
Enforcement

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

Fair trading (Part V)

Econovite Pty Ltd

Alleged misleading or deceptive conduct (s. 52), misleading representations (s. 53(a), (c))

On 10 September 2003 the Federal Court, Perth, declared that Econovite Pty Ltd had contravened the consumer protection provisions of the Trade Practices Act by making false claims regarding the composition and characteristics of some of the ingredients on the labels of its livestock feed supplement products which it supplied to farmers.

The court declared that by supplying the livestock feed supplements with incorrect labelling, Econovite made false and misleading representations in relation to the quality, composition, nature and characteristics of products.

Justice French agreed to consent orders that the company breached the Act by supplying the incorrectly labelled products. The orders follow court action by the ACCC.

The ACCC instituted proceedings on 27 June 2003 against Econovite alleging that from March 2002 until about March 2003, the company, in manufacturing and distributing the livestock feed supplements including:

- Econovite Mineral Block
- Econovite Dry Feed Block
- Econovite Cattle Block

made false and misleading representations on the package labelling of the products in relation to the composition and characteristics of the products. The court found that the conduct breached

sections 52, 53(a) and 53(c), of the Act which prohibit false and misleading representations.

The company also consented to orders by the court which:

- made injunctions restraining Econovite from engaging in similar conduct in the future
- made orders for the publication of a corrective notice by Econovite informing consumers and retailers of the breaches
- made orders for Econovite to undertake an industry education program
- made orders that Econovite implement a corporate trade practices compliance program
- the ACCC's court costs.

Australian Aboriginal Art Pty Ltd

Alleged misleading or deceptive conduct in relation to the authenticity of Aboriginal souvenirs (s. 52)

On 5 September 2003 the ACCC instituted proceedings in the Federal Court, Brisbane, against Australian Aboriginal Art Pty Ltd (AAA) and its director, Mr Hank de Jonge and former director Mr Bruce Read. The ACCC alleged that AAA has engaged in misleading or deceptive conduct by making certain representations about the authenticity of the Aboriginal-style souvenirs it manufactured and distributed to souvenir retailers throughout Australia and advertised on its website. The ACCC alleged that by placing stickers on souvenir products stating 'Australian Aboriginal Art', 'Aboriginal Art' and/or 'Authentic', AAA represented that those souvenirs were made by Aboriginal artists or artists who were of Aboriginal descent.

The ACCC alleged that the majority of artists employed by AAA to paint these souvenir products are neither Aboriginal nor of Aboriginal descent. The ACCC also alleged that both Mr de Jonge and Mr Read were knowingly concerned in the alleged contraventions by AAA. The ACCC is seeking declarations, injunctive relief, orders for corrective advertising to be provided to retailers of AAA souvenirs and to be placed on its website and orders requiring Mr de Jonge and Mr Read to attend a trade practices compliance seminar.

Mr de Jonge is a director of Australian Icon Products Pty Ltd (AIP) and Mr Read was the former general manager of that company. The ACCC had earlier instituted proceedings against AIP regarding similar conduct. However, AIP went into liquidation and its assets were allegedly transferred to AAA. The ACCC sought both default and summary judgment against AIP and the matter has been stood over to be heard concurrently with the AAA matter.

On 9 October 2003 directions providing for an interlocutory timetable were made by consent. The matter will return for further directions on 8 December 2003.

Will Writers Guild Pty Ltd

Alleged failure to comply with mandatory franchising code of conduct (s. 51AD), misleading and deceptive conduct (s. 52), false or misleading representations (s. 53(g), 59(2)),

On 3 November 2003 the Federal Court, Hobart, ordered that Will Writers Guild Pty Ltd (WWG) and its director, Mr Sidney James Murray, pay compensation of \$137 697 to Will Power International Pty Ltd for losses sustained in buying a will writing franchise.

The decision marked the culmination of criminal and civil proceedings taken by the ACCC against WWG and Mr Murray about their marketing of a franchise that would have been illegal to operate unless the franchisee was a lawyer.

In February 2003 the Federal Court fined WWG and Mr Murray a total of \$105 000 for falsely representing that a will writing business of the type promoted by Mr Murray could be carried on in the relevant state or territory of Australia by a person who was not a qualified legal practitioner. The court also ordered WWG and Mr Murray to pay \$229 770 compensation to five of the six franchise operators.

In May 2003, by consent of the parties, the Federal Court declared that WWG and Mr Murray sold will writing franchises covering all states and territories (except Queensland) to small business operators without first disclosing important information required by the franchising code of conduct. It imposed permanent injunctions restraining WWG and Mr Murray from offering for sale, selling or supplying any business which involves a franchise agreement under the franchising code of conduct, without providing a disclosure document which complies with the code to a franchisee or prospective franchisee.

Justice Weinberg's orders on 3 November brought the total compensation and fines ordered against WWG and Mr Murray to \$472 467.

Kwik Fix International Pty Ltd

Alleged misleading conduct and/or misrepresentations (ss. 52, 53(c), (e), 59(2)), unconscionable conduct (s. 51AC), contraventions of the franchising code of conduct (s. 51AC)

On 9 September 2003 the ACCC settled its legal proceedings in the Federal Court, Brisbane, against the franchisor of mobile repair services for vehicle paint, plastics and interiors, Kwik Fix International Pty Ltd, its director Mr David Bruckshaw and former director Mrs Kerry Bruckshaw.

The ACCC alleged:

- misleading conduct and/or misrepresentations regarding the franchise purchase price and profitability
- contraventions of the franchising code of conduct such as failure to meet disclosure and advice requirements
- unconscionable conduct regarding the circumstances of entering into the franchise and loan agreements, subsequent attempts to resolve issues in dispute, and failures to meet requirements of an applicable code of conduct.

Without admissions, Kwik Fix and David & Kerry Bruckshaw settled proceedings by way of s. 87B court enforceable undertakings, accepted by the ACCC on 31 July 2003 to:

- withdraw the alleged termination of the complainant's franchise and repurchase it
- implement an additional internal complaints-handling/dispute resolution system for franchisees
- implement a records management system in relation to documentations required under the franchising code and correspondence with franchisees and prospective franchisees
- agree to consent orders.

The orders, made by the Federal Court on 9 September 2003:

- note the Bruckshaws have already, at their own expense, attended a trade practice training seminar
- require Kwik Fix to implement a trade practices compliance program

- restrain Kwik Fix and the Bruckshaws from engaging for a period of five years in conduct similar to that alleged in the proceedings.

There was no order as to costs.

Sanyo Airconditioners Manufacturing Singapore Pte Ltd

Alleged misleading and deceptive conduct (s. 52), false representations as to the benefits of goods (s. 53(c), mislead the public as to the nature and/or characteristics of goods (s. 55)

On 11 September 2003 the ACCC instituted proceedings in the Federal Court, Sydney, against Sanyo Airconditioners Manufacturing Singapore Pte Ltd, trading as Sanyo Airconditioning Australia, alleging misleading and deceptive conduct in advertising environmental benefits for its air conditioning units.

The ACCC alleged that Sanyo Airconditioning Australia's environmental marketing claims, such as 'environmentally-friendly HFC "R407C" added' and 'for a new ozone era—keeping the world green', which appear in Sanyo Airconditioning Australia's brochures for the Eco Multi Series air conditioners, misled consumers and businesses in representing that its air conditioning units were environmentally friendly, when in fact:

- the hydrofluorocarbon (HFC) refrigerant R-407C employed in its air conditioning units does not benefit the environment
- R-407C is a powerful greenhouse gas and once released into the air is a significant agent contributing to climate change
- the hydrochlorofluorocarbon R-22 employed in its air conditioning units is a powerful greenhouse gas, an ozone depleting substance, and does not benefit the environment.

The ACCC is seeking court orders against Sanyo Airconditioners Manufacturing Singapore Pte Ltd including declarations, injunctions, orders on the disclosure of specific information, orders on the implementation of a trade practices compliance program and costs.

A second directions hearing was scheduled for 10 November 2003.

Note: Sanyo Airconditioners Manufacturing Singapore Pte Ltd manufactures and distributes air conditioning units and is a separate legal entity to Sanyo Australia Pty Ltd.

Crowded Planet

Alleged misleading or deceptive conduct (s. 52)

On 30 September 2003 the ACCC instituted proceedings for contempt in the Federal Court, Sydney, against Mr David ZeroPopulationGrowth Hughes.

The ACCC alleged Mr Hughes has supplied contraceptives in breach of orders made by Justice Alsop in March 2002.

In 2002 the ACCC successfully brought an action against Mr Hughes, trading as Crowded Planet, for breaches of the Trade Practices Act about advertisements published on the internet on the supply of oral contraceptives.

On 18 March 2002 Justice Allsop made orders that Mr Hughes be restrained from supplying oral contraceptives in Australia without disclosing in any promotional medium, including any internet site, that:

- it is illegal to supply the specified oral contraceptives to persons in Australia without prescription
- it is illegal for a person to acquire the specified oral contraceptives without prescription
- there are significant health risks in taking some oral contraceptives without obtaining medical advice about the suitability of those medications for use by the particular individual
- free medical assistance, including the appropriate issuing of a prescription, is available in Australia to Australian citizens and permanent residents who want to use oral contraceptives
- it is significantly less expensive to get oral contraceptives on prescription from a pharmacy in Australia than it is to buy them from Crowded Planet
- Mr Hughes be restrained from supplying the specified oral contraceptives to persons in the United States of America.

The ACCC alleged that Mr Hughes has not complied with those orders by supplying contraceptives into the United States of America and contracting to supply in Australia.

A directions hearing has been set down for 16 December 2003 before Justice Conti in Sydney.

Henry Kaye and National Investment Institute Pty Ltd

Misleading or deceptive conduct (s. 52)

On 30 September 2003 the ACCC instituted legal proceedings in the Federal Court, Melbourne, against Mr Henry Kaye and National Investment Institute Pty Ltd (NII) alleging misleading and deceptive conduct over the promotion of a 'millionaires' property investment strategy.

The ACCC alleged that advertisements for seminars in print and on the internet claimed that Mr Kaye could turn ordinary Australians into millionaires with no money down, no equity, no debt and a price protection guarantee that if the market were to go down they would not lose their money by teaching them and by them following Mr Kaye's property investment strategies when, in fact:

- the strategies do not enable ordinary Australians to become millionaires
- neither Mr Kaye nor NII had reasonable grounds for claims that an ordinary Australian would, if they followed Mr Kaye's strategies, become a millionaire
- neither Mr Kaye nor NII had reasonable grounds for claims that five volunteers, provided training by Mr Kaye, would become property millionaires in six months without using their own money or taking on a risk of debt.

Similar advertisements were also broadcast on radio.

The ACCC further alleged that Mr Kaye:

- aided, abetted, counselled or procured
- was directly or indirectly knowingly concerned or a party to NII's alleged misleading and deceptive conduct in promoting its investment mastery program.

It is also alleged Mr Kaye and NII claimed that a thousand ordinary people who signed up and paid to be taught property investment strategies by Mr Kaye would become property millionaires within 12 months when neither Mr Kaye nor NII had reasonable grounds for making the representation.

The ACCC has alleged that NII solicits members of the public to enrol in the investment mastery program for a fee of \$15 000.

The ACCC is seeking:

- injunctions restraining Mr Kaye and NII from publishing the advertisements

- corrective advertisements on radio, in print and on Mr Kaye's website.

On 9 October in the Federal Court in Melbourne, Henry Kaye and NII agreed not to publish any further advertisements promoting his 'millionaires' property investment strategy, pending the final outcome of the court proceedings.

At the directions hearing Justice Goldberg obtained Mr Kaye's commitment that the radio and print media advertisements, which he said had been discontinued after the ACCC's action, would not reappear, and that internet advertising, which was still running, would be removed that afternoon.

The trial date is due to commence on 28 January 2004.

Domain Names Australia Pty Ltd and Chesley Paul Rafferty

Alleged misleading or deceptive conduct (s. 52), unsolicited services—asserted right to payment (s. 64 (2A))

On 17 September 2003 the ACCC instituted proceedings in the Federal Court, Melbourne, against internet domain name supplier, Domain Names Australia Pty Ltd and its sole director, Chesley Paul Rafferty for alleged breaches of the Trade Practices Act. The ACCC alleged that Domain Names has made false or misleading representations to businesses that held a registered internet domain name since at least June 2003. Domain Names sent notices inviting them to register a new internet domain name that was substantially similar to the business's existing domain name and styled like an invoice.

The form of the notice was allegedly misleading or deceptive or likely to mislead or deceive contrary to s. 52 of the Act as it had the appearance of an invoice and contained representations to the effect that:

- the registration of the business's existing name was about to expire
- the company was offering to re-register the business's existing name
- the business was under an obligation or need to pay the amount referred to in the notice.

The ACCC also alleged that Domain Names has contravened s. 64(2A) of the Act claiming the notices it sent to businesses asserted a right to payment for the service of registering the domain name when the service was unsolicited and the company did not have a right to payment for that service.

The ACCC further alleged that Mr Rafferty was knowingly concerned and aided and abetted the alleged contravening conduct of Domain Names Australia Pty Ltd.

The ACCC is seeking:

- a declaration that Domain Names Australia Pty Ltd has breached ss. 52 and 64(2A) of the Act
- a declaration that Domain Names' sole director, Chesley Paul Rafferty, was a party to the contravention
- injunctions restraining future conduct by both Domain Names and Chesley Paul Rafferty
- an order that Domain Names send a corrective disclosure notice to recipients of the relevant documents
- costs.

A directions hearing was heard on 3 October 2003 in the Federal Court, Melbourne, before Justice Finkelstein and a trial date was set for 19 November 2003.

Arnolds Ribs and Pizza Australia Pty Ltd

Alleged unconscionable conduct (s. 51AC), misleading or deceptive conduct (s. 52), misrepresentations about profitability or risk or any other material aspect of business activity (s. 59(2))

On 16 October 2003 the ACCC settled its court action with the franchisor of Arnolds Ribs and Pizza Australia Pty Ltd with the Federal Court, Sydney, making orders by consent that Arnolds had contravened the Trade Practices Act.

The franchisor agreed that it had engaged in misleading and deceptive conduct in the promotion of and negotiations for the sale of franchises.

The court also accepted that the franchisor had engaged in conduct which in all the circumstances was unconscionable.

The ACCC was also able to obtain \$200 000 from the Arnolds franchisor for allocation to some affected franchisees.

The court declared that Michael Azzopardi, Robert Azzopardi, Phil Kilazolou, Eric Chan and Bradley Oliver had aided, abetted, counselled or procured or were knowingly concerned in and a party to Arnolds' contraventions.

The court made orders by consent restraining the Arnolds franchisor and the named individuals from making representations about the:

- experience required to run a fast food franchise

- profitability of Arnolds franchise businesses
- business support to be provided
- training to be provided
- capital that would reasonably be required
- nature and cost of the fit-out
- relationship between Arnolds and the person who is to undertake the fit-out
- lifestyle to be expected by a franchisee including working hours when these were untrue or misleading or deceptive.

The ACCC did not have any issues with any current or former Arnolds' franchisees.

Product safety (Part V)

Minmetals Australia Pty Ltd

Alleged contravention of product safety ban (s. 65)

On 23 October 2003 the ACCC accepted court enforceable undertakings from Minmetals Australia Pty Ltd to stop supplying children's toy dart gun sets with suction darts.

Children's toy dart gun sets supplied with small suction darts are subject to a national ban under the Trade Practices Act. The small darts could cause choking if the darts lodge in the throat. Minmetals contacted all retailers it supplied to recall the products.

The banned children's toy dart guns were found during a survey that was jointly conducted by the ACCC and Consumer Affairs Victoria. The first priority was to ensure the stores removed the goods from sale. The ACCC was very concerned that these banned toys were available as they pose a serious and unacceptable public safety risk, especially for young children.

Minmetals acted swiftly to seek and obtain legal advice once it had been contacted by the ACCC. It gave the following court enforceable undertakings to:

- stop supplying all of the banned products, and contact all the retailers it had supplied
- ensure each retailer it supplied with the banned products displayed an in-store notice that outlined the ban (in English, Chinese and Vietnamese) and offered refunds
- place a recall notice in relevant community newspapers in all the areas where the sets were sold
- implement a trade practices corporate compliance program.