
Appendix 1 Continuing matters

Enforcement

The following is a list of enforcement matters before the courts—in addition to the new and recently concluded matters reported in the enforcement chapter.

Anti-competitive practices

NSW Scrap Metal, ss. 45, 52. Alleged bid rigging, misleading or deceptive conduct.

Proceedings were instituted on 24 December 2001 against 17 scrap metal merchants alleging that collusive conduct by some bidders occurred at auctions held in New South Wales throughout 1999. It is alleged that the respondents formed agreements at auctions that had the purpose and likely effect of restricting the acquisition of scrap metal from auctioneers. This agreement was followed through by the respondents who met later in the day at a nearby club or hotel to discuss how to allocate the day's purchases.

The ACCC is seeking declarations, injunctions, penalties and costs. The hearing is set down for three weeks starting from March 2004 before Justice Bennett in Sydney.

Chaste Corporation Pty Ltd, ss. 48, 51AC, 51AD, 52, 53 and 59(2). Alleged resale price maintenance, unconscionable conduct, franchising code of conduct, misleading or deceptive conduct, and false misrepresentations.

Proceedings instituted on 23.11.01 in the Federal Court, Brisbane.

The ACCC alleged that Chaste Corporation and others, including Mr Peter Foster, have engaged in unconscionable conduct, breach of an industry code and false and misleading representations concerning the sale of area manager distributorships, the profitability of the distributorships and the efficacy of a weight loss product TRIMit. It is also alleged that the respondents acted with complete disregard of area managers' reasonable commercial expectations or the long-term viability of Chaste.

The next directions hearing was set down for 14.11.03.

Dataline.net.au Pty Ltd & ors, ss. 45, 48, 51AA, 51AC, 52, 53(a), 53(aa), 53(c), 53(d), 53(g), 55A, 60. Alleged unconscionable conduct, misleading or deceptive conduct, false representations, resale price maintenance, price fixing, undue harassment.

Proceedings were instituted on 21.12.01 in the Federal Court, Brisbane. The ACCC is taking action against Dataline.net.au Pty Ltd, Australis Internet Pty Ltd, World Publishing Systems Pty Ltd, the managing director of Dataline and CEO of Australis, John Lynden Russell, and senior staff.

Among other things the ACCC is seeking declarations, pecuniary penalties, permanent injunctions, findings of fact, orders for compensation and refunds, corrective advertising, implementation of a trade practices compliance program and costs.

On 8.2.02 the ACCC's application for interlocutory relief was heard before Justice Drummond who ordered:

- an injunction restraining Dataline, Australis and WPS from debiting the credit card of any person in connection with their business, without first having received a written authorisation for such a debit bearing a handwritten signature by the apparent credit card holder
- by consent, Dataline and Australis undertake not to take any step in the proceedings in the District Courts of Queensland and Western Australia against small businesses to have such proceedings set down or entered for trial, or allocated trial dates, or summarily determined, until the conclusion of the ACCC's proceedings.

The defence of the first to fourth and seventh respondents was filed on 3.5.02. The ACCC filed a reply on 27.5.02. A further directions hearing was listed for 31.10.03.

Visy Paper Pty Ltd, s. 45. Alleged attempt by Visy Paper to induce another business (Northern Pacific Paper) to enter into a market sharing agreement in relation to the collection of recyclable waste paper.

Proceedings instituted 18.11.98. The ACCC sought orders against Visy Paper including declarations, injunctions, orders requiring the institution of a trade practices compliance program and costs. It also sought penalties against Visy Paper and two senior employees. The matter was heard 16–18.8.00 and 10–12.10.00 before Justice Sackville. On 20.11.00

Justice Sackville dismissed the ACCC's application with costs. On 29.11.00 the ACCC appealed. Appeal heard 17–18.5.01 before Justices Hill, North and Conti.

On 10.8.01 the Full Federal Court upheld the ACCC's appeal. The court found by a 2:1 majority (Justices Hill and North, Justice Conti dissenting) Visy had breached s. 45, and remitted the matter to the trial judge (Justice Sackville) to consider what, if any, pecuniary penalty should be imposed (*ACCC v Visy Paper Pty Ltd [2001] FCA 1075*). Visy obtained special leave to appeal to the High Court and the matter was heard on 3.12.02.

On 8.10.03 the High Court found that Visy Paper Pty Ltd had contravened s. 45 of the Trade Practices Act which deals with anti-competitive agreements.

Visy had attempted to reach an agreement to prevent its competitor, Northern Pacific Paper Pty Ltd, a waste paper collection company, from taking its customers but claimed this was not unlawful because of a technicality in s. 45(6) the Act.

By a 5:1 majority, the High Court agreed with the Full Federal Court that the conduct was illegal. In a joint judgment, their Honours Chief Justice Gleeson and Justices McHugh, Gummow and Hayne said that 'section 45(6) provides to Visy Paper no answer to the case made against it by the ACCC'.

They observed that the focus should fall on the content of an agreement rather than the manner of its expression, stating that 'the relevant inquiry is about what may be done under the contract, arrangement or understanding, not how it is drafted.'

The case represents the first time the scope of s. 45(6) has been comprehensively considered by the High Court. The decision is a significant contributor to clarifying the operation of that section.

The High Court's construction of section 45(6) resulted in Visy's conduct being strictly prohibited by s. 45.

The matter has been remitted to the Federal Court to consider the issue of penalty.

Rhonwood Pty Ltd, s. 45A. Alleged price fixing.

Proceedings instituted on 11.12.03. The ACCC alleged that Woolworths (SA) Pty Ltd, the Arnhem Club Incorporated and Rhonwood Pty Ltd (trading as the Walkabout Tavern) had breached the price fixing provisions of the Act in the market for take-away alcohol in Nhulunbuy, NT by agreeing to stop discounting those products.

Woolworths and the Arnhem Club offered the ACCC consent court orders and court enforceable undertakings to provide \$300 000 to establish a service to address alcohol-related problems in Nhulunbuy, NT.

The court action is continuing against Rhonwood Pty Ltd.

A further directions hearing for the matter is listed before the Federal Court, Darwin, on 4.12.03. A penalty hearing is scheduled in the Federal Court from 2–4.2.04.

Woolworths Limited, Liquorland (Australia) Pty Ltd, ss. 45 and 45(4D). Alleged primary boycotts, restrictive agreements.

Proceedings instituted on 27.6.03. The ACCC alleged that the companies' conduct contravened the exclusionary (primary boycott) provisions of the Trade Practices Act to substantially lessen competition in packaged take-away liquor markets.

The ACCC instituted legal proceedings against Liquorland for 30 contraventions and Woolworths for 16 contraventions of the Act. The ACCC is seeking declarations, injunctions, pecuniary penalties, findings of fact, orders relating to trade practices compliance programs and costs.

On 23.7.03 Justice Allsop made orders by consent, setting out the timetable for progressing the case.

AMWU, AWU and CEPU, s. 45D. Alleged secondary boycott for the purpose of causing substantial loss or damage.

Proceedings instituted on 16.5.03 against the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU), the Australian Workers' Union (AWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) alleging that they had breached the secondary boycott provisions of the Trade Practices Act.

The ACCC is seeking declarations, injunctions, pecuniary penalties, implementation of a trade practices compliance program and publishing of notices.

An application for final orders to be made in the proceeding by consent of the parties was heard by the court on 11.9.03. The ACCC is waiting for the court's decision.

Metro Brick and Midland Brick Company Pty Ltd, s. 45A. Alleged price fixing agreements.

Proceedings instituted on 27.6.03.

The ACCC alleges that between September and November 2001 company representatives had several meetings and telephone conversations during which they reached price fixing arrangements or understandings about bricks supplied to builders in Western Australia.

It is alleged the arrangement contained a provision that the prices for all clay brick products supplied by Metro and/or Midland would increase by approximately 3 per cent for trade builders from in or about October 2001 and for major builders from in or about January 2002.

It is also alleged the companies reached an agreement or understanding that the tender price at which Metro Brick was to supply Verticore; and Midland Brick was to supply Maxibrick to major builders would not be below \$570 per thousand bricks.

The ACCC is seeking declarations, injunctions, pecuniary penalties, other remedial orders and costs.

A directions hearing was listed for 28.11.03.

Rural Press Limited and ors, ss. 45, 46. Misuse of market power and anti-competitive agreement in relation to the withdrawal of *The River News* regional newspaper from the Mannum area in South Australia.

Proceedings instituted on 14.7.99 against Rural Press Limited and its subsidiary, Bridge Printing Office Pty Ltd, in respect of ss. 45 and 46, and its employees Ian Law and Trevor McAuliffe for being knowingly concerned. Also instituted against Waikerie Printing House Pty Ltd in respect of s. 45 and its directors, Paul and Darnley Taylor, for being knowingly concerned.

On 1.3.01 judgment was handed down in the Federal Court, Adelaide. Rural Press Limited and its subsidiary, Bridge Printing Office Pty Ltd were found to have misused their market power in the market for regional newspapers in the Murray bridge area in contravention of s. 46. Law and McAuliffe were found to have been knowingly concerned in that contravention. Rural Press, Bridge Printing Office and Waikerie printing House were found to have entered into and given effect to an anti-competitive agreement concerning the circulation of *The River News* in contravention of s. 45. Law, McAuliffe, Paul and Darnley Taylor were found to have been knowingly concerned in that contravention.

On 7.8.01 the Federal Court, Adelaide, imposed penalties of \$600 000 against Rural Press Limited for misusing its market power and for making and giving effect to a market sharing agreement contrary to the Trade Practices Act. Justice Mansfield also imposed individual penalties of \$70 000 against the general manager of Rural Press' Regional Publishing Division, Ian Law, and its South Australian state manager, Trevor McAuliffe, for being knowingly concerned in the contraventions. Waikerie Printing House and its director, Paul Taylor, were penalised \$75 000 for entering into the market sharing arrangement with Rural Press.

The Rural Press respondents appealed the court's decision that they contravened ss. 45 and 46 of the Act. The ACCC appealed the court's decision on penalties. The appeals were heard by the Full Federal Court on 4-5.3.02. On 16.7.02 the Full Federal Court decided that the arrangement between Rural Press, Bridge Printing and Waikerie Printing House did not contain an exclusionary provision but did substantially lessen competition in the Murray Bridge market for regional newspapers in breach of s. 45 of the Act. It also decided that Rural Press and Bridge Printing did not misuse their market power in breach of s. 46 of the Act.

On 13.8.02 the ACCC filed an application for special leave to appeal to the High Court from the 16.7.02 decision of the Full Federal Court. The appeal relates to the decision that Rural Press and Bridge Printing did not breach ss. 45 (exclusionary provision) and 46 of the Act.

The Rural Press respondents also filed an application for special leave to appeal to the High Court in relation to the Full Federal Court's decision that the parties had entered into and given effect to an arrangement to substantially lessen competition in the market in breach of s. 45 of the Act.

On 11.4.03 the High Court granted the ACCC special leave application to appeal. The appeal will concern the application of s. 45 of the Act, which relates to the agreements that lessen competition (and in particular the meaning of 'exclusionary provisions' as defined in s. 4D) and s. 46, which relates to the misuse of market power. The High Court also granted Rural Press's application for special leave to appeal. The appeal was heard by the High Court sitting in Adelaide on 13 and 14.8.03. Judgment is pending.

ABB Australia Limited, Wilson Transformer Company & ors (both power transformer and distribution transformer proceedings), ss. 45, 45A, 4D. Alleged agreements lessening competition, price fixing agreements, primary boycotts.

Proceedings instituted on 1.10.99 in power case and on 6.11.00 in the distribution case. The ACCC is seeking relief including pecuniary penalties and injunctions. Judgment on Alstom Australia Limited and some associated individual respondents was handed down on 6.4.01 in both proceedings. A total of \$7 million in penalties was awarded against Alstom.

Penalties totalling approximately \$15 million were ordered against Schneider Electric, Wilson Transformer Company and A W Tyree Transformers and their managing directors on 3.5.02. Schneider's penalty of \$7 million was reduced to \$5.5 million on appeal.

The matter continues against ABB and some individual respondents.

Medibank Private Limited, ss. 12DA, 12DB, 12DF of the ASIC Act (equivalent to ss. 52, 53 and 55A of the TPA). Alleged false, misleading or deceptive advertising of the price and benefits of health insurance products.

Proceedings instituted on 26.10.00.¹ On an appeal to the Full Federal Court, Medibank was successful in having a number of paragraphs of the ACCC's application struck out. The Full Court's decision was handed down on 13.9.02. The relevant paragraphs sought compensation for members misled by the allegedly misleading representations. The ACCC unsuccessfully sought special leave to appeal the Full Court's decision to the High Court (20.6.03). As a consequence, the ACCC has sought leave to further amend the application to require Medibank to make good the allegedly misleading representations under an injunction granted under s. 80 (as distinguished from paying compensation). Justice Ryan heard argument on the notice of motion regarding the further amendment of the application on 6.11.03 and has reserved his decision.

¹ Proceedings were instituted under ss. 12DA, 12DB(1)(c), 12DB(1)(e), 12DB(1)(g), 12DF of the ASIC Act as opposed to the Trade Practices Act. Until March 2002 health insurance was regulated through the ASIC Act. ASIC had, however, formally delegated the regulation of all consumer protection aspects of health insurance to the Commission through the use of nominated Commission officers as delegates.

The substantive case has been set for hearing before Justice Ryan in the first available three weeks in February or March 2004.

Qantas Airways Limited, s. 46. Alleged misuse of market power.

Proceedings instituted 7.5.02 in the Federal Court, Sydney. The ACCC is alleging that Qantas misused its market power by increasing capacity and reducing prices in response to the entry of Virgin Blue Airlines on the Brisbane-Adelaide route. The ACCC is seeking penalties, declarations, injunctions, a new or upgraded trade practices compliance program, costs and findings of fact.

The first directions hearing was held on 12.6.02.

On 12.7.02 Qantas moved to strike out the statement of claim.

Justice Gyles dismissed the motion to strike out on 28.2.03. The next directions hearing was on 11.9.03 and the matter is set down for trial from 24.11.03.

Leahy Petroleum Pty Ltd & ors, s. 45. Alleged price fixing in relation to retail petrol prices in Ballarat, Victoria. Proceedings against:

- Leahy Petroleum Pty Ltd, Leahy Petroleum-Retail Pty Ltd, and Mr Robin Palmer
- Triton 2001 Pty Ltd and Mr Anthony Rosenow
- Brumar (Vic) Pty Ltd and Mr Garry Dalton
- Justco Pty Ltd and Mr Justin Bentley
- Apco Service Stations Pty Ltd and Mr Peter Anderson
- J Chisholm Pty Ltd
- Balgee Oil (administrators appointed/subject to deed of company arrangement) Pty Ltd and Mr John Gourley, Mr Robert Levick and Mr Peter Muller.

Proceedings instituted 21.5.02 in the Federal Court, Melbourne, with some respondents added on 20.12.02. The ACCC is seeking penalties, injunctions, declarations, findings of fact, the implementation of a trade practices compliance program, and costs.

Penalty hearings in relation to J Chisholm Pty Ltd, Mr Levick, Justco and Mr Bentley have been heard and the parties are awaiting judgment. Interlocutory steps are being undertaken regarding the proceedings against the other respondents.

Leahy Petroleum Pty Ltd & anor, s. 48. Alleged resale price maintenance.

Proceedings instituted 21.5.02 in the Federal Court, Melbourne, against Leahy Petroleum Pty Ltd and its general manager, Mr Robin Palmer, about the termination of supply to Mr Trevor Oliver. Mr Oliver, a Buangor service station owner, alleged that he had been telephoned by his supplier, Leahy Petroleum Pty Ltd, about a rise in retail petrol prices of about 10 cents at 10 am that day. Mr Oliver did not increase his retail price. Several weeks later Leahy Petroleum ceased supply to Mr Oliver's business.

The ACCC is seeking penalties, injunctions, declarations, findings of fact, the implementation of a trade practices compliance program and costs. Interlocutory steps are currently being undertaken.

Fila Sports Oceania Pty Ltd, ss. 46, 47. Alleged misuse of market power, exclusive dealing.

Proceedings instituted on 5.9.02 in the Federal Court, Sydney, with the ACCC also taking action against the current and former managing directors of Fila, Mr Craig Reidy and Mr David Carney, for their alleged involvement.

The ACCC 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 ACCC is seeking remedies against Fila and the individuals, including pecuniary penalties, declarations, injunctions preventing Fila from engaging in similar conduct in the future, findings of fact and an order for Fila to update its existing trade practices compliance program.

A directions hearing was held on 4.10.02.

On 28.4.03 Justice Hill heard the notice of motion by the first and third respondents to transfer the proceedings to the Federal Court's Victorian registry and the applicant's notice of motion to obtain an order for discovery. On 8.5.03 Justice Hill ordered that the matter be transferred to the Victorian Registry of the Federal Court. He also ordered that the first respondent give discovery of the categories of documents (as set out in the schedule A to the orders) by 27.6.03.

At the directions hearing on 5.8.03 Justice Heerey in Sydney made orders setting out a timetable for the progress of litigation.

A further directions hearing is listed for 16.12.03.

Eurong Beach Resort Limited and ors, ss. 45, 46, 47, 60. Alleged price fixing and market sharing, misuse of market power, exclusive dealing, harassment and coercion.

Proceedings instituted on 5.9.02 in the Federal Court, Brisbane, against Eurong Beach Resort Limited, Mr Sidney Albert Melksham, Jaigear Pty Ltd, Oser Pty Ltd and Ms Angela Kay Burger alleging predatory pricing and other conduct in contravention of the Trade Practices Act, in relation to vehicular barge services to Fraser Island.

The ACCC is seeking declarations, injunctions, pecuniary penalties, adverse publicity orders and the implementation of a trade practices compliance program.

A directions hearing is set down for 12.12.03.

Baxter Healthcare Pty Ltd, ss. 46, 47. Alleged misuse of market power, exclusive dealing

Proceedings instituted on 1.11.02 in the Federal Court, Sydney.

The ACCC alleged that Baxter entered into long-term, exclusive, bundled contracts of between three and five years to be the sole or primary supplier of large-volume parenteral fluids (intravenous fluids), parenteral nutrition, irrigating solutions and peritoneal dialysis products with the purchasing authorities of New South Wales, the Australian Capital Territory, Western Australia, South Australia and Queensland. It alleged that the purpose of the conduct was to damage Baxter's competitors, Fresenius Medical Care Australia Pty Ltd and Gambro Pty Ltd, in the relevant peritoneal dialysis market in contravention of s. 46 of the Act. The ACCC further alleges that the bundling of the products into long-term exclusive contracts contravenes the exclusive dealing provisions of the Act.

The ACCC is seeking penalties, findings of fact, declarations, injunctions, and orders for Baxter to review its trade practices compliance program.

The matter is currently progressing through interlocutory stages. A new trial date has been set for 17.5.04.

Dermalogica Pty Ltd, s. 48. Alleged resale price maintenance.

Proceedings instituted on 21.11.02. On 16.9.02 Dermalogica Pty Ltd wrote to two retailers stating that it strongly discouraged the selling of its products for more or less than their suggested retail price. Dermalogica noted that the retailers were offering its product range on their websites for lower than the

recommended retail price. Dermalogica requested that the retailers adjust their online retailing prices.

Dermalogica's web guidelines also stated that a violation of its policy could result in account termination and legal action.

The ACCC is seeking declarations, pecuniary penalties and injunctions.

The matter was heard in the Federal Court on 14–15.7.03. Justice Goldberg reserved his decision in respect of contested claims and penalty in respect of the uncontested claims.

George Weston Foods Limited, s. 45.
Alleged price fixing.

Proceedings instituted on 5.12.02. The ACCC alleged an attempt by George Weston and Mr Loneragan to induce a competitor to agree to increase the wholesale price of wheaten flour in contravention of the Trade Practices Act.

The ACCC alleged that in November 1999 Mr Loneragan called senior representatives of a competitor stating that George Weston was raising its prices and that they should cooperate and do the same. At the time Mr Loneragan was a divisional chief executive of George Weston, responsible for its milling activities nationally.

The ACCC further alleged that Mr Loneragan made a second call to the same competitor stating that George Weston was putting flour prices up and was looking for cooperation from that competitor.

The ACCC sought declarations, penalties, injunctions and costs.

Directions hearing before Justice Gyles on 7.2.03 and 17.7.03. A notice of motion filed by George Weston relating to a claim of legal professional privilege was heard on 14.4.03 by Justice Conti with judgment on 18.6.03. The next directions hearing was on 11.9.03.

New South Wales fire protection companies, ss. 45, 52. Alleged market sharing, price collusion and misleading or deceptive conduct.

Proceedings were instituted on 31.5.02 against four companies and several individuals, alleging that they entered into and/or gave effect to anti-competitive arrangements, and engaged in misleading or deceptive conduct regarding tenders for the supply of fire protection services in buildings in Sydney and Newcastle in breach of the Trade Practices Act.

The ACCC alleged the conduct occurred between 1996 and 1999. The ACCC investigation began as a

result of the Tyco Group discovering through its trade practices compliance and training program that the conduct had occurred and voluntarily approached the ACCC with information.

The companies that the ACCC is taking action against are:

- FFE Building Services Ltd
- Tyco Australia Pty Ltd
- Premier Fire Protection (NSW) Pty Ltd
- Metropolitan Fire Systems Pty Ltd (now part of Tyco).

The ACCC is seeking injunctions and declarations against all the companies. It is also seeking penalties and costs against FFE Building Services Ltd, Premier Fire Protection (NSW) Pty Ltd and several individuals.

The matter was set down for hearing for three weeks beginning 24.11.03 before Justice Wilcox in Sydney.

Hoffmann–La Roche, BASF Aktiengesellschaft and Takeda Chemical Industries, ss. 45 and 45A. Alleged market sharing and price fixing.

Proceedings instituted on 23.8.01.

The ACCC alleged that F.Hoffmann–La Roche (Switzerland), BASF Aktiengesellschaft (Germany), Takeda Chemical Industries (Japan), various related companies in the Asia-Pacific region and foreign executives entered into a global price-fixing arrangement of human vitamin C. The ACCC also alleged that an integral part of the arrangements was the allocation of global market shares among the foreign companies for the distribution of human vitamin C. None of the Australian subsidiaries have been joined to the action.

The proceedings arise from alleged agreements that were made and implemented overseas between January 1991 and October 1995 and which was part of the broader global vitamins cartel which came to an end in about 1999. In 2001 the ACCC was successful in securing record penalties of \$26 million against Roche Vitamins Australia Pty Ltd, BASF Australia Limited, and Aventis Animal Nutrition Pty Ltd for their involvement in arrangements to fix prices and allocate market shares of animal vitamins A and E and pre-mix.

The ACCC has obtained leave of the Federal Court to serve the proceedings on some of the respondents located in Switzerland, Germany and Hong Kong, and is preparing to seek similar leave regarding the remaining respondents.

McMahon Services Pty Ltd, SA Demolition & Salvage Pty Ltd and DCD Enterprises Pty Ltd, ss. 45A and 46. Alleged price fixing, misuse of market power.

Proceedings instituted on 24.1.03 in the Federal Court, Adelaide, against McMahon Services Pty Ltd, SA Demolition & Salvage Pty Ltd, DCD Enterprises Pty Ltd (trading as D & V Services) and a number of their representatives for alleged price fixing of a tender for demolition and asbestos removal work.

In late 2000 the Defence Estate Office of the Australian Department of Defence invited a number of companies to tender for a project involving the removal of asbestos and the demolition of structures at its site in Salisbury, South Australia. McMahon Services and SA Demolition were two of the companies invited to tender.

The ACCC alleged that in response to the invitation to tender:

- McMahon Services communicated to SA Demolition (through D & V Services), the price that SA Demolition should tender for the project
- McMahon Services advised SA Demolition and D & V Services that if SA Demolition tendered at the price specified and McMahon Services was awarded the tender, it would give the companies \$50 000
- McMahon Services also advised that if it won the tender it would subcontract D & V Services to undertake the asbestos removal component of the project and furthermore, may provide SA Demolition with some work on the project carting materials
- SA Demolition tendered at the specified price
- in or around the time that it was awarded the tender, McMahon Services sub-contracted D & V Services to carry out the asbestos removal work on the project
- soon after, McMahon Services paid \$50 000 to D & V Services and SA Demolition.

The ACCC is seeking orders including declarations, pecuniary penalties, injunctions, findings of fact, the implementation of a trade practices compliance program and costs.

The next directions hearing is scheduled for 5.2.04 in the Federal Court, Adelaide. The trial will commence on 8.3.04.

Unconscionable conduct

Lux Pty Ltd, ss. 51AB, 60. Alleged unconscionable conduct with accompanying harassment and coercion by a company towards an intellectually impaired couple to secure the sale of a Lux vacuum cleaner.

Proceedings were instituted on 27.7.00. Trial commenced on 22–26.4.02, 7–11.4.03 and was finished on 20.10.03. In addition to the matter, the court has also heard a number of arguments from opposing counsels regarding the admissibility of certain evidence and the applicability of privilege status of a number of documents.

Justice Nicholson ruled in favour of the ACCC on the admissibility of certain evidence and essentially ruled in favour of the ACCC to apply privilege status to a number of documents, allowing a limited number of documents to forfeit any privilege status.

Justice Nicholson did, however, rule in favour of Lux regarding the admissibility of evidence from their expert witness.

Orders have been made by Justice Nicholson for the filing of written closing submissions at which time the matter will be reserved awaiting his ruling.

Esanda Finance Corporation Ltd and ors, ss. 51AB, 60. Alleged unconscionable conduct with accompanying harassment and coercion.

On 12.4.01 the ACCC instituted proceedings in the Federal Court against Esanda Finance Corporation Ltd, Capalaba Pty Ltd trading as Nationwide Mercantile Services, and a number of individuals alleging the use of physical force, undue harassment and coercion, and unconscionable conduct in connection with the supply and payment for services by a consumer. The ACCC has also alleged some individuals breached s. 23 of the *WA Fair Trading Act 1987* (which mirrors s. 60 of the *Trade Practices Act*).

In the proceedings against Esanda Finance Corporation Ltd, Capalaba Pty Ltd and three individuals' consent orders were filed on 21.7.03 but the court has not yet made orders. A trial involving three individuals (6th to 8th respondents) took place on 21.7.03. Awaiting judgment.

Westfield Shopping Centre Management Co. (Qld) Pty Ltd and ors, ss. 51AC, 52. Alleged unconscionable conduct, misleading or deceptive conduct.

Proceedings instituted 29.10.01 in the Federal Court, Brisbane, against Shopping Centre Manager, Westfield.

Some related companies and representatives of Westfield have also been joined in the proceedings for allegedly aiding or abetting or being knowingly concerned in the misleading or deceptive conduct.

The ACCC alleged that Westfield contravened the misleading or deceptive conduct provisions of the Act through misrepresentations made in the course of leasing negotiations to former tenants of the Indooroopilly Shopping Centre, Brisbane (previously managed by Westfield).

It also alleged that Westfield acted unconscionably by refusing to finalise a settlement with a small business tenant regarding the misleading and deceptive conduct unless:

- the former tenants, among other things, withdrew their complaint to the ACCC and notified it that they were satisfied with the settlement
- an undertaking was received by Westfield from the ACCC that it would cease its investigations into the matter.

The ACCC is seeking court orders including findings of fact, declarations that the parties have breached the relevant provisions of the Act, injunctions preventing the repetition of similar conduct, damages for the former tenants and costs.

Consent orders for directions filed on 2.11.01, 4.2.02, 13.6.02, 12.5.03 and 15.7.03. The defence of the respondents was filed on 8.3.02. Further court orders were made on 13.9.02 and 29.10.02 on a timetable for the remaining steps before trial. All evidence was filed at 15.8.03. Respondent's notice of motion for mediation of quantum was heard on 30.7.03. The court ordered that all issues in the proceedings be mediated on a date to be agreed by the parties.

Contravention of industry codes

Helen Ewing, director, and Chris Hudman, former director, Synergy in Business Pty Ltd (in liquidation), ss. 51AD, 52, 59(2). Alleged contravention of industry codes.

Proceedings instituted in the Federal Court, Adelaide, on 22.7.02 with the ACCC alleging 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'.

The ACCC alleged 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 ACCC's view is that Synergy is in fact a franchise and operates as such in practice.

The ACCC is seeking declarations, 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], injunctions, orders for refunds and costs.

Next directions hearing is on 3.12.03.

Consumer protection

Morgan Buckley Pty Ltd, ss. 52, 53(e). Alleged false, misleading or deceptive conduct in relation to the price of legal services provided by Morgan Buckley to clients.

Proceedings instituted 27.6.03 in the Federal Court, Darwin, against Morgan Buckley and Anthony Whitelum, a partner and legal practitioner of the law firm.

The ACCC alleged that Morgan Buckley has engaged in conduct in breach of the Act by issuing tax invoices for legal fees to a client that implicitly represented that the invoices had been calculated in accordance with the retainer agreement between Morgan Buckley Pty Ltd and the client.

The ACCC alleged that the fee invoices had not been calculated in accordance with the retainer agreement with the result that the client had been overcharged. The case has been tentatively listed for hearing on 28.6.04.

Australian Biologics Testing Services Pty Ltd, ss. 52, 53(c), 55A. Alleged misleading and deceptive conduct, false or misleading representations, misleading conduct in relation to services.

Proceedings instituted on 1.7.03 in the Federal Court, Sydney.

Australian Biologics provides medical services including thermography, live blood analysis and the Bolans clot retraction test. It promoted these services in printed brochures and on the internet.

The ACCC alleged that Australian Biologics did not have reasonable grounds for making a number of specific statements about thermography, live blood analysis and the Bolans clot retraction test.

The ACCC is seeking declarations, injunctions, corrective notices, other remedial orders and costs.

A directions hearing was set down for 27.11.03.

Thorn Australia Pty Ltd, ss. 52, 53(g), 53C. Alleged misleading or deceptive conduct, making of a false representation concerning the existence of conditions and the failure to specify a full cash price for goods.

Proceedings were instituted on 23.5.03 against Thorn Australia Pty Ltd trading as Radio Rentals. The ACCC alleged that Radio Rentals made representations in its 'Rent Two, Get One Rent Free' advertising campaign in October and November 2002 and its 'Rent, Try, Buy' campaign in 2003 which were misleading. The ACCC also alleged that in these campaigns, Radio Rentals advertised the supply of goods at a weekly rental price but did not specify the cash price for the goods. The ACCC also alleges that in the 'Rent Two, Get One Rent Free' television advertising, Radio Rental did not disclose, or sufficiently disclose, the advertised offer was subject to terms and conditions.

The ACCC is seeking declarations, injunctions, corrective notices, other remedial orders and costs.

The matter was heard on 3.11.03 and Justice French reserved his decision.

Australian Icon Products Pty Ltd, s. 52. Alleged misleading and deceptive conduct in relation to representations that hand painted or carved Indigenous-style souvenirs were done by persons of Aboriginal descent.

On 19.3.03 proceedings were instituted in the Federal Court, Brisbane. On 4.4.03 interim orders, including injunctions and corrective notices, were granted by consent. The ACCC also sought final orders including declarations, injunctions, corrective notices, public notices and trade practices compliance training for management.

Directions hearing 23.5.03 adjourned until 4.7.03. Australian Icon went into voluntary administration on 23.6.03 and resolved on 2.7.03 that it would be wound up. A notice of motion seeking leave to proceed and summary judgment in respect of declaratory relief and costs was filed on 27.6.03, and adjourned to 12.9.03. On 10.7.03 an amended notice of motion was filed seeking default judgment in the alternative and declaratory relief only. On 12.9.03 there was a hearing of an amended notice of motion and application for leave to proceed, adjourned to a date to be fixed.

To be heard together with ACCC v Australian Aboriginal Art Pty Ltd & Ors for which proceedings were instituted on 5.9.03. (See Enforcement chapter.)

Global Pre Paid Communications Pty Ltd and In-Touch Networks Pty Ltd, ss. 52, 59. Alleged misleading representations about the level of projected profitability, location support and maintenance of vending machines that sell pre-paid telephone cards.

On 19.3.03 proceedings instituted in the Federal Court, Sydney.

On 9.4.03 the first directions hearing. Justice Gyles ordered timelines for requests for further and better particulars and filings of defences.

On 11.6.02 the companies were placed under external administration.

On 20.6.03 defences were due to be filed by the respondents, however, none were filed.

On 17.7.03 the second directions hearing. Justice Gyles ordered that the applicant file and serve the ACCC's amended statement of claim by 21.7.03; the respondent file and serve their defences by 18.8.03 and that the respondent could make any notice of motion (in relation to pleadings) by 13.8.03.

On 21.7.03 the ACCC's amended statement of claim was filed as ordered.

On 25.7.03 a notice of motion seeking orders for substituted service on two individuals yet to be served was made. The court agreed with the ACCC's proposed orders regarding service and all individuals have since been served.

Giraffe World Australia, ss. 52, 57, 61. Alleged referral selling and pyramid selling.

Proceedings instituted on 6.5.98 in the Federal Court, Sydney. Undertakings given by Giraffe World on 23.4.99 not to represent that the 'negative ion' mat it marketed produced negative ions, relieved health ailments or promoted health. On 29.6.99 the court found that Giraffe World had breached that undertaking. On 26.8.99 Justice Lindgren found in the Federal Court that Giraffe World Australia Pty Ltd (in liquidation) had engaged in misleading or deceptive conduct, promoted a pyramid selling scheme and engaged in referral selling. Justice Lindgren also found that Mr Akihiko Misuma, founder and director of Giraffe World and Mr Robin Han, its president and chief executive officer until November 1998, were knowingly concerned in, and a party to, the contraventions by Giraffe World.

In June 2000 the liquidator of Giraffe World commenced Supreme Court proceedings against the chairman of Giraffe World to recover funds for distribution to Giraffe World creditors. In March 2003 the Supreme Court ordered that those funds are not to be disbursed until judicial advice is obtained about whether it is appropriate for the liquidator to accept claims by members of Giraffe World for refunds for ion mats and claims for outstanding commission payments for recruiting new members to the company.

In July 2003 the ACCC was granted leave to intervene and make submissions in those proceedings that members' claims for unpaid commission income from an illegal pyramid selling scheme should not be accepted, but that claims for refunds for the negative ion mat that did not perform as represented, should be accepted.

Pacific Dunlop Limited (PDL), ss. 52, 75AD. Alleged misleading or deceptive conduct, liability for defective goods causing injuries—loss by injured individual.

Proceedings instituted on 21.1.00. The proceedings were initially brought under the representative action and product liability provisions of the Act. The ACCC sought compensation for a consumer who had allegedly developed a serious form of latex (rubber) allergy through the frequent and consistent use of PDL's Ansell brand of household rubber gloves. On 18.6.01 the Federal Court granted leave for the ACCC to amend its current application and amended statement of claim to include an action under the misleading or deceptive provisions of the Act.

In late December 2002 the consumer on whose behalf the ACCC had taken representative action under the product liability provisions of the Act accepted a private settlement of her compensation claim with PDL. The ACCC's action under s. 52 of the Act is still proceeding. A trial date is yet to be set.

Emerald Ocean Distributors Pty Ltd, Slendertone Health and Beauty Pty Ltd, ss. 51A, 52, 53(c). Alleged false and misleading representations by a firm about the benefits of electronic muscle stimulation products.

Proceedings instituted on 19.7.00 in the Federal Court, Perth. A directions hearing was held on 18.12.01. Leave was granted to the respondents to join the parent company, Bio Medical Research Ltd located in Ireland, as a cross respondent to the action and to serve notice outside of Australia and in Ireland. On 4.4.02 Justice Nicholson ruled that the cross-claim issue was to be heard at the trial for the main action. The trial commenced on 22.7.02 and the matter

has been partly heard. A directions hearing was held on 7.11.02 with arguments put forward on the admissibility of the respondent's expert and lay witnesses.

Justice Nicholson provided a ruling on these issues on 4.2.03, allowing most of the ACCC's objections to the respondent's lay witnesses to stand, but allowed the respondent's expert witnesses to give evidence.

The trial recommenced on 11–14.3.03, 19–20.6.03 and 28–29.7.03, but was not completed.

One further day to complete the trial is still to be set to hear evidence of an expert witness for BMR in the cross-claim and the evidence has no effect on the ACCC's case.

Info4pc.com Pty Ltd, ss. 52, 56, 58. Alleged misleading or deceptive conduct, bait advertising and accepting payment not intending to supply.

Proceedings instituted on 23.1.01 when the ACCC asked for an interim injunction in the Federal Court, Adelaide. A hearing on 24.1.01 removed the matter to the WA Federal Court. An ex parte interim injunction restrains the company from, among other things, advertising and accepting orders for computers and/or upgrades, and freezes the company's business bank account.

Procedural orders regarding discovery and other matters were made on 2.4.03. The matter is now only continuing against the director, James Rae, in view of ASIC's deregistration of Info4pc following failure by the company to comply with the reporting requirements of the *Corporations Act 2001*. Further directions are being sought.

On 31.7.02 Info4pc and James Rae, were fined a total of \$14 000 and ordered to apy costs on two motions for contempt of court dated 31.1.01 and 7.5.01.

Medical Benefits Fund of Australia Ltd (MBF) and John Bevins Pty Ltd, ss. 12DA, 12DB, 12DF of the ASIC Act. Alleged misleading or deceptive conduct.²

Proceedings were instituted on 8.2.01 in the Federal Court, Sydney, concerning print and television advertisements containing pregnancy-related images. It was also alleged that John Bevins Pty Ltd, an advertising agency, was knowingly concerned in the alleged breaches.

The ACCC alleged that fine print in the advertisements stating that the 12-month waiting period for pregnancy-related services would not be

² See footnote 1.

waived, were inadequate and unlikely to come to the attention of consumers.

Hill J handed down his decision on 9.9.02 making an order that the respondents pay the ACCC's costs and indicating that he proposed to make orders that MBF undertake corrective advertising on television and in newspapers because the original television and billboard advertisements were misleading. The matter was stood over to 20.9.02 to hear submissions from the parties as to the form of orders to be made. Following those submissions the Federal Court made orders for corrective advertising and this decision was appealed by MBF. The appeal was heard on 12.5.03 and the Full Federal Court reserved its decision.

John Bevins Pty Ltd, ss. 12DA, 12DB, 12DF of the ASIC Act. Alleged misleading or deceptive conduct.³

Proceedings instituted on 5.2.01 in the Federal Court, Sydney, with the MBF matter above. The court found that John Bevins Pty Ltd, MBF's advertising agent, was knowingly concerned in the alleged contraventions by MBF. This aspect of the case was also appealed and heard with the MBF proceedings on 13.5.03. The Full Federal Court similarly reserved its decision.

Signature Security Group Pty Limited, ss. 52, 53C, 53(e), 53(d), 53(g). Alleged misleading or deceptive conduct, cash prices to be stated in certain circumstances, false or misleading representations, alleged breach of s. 87B undertakings.

Proceedings instituted on 19.3.01 in the Federal Court, Sydney. The ACCC is seeking court orders including injunctions restraining Signature from making similar misrepresentations in the future; and declarations that Signature has contravened the relevant provisions of the Act.

On 13.1.03 Justice Stone of the Federal Court of Australia found that Signature's advertisements had specified prices without reference to an additional GST component payable and were therefore false, misleading and deceptive in contravention of ss. 52 and 53(e) of the Act. Advertisements which specified prices as 'from just \$295*' and elsewhere in the advertisement, in fine print, stated '* plus GST where applicable' were ruled to be false, misleading and deceptive and also found to have stated part of the price of the goods and services without specifying the cash price as well, in contravention of s. 53C of the Act.

³ See footnote 1.

Signature also contravened ss. 52 and 53(d) of the Act by representing to a particular customer that it had an arrangement which allowed it to quote its prices exclusive of GST when it did not in fact have such an arrangement. The court also ruled that, by promoting goods on a price plus GST basis, for example 'from \$295 plus GST', Signature had contravened s. 53C of the Act by stating part of the price of the goods and services without also specifying the cash price, and had also contravened certain s. 87B undertakings.

On 29.4.03 Justice Stone made declarations, injunctions restraining Signature from engaging in similar conduct for two years; and an order that Signature pay the ACCC's costs.

Multigroup Distribution Services Pty Ltd & ors, ss. 51A, 52. Alleged representations as to future matters, false or misleading conduct.

Proceedings instituted on 11.7.01 in the Federal Court, Brisbane. Individuals alleged to be knowingly concerned in the conduct are Mr John O'Neile and Mr Malcolm Roberts.

The ACCC alleges that between January and September 1999, Multigroup Distribution Services Pty Ltd misled or deceived, or was likely to mislead or deceive Mr Wayne Parker, a director of Parker Freight Express Pty Ltd about the provision of a transport contract in North Queensland to Parker Freight Express Pty Ltd.

The ACCC is seeking declarations, injunctions, compensation for Parker Freight Express, orders to implement a trade practices compliance program and costs.

The trial is set for five days starting on 19.4.04.

Berri Limited, ss. 52, 53(a), 53(eb), 55. Alleged misleading country of origin claims.

Proceedings were instituted on 13.8.01 in the Federal Court, Melbourne. It is alleged that between March 1999 and June 2000 Berri supplied Coles Supermarkets Australia Pty Ltd with Farmland brand orange juice concentrate that was labelled 'Made in Australia from Australian Fruit Juice'. It is alleged that the product contained imported juice.

The labelling on the Farmland brand orange juice concentrate product was changed around June 2000 to 'Made from a blend of quality Australian and imported fruit juices depending on seasonal availability'. It is alleged this and similar labelling, which has also appeared at various times on apple and other juice varieties sold under the Farmland,

Just Juice and Sunburst brands was misleading because Berri failed to use so far as available a majority of Australian produce in these products. It is alleged that in some instances several of the products contained no Australian juice.

The ACCC instituted further proceedings against Berri on 14.12.01 alleging the use of a seasonal qualifier on its pineapple juice products was misleading.

The two proceedings have now been consolidated and the ACCC is seeking declarations from the court that the labelling was misleading and injunctions restraining Berri from making similar representations in the future. It is also seeking court orders requiring Berri to publish corrective advertisements in national daily newspapers informing consumers of the misleading conduct; and requiring Berri to implement a corporate compliance program.

The matter is awaiting a trial date later this year.

World Netsafe, Contempt proceedings.

On 1.11.01 the ACCC instituted contempt proceedings against World Netsafe Pty Ltd and its sole director, Terence Butler. Justice Spender of the Federal Court, Brisbane, made extensive court orders on 8.12.02 regarding the ATTM Card Scheme which was promoted and marketed by World Netsafe and Mr Butler.

Justice Spender found that World Netsafe and Mr Butler had breached the Trade Practices Act including ss. 52, 53(aa), 53(c), 53(d), 57, 58, 59 and 61. An urgent ex parte application was heard on 1.11.01 and Spender J ordered that until Friday, 2.11.01 Mr Butler was to be restrained from leaving Australia, was not to approach within 500 metres of any airport or port, and was to surrender all passports held by him to the registrar of the Federal Court by 2.11.01.

On 2.11.01 consent orders were made on the basis of the following undertakings by Mr Butler, that he:

- would not to leave Australia without first receiving the ACCC's written consent
- would deliver all of his passports to the registrar of the Federal Court who would hold it or them unless authorised in writing by the ACCC to release it or them to Mr Butler
- would not, before 9.11.01 sell or agree to sell his property situated at Brookfield, Brisbane.

On 9.11.01 through his legal representatives, Mr Butler undertook not to sell, dispose or further

encumber or otherwise deal with his interest in his Brookfield property without first giving the ACCC five business days' written notice of his intention to do so. Spender J also ordered by consent of all parties that Mr Butler:

- complete a statement of the financial position of World Netsafe and a personal statement of his own financial position by 26.11.01
- deliver to the registry of the Federal Court a list of documents on the financial position of him and the company on or before 26.11.01
- attend before the registrar of the Federal Court to give information and answer questions about his personal property and the property of World Netsafe on a date to be notified by the registrar.

Justice Spender heard the contempt trial on various days in April and May 2002 and delivered his judgment on 6.3.03. Justice Spender found two counts of contempt against Mr Butler relating to one of the World Netsafe websites and the lack of provision of information to the ACCC in accordance with the substantive orders of 8.12.00. On 23.4.03 Justice Spender heard submissions relating to penalty and costs arising from the contempt judgment. The ACCC awaits Justice Spender's decision on these issues.

NRMA Health Pty Ltd trading as SGIC Health and SGIO Health, NRMA Insurance Ltd and Saatchi & Saatchi Australia Pty Ltd, ss. 12DA, 12DB, 12DF of the ASIC Act. Alleged misleading or deceptive conduct.⁴

Proceedings instituted on 5.11.01 in the Federal Court, Sydney, against NRMA Health Pty Ltd, NRMA Insurance Limited and Saatchi & Saatchi Australia Pty Ltd alleging misleading and deceptive advertising of health insurance products.

The ACCC alleged that the companies used print advertisements that depicted a woman nursing a new born baby, made representations guaranteeing 'free delivery' 'no matter how advanced your pregnancy is' to entice consumers to transfer or join their health insurance funds. The ACCC sought court orders including declarations that the companies contravened the relevant provisions of the *Australian Securities and Investments Commission Act 1989*.

On 4.7.02 the Federal Court made orders by consent for NRMA Health Pty Ltd and NRMA Insurance Ltd. The orders included declarations that

⁴ See footnote 1.

NRMA Health breached the relevant provisions of the ASIC Act, a requirement that NRMA Health inform consumers of the misleading conduct, waiver of waiting periods for those who were misled and the availability of refunds for excesses and copayments.

Saatchi & Saatchi Australia Pty Ltd, ss. 12DA, 12DB, 12DF of the ASIC Act. Alleged misleading or deceptive conduct.⁵

The ACCC alleged that Saatchi & Saatchi, NRMA's advertising agency, was involved in the contraventions outlined in the matter above and they were joined to the action as primary contraveners as opposed to being knowingly concerned. On 3.10.02 Justice Jacobsen dismissed the ACCC's application as it related to the involvement of Saatchi & Saatchi.

The ACCC lodged an appeal in the Full Federal Court that was heard on 13.5.03 with the appeal in the MBF and John Bevins matters referred to above. The decision was reserved.

Oceana Commercial Pty Ltd & ors, ss. 51A, 51AA, 51AC, 52, 53(a), 53A, 53(c), 53(e). Alleged representations as to future events without reasonable grounds, unconscionable conduct, misleading or deceptive conduct, misleading representations about the standard, quality, value, grade, composition, style, model, or history of goods or services, false or misleading representations in relation to the sale of land, misrepresentations about the performance characteristics of goods, false or misleading representations about the price of goods and services.

Proceedings instituted on 14.11.01 in the Federal Court, Brisbane, against the following respondents, alleging they had been involved in two-tier marketing on the Gold Coast:

- marketer: Oceana Commercial Pty Ltd (at the relevant time named Coral Reef Group Pty Ltd) and its director Christopher Bilborough
- finance consultant: Markfair Pty Ltd (at the relevant time trading as Investlend (Aust)), its manager Dudley James Quinlivan and alleged agent, Shane Andrews
- developer: Advanced Commercial Developments Pty Ltd (at the relevant time named Redwind Pty Ltd) and its directors Dean Cornish and John Grounds
- the Commonwealth Bank of Australia
- lawyers: Gregory Pointon and Rodney Johanson.

⁵ See footnote 1.

The ACCC alleged that Oceana Commercial entered into a marketing arrangement with a developer, Advanced Commercial Developments Pty Ltd, for a unit complex on the Gold Coast and then engaged National Asset Planning Corporation (NAPC) (in liquidation) to use two-tier marketing to sell the units. Alleged agents of NAPC Michael Byrom and Peter Eggenhuizen have also been joined in the proceedings.

Solicitors Gregory Pointon from Perrin Pointon Solicitors (who acted for the purchasers) and Rodney Johanson from Short Punch & Greatorix (who acted for the developer) have also been joined in this action. It is alleged that both Mr Pointon and Mr Johanson, when acting for purchasers who had been referred to their firms by NAPC, failed to tell their clients of the marketing fees and inflated prices. It is further alleged that Mr Pointon did this when acting for a couple from Cairns.

The ACCC is seeking court orders including findings of fact, a declaration that the parties have breached the relevant provisions of the Act, restraining injunctions, implementation by the parties of a trade practices compliance program, and costs.

Ten directions hearings have been held with the first on 3.12.01 and the most recent on 19.12.02. The trial in the matter was heard from 10.3.03 to 11.4.03, 4–20.6.03 and 8–11.7.03 before Justice Keifel in the Federal Court, Brisbane.

The matter is currently awaiting judgment.

Cadbury Schweppes Pty Ltd, ss. 52, 53(a), 55. Alleged misleading labels on cordial products.

Proceedings instituted on 22.3.02 in the Federal Court, Melbourne, with the ACCC seeking declarations that labelling breached the relevant provisions of the Act. It is also seeking an injunction restraining Cadbury Schweppes from supplying these and other drink products labelled with pictures of real fruit when such products are not made from and/or do not contain the fruit pictured. And it is seeking court orders requiring Cadbury Schweppes to issue in-store public disclosure notices and corrective advertising in newspapers and to implement a corporate compliance program.

The trial took place on 18 and 19.6.03 and the parties are now awaiting judgment.

IT&T AG, ss. 52, 55A, 64. Alleged misleading or deceptive conduct, certain misleading conduct in relation to services, assertion of right to payment for unsolicited goods or services or for making entry in directory.

On 28.3.02 the ACCC instituted proceedings in the Federal Court, Perth, against Swiss-based company, IT&T AG, alleging it engaged in misleading and deceptive conduct in relation to an international fax directory operated by the company.

On 2.5.02 an ex parte notice of motion filed by the ACCC was heard by Justice Nicholson who ordered that leave be granted to enable service out of jurisdiction. Service of statement of claim and application has now been effected.

On 13.8.03 Justice Nicholson made orders (following a directions hearing held on 10.6.03) giving IT&T AG leave to file a notice of appearance and a defence within the timeframes set out in the orders. Failure to file a notice of appearance and a defence within these timeframes (28 and 56 days respectively of service of the orders on the respondent) will result in judgment being entered against IT&T AG. The matter is to be listed for trial in the week commencing 8.7.04.

Remedies sought by the ACCC include declarations, injunctions, corrective notices, refunds, TPA compliance program and costs.

Advanced Medical Institute Pty Ltd (AMI), ss. 52, 53(a) and/or 53(aa), 53(c), 53(g), 55 and/or 55A. Alleged misleading or deceptive conduct, misrepresentations about goods and/or services being of a particular standard or quality, about the performance characteristics, uses or benefits, about the existence of a guarantee and about the nature, characteristics and suitability of treatments.

Proceedings instituted 19.4.02 in the Federal Court, Sydney, against Advanced Medical institute Pty Ltd (AMI) and its managing director, Jacov Vaisman.

The ACCC is alleging that some of AMI's representations are likely to have misled prospective patients about treatments offered by AMI for impotency and premature ejaculation.

The ACCC is seeking court orders including declarations, injunctions, corrective advertisements, refunds and community service orders.

It is also seeking orders that AMI disclose details of the failure rates and contra-indications of all forms of treatment to all future or prospective patients, before they commit to any treatment at AMI clinics, implementation of a trade practices compliance program and costs.

A trial date commencing 1.12.03 is scheduled.

Commonwealth Bank of Australia, ss. 52, 53. Alleged misleading or deceptive conduct.

Proceedings instituted on 25.9.02 in the Federal Court, Sydney.

The ACCC alleged false, misleading or deceptive advertising in the bank's Cricket Home Loan campaign which ran from 22.11.01 to 27.1.02 as part of the bank's 'No Regrets' advertising. The adverts contained the caption 'no establishment fee'. The ACCC argued it created the impression that customers applying for home loans who met standard home loan requirements would not incur an establishment fee; fine print was inadequate to dispel that impression. To qualify, customers had to hold two or three other bank products.

On 20.10.03 the Federal Court, Sydney, declared that television and in-branch advertising by the Commonwealth bank for one of its home loan campaigns misled consumers.

The court ruled that the advertisements were misleading and deceptive as they did not make clear that customers had to either hold or obtain these additional products to avoid an establishment fee.

The court also found breaches of:

- section 53(c), which prohibits misrepresentations as to the benefit of services
- section 53(e), which prohibits misrepresentations as to price
- section 53(g), which prohibits misrepresentations concerning the exclusion of any condition.

The court ordered injunctions and corrective advertising. The matter is before the court again on 20.11.03 for consideration of injunctive relief and the form and scope of advertising.

Harvey Norman Holdings Pty Ltd, ss. 52, 56. Alleged misleading or deceptive conduct, bait advertising.

Proceedings instituted on 7.11.02 in the Federal Court, Melbourne, against three companies in the Harvey Norman group.

The ACCC also instituted proceedings against two Harvey Norman corporate group individuals, John Slack-Smith and Paul D'Ambra and 15 Harvey Norman franchisees.

It is alleged that before the introduction of the GST in June 2000, national advertising was conducted for Harvey Norman Computers and Communications stores which featured a promotion for GST-related

software, Quicken Quickbooks, for \$199 with a bonus software bundle valued at more than \$900.

The ACCC alleged the Harvey Norman Quicken Quickbooks promotion was advertised when the parties were aware that quantities of the bonus software were insufficient to meet consumer demand.

The ACCC further alleged that the catalogue advertising misled consumers about the eligibility for taxation benefits associated with the purchase of Quicken Quickbooks software and digital cameras before the introduction of the GST.

The ACCC is seeking declarations, injunctions, corrective public notice, findings of fact and an independent audit of the companies' trade practices compliance program.

Investigation of this matter began in July 2000 but was delayed because of other court proceedings during the process of investigation. The ACCC also took action to have five franchisee companies reinstated that were voluntarily de-registered during the investigation process.

A further directions hearing is scheduled for the first available date in May 2004.

Mr David Francis, ss. 52, 53 and 55. Alleged misleading or deceptive conduct in the promotion of certain products which were represented as assisting in weight loss.

Civil proceedings instituted in the Federal Court, Melbourne, on 31.10.02. The ACCC is seeking declarations that Mr Francis breached and was knowingly concerned in contraventions of the relevant provisions of the Act, injunctions and costs. Directions hearings were held on 21.11.02 and 31.3.03. An application for final orders to be made in the proceedings by consent of the parties was heard by the court on 6.5.03. The ACCC is waiting for the court's decision.

Pest Free Australia Pty Ltd, ss. 52, 51A, 53(c). Alleged misleading or deceptive conduct, representations as to future matters, misrepresentations that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have.

Proceedings were instituted on 14.11.02 against Pest Free Australia Pty Ltd, a company that supplies a device that claims to rid premises of rats, cockroaches and other pests.

The ACCC alleged that Pest Free made false and misleading representations about the performance

characteristics of its 'Plug In Pest Free' electronic device in various television advertisements, newspaper advertisements, on its website and in various brochures and promotional material.

The ACCC sought declarations, corrective advertisements, injunctions, refunds to consumers, removal of the products from sale and costs.

Next directions hearing was set for 28.11.03.

National Telecoms Group Pty Ltd, ss. 52 and 53. Alleged misleading or deceptive conduct, false or misleading representations.

Proceedings instituted on 13.2.03 in the Federal Court, Melbourne.

The ACCC alleged that NTG, and several of its subsidiaries, supply telephony packages, often marketed under the name Synergy, to small and medium-sized businesses. These telephony packages allegedly consist of a lease on a new phone system and involve the transferring of the customer's fixed line telephony services to Direct Telecoms, a wholly owned subsidiary of NTG. Under these NTG telephony packages, the ACCC alleges a customer pays rent for a new phone system and may also receive a rebate on their telephone bill.

The ACCC alleged that, in the course of marketing these telephony packages, NTG and its agents, made representations to customers that:

- they would pay no more, or pay only marginally more, than they were currently paying for their telephony services, if they signed up to an NTG package
- they would receive a free phone system if they signed up to the NTG package
- the call rates for the telephony services provided in the NTG package would be the same or cheaper than the call rates that customer paid to their existing telephony provider.

The ACCC is seeking court orders including declarations; injunctions restraining NTG from engaging in the same conduct in the future; the implementation of a trade practices compliance program and an education and training program for its promoters, marketers and sellers of the NTG package; corrective advertising and costs.

On 19.3.03 Justice Weinberg made orders setting out particular documents for the parties to file with the court to progress the matter.

Product safety (Part V)

BMW (Australia) Limited, s. 65C. Product safety standards.

Proceedings instituted 28.10.02 in the Federal Court, Melbourne, regarding the safety warning carried on vehicle jacks supplied with BMW vehicles and in the vehicle owner's manual on safe usage instructions for the jack.

On 16.7.03 the Federal Court declared that BMW (Australia) Limited had supplied vehicle jacks and vehicle owner manuals that failed to comply with the mandatory consumer product safety standard for vehicle jacks.

In granting all the relief sought by the ACCC, Justice Marshall concluded:

- the ACCC had made out its case that the BMW specific vehicle jack did not comply with the mandatory standard
- BMW had not shown that the mandatory standard was invalid
- the mandatory standard was legally effective and that it fell to BMW to comply with it
- BMW had failed to comply with the mandatory standard.

In declaring that BMW had breached the Trade Practices Act, Justice Marshall also ordered that:

- BMW be restrained for three years from supplying vehicle jacks and usage instructions that do not comply with the mandatory vehicle jack standard
- BMW appoint an independent auditor to audit and report its trade practices compliance program annually for three years
- BMW recall non-complying vehicle jacks and usage instructions. The recall is to be effected publicly in major newspapers throughout Australia and by identifying all affected BMW customers and advising them separately in relation to the recall
- service bulletins be issued to authorised BMW dealers
- the company provide the ACCC with a written audit report detailing BMW's adherence to the recall program ordered; and
- BMW publish a related notice on its internet website.

Justice Marshall further ordered that BMW pay the ACCC's costs in the proceedings.

Earlier this year the ACCC accepted court enforceable undertakings from vehicle importer/distributors Daewoo, Audi and Proton about vehicle jacks that did not comply.

BMW claimed before and throughout the court proceedings that its warning to consumers was better than the one prescribed in the mandatory safety standard.

In rejecting this Justice Marshall observed that there was no conclusive evidence that the warning on BMW's jacks would more effectively prevent people from getting under a vehicle and injuring themselves. He noted also that it remained possible that on reading BMW's warning people might still get under a BMW by using makeshift supports other than the specific vehicle jack or vehicle support stands.

Justice Marshall commented that it is for the experts who wrote the standard rather than the court to better resolve the issues of safety in relation to the use of vehicle jacks. He also noted that BMW had made a request to Standards Australia to amend the warning in 1995 and that Standards Australia determined that the warning should remain as written.

An appeal hearing was listed for 19 November 2003.

Adjudication

The following authorisation applications and notifications are under consideration by the ACCC. New authorisation and notification matters are discussed in the Adjudication chapter.

Authorisation applications under consideration

TAB Agents' Association of New South Wales (A90885) Application for authorisation in relation to collective bargaining arrangements.

9.9.03 Application lodged.

The Council of Camden, Campbelltown City Council, Liverpool City Council, Wollondilly Shire Council, Wingecarribee Shire Council (A90886) Application for authorisation to collectively tender for the services of qualified contractors for kerbside collected waste material.

16.10.03 Application lodged.

The Showmen’s Guild of Australia (A90729)
Application for authorisation of the guild’s proposed code of conduct, rules and collective bargaining for sideshow entertainment at agricultural shows.

20.12.01 Draft determination issued.

15.4.02 Application amended. Second draft determination required.

9.4.03 Second draft determination issued.

Sisters of Charity Health Service Limited (A30216, A30219) Joint negotiation of hospital purchaser provider agreements (HPPA) with health funds and the Repatriation Commission and joint negotiation of purchasing arrangements with suppliers.

21.10.02 Application lodged.

21.8.03 Interim authorisation granted in part.

21.8.03 Draft determination issued.

23.9.03 Pre-decision conference held.

Queensland Newsagents Federation Ltd (QNF), Australian Newsagents Federation (ANF) (A90804) QNF/ANF seek authorisation to collectively represent newsagent members in their negotiations with certain publishers and distributors of newspapers and magazines.

12.10.01 Application lodged.

21.11.01 Interim authorisation denied.

29.4.02 Amended application.

29.8.02 Further amendment to application.

13.6.03 Draft determination issued.

25.7.03 ANF advised it intended to lodge a submission narrowing the scope of proposed conduct.

28.7.03 Pre decision conference held.

20.10.03 QNF lodged a submission narrowing the scope of conduct.

29.10.03 ANF lodged a submission narrowing the scope of conduct.

Air New Zealand on behalf of Star Alliance (A30209–10) Joint offers of discounted fares and other benefits to corporate customers by Star Alliance member airlines through the Star Joint Corporate Agreement.

22.5.02 Interim authorisation denied.

30.5.03 Draft determination issued.

Medicines Australia (CA90779 & A90780)
Application for revocation and substitution of an authorisation in respect of a code regulating the promotion of prescription medicines to healthcare practitioners by the pharmaceutical industry.

27.6.03 Draft determination issued.

Investment & Financial Services Association (A90857 & A90869) Application for revocation and substitution seeking re-authorisation of clauses 10.1 and 10.3 of its Standard No 11 Genetic Testing Policy.

12.12.02 Interim authorisation granted

8.10.03 Draft determination issued.

Australasian Institute of Mining & Metallurgy lodged an application for revocation and substitution seeking re-authorisation of its charter, by-laws, code of ethics, code for consultants, fee guidelines, JORC & VALMIN codes.

13.3.02 Draft determination issued.

29.4.02 Pre-decision conference held. Application deferred at request of applicant while it reviews the various codes constituting its application.

Allianz Aust Insurance, QBE Insurance Aust, NRMA Insurance (A30217–8) Joint provision of public liability insurance for not-for-profit organisations.

27.11.02 Interim authorisation granted.

28.4.03 Draft determination issued.

International Air Transport Association (A90855) Application for revocation and substitution of A90435 which was issued 19 years ago and relates to all activities other than those involving travel agents.

13.11.02 Application for revocation and substitution lodged.

15.4.03 Amended application lodged.

Australia and New Zealand Banking Group and others (A30224–5) Application for authorisation of an agreement between a group of 12 financial institutions to reduce EFTPOS interchange fees to zero.

21.2.03 Application lodged.

8.8.03 Draft determination issued.

1.9.03 Pre-decision conference held.

Australian Payments Clearing Association (A90617–19) Application for minor variation including proposed amendments to the high value clearing system regulations and procedures establishing new failure to settle rules.

24.9.03 Application withdrawn.

Australian Payments Clearing Association (A30228–9) Application for revocation and substitution of authorisations in relation to the rules governing the consumer electronic clearing system (CECS).

30.4.03 Application for revocation and substitution lodged.

27.8.03 Interim authorisation granted.

Australian Stock Exchange Limited (A90872) Application for authorisation in relation to section 2 of the ASX business rules which govern the operation of the stock exchange trading system (SEATS).

16.5.03 Application for authorisation lodged.

11.6.03 Interim authorisation granted.

Qantas Airways Limited/British Airways Plc (A30226–7) Application for authorisation of restated joint services agreement.

6.5.03 Application for authorisation lodged.

11.6.03 Interim authorisation granted.

Australian Direct Marketing Association (A90876) Application for revocation and substitution to extend the period of its current authorisation, and substitute with an amended code of practice if approved by the board of directors.

25.6.03 Application for revocation and substitution lodged.

13.8.03 Interim authorisation granted.

8.10.03 Applicant requested further consideration of application to be delayed until further amendments are made to the code of practice.

Mortgage Industry Association of Australia (A90880) Application for authorisation of its disciplinary rules.

19.8.03 Application lodged.

24.9.03 Interim authorisation granted.

Australian Stock Exchange Limited ASX Settlement and Transfer Corporation Pty Limited (A90881–4) Application for revocation and substitution of authorisations relating to the rules governing the operation of the clearing house electronic subregister system (CHESS).

14.8.03 Application for revocation and substitution lodged.

27.8.03 Interim authorisation granted with conditions.

David Jones Limited (A30228) Application for authorisation in relation to the participation of retail brand management businesses (or ‘concessions’) in David Jones promotions such as storewide and department-wide discounts.

19.8.03 Application lodged.

24.9.03 Interim authorisation granted.

Notifications under consideration

NZI Insurance Australia Ltd, Insurance Manufacturers of Australia Pty Ltd, SGIO Insurance Limited and SGIC General Insurance Limited, Insurance Australia Ltd, CGU—VACC Insurance Ltd, CGU Insurance Ltd (N31249, N91974–79) Recommendation to policy holders that they use preferred accident towing operators to tow their vehicles.

Geraldton Fuel Company Pty Ltd trading as Caltex Sunset (N70370) Discount of 4 cents per litre on fuel for customers presenting a voucher from Sunset supermarket.

Fuellink–Young (N31253) Offer of a 4 cent per litre discount on fuel with proof of purchase from the local IGA supermarket.

United Retail Pty Ltd (N91184) Offer of a discount on fuel to consumers with proof of purchase from Ritchie’s supermarket.

Honda Australia Motorcycle and Power Equipment Pty Ltd (N40595) Requirement of original equipment manufacturers who have contractual relationships with Honda MPE to deal only in original products. Use of copy products will result in termination of their original equipment manufacturers conditions of sale agreement.

The Royal Automobile Club of Queensland Ltd (N91185) Offer of loyalty discounts to private members depending on their length of membership.

Malpass Enterprises Pty Ltd (N91189) Discount of fuel for customers presenting a voucher from Walters’ IGA.

Lease Plan Australia Ltd (N40605) Imposing a fee of \$250 on clients who request vehicles from non-preferred suppliers.

Parlours Cobden Motor Food & Auto (N91188) Offer of a discount on fuel to customers of Richies’ IGA.

Andrews Oil Pty Ltd, Renmark Hotel Incorporated, G & S Koch & Sons Pty Ltd, Renmark Foodland (N60038) Offer of a 4 cent per litre discount on fuel on the condition that customers pay in cash and have a receipt totalling \$30 or more from IGA Foodland in Renmark, Loxton or the Renmark Hotel Motel.

GE Capital Australia (N40606) Offer of a co-branded credit card with the ability to accrue loyalty points on the condition that the applicant also acquires a membership in the relevant loyalty program from the operator of that program, Coles Myer Ltd.

Stihl Pty Ltd (N40607) Supply of Stihl products to dealers who participate in its imaging program on the condition that they do not acquire any competing product ranges for promotion and resale within their businesses.

Burger King Corporation (N31259) Granting of Hungry Jack's franchises on condition that the franchisee adheres to the BKC franchise agreement in particular acquiring goods and services from pre-approved suppliers and distributors.

Coles Supermarkets Australia Pty Ltd, Kmart Australia Ltd, Liquorland Australia Pty Ltd, Myer Stores Ltd, Target Australia Pty Ltd, Viking Office Products Pty Ltd, Fosseys Pty Ltd, Officeworks Superstores Pty Ltd, Liquorland (Qld) Pty Ltd, Coles Myer Limited, Liquorland Direct Pty Ltd, Newmart Pty Ltd, Coles Online Pty Ltd, Eureka Operations Pty Ltd, Katies Fashions Pty Ltd, ht.com.au Pty Ltd, Charles Carter (Norwest) Pty Ltd, Tyremaster (Wholesale) Pty Ltd (N91193-272) (1) Supply of loyalty program services to members of the public on condition they acquire a relevant credit card and related services from GE Capital Finance Australia. (2) Supply of loyalty program services to cardholders on condition they become members of the FlyBuys program operated by Loyalty Pacific. (3) Supply of bonus loyalty points on condition they acquire qualifying goods or services from other parties. (4) Supply of additional benefits including gift and discount vouchers on condition they acquire qualifying goods or services from other parties.

JVC2 Pty Ltd (N31261) Supply of discounted fuel to customers on the condition they provide proof of purchase no less than a nominated value from Woolworths Limited, Australian Safeway Stores Pty Ltd, Woolworths (Victoria) Pty Ltd, Woolworths (Qld) Pty Ltd and Woolworths (South Australia) Pty Ltd.

Zurich Australia Insurance Ltd (N31260) Offer of discounted compulsory third party insurance products and services to taxi industry participants on condition they also acquire comprehensive motor insurance for the same vehicle from Zurich Australian Insurance Ltd.

Byrono Pty Ltd (N91279) Offer of discounted fuel on presentation of Smith's supermarket docket on condition customer has minimum purchase of \$40.

Westoil Petroleum Pty Ltd (N91275) Offer of discounted petrol to customers with a receipt to the value of \$40 or more from Liquor Marketing Group Ltd.

Westoil Petroleum Pty Ltd (N91276) Offer of discounted fuel to customers presenting a receipt with a minimum value of \$30 from IGA supermarkets.

Marclef Pty Ltd trading as Hayes Petroleum (N91277) Offer of discounted fuel to customers on condition they present a receipt verifying the purchase of groceries in excess of \$30 from Franklins.

McWilliam's Wines Pty Ltd (N91294) Offer of a Henkell Trocken Piccolo at no charge and a 10 per cent discount off a 3-pack of Hankell Trocken Piccolo upon presentation at a Liquorland T/A Vintage Cellars store of coupons acquired from *Marie Claire* magazine.

RACV Sales and Marketing Pty Ltd (N40608) Offer to partially or fully reimburse the cost of mechanical repairs within 30 days of inspection on the condition customers are members of the Royal Automobile Club of Victoria and have purchased comprehensive or pre-purchased motor vehicle inspection products.

General Motors Acceptance Corporation Australia, Subaru (Aust) Pty Ltd, Interleasing, Swann Insurance (Australia) Pty Ltd (N40609-12) Subaru offering a discount on vehicles to dealers on condition they acquire wholesale finance from GMAC. GMAC offering a discount on finance services to consumers of Subaru motor vehicles on condition they acquire vehicles from wholesale dealers. Swann Insurance (Australia) supplying or discounting insurance services to consumers of Subaru motor vehicles on condition they acquire the vehicle from a wholesale dealer who can, in turn, offer insurance products on condition that the dealers acquire wholesale finance from GMAC.

Norvac Pty Ltd (N91282) Offer of discounted fuel to consumers on the condition that they will acquire, or have acquired goods of not less than a nominated value from participating Coles supermarket stores.

ANZ (N40613) Offer to employees of a rebate on the first year's annual fee on condition they use their ANZ low rebate MasterCard to purchase a Dell computer from Dell Computer Pty Ltd.

Mirvac Queensland Pty Limited (N91281) Offer to purchase vacant land in Mossvale on Manly development on condition purchaser enters into a building contract with Mirvac Homes for construction of a dwelling upon the land.

Westralia Airports Corporation Pty Ltd (N70374) Offer of a contract for the construction and operation of a baggage-handling and checked-bag screening facility at Perth airport on condition the successful proponent enters into various contracts with preferred suppliers for specialised goods or services.

TransACT Capital Communications Pty Ltd (N91299) Offer of a rebate to TransACT retail customers on the condition they enter into a 24-month service agreement with TransACT in relation to the TRANSGOLD service and a 24-month agreement with Actew AGL in relation to certain services.

Optus Internet Pty Ltd (N31262) Offer of a discount on Sony PlayStation online games to customers who use or will use Optus internet services or products on condition they acquire the Sony PlayStation online games from an Electronics Boutique outlet.

Nationwide News Pty Limited (N40433–5) Territorial distribution agreement—setting maximum price for home delivery—retail agency agreements (third line forcing).

ALH Group Pty Ltd (N91136) Sale of instructional occupational health and safety compliance programs to members of particular hospitality industry associations.

Andrianopoulos Motors Pty Ltd (N91171) Supply discount fuel upon proof of purchase from selected IGA Food-Way and IGA Food-Rite supermarkets and other alternative trading names from time to time operating in the greater Melbourne area, the Geelong Bellarine Peninsula district and the Mornington Peninsula.

Camp Counselors USA Pty Limited (N31246) Mandatory provision that students and young persons wishing to participate in its USA program do so on the condition that they use a particular travel agent to arrange their flights.

Eureka Operations Pty Ltd (N91137) Discount of 4 cents/litre in relation to the supply of petroleum products on condition that the customer has acquired goods of \$30 value from Coles supermarkets, Bi-Lo or Liquorland.

Helburn Petroleum Pty Ltd (N91170) Supply discount fuel upon proof of purchase from Coles Myer.

Maleny Fresh Foods Pty Ltd (N50145) Discounted price of petrol at participating service stations on the condition the customer has an approved docket issued by Maleny Fresh Foods.

New Success Pty Ltd (N91153) Supply discounted fuel upon proof of purchase from Coles Myer.

Optus Mobile Pty Ltd (N91150) Telpay proposes to supply persons who use wireless/mobile credit card software supplied by Telpay on condition that those persons will acquire mobile telecommunication services from Optus Mobile.

Origin Energy (Vic) Pty Ltd, Origin Energy Electricity Limited (N40578–9) Offer a rebate for certain customers who sign a market contract with the notifying parties and who remain on contract for a minimum of 12 months. Origin Energy Electricity Limited lodged a notification in which they offer a rebate for certain customers who sign a market contract with the notifying parties and who remain on contract for a minimum of 12 months.

Peter John Edwards (N91159) Shell service station supplying fuel at a discounted price to Coles Myer customers on presentation of a voucher.

AGL Retail Energy Limited, ACTEW Retail, AGL ACT Retail Investments Pty Ltd, AGL Electricity Limited, AGL Energy Sales & Marketing Limited, AGL South Australia, Dingo Blue (N30878–83) Offering discounted gas, electricity, ancillary or telecommunications services on condition that customers also acquire one or more additional services (third line forcing).

Swinburne University of Technology (N40466) Offer of a Bachelor of Technology and a Diploma of Technology to students who fulfil the requisite entry requirements (third line forcing).

Origin Energy Electricity Limited (N40470) Offer of rewards to Origin Energy Vic p/l (gas retailer) including reduction in gas bills (third line forcing).

Citygold Investments Pty Ltd (N70358) in relation to the Moreton Bay Court Perth residential housing development nominated builder Pindan Homes.

Honda Australia Motorcycle and Power Equipment Pty Ltd (N40557) in relation to an agreement for Australian dealers not to deal in copy products.

Australian Liquor Marketers Pty Ltd, Australian Liquor Marketers (WA) Pty Ltd, Australian Liquor Marketers (QLD) Pty Ltd (N31180–2) concerning the supply of liquor, cigarettes and promotional and marketing support on condition that independent grocery and liquor retailers acquire membership of a specified banner group.

DFA Australia Limited (N31227) in relation to individual investors receiving advice from an approved financial adviser.

Harliwich Investments Pty Ltd (N70362) in relation to the supply of land at Bondi and Randwick on condition that the purchaser contracts a nominated builder, has a supervision contract with Australian Property Systems Limited or related entity and engages a nominated quality surveyor.

Heritage Management Limited (N70361) in relation to a discount on administration fees to members of HML superannuation fund and/or the OneSource Investment Trust if the member has an account with nominated providers.

Liquorland (Australia) Pty Ltd (N91129) in relation to an arrangement where they offer a discount on specified beverages to customers who buy a 'Footy Feast' from Pizza Hut.

IGA Distribution Pty Ltd, Metcash Trading Limited (N40559–60, N40571–72) in relation to a proposal to supply a range of business development and support services and a discount of groceries and other products on condition that retailers to whom IGA supplies will not be involved with any other supermarket business other than IGA and will not participate or be a member of any other buying or promotional network competitive with the IGA network.

Origin Energy (Vic) Pty Ltd, Origin Energy Electricity Ltd (N40566–7) in relation to rebates to customers who sign a market contract with both companies and who remain on contract for a minimum of 12 months.

Australian Society of Orthodontists Inc (N91124) concerning the requirement that for someone to become a member of the society, they must also be a member of an approved professional association for dentists. Additionally, the society requires that if a member ceases to be a member of an approved professional association of dentists, or

ceases to be a registered orthodontist or registered dentist, that person ceases to be a member of the society.

Australian Competition Tribunal

New South Wales Department of Health (N90754–5) Policy that public pathologists exclusively provide pathology services to private in-patients in New South Wales public hospitals.

27.6.03 Final determination issued granting with conditions.

17.7.03 Appeal to the Australian Competition Tribunal.

Qantas Airways and Air New Zealand (A30220–2) Acquisition by Qantas of ordinary shares comprising up to a 22.5 per cent voting equity interest in Air New Zealand and collaborative arrangements between the parties.

10.4.03 Draft determination issued.

9.9.03 Final determination issued denying authorisation.

29.9.03 Appeal to the Australian Competition Tribunal.

Qantas Airways Limited and Air New Zealand Limited (A90862–3) Cooperation agreement—pricing and scheduling of passenger and freight services.

10.4.03 Draft determination issued.

9.9.03 Final determination issued denying authorisation.

29.9.03 Appeal to the Australian Competition Tribunal.

Certification trade marks

Completed

Consorzio Per La Tutela Del Formaggio Grana Padano (CTM 732270–1) Italian cheeses.

18.3.02 Initial assessment issued.

27.10.03 Withdrawn.

National Safety Council of Australia Ltd
(CTM 725527) Certification of audit services of occupational health and safety activities.

27.10.03 Withdrawn.

Standards Association of Australia
(CTM 743379) Certification of quality management systems under the 'Standards Mark'.

27.10.03 Withdrawn.

Wireless Ethernet Compatibility Alliance Inc.
(CTM 838376) Certification of wireless local area networking (WLAN) equipment as interoperable with each other.

11.11.02 Initial assessment issued.

25.9.03 Certificate issued.

Under consideration

Horticulture Australia Limited (formally Australian Horticultural Corporation)
(CTM 659736–7) to vary rules certifying a standard of quality in the handling, supply and management of horticultural products.

Australian Vine Improvement Association Inc.
(CTM 720347) Certification of grapevines, and related cuttings, buds, graftings, tissue cultures and strikings.

Australian Registered Cattle Breeders Association and Beef Improvement Association of Australia Inc. (CTM 727387)
Sale of beef cattle seedlot.

Recording Industry Association of America
(CTM 704384) Certification of enhanced CDs, musical sound recordings with accompanying text, graphics and audio-visual images with interactive capabilities.

Tasmanian Quality Assured Inc. (CTM 795314)
Quality assurance of Tasmanian agricultural, horticultural and other primary products.

Migration Institute of Australia Ltd
(CTM 786309) Certification of migration advisory services.

Healthy Waterways (CTM 763115) Certification of a wide range of goods and services relating to the use of the Brisbane River and Moreton Bay waterways.

Consorzio Del Prosciutto Di Parma
(CTM 815585) Certification of 'Parma' ham products.

Cornelis Johaanes & Marcella Maria De Groot
(CTM 798087) Certification of installers of a patented locking function for hinged doors or windows.

2.7.02 Initial assessment issued.

Department of Agriculture, Western Australia
(CTM 774429–30) Certification of food and beverage businesses involved in the production, processing, transport, storage, distribution and sale of agricultural, horticultural and forestry products.

The Institute of Inspection, Cleaning and Restoration (CTM 789517) Certification of technicians and firms within the carpet and upholstery cleaning industry.

22.9.03 Initial assessment issued.

Government of Thailand, Dept of Foreign Trade, Ministry of Commerce (CTM 891642)
Certification that rice is Thai Hom Mali rice.

Australian Gas Association (CTM 845494–5, 845497, 845499) Compliance with safety standards for gas appliances.

Verband Hannoverscher Warmblutzüchter E.V. (CTM 868690) Certification system for horses.

Australian Communications Industry Forum Limited (CTM 887036, 901898) Certification for industry compliance mark rules and code of conduct.

25.8.03 Initial assessment issued.

King Island Council (CTM 916199).

Meat and Livestock Limited (CTM 914767).

Hill and Knowlton (Australia) Pty Ltd
(CTM 871540).

HACCP Australia Pty Ltd (CTM 880083).

University of Sydney Glycemic Index Tested
(CTM 912626).

9.7.03 Initial assessment issued.

Belgian State Ambao (CTM 872652) Ambao chocolate products.

Wireless Ethernet Compatibility Alliance Inc.
(CTM 926160). Certification that venues support interoperable WLAN equipment. See also CTM 838376.

25.9.03 Initial assessment issued.

Aus-Meat Limited (CTM 872207–8).

National Association of Testing Authorities
(CTM 873239) NCS International certified quality management system.

17.10.03 Initial assessment issued.

Pyrenees Vignerons Association Inc.
(CTM 888055) Use of wine grapes grown in the Pyrenees region.

SmartUse Environmental Certification Pty Ltd
(CTM 882082).

Benchmark Certification (Conformance) Pty Ltd (CTM 92456–8).

Cotton Australian Limited (CTM 880641)

Scottish Cashmere Club Limited (CTM 422521)
Assignment of CTM from The Scottish Cashmere Association Ltd to the Scottish Cashmere Club Limited.

Australian Diabetes Educators Association Limited (CTM 919459) in relation to accreditation.

10.10.03 Initial assessment issued.

Egyptian Ministry of Economy and Foreign Trade (CTM 871855, 875282) in relation to Egyptian cotton.

25.9.03 Initial assessment issued.

Master Plumbers' and Mechanical Services Association of Australia (CTM 866421) in relation to plumbing products and services.

Association of Certified Turnaround Professionals Inc (CTM 890532)

25.9.03 Initial assessment issued.

International Foundation of Employees Benefit Plans Inc (CTM 899364) in relation to RPA retirement plans associate.

International Foundation of Employees Benefit Plans Inc (CTM 899365) in relation to GBA group benefits associate.

Australasian Biological Control Inc
(CTM 939875) in relation to IPM integrated pest management.

Copper Development Centre Australia Ltd
(CTM 905111) in relation to genuine copper–copper plumbing quality.

National Refrigeration and Airconditioning Council Ltd (CTM 945435) in relation to the ARC tick certification.

National Heart Foundation of Australia
(CTM 498188–90, 506334)

B-Qual Australia Pty Limited (CTM 874400) in relation to B-Qual Australia Pty Limited honey and honey products.

BKS Iyengar Yoga Association of Australia
(CTM 874400) in relation to BKS Iyengar Yoga Association of Australia teacher certification.

UpnP Implementers Corporation (CTM 903290) in relation to global and private access computer printers.

Standards Australia (CTM 740328) to vary rules governing the use of CTM 740328.

Law Society of Western Australia Inc
(CTM 947402)

Urban Rainwater Systems Pty Ltd
(CTM 953018) in relation to rainwater tank systems.

Australian Pome Fruit Improvement Program Limited (CTM 964237)

22.10.03 Initial assessment issued.