Enforcement

The following are reports on new and concluded Commission actions in the courts, settlements requiring court enforceable undertakings (s. 87B) and mergers opposed by the Commission. Other matters currently before the court are reported in appendix 1. Section 87B undertakings accepted by the Commission and non-confidential mergers not opposed by the Commission are listed in appendix 2.

Anti-competitive agreements (Part IV)

Fila Sports Oceania Pty Ltd

Alleged misuse of market power (s. 46), exclusive dealing (s. 47)

On 5 September 2002 the Commission instituted proceedings in the Federal Court, Sydney, against Fila Sports Oceania Pty Ltd for the implementation of a selective distribution policy in relation to the supply of Fila's AFL licensed apparel to retailers.

The Commission has also taken action against the current and former managing directors of Fila, Mr Craig Reidy and Mr David Carney, for their alleged involvement in the formulation and implementation of the policy.

Fila is the Australian subsidiary of Fila Holding SpA, an Italian-based clothing manufacturer, with operations in more than 20 countries and a worldwide sales turnover of about EURO$1 billion (A$1.7 billion).

In Australia, Fila operates as a wholesale supplier of leisurewear and sportswear and operates some Fila retail stores. As well as being a major sponsor of the Adelaide Crows, Essendon Bombers, Geelong Cats, Melbourne Demons and Western Bulldogs, Fila is the AFL's official supplier of on-field and licensed supporter wear for these teams.

The Commission alleges that Fila implemented a selective distribution policy in late 1999 to supply clothing retailers with Fila AFL-licensed apparel only on condition that these retailers agreed not to stock AFL-licensed apparel from Fila's competitors.

The Commission began to investigate Fila's conduct after complaints from some Fila competitors, who had previously complained to the AFL, about the effect that Fila's selective distribution policy was having on their business.

The Commission has claimed that the policy was operating nationally for about 19 months, during which Fila withdrew its supply of Fila AFL-licensed apparel from some major retailers who did not agree to embrace Fila's policy and decided to stock Fila's competitors products, primarily Vivid and Burley Sekem.

In August 2001 Fila agreed (on a without admission basis) to the Commission's request that it suspend the selective distribution policy and provide written advice to more than 400 of its retail customers that the policy had been suspended.

The Commission is seeking remedies against Fila and the individuals, including:

- pecuniary penalties
- declarations that the selective distribution policy contravened the Act
- injunctions preventing Fila from engaging in similar conduct in the future
- findings of fact
- an order requiring Fila to update its existing trade practices compliance program.

A directions hearing was set down for 4 October 2002.

Industry codes (Part IVB)

Helen Ewing, director, and Chris Hudman, former director, Synergy in Business Pty Ltd (in liquidation)

Alleged contravention of industry codes (ss. 51AD, 52, 59(2))

On 22 July 2002 proceedings were instituted in the Federal Court, Adelaide, against Helen Louise Ewing and Christopher Graeme Hudman, directors

of the Newcastle-based company Synergy in Business Pty Ltd (in liquidation).

The Commission alleges that the Newcastle-based company advertised throughout Australia to sign up consultants. It then licensed these people to promote and sell Synergy's small business development program, known as the 'Best Practice Program'. At least 31 people, located in various states and territories, joined as consultants and paid between $11 000 and $24 500 each for the licences.

The Commission alleges that Synergy specifically excluded the licence arrangement from being characterised as a franchise by including a clause in the licence contract to that effect, in addition to making oral representations to prospective licensees. However, the Commission's view is that Synergy is in fact a franchise and operates as such in practice. The Commission alleges that therefore Synergy has contravened the Franchising Code by failing to provide proper disclosure documents to prospective licensees and failing to render other investor protection afforded by the code.

The Commission also alleges that Synergy breached s. 59(2) of the Act by making false or misleading representations about the potential income that could be earned by licensees in selling the best practice programs.

The Commission is seeking:

- a declaration that the licences were franchises and therefore subject to the Franchising Code
- orders that effectively inaugurate the franchisees' rights under the code, including their cooling off rights, or in the alternative, that the licences are void *ab initio* [from the beginning]
- declarations that Ewing and Hudman contravened ss. 51AD, 52 and 59(2) of the Act
- injunctions, orders for refunds and costs.

At a directions hearing on 2 September 2002 the court ordered that the matter be transferred to the Sydney Registry of the Federal Court and that leave be granted to the applicant to file an amended application on or before 16 September. The next directions hearing date has not been set.

Mergers (Part IV)

Farm Pride Foods and Pace Farms

Mergers (s. 50)

On 11 July 2002 the Commission announced it was opposing a proposed joint venture between Farm Pride Foods Limited and Pace Farms Pty Limited in relation to their egg product business.

FPF and Pace are involved in the production, grading, packing and distribution of shell eggs and the manufacture of egg products.

Egg product, which may be in liquid or dried form, is made from second-grade eggs and is used mostly in the food processing and food services industries.

The Commission is concerned that the proposed egg product joint venture between FPF and Pace would be likely to result in a substantial lessening of competition in that market.

FPF and Pace together would account for more than half of the egg product market. The Commission was concerned that neither imports nor existing competitors will provide a sufficient competitive constraint on the joint venture.

The Commission conducted extensive market inquiries into the proposed arrangement, consulting with food manufacturers and wholesalers as well as industry groups and competitors. Concern emerged from several quarters during these inquiries that the joint venture would substantially lessen competition.

Australian Wheat Board/Goodman Fielder's flour milling operation, Milling Australia

Mergers (s. 52)

On 16 August 2002 the Commission announced it would oppose the proposed acquisition by the Australian Wheat Board of Goodman Fielder's flour milling operation, Milling Australia.

The AWB is Australia's monopoly exporter of wheat and the largest domestic grain trader. Milling Australia is one of Australia's leading flour milling operations with production facilities in most Australian states.

The Commission conducted market inquiries on the proposed acquisition of Milling Australia, among millers, grain traders, food manufacturers, storage and handling companies, growers and others.

It found that AWB's acquisition of Milling Australia would be likely to substantially lessen competition in the markets for flour milling and mixing across Australia, and in grain trading in Queensland. The Commission was concerned about the market power AWB derives from its strong position in grain acquisition through its monopoly over the export of wheat, and its leading position in the domestic trading market. This could enable it to substantially lessen competition in the market for flour milling and mixing were it to acquire a flour milling and mixing business.

Market participants were concerned about:

- the AWB having significant market power based on substantial influence over wheat pricing through AWB's management of the national pool
- logistical advantages through AWB's discretion over grain 'swaps' to millers, and an informational advantage based on superior knowledge of likely national pool price movements
- the AWB being able, and having an incentive, to use this market power to raise rival flour millers' costs, were the acquisition to proceed
- in particular, AWB possibly discriminating against them when providing swaps of grain.

A swap is the swapping of one parcel of grain with another at a different location, which can substantially reduce transport costs for millers. AWB is the largest provider of swaps in Australia. Also the discretion that AWB had over setting the price of wheat for the national pool, on which domestic wheat prices were based, could enable it to raise rival millers' costs of purchasing wheat.

The Commission also found that the proposed acquisition would have been likely to lead to AWB exclusively supplying grain to Milling Australia. This would be likely to substantially lessen opportunities for other traders to supply grain, particularly in Queensland where Milling Australia is a large purchaser of grain. Accordingly, the Commission found that the proposed acquisition would substantially lessen competition in the market for grain trading and marketing in Queensland. AWB's substantial presence in the grain trading market was a factor in this element of the Commission's view.

The Commission advised AWB that it was opposed to their proposed acquisition. AWB considered it could address the Commission's concerns with undertakings. However, as Goodman Fielder announced the sales of its milling assets before any undertakings were offered, the Commission did not assess whether they would address the competition concerns.

Fair trading (Part V)

Dell Computer Pty Ltd

Misleading or deceptive conduct (s. 52), misleading representation as to price (s. 53(e)), failure to state cash price of goods in certain circumstances (s. 53C)

On 2 July 2002 the Federal Court, Sydney, declared that from about June 1994 to 30 November 2001 Dell Computer Pty Ltd published advertisements that contravened s. 52 of the Trade Practices Act. The advertisements did not make clear to customers that they had to pay a compulsory delivery charge on top of the advertised price for Dell's computers.

In the advertisements in question, prices were prominently displayed next to images of Dell computers. But most customers could not purchase the computers at these prices. They were forced to pay an additional delivery charge of up to $99 (the amount varied according to model purchased). The delivery charge was compulsory as Dell is a direct marketer without a shop front and its computers are only available by way of delivery by Dell to its customers.

The Commission's court action followed complaints from consumers that Dell computers could not be purchased at the advertised price, and in fact were in some cases about $99 dearer than advertised.

The Dell advertisements included references along the lines of 'delivery additional' or 'additional delivery charge of up to $99' either next to the advertised price or in the fine print at the bottom of the advertisement. But the court found that these references did not make clear to customers that delivery was compulsory and could lead customers to think they could avoid a delivery charge by collecting the computer themselves. In reality, customers had no choice but to have the computer delivered.

The court ruled that these advertisements were misleading or deceptive and made injunctions restraining Dell from advertising in that manner in the future. The court ordered Dell to publish a corrective advertisement in major newspapers in each capital city of Australia explaining how it

misled its customers. The court also ordered Dell to pay the Commission's costs.

However, the court found that there was no contravention of ss. 53(e) and 53C, dealing with a false or misleading representation as to the price of goods or services and specifying the cash price of goods or services, as alleged by the Commission. The Commission has filed a Notice of Appeal in the Federal Court appealing the findings of Jacobson J on ss. 53(e) and 53C.

NRMA Health Pty Ltd, NRMA Insurance Limited

Misleading or deceptive conduct (s. 52)

On 10 July 2002 the Federal Court, Sydney, made orders by consent against NRMA Health Pty Ltd for misleading advertising that appeared in various newspapers in September 2001 and against NRMA Insurance Limited for a misleading publication on its website. The Commission instituted proceedings against NRMA Health Pty Ltd, also trading as SGIC Health and SGIO Health, and NRMA Insurance Limited in November 2001.

The material published by NRMA Insurance Limited on its website represented that it would not cost a pregnant woman anything to have a baby if she was insured with NRMA Health Pty Ltd whereas a significant proportion of members were required to pay either an excess or a co-payment.

The Commission alleged that the print advertisements published by NRMA Health Pty Ltd, depicting a woman nursing a newborn baby, made representations guaranteeing 'free delivery ... no matter how advanced your pregnancy is' in an endeavour to entice consumers to transfer or join NRMA health insurance. The advertisements contained two fine print disclaimers that stated members only received full health insurance coverage for obstetric services after:

- the payment of any excess or co-payment
- the 12-month waiting period for obstetric related benefits had been served with NRMA Health Pty Ltd or an existing fund.

The Commission alleged that the disclaimers were inadequate and unlikely to come to the attention of consumers. It alleged they failed to detract from the overall impression conveyed by the advertisement that it would not cost a pregnant woman anything to have a baby if she was insured with NRMA Health Pty Ltd and that she would not be required to serve any waiting period.

The Federal Court orders include:

- declarations that NRMA Health Pty Ltd and NRMA Limited contravened the relevant provisions of the *Australian Securities and Investment Commission Act 1989*[1] by publishing advertisements that were misleading
- a requirement that NRMA Health Pty Ltd write to consumers who took out Hospital Plus or Hospital Value health insurance products between 1 July and 30 August 2001 informing them that the advertisements were misleading
- a requirement that, for people who were misled, NRMA Health Pty Ltd will waive the 12-month waiting period for pregnancy related services and refund excesses or co-payments
- an order that the NRMA Health Pty Ltd and NRMA Limited must not make representations in the future about health insurance benefits without clearly and prominently displaying the existence of excesses, co-payments and waiting periods
- an order requiring NRMA Health Pty Ltd and NRMA Limited to review and report on their trade practices compliance programs.

Saatchi & Saatchi Australia Pty Ltd, the advertising agency responsible for preparing the NRMA's campaign, were joined in this action. The Commission's proceedings against Saatchi and Saatchi were heard on 18 September 2002 and the decision was reserved.

Voyages Hotels and Resorts Pty Ltd

Alleged misleading or deceptive conduct (s. 52)

On 18 July 2002 the Commission instituted Federal Court proceedings against Voyages Hotels and Resorts Pty Ltd alleging misleading and deceptive advertising for tours to Aboriginal land near Uluru.

[1] The proceedings were instituted under ss. 12DA, 12DB(1)(c), 12DB(1)(e), 12DB(1)(g), 12DF of the *Australian Securities and Investments Commission Act 1989* (ASIC Act) as opposed to the Trade Practices Act. Health insurance, as it falls within the definition of a financial product, is regulated through the ASIC Act. However, ASIC has, since December 1998, formally delegated the regulation of all consumer protection aspects of health insurance to the ACCC through the use of nominated ACCC officers as delegates.

The Commission allegations include that Voyages represented that:

- a tour to Yulara Pulka Aboriginal Homelands near Uluru would be offered, when there was no agreement that would entitle Voyages to take tours to the Yulara Pulka
- they had an exclusive right to conduct tours into Yulara Pulka when another company had been conducting tours in Yulara Pulka since December 1999
- traditional Aboriginal owners would meet with Voyages tour groups at Yulara Pulka when there was no agreement between any of the traditional Aboriginal owners and Voyages to assist in, attend or meet the tour groups
- the traditional Aboriginal owners would receive a significant amount of the tour price from Voyages when there was no such agreement.

The Commission accepted inter parte undertakings from Voyages to resolve the interlocutory injunction.

The Commission is now seeking permanent injunctions, declarations and costs. The next directions hearing is on 4 February 2003.

Golden Way Realty (S.A.) Pty Ltd

False or misleading representations about the price of goods and services (s. 53(e))

On 9 August 2002 an Adelaide real estate agency, Golden Way Realty, agreed to offer a refund to customers who may have been misled over the agent's professional fee or commission, after Commission intervention.

It was alleged that some of the sales agency agreements entered into by the firm had failed to clearly disclose to property vendors that GST was applicable and would be charged in addition to the quoted fee. The sales agency agreements related to property sales and professional fees collected from July 2000.

The Commission investigation found that five customers had been affected and $2240 for GST payments were incorrectly claimed. When such GST payments were collected they were remitted to the Australian Taxation Office. Golden Way Realty submitted that it had not intended to mislead or deceive its customers and that the conduct had resulted from it having been confused over GST-related changes contained in the standard Real Estate Institute of South Australia sales agency agreement.

The Commission accepted court enforceable undertakings that included refunding the GST liability to affected customers and implementing a trade practices law compliance training program for staff. The Commission acknowledged that Golden Way Realty acted promptly to resolve the matter.

Wesfil (Australia) Pty Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations as to place of origin (s. 53(eb))

On 16 August 2002 the Federal Court declared, by consent, that Wesfil (Australia) Pty Ltd misled customers about the country of origin of some of its automotive air filters. Between June 1999 and May 2002, Wesfil stuck labels bearing the claim 'Made in Australia' on the packaging of automotive air filters it had intermittently imported from Thailand.

The court made:

- declarations that Wesfil had breached ss. 52 and 53(eb) of the Trade Practices Act
- injunctions restraining Wesfil from engaging in similar conduct in the future.

It also ordered that Wesfil:

- use all reasonable endeavours to identify and relabel any offending air filters remaining with customers and to advise the Commission of the outcome
- publish a corrective notice in a major newspaper in each capital city, *The Australian* newspaper and two magazines, *4x4* and *Street Machine*
- pay a refund to customers who had been misled by the claims and purchased the air filters
- institute a corporate trade practices act program
- pay costs.

Woolworths Ltd

Misleading or deceptive conduct (s. 52), false or misleading representations as to place of origin (s. 53(eb))

On 20 August 2002 Lindgren J of the Federal Court declared that Woolworths Ltd had, in respect of advertisements during the period 22 February 2001 and 1 March 2001, engaged in misleading or deceptive conduct in breach of the Trade Practices

Act. He also declared that Woolworths had made false or misleading representations in relation to the origin of cattle.

The orders follow the court's finding on 12 August 2002 that advertisements, entitled 'Beefing Up the Local Economy', published by Woolworths misled consumers about beef sold in some its regional supermarkets in NSW being sourced from cattle in the north-west NSW and New England regions.

In the orders, Lindgren J declared that Woolworth's had made false or misleading representations about the place of origin of cattle ultimately sold as beef in some of its regional supermarkets in contravention of s. 53(eb). He also declared that Woolworths had engaged in misleading or deceptive conduct in contravention of s. 52 in relation to this beef and to grain used to feed the cattle.

Lindgren J declined to order Woolworths to publish corrective advertisements, as sought by the Commission. He concluded that the offending advertisements were published 18 months ago and that the effect of the misleading aspects of the advertisements had since diminished.

Lindgren J also declined to order injunctions against Woolworths, as sought by the Commission. He was satisfied that Woolworths did not intend to repeat the advertisements particularly because they were in relation to a one-off event, the refurbishment of the Cargill abattoir at Tamworth.

Crackerjack Productions Pty Ltd

Misleading or deceptive conduct (s. 52), misleading conduct in relation to employment (s. 53B)

On 28 August 2002 the Federal Court, Sydney, made orders by consent against television production company, Crackerjack Productions Pty Ltd, its producer Mr Jim Burnett, and Network Ten Pty Ltd. The orders were for conduct that included placing misleading job advertisements in several newspapers by Crackerjack to lure potential subjects for a reality television show it was producing.

In January and February 2001 Crackerjack advertised casual jobs in Dubbo and Melbourne, seeking a 'Self Starting Girl/Boy Friday' for five days' work. Crackerjack also placed vacant positions with several job agencies in Dubbo. These advertisements were to lure job seekers to an 'interview' and then film them after asking them to help out in fictitious situations contrived by Crackerjack employees. For example, job seekers in Dubbo, believing they were to be interviewed for the job, were asked to assist a film crew making a television commercial at the time. The job seekers were not told their actions were being filmed by Crackerjack for possible use in a candid camera style television show.

Two job seekers were then offered the advertised work by Crackerjack. This work, however, was not genuine and the tasks they were required to perform over the five days were part of an elaborate hoax. The two job seekers, who were paid for their five days, were not told until afterwards the real reasons behind what they were asked to do, nor that they were being filmed.

The court, in the consent orders, found Crackerjack's purpose in advertising and offering the five days' work was to obtain candid film footage of job seekers for use in a reality television program it was making called Mind Games—A Real Life Adventure, broadcast by Network Ten on 4 August 2001.

In addition to finding that Crackerjack had breached the Trade Practices Act by engaging in misleading conduct and misrepresenting the availability of employment, and that Mr Burnett was knowingly concerned in the conduct, the court also ordered that:

- Crackerjack and Mr Burnett be permanently restrained from undertaking similar conduct again
- Crackerjack send a letter of apology to affected job seekers
- Crackerjack put in place a trade practices compliance program
- Crackerjack and Mr Burnett pay the Commission's costs.

Network Ten was also found by the court to have misled one of the job seekers in relation to a mock press conference he was required to take part in during the five days he thought he was working for Crackerjack as an assistant to a film crew. The court also found that Network Ten was knowingly concerned in Crackerjack's breaches of the Act by commissioning Crackerjack to produce the television show despite being fully aware of what Crackerjack proposed to do.

The Commission asked the court to also restrain Network Ten from engaging in similar conduct in future. The company opposed this application, but on 21 October 2002 consent orders were made by Lindgren J against Network Ten. Under the orders, Network Ten are restrained from repeating the conduct for two years and will pay the Commission's costs.

Solutions Software International Pty Ltd and ors

Unconscionable conduct (s. 51AC), misleading or deceptive conduct (s. 52), misrepresentation of performance characteristics, uses or benefits (53(c)), misrepresentation of approval or affiliation (s. 53(d)), misrepresentations about the price of goods and services (s. 53(e)), misleading statements about work-at-home schemes (s. 59(1))

On 2–3 September 2002 after admissions by Gold Coast businessman, Robert James Price, the Federal Court, Brisbane, found that he misled consumers and in one instance acted unconscionably in connection with the marketing and sale of horse race betting software in Australia and New Zealand.

The Commission had alleged the software, which was marketed under names such as 'Autotab', 'Offtrack' and 'Solutions Software' by companies that metamorphosed at regular intervals, falsely claimed to be able to predict horse-race place-getters with high accuracy. Purchasers paid up to $12 500 for a copy of the program, having been told they could use it to earn up to $8000 per month and realise the lifestyle of their dreams.

The companies included Solutions Software International Pty Ltd and the companies formerly known as Acepark Pty Ltd and Offtrack Investments Pty Ltd. Although not all of the companies were parties to the proceedings, the court found that Mr Price was knowingly concerned in contraventions of the Trade Practices Act by five companies.

The Commission alleged the program claimed to follow and analyse the fluctuations of dividends paid and track money bet on horse races. It allegedly highlighted 'smart money' (money placed by professional punters at the last minute) and recommended runners to be backed. With increasing globalisation and conduct occurring internationally, the Commission relied on assistance from the New Zealand Commerce Commission to achieve an effective outcome for both Australian and New Zealand consumers. (This matter is also discussed under New Zealand in the International developments chapter of this journal.)

The court's findings included that, contrary to what purchasers were told, the program was a gambling program (and not an investment program), did not have a success strike rate of between 70 and 95 per cent, and there were no reasonable grounds for representing that purchasers could expect to earn income or profit using the program. In late 2001 the Commission obtained interlocutory injunctions to stop the offending claims being made pending final orders from the court.

The Commission commented that:

> Widespread marketing of this type of program is necessarily self defeating in that any financial return from using the program is linked through the dividend to the number of people sharing the 'inside information' that the program is supposed to provide.
>
> As the number of people sharing this information increases, so too will the number of people making last minute wagers on the one selection, causing any dividend paid to be dramatically reduced from that quoted at the time users decide to place their bet.

The Commission had the program tested and concluded that punters would achieve a similar success rate for a place bet if they were to simply follow the TAB Win Favourite or Tip.

The court also found that Acepark Pty Ltd, through Mr Price, acted unconscionably by requiring one consumer to sign a waiver as a condition of being refunded the amount paid for the program after a court enforceable undertaking given to the Commission in 1999 (see *ACCC Journal* no. 23, p. 38). The waiver purported to make the payment a full and final settlement, whereas the undertaking required the company to also compensate the consumer for amounts lost while attempting to operate the program. Mr Price was fully aware that the consumer had limited money and had bought the program so she could work at home while caring for her terminally ill partner.

The court ordered, by consent, that Mr Price and two of his former colleagues, Ronald James Curtin and William Greig Millar, be permanently restrained from being in any way involved in representing that, in connection with the marketing and sale of the program, or any substantially similar program:

- the program and/or the company marketing the

program has sponsorship, approval or affiliation with any TAB services throughout Australia

- that purchasers can reasonably expect to earn certain amounts of income and profit by operating the program
- the program has an average strike rate or success rate ratio of 70 to 95 per cent in respect of selecting successful place bets
- it is necessary that potential purchasers purchase the program urgently, to avoid imminent price increases
- the program is an investment program, not a gambling or punting system and involves minimal risk
- the number of people who purchase the program will not render the program less effective.

The court also made declarations, findings of fact and granted permanent injunctions against Solutions Software International Pty Ltd and the companies formerly known as Acepark Pty Ltd and Offtrack Investments Pty Ltd.

Mr Price was ordered to publish prominent corrective advertisements in Australian and New Zealand newspapers. He and Mr Curtin were also ordered to make financial payments to the Commission, which the Commission expects will provide for partial refunds to purchasers named in the proceedings. Mr Millar undertook to perform community service work with a gambling assistance charity on the Gold Coast in lieu of any financial contribution. Both were ordered to attend trade practices compliance training.