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)

Roche Vitamins Australia Pty Ltd, BASF Australia Limited, and Aventis Animal Nutrition Pty Ltd (formerly known as Rhone-Poulenc Animal Nutrition Pty Ltd)

Price fixing and market sharing (s. 45)

On 1 March 2001 the Federal Court, Sydney, imposed record penalties totalling $26 million against three animal vitamin suppliers for price fixing and market sharing.

In proceedings instituted by the Commission, penalties were imposed against Roche Vitamins Australia Pty Ltd (RVA) ($15 million), BASF Australia Limited (BAL) ($7.5 million), and Aventis Animal Nutrition Pty Ltd (AAN), formerly known as Rhone-Poulenc Animal Nutrition Pty Ltd ($3.5 million).

The companies admitted to the court they had engaged in price fixing and market sharing conduct in the Australian market for animal vitamins A and E and pre-mix containing these vitamins. The Commission and the companies jointly recommended to the court that penalties in the amounts set out above be imposed on the companies.

The three companies are affiliates of three of the world's largest vitamin suppliers — F. Hoffmann-La Roche Limited (FHLR), BASF Aktiengesellschaft (BASF AG), and Aventis Animal Nutrition SA, formerly known as Rhone-Poulenc Animal Nutrition SA. The conduct of the Australian companies was a manifestation of arrangements made overseas by the parent companies.

The Commission noted that, as measured by the global size of the parent companies, this case was probably the most significant yet brought before the court.

It also drew attention to the record penalties being an important breakthrough in that for the first time a penalty higher than $10 million had been imposed on a single corporation.

In statements of agreed facts and joint submissions put to the court by the Commission and the respondents reference was made to:

- price fixing and market sharing arrangements for vitamins A and E in various parts of the world were entered into between global affiliates of the respondents, namely FHLR, BASF AG and Aventis SA;
- part of these arrangements was that affiliates of each of FHLR, BASF AG and Aventis SA would implement the arrangements in Australia and elsewhere;
- senior executives of FHLR, BASF AG and Aventis SA or of some affiliated regional companies agreed to fix regional wholesale prices and to allocate market shares for Australia and elsewhere;
- the Australian respondents met and communicated by telephone to make and give effect to price fixing and market sharing arrangements for vitamins A and E and pre-mix containing those vitamins;

- the Commission regarded the admitted contraventions as extremely serious, in fact uniquely serious in Australian trade practices history, as the contraventions involved arrangements made globally by three very large multinational corporate groups; and
- the respondents also recognised the serious nature of their collusive conduct by agreeing to the penalties imposed by the court.

The Commission and each of the respondents made joint submissions to the effect that the court should emphasise deterrence and that:

- the conduct was covert and clandestine, and was engaged in with full knowledge of its illegality and disregard for its direct effect on customers and ultimate effect on consumers;
- the conduct involved contraventions of the per se provisions of the Act which Parliament has deemed to be the most serious contraventions of the Act;
- the value of sales affected by the collusive arrangements was significant. The arrangements set floor prices for all sales of animal vitamins A and E and of pre-mix containing these vitamins;
- the companies involved were the three largest suppliers of animal vitamins in Australia;
- in respect of the statutory limitation period, RVA and BAL engaged in the conduct over a four-year period from 1994 to 1998 and AAN engaged in the conduct over a two-year period from 1994 to 1996;
- the three respondents controlled approximately 90 per cent of the market for supply of animal vitamins A and E and that customers had limited alternative sources of supply as the relevant corporate groups are the predominant global manufacturers of vitamins A and E;
- the conduct continued after multimillion dollar penalties were handed down by the court in the freight and concrete industries and after the 40-fold increase in maximum penalties to $10 million;
- the collusive arrangements, overseas and in Australia, were made and given effect to at senior management levels; and
- the companies were aware of the illegality of the conduct, despite each of them having a program of trade practices compliance in place during the period of the collusive arrangements.

Each of the respondents fully cooperated with the Commission's investigations, including providing detailed information and admissions about their involvement in the collusive arrangement. Each of the parties has cooperated in reaching agreement on submitting an appropriate penalty to the court and on other appropriate remedies, including consenting to injunctions, declarations, and payment of the Commission's costs. And each undertook to ensure its compliance program meets the relevant Australian standard.

Rural Press Limited

Misuse of market power (s. 46)

On 1 March 2001 the Federal Court, Adelaide, found that Rural Press Limited and its subsidiary, Bridge Printing Office Pty Limited, had misused market power against a smaller regional publisher, Waikerie Printing House Pty Limited.

Mansfield J also decided that as a direct consequence of the conduct, Waikerie Printing House, Rural Press and Bridge Printing entered into an arrangement to withdraw *The River News* by Waikerie Printing House, from the Mannum area, thus contravening anti-competitive provisions of the Trade Practices Act.

The Commission took this action because it was clear a powerful player had used its market power to threaten a family operated publisher. Rural Press not only succeeded in getting Waikerie to stop competing against a Rural Press newspaper but also ensured that Waikerie contravened the Act by entering into an anti-competitive arrangement with it.

Waikerie Printing House publishes three regional newspapers, *The River News*, *The Loxton News* and *The Murray Pioneer*, in the Riverland region of South Australia. *The River News* had traditionally circulated in Waikerie and as far south down the Murray River as Swan Reach. In July 1997 the circulation area of *The River News* was extended further south to Mannum, a town not far from the regional centre of Murray

Bridge which had traditionally been serviced by a Rural Press newspaper, The *Murray Valley Standard*. *The River News* reported on news and events occurring in and around Mannum, appointed a local resident as its correspondent and attracted advertising revenue from the area.

The Commission alleged that from July 1997 to April 1998 senior representatives of Rural Press communicated to Waikerie Printing House that it did not want it to solicit advertising in *The River News* from the Mannum area. The Commission also alleged that Rural Press wanted *The River News* to stick to its prime circulation area and that it had already begun the groundwork to introduce an opposition regional newspaper into the Riverland to drive out its new competitor in the Murray Bridge market for regional newspapers.

The Commission also alleged that as a result Waikerie Printing House advised Rural Press that it would withdraw *The River News* from the Mannum area and did in fact do so in May 1999.

Mansfield J found that Rural Press and Bridge Printing had substantial market power in the Murray Bridge market for regional newspapers by virtue of their financial resources and strength and their capacity to immediately carry out the threat, and had misused their market power by making the threat to Waikerie Printing House.

Mr Ian Law, general manager of Rural Press' regional publishing division, and Mr Trevor McAuliffe, South Australian state manager, were held to have been knowingly concerned in the contraventions of ss. 45 and 46 by Rural Press and Bridge Printing.

Mr Paul Taylor and the late Mr Darnley Taylor were held to have been knowingly concerned in the contravention of s. 45 by Waikerie Printing House.

Submissions on penalties will be heard by the court on 9 July to 10 July 2001

(See Legal Notes for a discussion of this matter).

Queensland Newsagents Federation Ltd

Primary boycotts (s. 45), exclusionary provisions (s. 4D)

On 19 March 2001 Queensland Newsagents Federation (QNF) provided court enforceable undertakings to the Commission to:

- implement a trade practices compliance program within four months;
- conduct a trade practices education and training campaign for all QNF members; and
- compensate Nextra Australia Pty Ltd or any of its members for any losses reasonably sustained as a result of QNF conduct.

In November 2000 two QNF members, operating as part of the Nextra franchise, opened newsagencies in Townsville in a new shopping centre. Under an authorisation of newsagency territories, which had been earlier cancelled, this centre would previously have belonged to another newsagent.
On 7 December the QNF wrote to the two newsagents advising them that their QNF membership had been suspended as a result of a breach of the QNF code of ethics. The QNF later indicated that all Nextra newsagents' membership would be reviewed. Membership of the QNF has advantages for newsagents.

QNF has acknowledged that its code, which allowed suspension if territories were infringed, was unenforceable as the territories were no longer protected by a Commission authorisation. It has rescinded its code of ethics and does not contemplate formulating a new one.

The Commission acknowledged it had been voluntarily approached by the QNF.

Sony Music Entertainment (Australia) Limited and Sony Music Entertainment Holdings (Australia) Pty Limited

Agreements lessening competition (s. 45), misuse of market power (s. 46), exclusive dealing (s. 47)

On 2 April 2001 Sony Music Entertainment (Australia) Limited and Sony Music Entertainment Holdings (Australia) Pty Limited gave undertakings to the Federal Court and agreed to contribute to the Commission's costs of proceedings over allegations of misuse of market power.

As a result of the undertakings given by Sony to the court, the Commission expects that opportunities to import CDs (other than pirate CDs) from overseas will be enhanced. Imported CDs have provided considerable price competition and consequently the undertakings are likely to generate significant price competition for popular CDs. The threat of sanctions on retailers who supply imported Sony CDs has been removed, enabling consumers to access a wider range of products at competitive prices.

The Commission began to investigate the conduct of major record companies in 1998 after reports they had threatened to withdraw significant trading benefits from retailers who stocked parallel imports. In several cases record companies had allegedly cut off supply to retailers who stocked parallel imports. Separate proceedings were instituted in September 1999 against each of Sony, Universal and Warner. The Sony proceedings were distinct from those alleged against Warner and Universal in that the Commission did not allege Sony had cut off supply to retailers, but had instead allegedly threatened to withdraw trading benefits if retailers stocked parallel-imported CDs.

The Commission alleged that the respondent record companies, as well as some of their senior personnel, breached the Trade Practices Act in attempting to prevent the importation of recorded music by Australian wholesalers and retailers after the changes to the Copyright Act which allowed for parallel imports.

Without admitting liability Sony has provided undertakings to the court that it will:

- for two years, refrain from taking any action to withdraw trading benefits from Australian retailers because they source or have sourced 'non-infringing copies of articles' containing recorded music within the Sony Australian catalogue from alternative suppliers;
- implement a trade practices compliance program for part IV of the Trade Practices Act;
- for two years, take no action having the purpose or effect of hindering or preventing non-related distributors outside Australia from exporting 'non-infringing copies of articles' containing recorded music from territories outside Australia to Australia; and
- contribute $200 000 to the Commission's costs to date, and bear its own costs of the proceedings.

The Commission has agreed that the proceedings against Sony will end. Proceedings continue against Universal Music and Warner Music as well as three senior executives of Universal, and two senior executives of Warner. The Commission seeks substantial penalties and injunctions against those parties. The maximum potential penalties under the Act for the Warner and Universal proceedings are $10 million per contravention. The proceedings are currently being heard before Hill J in the Federal Court, Sydney.

Alstom Australia Limited

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

On 6 April 2001 the Federal Court, Melbourne, fined Alstom Australia Limited more than $7 million and its managing director, Mr RG Elliot, $150 000 for price fixing and market sharing contraventions of the Trade Practices Act.

The judgment is the first in two important sets of proceedings brought by the Commission alleging extensive cartel conduct between the principal firms in the Australian transformer industry (power transformers and distribution transformers).

Power transformers

Alstom Australian Limited admitted its involvement in the unlawful conduct, cooperated fully and made joint submissions with the Commission as to the appropriate pecuniary penalties and the other relief the court should impose.

Alstom Australia Limited made admissions to the court that it engaged in extensive market sharing and price fixing cartel conduct in the market for power transformers from in or about 1989 until the end of 1995.

Mr RG Elliot was the managing director of Alstom throughout the period of the power transformer cartel. Mr Elliot did not participate in meetings or telephone conversations with competitors, but he admitted that senior managers of Alstom made him aware that his company was involved in the cartel. However,

he did not stop the illegal conduct. The penalty imposed upon Mr Elliot is the equal highest individual penalty awarded by the court for contraventions of the Act.

In joint submissions put to the court it was submitted that the existence of the power transformer cartel created and maintained substantial inefficiencies in the power transformer market and insulated the members of the cartel from ordinary competitive forces.

Finkelstein J stated:

> When the contraventions occurred, Alstom did not have a trade practices corporate compliance program and did not provide its executives, employees and other representatives with trade practices education or training. Still, the executives engaged in the contravening conduct covertly and clandestinely, with full knowledge of its illegality.

His Honour went on to say:

> The arrangement came to an end in late 1995. That was around the time when multi-million dollar penalties were imposed in respect of cartel arrangements in the Australian express freight industry ... and the pre-mixed concrete industry ... This shows that high penalties will deter unlawful conduct.

He fined Alstom $5.5 million, awarded a payment towards the Commission's costs of $60 000 and fined RG Elliot $150 000.

Distribution transformers

Alstom Australia Limited also made admissions to the court that it engaged in customer sharing and price fixing conduct for two tenders in the market for distribution transformers in 1994 and 1996.

Finkelstein J fined Alstom $1.5 million and awarded a payment towards the Commission's costs of $40 000.

In both sets of proceedings the Federal Court also made other orders sought by the Commission including injunctions against Alstom and its relevant senior management restraining them from engaging in similar conduct in the future.

The level of penalty imposed in these proceedings was influenced by various factors including the size of the company, the seriousness and covert nature of the unlawful conduct, the number of separate contraventions, the amount of commerce affected by the arrangements and the level of management involved.

The Trade Practices Act allows for pecuniary penalties of up to $10 million per contravention against corporations and up to $500 000 per contravention against individuals.

In referring to the level of penalties imposed in the past for serious contraventions of the Trade Practices Act, Finkelstein J observed:

> If general deterrence is the principal object of imposing a penalty, the number of cases that still come before the court, and the seriousness of the conduct that is involved in some of them, suggests that past penalties are not achieving that object. For a penalty to have the desired effect, it must be imposed at a meaningful level. Most antitrust violations are profitable. Accordingly, the penalty must be at a level that a potentially-offending corporation will see as eliminating any prospect of gain.

In joint submissions put to the court the parties to these proceedings acknowledged that the pecuniary penalties imposed by the court could have been much higher if it was not for the substantial cooperation provided by Alstom and its management to the Commission during its investigation and throughout the court proceedings.

A hearing of these proceedings against other corporate and individual respondents allegedly involved in the unlawful conduct has been set down for 30 and 31 July 2001.

Quickcat Cruises (QLD) Pty Ltd

Price fixing (s. 45A)

On 9 April 2001 the Federal Court, Brisbane, made orders by consent against Quickcat Cruises (QLD) Pty Ltd in relation to its ferry service to Dunk Island in North Queensland.

The orders followed allegations by the Commission that Quickcat Cruises had entered into a price-fixing agreement with one of its competitors. The Commission alleged that Quickcat Cruises approached the proprietor of a competitor in late 1999 asking the competitor to increase its price, stop offering free trips to children under 10 years and stop offering free barbecues. The Commission alleged that Quickcat Cruises offered to stop discounting in return for an agreement to the above.

The Federal Court, Brisbane, made orders by consent including declarations that Quickcat Cruises had breached the price-fixing provisions of the Act, injunctions restraining future conduct, and an order that Quickcat Cruises contribute to the Commission's legal costs.

Quickcat Cruises also agreed to provide the Commission with court enforceable undertakings which include implementing a trade practices compliance program and providing free return trips between Mission Beach and Dunk Island to age pensioners for a period of two weeks.

National Australia Bank

Price fixing (s. 45A)

On 19 April 2001 the Commission's proceedings on credit card interchange fees against the NAB were discontinued. The Commission had commenced proceedings against NAB in September 2000. Although the Commission took action only against NAB, it alleged that the behaviour involved all the major banks and the credit card associations.

The decision to discontinue proceedings was made after the Reserve Bank of Australia decided to use its powers under the *Payment Systems (Regulation) Act 1998* to 'designate' the credit card schemes in Australia.

The Commission considered that the use of its legislative powers to facilitate reform of the credit card payment system by the Reserve Bank would provide greater certainty and faster benefits for merchants and consumers.

Mergers (part IV)

Ansett Airlines Limited/Hazelton Airlines Limited

Acquisition (s. 50)

On 9 March 2001 the Commission accepted an undertaking from Ansett clearing the way for its bid for Hazelton Airlines to proceed. The undertaking addresses the Commission's concerns that the acquisition of Hazelton by Ansett would limit competition in regional air transport in NSW. The Commission was particularly concerned to ensure that any new entrant into regional NSW would be able to access scarce takeoff and landing slots at Sydney Airport.

The undertaking provides assurances on the use of slots at Sydney; limitations on swapping slots within the Ansett group; the requirement to make available to new regional operators up to 80 slots per week (spread across the day); and restrictions on air fare increases for certain regional routes.

It also requires Ansett to hand back a specified number of slots to the slot coordinator for allocation via the general pool should they not be allocated to new regional operators within a specified time; and to make available to new entrants on NSW regional routes up to 30 per cent of Hazelton's slots in the morning peak, between 7 a.m. and 9 a.m. Currently there are no slots available in this period. The ability of new players to access slots during this period represents a substantial barrier to entering regional markets. The undertaking by Ansett to make a significant proportion of Hazelton's slots in this period available to new entrants on NSW regional routes was fundamental to satisfying the Commission's concerns.

The Commission initially announced in December 2000 it would oppose the acquisition of Hazelton by either Ansett or Qantas. Following that announcement both airlines offered revised proposals and draft undertakings to address the Commission's concerns. Neither proposal satisfied the Commission and involved changes to the Slot Management Scheme at Sydney Airport, which may not have been forthcoming. The Commission announced in January 2001 that the revised proposals were inadequate and that it would continue to oppose the acquisition by either Ansett or Qantas.

Also in January the Minister for Transport and Regional Services stated that ring-fenced regional slots could be moved by no more than 30 minutes from their original time (as against 30 minutes each scheduling period) and foreshadowed changes to the scheme limiting the number of ring-fenced slots for regional services.

Shortly after the Minister announced the changes to the scheme and the Commission announced its rejection of the revised proposals by Ansett and Qantas, Qantas announced that it would let its bid lapse. However, Ansett decided to continue to explore ways of addressing the Commission's concerns while working within the rules of the Slot Management Scheme.

Unconscionable conduct (part IVA)

Commodore Homes (WA) Pty Ltd

Unconscionable conduct (s. 51AB), misleading or deceptive conduct (s. 52)

On 5 April 2001 the Commission instituted legal proceedings in the Federal Court, Perth, against Commodore Homes (WA) Pty Ltd, a member of the Buckridge Group of companies.

The Commission alleges that in the lead up to the introduction of the GST Commodore Homes represented to potential homebuyers that, if they signed up with them, their homes would be built by 1 July 2000 and they would avoid having to pay GST. Delays in construction of the new homes meant that many homes were not completed by that date but Commodore Homes still tried to recover the GST component from those homebuyers. The Commission alleges the representations amounted to false, misleading or deceptive conduct. The Commission also alleges that the manner in which Commodore Homes tried to recover the GST from some of the homebuyers breached the unconscionable conduct provisions of the Act. For example, the Commission alleges that Commodore Homes sometimes withheld keys to completed homes until the outstanding GST amount was paid by purchasers.

The Commission is seeking:

- declarations that Commodore Homes' conduct breached the Trade Practices Act;
- orders restraining Commodore Homes from engaging in such conduct in the future;
- for Commodore Homes to publish a corrective public notice and implement a trade practices compliance program;
- refunds of the GST monies paid to Commodore Homes by affected homebuyers; and
- costs.

inthebigcity.com Pty Ltd and APN Newspapers Pty Ltd

Unconscionable conduct in taking unfair advantage of consumers (s. 51AB), misleading or deceptive conduct (s. 52), misrepresentations about the uses and benefits of goods and about approval or affiliation (ss. 53(c), 53(d)), misleading conduct regarding the availability, nature, terms or conditions of employment (s. 53B)

On 9 April 2001 the Federal Court made interlocutory orders against inthebigcity.com Pty Ltd and its directors, Craig Leggo and John Barton and against APN Newspapers Pty Ltd and its Group Product Development manager, David Cowan. These interim orders stopped inthebigcity.com Pty Ltd and its directors from operating or promoting this or any other 1900 employment service. APN and David Cowan gave an interim undertaking not to operate or promote any 1900 premium rate telephone service providing employment or employment advisory services.

The Commission acted in response to advertisements that appeared in rural and regional areas throughout Queensland and northern New South Wales. These advertisements mentioned guaranteed work and stated there were a minimum number of positions available in a minimum number of industries. The Commission alleges that the representations made in the advertisement were false: employment was not guaranteed and consumers were not told that available positions were commission only.

The Commission further alleges that the nature of the 1900 job line, in targeting the unemployed or those in financial need living in rural and regional areas, is in possible breach of consumer unconscionable conduct provisions of the Trade Practices Act.

Esanda Finance Corporation Ltd and ors

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

On 12 April 2001 proceedings were instituted in the Federal Court against Esanda Finance Corporation Ltd, Capalaba Pty Ltd trading as Nationwide Mercantile Services, and some individuals. The Commission alleged that a consumer who obtained a loan from Esanda, secured by a chattel mortgage (i.e. a mortgage over personal property) over a motor vehicle, was subjected to physical force, undue

harassment and coercion, and unconscionable conduct.

The Commission also alleged some individuals breached s. 23 of the Western Australian Fair Trading Act which mirrors s. 60 of the Trade Practices Act.

The Commission alleges Esanda and/or its agents:

- used physical force to gain entry to the consumer's residence and repossess the motor vehicle;
- engaged in aggressive and excessive behaviour towards the consumer;
- failed to specify the amount of arrears or method of calculation;
- repeatedly observed the consumer or third party in or around their home;
- visited the spouse of the consumer at her place of employment;
- restricted access from the consumer's residence;
- charged the consumer unreasonable amounts by way of collection fees; and
- made excessive contact with the consumer and acted contrary to a notice of demand given to the consumer.

The Commission is seeking:

- declarations that Esanda, Capalaba and the individuals engaged in conduct in contravention of s. 60 of the Act;
- declarations that Esanda engaged in unconscionable conduct and that Capalaba was party to or involved in that conduct;
- injunctions restraining Esanda, Capalaba and the individuals from engaging in or being otherwise involved in similar conduct;
- orders requiring the publication of information;
- orders requiring the implementation of trade practices corporate compliance programs and attendance at trade practices seminars;
- compensation for loss or damage; and
- costs.

A directions hearing was held on 4 May 2001 in the Perth Federal Court. A further directions hearing was scheduled for 8.6.01.

Avanti Investments Pty Ltd and Dr Giuseppe Barbaro

Unconscionable conduct (s. 51AA), undue harassment or coercion in connection with land, (ss. 51AA or 51AC), misleading or deceptive conduct (s. 52), false or misleading representations about land (s. 53A)

On 27 April 2001 the Commission instituted proceedings in the Federal Court, Adelaide, against Avanti Investments Pty Ltd for alleged unconscionable conduct against five of its lessees, who are market gardeners of Vietnamese origin and have little formal education or knowledge of English.

The Commission also alleges that Avanti Investments engaged in misleading or deceptive conduct, made false or misleading representations about the land leased by the farmers, and used undue harassment or coercion in connection with the land.

It is alleged that Avanti Investments:

- entered into agreements to lease the land at Salisbury in South Australia in 1994 and that the agreements had no limitation on the water available from a bore on the land;
- in 1998, and again in 1999, made the farmers sign new lease agreements which each time significantly reduced the amount of water available after having represented that the agreement was the same as the old agreement;
- in 1998 sold a significant proportion of the water allocated to the bore with the result that the farmers would incur excess water charges; and
- demanded payment from the farmers totalling more than $67 000 for excess water for the years 1998–1999 and 1999–2000.

The Commission is also taking action against Dr Giuseppe Barbaro, a former director and representative of Avanti Investments, for allegedly aiding or abetting or being knowingly concerned in the breaches.

The Commission is seeking injunctions, declarations, findings of fact, and orders to vary the market gardeners' agreements so they are no longer responsible for the cost of excess water. A directions hearing was set down for 1 June 2001.

Industry codes (part IVB)

Will Writers Guild Pty Ltd

Alleged failure to comply with a mandatory industry code (s. 51AD), misleading or deceptive conduct (s. 52), false or misleading representations concerning the existence of a right (s. 53(g))

On 27 March 2001 the Commission instituted proceedings against Will Writers Guild Pty Ltd (WWG) and its director, Sidney James Murray, in the Federal Court in Hobart. The Commission alleges that WWG entered into franchise agreements in Victoria, Tasmania, South Australia, Western Australia, New South Wales, Northern Territory and the ACT without complying with the mandatory franchising code of conduct.

It is also alleged that WWG made false or misleading representations by representing orally, or implying by silence, that the will-writing business could be carried on by a person who was not a legal practitioner in the relevant State or Territory.

The matter was listed for first mention in the Federal Court, Hobart, on 5 June 2001.

Fair Trading (part V)

C7 Pty Ltd

Misleading or deceptive conduct (s. 52)

On 7 February 2001 the Commission accepted court enforceable undertakings provided by C7 Pty Ltd. C7 has undertaken to:

- use its best endeavours to ensure that any future representations in relation to C7's programming are not misleading or deceptive;
- provide refunds of $20 to Austar or Foxtel customers misled by the representation and who lodge a complaint with C7 within a specified period; and
- implement a trade practices compliance program.

C7 also agreed to donate $15 000 to Olympic Aid, a charity created to raise funds and awareness of refugee children and other children who were in situations of disadvantage during the Sydney 2000 Olympic Games.

The undertakings resulted from a Commission investigation into advertising claims made by C7 Pty Ltd in the lead-up to the Sydney Olympics. C7 made representations in September 2000 to Austar and Foxtel customers that every Australian Olympic basketball game could be seen live on C7's Olympic channels. However, of the 16 possible Australian Olympic basketball games, C7 showed only six full games live and a further four live games in part. The remaining games (bar one shown live on the Seven network) were shown on the C7 Olympic Channels on a delayed basis.

The Commission believed the representation made by C7 was likely to mislead consumers about the live coverage of Australian Olympic basketball games.

The Commission welcomed the approach of C7 in recognising its obligations in advertising and cooperating with the Commission.

David Zero Population Growth Hughes trading as Crowded Planet

Misleading or deceptive conduct (s. 52), misrepresentations about the performance characteristics of goods (s. 53(c)) and about sponsorship (s. 53(d))

On 9 March 2001 the Federal Court committed Mr David Hughes, trading as Crowded Planet, to gaol for two weeks for contempt of court.

On 2 February Tamberlin J had found Mr Hughes guilty of contempt and issued a warrant for his arrest and committal but allowed him 30 days to comply with the orders.

The Commission instituted contempt of court proceedings against Mr Hughes on 22 November 2000 alleging he was guilty of contempt of court by failing to comply with orders made by the Federal Court on 9 November 2000. On that date the court made interim orders that Mr Hughes:

- be restrained from supplying oral contraceptives to consumers within Australia; and
- publish on his website a notice stating that Crowded Planet cannot and will not supply oral contraceptives to consumers within Australia.

The Commission's action against Crowded Planet is for the supply of schedule 4 oral contraceptives over the Internet. Because of health risks associated with oral contraceptives it is illegal, in Australia, to supply schedule 4 drugs without a prescription.

A directions hearing was listed for 11 May and a final hearing on 2 August to 3 August 2001.

Moore Talk Communications Pty Ltd

Misleading or deceptive conduct (s. 52)

On 14 March 2001 consent orders were issued by the Federal Court, Brisbane, and a court enforceable undertaking provided by Moore Talk Communications Pty Ltd after a Commission action for alleged misleading or deceptive conduct in the promotion of mobile phone and access plan packages.

Between February 1999 and October 1999 Moore Talk Communications Pty Ltd, trading as MT Marketing, operated a national telemarketing campaign out of Brisbane. During the campaign, representatives of MT Marketing contacted potential customers by telephone and asked them to take part in a survey. At the completion of the survey, consumers were advised that they could be selected to receive a complimentary digital mobile phone. If the consumer expressed interest, another MT Marketing representative then rang the consumer back, advised that they were one of the lucky people selected to receive a complimentary digital mobile phone, and faxed through details of the phone specifications and two mobile phone access plans.

Receipt of the mobile phone was conditional upon the consumer signing up to an access plan with a telecommunications service provider. If the consumer agreed to this, an application for mobile services was faxed through to the consumer for signature. However, the terms and conditions attaching to the supply of such a service were not provided to the consumer before signing.

The Commission believed that the company had engaged in misleading or deceptive conduct with about 2000 consumers being affected.

The court's consent orders prohibit MT Marketing from conduct that would mislead consumers as to the nature of any future telemarketing activities. Further, they ensure that a full and legible copy of the relevant terms and conditions of an application for the supply of mobile services will be provided to all potential customers, before asking them to sign on.

Moore Talk Communications Pty Ltd has also provided the Commission with a court enforceable undertaking that it will:

- conduct an internal review of its operating procedures;
- ensure that all potential customers receive a copy of the terms and conditions attaching to the application for mobile services;
- sign the Australian Communications Industry Forum industry code on customer information about prices, terms and conditions; and
- implement a trade practices compliance program.

Mr Stephen Henry Wayt

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

On 28 March 2001 the Commission instituted proceedings in the Federal Court of Australia, Brisbane, alleging that Mr Stephen Henry Wayt, the proprietor of COM.AU.REGISTER, between January and March this year sent businesses and organisations throughout Australia a facsimile that stated:

> The registration of your Internet Address@reg.com.au is now due. Please check the current company information listed within our database as detailed below and where applicable advise any additions or alterations as necessary. Registration for 12 months $330.00 inc GST.

After receiving complaints the Commission took action against Mr Wayt alleging that the fax was likely to mislead or deceive recipients into believing that COM.AU.REGISTER was responsible for registering Internet domain address registration and that it had dealt with those businesses and organisations previously.

The Commission has alleged that COM.AU.REGISTER is not able to provide Internet domain address registration and is simply a directory of business names with details of Internet addresses. The Commission also alleges that COM.AU.REGISTER had no significant prior dealings with the businesses or organisations that it sent the faxes to.

The Commission has also alleged that some of COM.AU.REGISTER's Internet site representations were likely to mislead or deceive businesses and organisations.

The Commission is seeking court orders including declarations that Mr Wayt breached the Act, injunctions to prevent Mr Wayt from making similar representations in the future and to implement a trade practices compliance program in any future business of which he has managerial control. The Commission is also seeking an order for costs.

COM.AU.REGISTER has closed down its website and advised the Commission that all money paid to COM.AU.REGISTER has been refunded to customers.

A directions hearing was held on 12 April 2001 in the Federal Court, Brisbane, at which a timetable for progress of the proceedings was set. The matter is next listed for directions on 10 August 2001.

Black on White Pty Limited t/a Australian Early Childhood College

Unconscionable conduct (s. 51AB), misleading or deceptive conduct (s. 52)

On 4 April 2001 Spender J of the Federal Court, Brisbane, made orders declaring that Black on White Pty Ltd, trading as the Australian Early Childhood College, had breached the Trade Practices Act.

The court's declaration and finding of fact follow proceedings instituted by the Commission which alleged the company misled consumers about accreditation for courses, a deferred payment scheme for tuition fees, and had engaged in unconscionable conduct by signing students up to contracts without disclosing the onerous nature of some of the clauses. The company subsequently went into liquidation and was deregistered.

The college offered courses in child care and related fields at its three campuses in Brisbane, Sydney and Melbourne. The company represented that courses it offered during 1997 were accredited with VETEC (Vocational Education Training and Employment Commission of Queensland), were accredited nationally pursuant to the National Framework for the Recognition of Training (NFROT) agreement (being an agreement between the Commonwealth and various State and Territory Governments), and that the college qualified for the use of the trade marks or logos relating to VETEC accreditation and national accreditation in relation to those courses.

Spender J also found that Mr James Poteri, a director of the company, was knowingly concerned in misleading and unconscionable conduct and that his son, Mr Nicholas Poteri, a college employee, was knowingly concerned in the company's contraventions in representations on accreditation.

Guardian Finance and Insurance Consultants Pty Limited

Referral selling (s. 57), pyramid selling (s. 61)

The Commission instituted proceedings against Guardian Finance and Insurance Consultants Pty Ltd on 5 April 2001. The Commission has alleged that the company promoted a scheme that could amount to an illegal pyramid selling scheme or referral selling scheme. The Commission also alleged that its sole director, Mr Peter Martin James (also known as Peter St James) was knowingly concerned in the alleged conduct.

The Commission has alleged that Guardian Finance and Insurance Consultants promoted a reducible home loan scheme where:

- consumers who took a loan through the company will receive a 0.1 per cent reduction in their interest rate for each customer they successfully refer to it; and

- consumers who took a reducible home loan would receive various benefits for each customer successfully referred thereafter.

The Commission has alleged that in carrying on this scheme Guardian Finance and Insurance Consultants is likely to have breached or attempted to breach the pyramid selling and referral selling provisions of the Act.

On 12 April 2001 the Commission obtained interlocutory injunctions against the company and Mr James. The injunctions were made by Spender J in the Federal Court, Brisbane, and operate until the trial. The injunctions prevent Guardian from contravening the pyramid selling provisions of the Act by promoting the scheme in its current form.

At the final hearing the Commission is seeking declarations that both parties breached the Act, injunctions to prevent future conduct, compensation to affected consumers, the implementation of a trade practices compliance program, and costs.

The matter will be returned to the court for a timetable for the proceedings.

National Australia Bank Limited

False or misleading representations (ss. 52, 53(aa))

Between 22 and 30 November 2000 National Australia Bank placed full page advertisements in the following newspapers: *The Land* (NSW), *The Stock & Land* (Vic), *The Weekly Times* (Vic), *The Farm Weekly* (WA) and *The Countryman* (WA) promoting its Wheat Advance product. In the advertisements NAB made representations offering wheat farmers a better deal with a key feature being underwriting costs around 17.5 per cent lower than otherwise available at that time. Of concern to the Commission was that NAB was aware for at least seven days before the first advertisement was published, that the representations were factually incorrect, and failed to take any action either to correct the representations or have the advertisement withdrawn from publication.

Over the Christmas/New Year period NAB notified all customers who applied for the Wheat Advance product of the inaccuracies in the advertisements. Additionally, corrective advertisements were also published over this period.

On 17 April 2001 NAB provided the Commission with an s. 87B undertaking to:

- acknowledge that the advertisements were in breach of ss. 52 and 53(aa) of the Trade Practices Act;
- implement a compliance program to meet Australian Standard AS3806 and provide for an independent, annual audit of its application and effectiveness for three years with a report being sent to the Commission; and
- not make similar false or misleading comparative advertising claims.

Paul and Linda Storer

Misleading or deceptive conduct (s. 52), misrepresentations about the performance characteristics of goods (s. 53(c)), sponsorship, approval or affiliation of a corporation (s. 53(d)), a buyer's needs for goods or services (s. 53(f))

On 23 April 2001 the Federal Court, Perth, made declarations that Mr Paul Storer and Mrs Linda Storer, who operate the Perth Chronic Fatigue Advisory Centre, engaged in false and deceptive conduct and made misrepresentations in relation to chronic fatigue syndrome which broke the consumer protection provisions of the Trade Practices Act.

The court declared in consent orders that the Storers had, while promoting their services — the products OMX probiotics and USANA supplements — and their management plan in television appearances, on radio, in newspapers, in lectures and workshops around Australia made misleading or deceptive claims including that:

- Mr Storer was a doctor and that he had a PhD in microbiology from the University of Western Australia when this was not the case;
- CFS sufferers could obtain significant benefits from following their management plan and/or taking OMX probiotics and USANA supplements; and
- there were more than 1000 published articles supporting the use of probiotics in treating CFS when this was not the case.

The court also made orders restraining the Storers from engaging in similar conduct in the future, including the making of representations or inferring that:

- Paul Storer is, or is entitled to be, described as a doctor or to practise medicine or surgery;
- Paul Storer is the holder of a PhD; and
- chronic fatigue syndrome sufferers who followed their management plan and/or used the products promoted by the Storers would be cured, have their symptoms terminated or would get well after three months.

The court ordered the Storers to offer refunds to consumers who were misled by the representations and also required the Storers to participate in a trade practices compliance program seminar, and to publish corrective notices in prominent newspapers to inform the public of the decision.

Product safety (part V)

Regency Importing Company Australia Pty Ltd

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

On 12 March 2001 Regency Importing Company Australia Pty Ltd provided the Commission with an enforceable undertaking to recall the DT900 Lifestyler exercise cycle after a random safety standards audit conducted in Adelaide prompted the Commission to raise concerns about the cycle. The Melbourne-based importing company had imported them from the United States and they were sold exclusively over the past year through Rebel Sport stores around Australia.

The undertakings also provide full refunds to consumers and an agreement to implement a compliance program.

After the Commission expressed its concern the importer had the exercise cycle tested by an accredited testing authority. The result indicated there was an entrapment hazard at the point where the chain joined the flywheel. Also the adjustable seat did not have the required mark to indicate the maximum and minimum safe level of adjustment. The safety standard for exercise cycles requires that guards be provided for any dangerous moving part accessible to a child's finger, in particular the flywheel, drive chain and flywheel loading mechanism. This is intended to reduce injuries to children, such as crushing or severing of fingers.

GST compliance and enforcement (part VB)

Classic Video Pty Ltd (Video City)

False or misleading conduct (s. 52), false or misleading representations about the price of goods and services (s. 53(e)), price exploitation under the New Tax System (s. 75AU)

On 20 April 2001 the Commission accepted Video City's proposal to donate $4818 to the Royal Tasmanian Botanical Gardens Trust to compensate for overcharging GST on the rental of videotapes hired during the week before 1 July 2000.

The Commission's investigation followed complaints from consumers concerned that GST may have been incorrectly charged on videos hired before 1 July 2000 and returned on or after 1 July 2000. Video City advised the Commission that because charges are paid on return of videotapes, and the somewhat unclear position at the time as to the taxation implications of such transactions, GST was incorrectly charged on the pre-1 July portion of these transactions. This overcharge occurred at a number of Video City sites throughout Tasmania over a period of up to one week. It was found that some 20 500 customers were overcharged an average amount of approximately 23 cents, resulting in a total overcharge of $4818.

The Commission usually seeks to obtain direct refunds for consumers affected by GST overcharges. In this case the Commission accepted that the small size of each refund and the difficulty in identifying individual consumers meant that a donation to a charitable trust was appropriate. Video City also agreed to post in-store notices to inform customers of the matter and its resolution.

Video Ezy & ors

Misleading or deceptive conduct (s. 52), false or misleading representations (s. 53), price exploitation under the New Tax System (s. 75AU)

On 27 April 2001 the Commission settled its legal proceedings against Video Ezy Australasia Pty Ltd, related companies and various senior Video Ezy managers.

The Commission began legal action in May 2000 alleging that from December 1999 Video Ezy, in 21 of its 33 corporately owned stores, supplied some new release videos at $7. The price of $7 was an increase of $1 above the previous price. The Commission alleged that the increased prices were charged unlawfully in anticipation of the introduction of the GST.

The Commission also alleged that Video Ezy, through its staff at its corporate stores in Townsville, made representations to them that were likely to mislead customers into believing the price increases were because of the GST and that Video Ezy was entitled or obliged to collect GST before July 2000.

In settling the matter Video Ezy has consented to Federal Court orders in which it:

- declared that it had made false and misleading representations in breach of the Trade Practices Act by advising some customers at its Townsville, Queensland stores that the price increases of the new release videos were because of the inclusion of the GST when this was not the case;
- is restrained from making similar representations in the future;
- will, for six months, reduce the overnight hire price of all new release videos at the Townsville Stores to a price not exceeding $6.45 (inclusive of GST);
- will give one free overnight first release video to compensate anyone who hired a $7 video at any of the Townsville stores between 1 September 1999 and 31 January 2000 (if they provide satisfactory confirmation to Video Ezy that they were confused or concerned by a statement from a Video Ezy employee linking increases in the hire prices for such videos in any way to the GST). Video Ezy will make this offer known to members of the relevant store by in-store notices in Townsville and letters of apology to Townsville members;
- will further develop its trade practices compliance and education program in relation to relevant provisions of the Act. The program will be improved to lessen the likelihood of any future breaches of the Act by Video Ezy; and
- will contribute to the Commission's costs in the matter.

The Commission has agreed to discontinue its price exploitation claims.