley jacks.

The Commission raised its concerns with the companies. All the non-compliant jacks were subsequently removed from sale. Super Cheap Auto, Shinn-Fu (Australia) and Jutco placed recall notices in major newspapers in the States where the non-compliant jacks were supplied.

All vehicle jacks (up to and including 8 tonne capacity) and trolley jacks (up to and including 2.5 tonne capacity) sold in Australia are bound by mandatory consumer product safety standards — Australian/New Zealand Standard AS/NZS 2693:1993 (vehicle jacks) and AS/NZS 2615:1995 (hydraulic trolley jacks).

The Commission noted that the labelling and information requirements of the mandatory standards were just as important as the performance standards. The majority of deaths in Australia from jacks are because of misuse, not mechanical failure.

### **Dimmeys Stores Pty Ltd**

*Product safety standards and unsafe goods (s. 65C)*

On 22 March 2001 the Federal Court, Brisbane, fined Dimmeys Stores Pty Ltd \$160 000 for supplying children's nightwear that did not comply with the mandatory consumer product safety standards.

Under the Trade Practices Act, companies can be fined up to \$200 000 per offence and individuals up to \$40 000 per offence.

The orders follow criminal proceedings instituted by the Commission against Dimmeys for contravening the product safety provisions of the Act. The breaches related to six charges concerning the supply of children's nightwear in Townsville in July 2000 and one further charge for the supply of children's nightwear in Melbourne in November 2000.

The Commission had alleged that in July 2000, Dimmeys, at its Townsville store, illegally supplied six styles of children's nightwear ranging from long and short sleeved pyjamas to girls' nighties. It was alleged that the garments did not carry the appropriate fire hazard information labels as required under the mandatory consumer product safety standard. In fact the majority of the garment styles had no fire hazard information label attached at all.

The Townsville contraventions were immediately raised with Dimmeys who, after being asked, undertook a public recall at that time.

However, further surveys by Commission staff in Melbourne in November 2000 found similar garments were on sale in a Dimmeys Melbourne store without any fire hazard information labels. Again, the issues were immediately raised with Dimmeys who agreed to take further recall action in both Victoria and Queensland.

Dimmeys pleaded guilty to the seven charges.

The total fines of \$160 000 are the highest ever under the product safety provisions of the Act and included the highest fine for an individual charge of \$100 000 for the Melbourne one.

In addition to fines the court imposed an injunction which will operate until 2004. Justice Drummond also ordered that Dimmeys implement a trade practices compliance program and that Dimmeys pay the Commission's costs of the entire action.

## **GST compliance and enforcement (part VB)**

### **Gateway Pty Ltd**

*Misleading and deceptive conduct (s. 52)*

On 28 December 2000 the Commission received court enforceable undertakings from Gateway Pty Ltd. The undertakings provide refunds for consumers who bought Gateway personal computers in early May after concerns by the Commission about advertising before the implementation of the GST.

In May 2000 Gateway ran a newspaper promotion for personal computers advertising savings 'before the GST'. The abolition of the 22 per cent Wholesale Sales Tax should have led to larger savings after the introduction of the GST.

Depending on which Gateway model a consumer bought, they will receive refunds of between \$100 and \$200. This amount represents the difference between the advertised promotional price and the price of the computers immediately after the introduction of the GST.

Gateway also undertook to complete a trade practices compliance program.

### **Signature Security Group Pty Ltd**

*Misleading or deceptive conduct (s. 52), representations that the corporation has a sponsorship, approval or affiliation it does not have (s. 53(d)), misrepresentation with relation to the price of GST (s. 53(e)), misrepresentation of warranties, conditions, guarantee, right or remedy (s. 53(g)), cash price to be stated in certain circumstances (s. 53C)*

On 2 March 2001 the Commission instituted proceedings in the Federal Court, Sydney, alleging a serious breach of s. 87B undertakings by Signature Security Group Pty Ltd, a provider of home and business security services that had been advertising their prices on a GST-exclusive basis.

Signature Security promotes its services throughout Australia through the print and broadcast media and by advertising in the Yellow Pages and Yellow Pages Internet website.

The Commission was concerned that an advertisement on a Melbourne radio station referring to a price of '\$295 plus GST' could mislead consumers. In the Commission's price exploitation guidelines it is outlined that businesses should advertise on a GST-inclusive basis.

On 21 December 2000 Signature Security offered the Commission court enforceable undertakings to:

- cease any advertisements currently being run in the broadcast and print media stating GST-exclusive prices and ensure future advertising does not state GST-exclusive prices;
- not renew the current Yellow Pages advertisement which refers to a GST-exclusive price;
- modify current price displays and cut sheets to clearly state the GST-inclusive price; and
- implement a trade practices compliance program.

Despite these undertakings the Commission alleges that Signature Security continued to advertise and quote on a GST-exclusive basis. As such, the Commission instituted proceedings alleging breaches of the undertakings, as well as breaches of ss. 52, 53(d), 53(e), 53(g) and 53C.

The Commission expects that all businesses should have taken steps after the introduction of the GST to ensure that their advertised prices are GST-inclusive.