Enforcement

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

Anti-competitive agreements (Part IV)

Eurong Beach Resort Limited and ors

Alleged price fixing and market sharing (s. 45), misuse of market power (s. 46), exclusive dealing (s. 47), harassment and coercion (s. 60)

On 5 September 2002 the Commission filed proceedings in the Federal Court, Brisbane, against Eurong Beach Resort Limited, Mr Sidney 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 December 2000 a rival barge, the Manta Ray, began operating from Inskip Point near Rainbow Beach to Hook Point on the southern tip of Fraser Island. Before the Manta Ray's arrival, the only regular barge service on the Inskip Point–Hook Point route was operated by companies controlled by Mr Melksham. Those companies had held a virtual monopoly since 1989, apart from a brief period in late 1991 and early 1992.

The only practical way to get around Fraser Island, the world's largest sand island, is by 4WD vehicle. Barges operating on the Inskip Point route provide the most popular way to take vehicles to the island.

Before the Manta Ray's arrival, the cost of travelling to Fraser Island from Rainbow Beach on one of the Melksham companies' barges was $70 per standard vehicle (return), except for contract customers, who the Commission alleges were charged lower prices on condition they exclusively used the services of the Melksham companies.

Passengers cost an extra $4 each, with trailers an additional $22 to $64 depending on the length.

Since December 2000 the Melksham companies dropped their price so that it was $20 or less, with passengers and trailers free. The Commission alleges this was done to damage or eliminate their competitor Manta Ray.

The Commission further alleges that some of the Melksham companies have previously engaged in similar conduct against other barge operators on the Inskip Point route.

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

A directions hearing is listed for 7 March 2003.

Golden Casket Lottery Corporation Limited

Misuse of market power (s. 46)

On 8 October 2002 the Commission accepted court enforceable undertakings from Golden Casket Lottery Corporation Limited. This is an important development in the application of the Trade Practices Act to government-owned businesses and to exclusive distribution systems.

The Commission alleged that Golden Casket's decision in July 2001 to reject a Brisbane suburban newsagency's application for an online betting licence placed Golden Casket at risk of breaching s. 46. Golden Casket had advised the Commission it rejected the application largely because it was concerned that establishing a Golden Casket lottery agency in the Victoria Point Shopping Centre would 'cannibalise' the sales of an existing one.

The Commission expressed concern that Golden Casket has a substantial degree of power in the Queensland market for the supply of lottery operating services and used that power to protect the existing agent from competition. In particular, the Commission was concerned that Golden Casket had not adequately considered whether having two agencies in the same area would be viable and potentially more profitable for Golden Casket.

A Golden Casket agent need not be a newsagent but, as with the two agencies at the centre of this matter, generally is. In December 1997, in a move towards a more competitive newsagency system, consistent with that required by the Australian Competition Tribunal, the Commission revoked a previous authorisation that had allowed Queensland newsagencies to operate within a system of exclusive 'territories'. The Commission also substituted a further authorisation until 1 February 2001 to allow the industry time to adjust to the changes. In the present matter, the newsagency applying for the Golden Casket agency was within the area that would have been considered part of the 'zone' for the existing newsagency under the old Queensland Newsagents Federation Code of Ethics.

Golden Casket acknowledged that the rejection of the agency application in this instance risks breaching s. 46 of the Act. Accordingly, it offered court enforceable undertakings. These address the Commission's concerns and ensure future applications for Golden Casket agencies will not be rejected for a substantial purpose of preventing an applicant from competing with an existing one (for example in circumstances under which the appointment of the new agency would result in significant incremental lottery sales for Golden Casket).

As part of its court enforceable undertaking, Golden Casket has also agreed to:

- review, and if necessary amend, its agency selection criteria to ensure they do not contain factors which, if relied upon in determining whether to accept agency applications, could place Golden Casket at risk of breaching s. 46
- continue to make its selection criteria publicly available
- ensure that market analysis to assess the effect of appointing a proposed agent will be of a standard reasonably suitable for its intended purpose
- develop a public complaints-handling process
- upgrade its trade practices compliance program.

The Commission welcomed the court enforceable undertakings provided by Golden Casket and acknowledged the high level of cooperation it has provided in resolving the matter.

This case was particularly interesting given the High Court's recent consideration of a firm with market power refusing to supply a person that wished to become a wholesale distributor of its products. In *Melway Publishing v Hicks*, the majority held that Melway did not necessarily take advantage of its power in the market for Melbourne street directories where it refused supply to maintain an existing distribution system and that system had been in place before the company gained market power.

In the Commission's view, there are several important distinctions between Melways and Golden Casket. These include:

- Golden Casket did not develop its distribution system under competitive conditions. It has always had market power because of its exclusive ability to sell lottery products under its statutory monopoly.
- Melway's distributors onsold directories to specific and exclusive classes of retailers and did not compete directly with each other. Golden Casket agencies sell directly to the public and compete directly with surrounding agencies.
- Melway's system was entirely to maximise its own profits rather than to protect the business of its distributors from competition or promote social objectives.
- The High Court found Melways could not have sold more products had it allowed further distributors and therefore consumers were unaffected by the conduct. Golden Casket, on the other hand, could have increased sales overall as well as providing greater access and convenience to the public.
- Although the Melways directory was dominant in its market, there were other directories for Hicks to sell, whereas there is really no closely substitutable product for Golden Casket's gold lotto and instant scratch-it tickets.

Mark Leyden, Paul P T Khoo Pty Ltd, Stephen Robson Medical Pty Ltd, Paul Khoo and Stephen Robson

Alleged agreements lessening competition, primary boycotts (ss. 45(2)(a)(i), 45(2)(b)(i), 76(1)(c) and 76(1)(e) of the Trade Practices Act and of the Queensland Competition Code)

On 29 October 2002 the Federal Court made orders by consent finalising action against three obstetricians who provided private in-hospital obstetrics services in Rockhampton.

The Commission instituted proceedings in April 2002 against the obstetricians for alleged boycotts of 'No-Gap' billing arrangements offered by a

number of private health insurance funds. It alleged Dr Leyden, Dr Khoo and Dr Robson made arrangements in December 2000 and January 2001 that none of them would provide private in-hospital obstetrics services to their patients on a 'No-Gap' billing basis.

The outcome of the conduct was that about 200 patients had to pay a gap for the in-hospital medical expenses associated with the birth of their child.

The orders included findings that all three obstetricians engaged in conduct in contravention of the Trade Practices Act and/or the Competition Code of Queensland, injunctions restraining them from future like contraventions and costs.

Dr Leyden and Dr Khoo have provided the Commission with court enforceable undertakings to refund to affected patients the 'gaps' that the patients were required to pay when the obstetricians engaged in the conduct. Dr Robson has voluntarily paid to his patients a portion of the gap paid by them as a consequence of the arrangement. Almost $97 000 will be repaid to affected patients in and around the Rockhampton region, as a result of the Commission's action.

Although all three doctors provided after-hours services to each others' patients, there was no allegation of a contravention in relation to the after-hours roster.

Baxter Healthcare Pty Ltd

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

On 1 November 2002 the Commission filed proceedings in the Federal Court, Sydney, against Baxter Healthcare Pty Ltd.

The Commission alleges 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. Each state and territory purchasing authority acquires these products for supply to publicly funded health facilities, including public hospitals. The Commission alleges that Baxter took advantage of its market power by structuring contract terms for product supply so that the state or territory needed to acquire the products as a tied bundle of products to benefit from significantly lower prices.

The Commission alleges 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 Commission further alleges that the bundling of the products into long-term exclusive contracts contravenes the exclusive dealing provisions of the Act. It is alleged that Baxter engaged in this conduct for the purpose and with the effect or likely effect of substantially lessening competition in the relevant markets.

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

A directions hearing was held on 22 November 2002 in the Federal Court, Sydney, and a further directions hearing is listed for 16 April 2003.

Mergers (Part IV)

Australian Pharmaceutical Industries Limited (API)/Sigma Company Limited

Mergers (s. 90(9))

On 12 September 2002 the Commission decided not to authorise this proposed merger as it considered there was insufficient public benefit to outweigh the harm to competition.

The Commission took account of the effect of the merger in creating a company with 60 per cent of the pharmaceutical wholesaling market in NSW, Victoria and Queensland and more than 50 per cent in other states. With Mayne, the only other major wholesaler, it would account for almost 90 per cent of the market.

It considered that the scope for parallel conduct between the merged entity and Mayne would have been significant. Lower service levels and higher prices to pharmacists could increase the price of medicines for consumers.

The Commission also found that loyalty arrangements, such as banner groups and financial guarantees for pharmacists, which effectively tie pharmacists to wholesalers, limit the likelihood of entry by new competitors into the market. The deterioration in competitive pressures as a result of the merger would be a major public detriment.

API and Sigma claimed benefits from the merger would outweigh any detriment. While the Commission accepted that there would be some public benefit, it considered it would be insufficient to outweigh the detriment.

The companies also claimed that, on a combined revenue base of $3500 million, efficiency gains worth $20 million a year would flow from the merger. The Commission accepted that efficiency gains were likely, but considered that they may be offset by the reduced efficiency that goes with a slackening of competitive pressure on the firm. In addition, they would flow to the company and its shareholders rather than the community through lower prices.

API and Sigma also claimed that the merger would ensure continued community access to pharmaceuticals, enhance community health services, help it provide small business support, reduce Commonwealth expenditure on the Pharmaceutical Benefits Scheme (PBS), and enhance the export potential of its pharmaceutical manufacturing. The Commission found that either these benefits were likely to occur in any event, or were of relatively modest sizes. Some public benefits claimed were not accepted by the Commission because the parties failed to adequately substantiate them.

API and Sigma also claimed that the Commonwealth, through the PBS, constrains prices for 70 per cent of what it sells. The Commission found that the merged entity had scope to increase its wholesaling margin by almost 40 per cent (from the current seven per cent to the allowable 10 per cent) under the existing PBS arrangements. Further, there are no government price constraints on the other 30 per cent of the sales made by API/Sigma—around $1000 million worth. This is particularly important for those products that are available in pharmacies only, such as cold/flu remedies and allergy treatments, which amount to about half of this amount.

This would have guaranteed specified service levels for five years and pricing levels for PBS products for two years. The Commission was not satisfied that they were sufficient as they did not prevent the reduced competition and the potential impact on price and quality. The service levels specified in the undertaking were less than the combined level of service provided by API and Sigma now.

The Commission received more than 120 submissions from diverse parties including pharmacists, pharmaceutical manufacturers, pharmaceutical wholesalers, logistics providers, financial analysts and government agencies.

Opinions on the potential effects of the merger varied markedly. Most submissions from individual pharmacists supported the merger while most from non-pharmacists opposed it.

The full transcript of the Commission's determination is available from the ACCC website at <http://www.accc.gov.au>.

Fair trading (Part V)

Transformation 2012

Alleged representations as to future events without reasonable grounds (s. 51A), misleading or deceptive conduct (s. 52), misrepresentations about the performance characteristics of goods (s. 53(c))

On 11 September 2002 the Commission instituted proceedings in the Federal Court, Canberra, against Internet trader, Michael Desveaux.

The Commission is seeking an interim injunction to prevent Mr Desveaux making representations about health benefits from the use of the marketed products.

The Commission alleges that Mr Desveaux, via his Internet site <http://www.transformation2012.com.au>, engaged in misleading and deceptive conduct in relation to the marketing and sale of:

- unique water
- 02xyrich liquid oxygen
- colloidal silver
- colloidal gold
- sleepaweigh
- noni juice
- white powder gold and etherium gold
- olive leaf extract
- colloidal mineral
- stevia
- Peruvian maca
- biosun hopi candle
- colloidal silver makers.

Among the claims made are that consumption of the products can help treat and/or cure such diseases and infections as AIDS, cancer, herpes, hepatitis, Epstein Barr, multiple sclerosis, chronic fatigue syndrome, discoid lupus, alcoholism and drug additions, bronchial asthma, dermatitis and immune diseases.

The Commission alleges that Mr Desveaux engaged in misleading and deceptive conduct and made false or misleading representations because the consumption of the products would not produce any of the beneficial effects claimed.

The Commission is seeking orders including:

- declarations that Mr Desveaux breached the relevant provisions of the Trade Practices Act
- injunctions restraining Mr Desveaux from engaging in the same conduct in the future
- corrective advertising
- refunds for consumers
- an order requiring Mr Desveaux to undertake a trade practices compliance program
- findings of fact
- costs.

The Commission is also alleging that Mr Desveaux engaged in conduct designed to intimidate or harass an officer of the Commission in breach of provisions of the Trade Practices Act and the Crimes Act. The Commission is seeking orders that Mr Desveaux:

- not contact the Commission officer the subject of the alleged conduct
- will not disclose the Commission officer's details on his website or otherwise
- will cause to be displayed on his website and, via email distribution list, a corrective statement
- costs.

A directions hearing was held on 11 October 2002 and a trial date set for 3 February 2003.

Internet Registrations Australia Pty Ltd

Alleged misleading or deceptive conduct (s. 52), misleading representations about the standard, quality, value, grade, composition, style, model, history of goods or services (s. 53(aa)), performance characteristics of goods (s. 53(c)), a buyer's needs for goods or services (s. 53(f)), false or misleading representations (s. 53(g)), certain misleading conduct in relation to services (s. 55A), accepting payment without intending or being able to supply as ordered (s. 58), and assertion of right to payment for unsolicited goods or services or for making entry in directory (s. 64)

On 29 November 2002 the Commission accepted court enforceable undertakings by domain name reseller, Internet Registrations Australia, to refund recipients of its misleading Internet renewal notices who respond to its apology. The Federal Court, Canberra, also made orders against IRA for making false or misleading representations about registration and renewal of Internet domain names.

The Commission instituted proceedings in September 2002 after an influx of consumer complaints and inquiries about unsolicited domain name 'renewal advice' notices that looked like invoices for payment. The Commission contacted IRA advising them of the concerns and IRA then made an informal undertaking to the Commission that it would rectify its marketing practices.

The court orders include permanent injunctions stopping IRA from engaging in similar conduct in the future, requiring it to implement a trade practices compliance program, to pay an agreed amount of the Commission's costs, and declarations that the conduct of IRA had breached certain provisions of the Trade Practices Act. The misleading notices were distributed by IRA to about 70 000 recipients throughout Australia. Many recipients did not have a pre-existing relationship or prior dealings with IRA.

The court orders included that IRA had made false, misleading and/or deceptive claims in breach of the Trade Practices Act by representing to businesses that:

- it had a pre-existing relationship or prior dealing with them
- it had the authority to register or renew a consumer's domain name and could provide the services of registration or renewal
- it could register .com.au domain names on the Internet for periods of four, six, eight, or 10 years, and that registration for periods over two years would involve savings
- a payment for unsolicited domain name services must be made
- renewal fees paid by recipients for registration of .com.au domain names are not fully refundable even where the registration has been unsuccessful
- statutory warranties that the services will be rendered with due care and skill and be fit for the purpose made known by the consumer do not exist or may be excluded
- clauses of the terms and conditions posted on IRA's website were capable of avoiding the effect of the Act.

The court also declared that IRA had contravened provisions of the Act by:

- failing to supply domain name renewal services within a reasonable time or by the renewal deadline
- accepting payment for the provision of renewal services or 'renewal management' services where, at the time of acceptance of such payment, IRA intended to supply services materially different from the services which the recipient would reasonably expect to receive
- failing to supply domain name renewal services or domain name 'renewal management' services at all, due to not having possession of the recipient's registry key.

Dodo Internet Pty Ltd

Alleged misleading or deceptive conduct (s. 52), false or misleading representations (ss. 53(e), 53(g)), unconscionable conduct (s. 51AB)

On 17 September 2002 the Commission instituted proceedings in the Federal Court, Adelaide, against Dodo Internet Pty Ltd.

The Commission alleges that from about September 2001 to January 2002 Dodo made representations in its television advertisements, in pamphlets, on its website, and in telephone conversations between its sales representatives and consumers, to the effect that:

- it provided unlimited Internet access for $9.90 per month
- it provided Internet access with a local call cost for connection
- it provided Australia-wide Internet access at the cost of a local call
- the use of particular dial-in telephone numbers would provide Internet access at the cost of a local call
- it had no contracts or joining fees/minimum period agreements.

The Commission also alleges that from about September 2001 Dodo made representations on its website to the effect that its customers have no rights or remedies against Dodo in relation to the provision of its services.

The Commission alleges that Dodo engaged in misleading and deceptive conduct and made false or misleading representations because:

- from August to December 2001 consumers using the dial-in telephone number provided by Dodo for the Perth suburb of Wanneroo could not access the Internet through Dodo for the cost of a local call and incurred STD telephone call charges
- from August 2001 to April 2002 consumers using the dial-in telephone number provided by Dodo for Broome could not access the Internet through Dodo for the cost of a local call and incurred STD telephone call charges
- Dodo does not provide Australia-wide access for the cost of a local call as consumers in Broome are not able to access the Internet through Dodo for the cost of a local call and would incur STD telephone call charges
- from August 2001 Dodo sales representatives provided incorrect dial-in telephone numbers to some consumers in other parts of Australia and they incurred STD telephone call charges
- when consumers complained to Dodo about STD call charges incurred by them as a result of connecting to the Internet through Dodo, Dodo relied on terms and conditions on its website and denied liability for the STD charges
- Dodo's terms and conditions contain clauses that purport to exclude consumers' rights and remedies under statute and the general law.

The Commission further alleges that Dodo engaged in unconscionable conduct in its dealings with consumers who received large STD telephone bills as a result of relying on Dodo's misrepresentations.

The Commission is seeking court orders including:

- declarations
- injunctions
- corrective advertising
- compensation for affected consumers
- a trade practices compliance program
- costs.

A directions hearing was held on 25 November 2002 and a further directions hearing is listed for 6 February 2003.

Skybiz.Com Inc.

Pyramid selling (s. 61)

On 26 September 2002 the Federal Court declared that a United States web-based company,

Skybiz.Com Inc., breached the pyramid selling and other consumer protection provisions of the Trade Practices Act.

The orders restrain SkyBiz from repeating the conduct and require it to disclose to the Commission the names and contact details of Australian residents who took part in the scheme.

When the Commission instituted proceedings against SkyBiz.Com Inc., it alleged that between September 1999 and August 2000 SkyBiz operated and promoted the 'Skybiz 2000 Home Based Business Scheme' using a pyramid selling scheme.

The Commission alleged participants paid SkyBiz US$100 for a website to take part in the scheme. It alleged SkyBiz claimed participants could then earn monetary payments by introducing new consumers into the scheme and that the Skybiz scheme could be operated as an e-commerce business.

In settlement, SkyBiz.Com Inc. consented to orders which declared:

- the Skybiz scheme, operated by SkyBiz.Com Inc., was a pyramid selling scheme
- SkyBiz.Com Inc. represented that the Skybiz scheme could be used to engage in e-commerce when, in fact, it could not
- SkyBiz.Com Inc. attempted to induce people to take part in the Skybiz scheme by representing that those who joined would later receive money if they introduced new consumers into the Skybiz scheme, contingent on those new consumers recruiting further consumers, thereby engaging in referral selling which is prohibited under the Act
- SkyBiz.Com Inc. represented that the Skybiz scheme would be a profitable home-based business for all who took part when this was not the case, thereby making false or misleading representations
- SkyBiz.Com Inc. attempted to induce persons to take part in the Skybiz scheme by representing that those who joined would later receive payments.

The Commission noted that its action:

> ... was greatly assisted by the excellent relationships and level of cooperation it has built with its international counterparts. In particular, the FTC in the US was instrumental in assisting the ACCC in bringing this action. The FTC also has on-going proceedings against SkyBiz.Com Inc. in the US District Court.
>
> The ACCC has regularly communicated with its consumer protection enforcement counterparts from Canada, Japan, New Zealand and India, which have followed the ACCC's case against Skybiz with great interest.
>
> The information sharing that took place in Skybiz demonstrates the effectiveness of cooperation between consumer protection enforcement agencies.
>
> In particular the International Marketing Supervision Network has been central to international cooperation by consumer protection law enforcement agencies. As global business has expanded so too have the cooperative efforts of consumer protection bodies worldwide.

This action by the Commission follows an earlier court action in which the Federal Court, Perth, handed down orders by consent on 22 August 2001, which declared Mr Kevin Ryan, a Western Australian promoter of the Skybiz 2000 scheme, had breached the pyramid selling scheme prohibition section of the Act.

GIA Pty Ltd (in liquidation) t/a Tamar Knitting Mills

False or misleading representations as to place of origin (s. 53(eb)), knowingly providing false or misleading information in purported compliance with a statutory notice (s. 155(5))

On 23 October the Federal Court, Hobart, imposed a $50 000 fine on Tasmanian knitwear company GIA Pty Ltd (in liquidation), which traded as Tamar Knitting Mills, for falsely representing that Chinese-made polo shirts supplied by Tamar over a 12-month period were made in Tasmania by Tamar.

Former Tamar managing director, Mr Eric Ian Thompson, was fined $4000 by the court for having been knowingly concerned in the company's contravention.

The court also fined Tamar $5000 for knowingly providing false and misleading information to the Commission in response to a statutory notice issued by the Commission to Tamar. Mr Thompson was fined $1000 for being directly or knowingly concerned in the provision of the false and misleading information to the Commission.

The court found that after purchasing Chinese-made polo shirts from an importer, Tamar removed from each shirt the original collar label which stated that the polo shirt was made in China. It then substituted a 'Tamar' collar label, and attached a swing tag to each polo shirt falsely representing that the polo

shirt was 'Tasmanian' or was 'Made in Tasmania by Tamar Knitting Mills'. The polo shirts were then sold to the public by Tamar through the company's retail outlet in Launceston and via mail order to Lions Club members throughout Australia. The court found that at least 400 polo shirts were supplied with the false labelling.

In imposing penalties on Tamar and Mr Thompson for the place of origin misrepresentations, Heerey J stated:

> I regard the conduct constituting this offence as deplorable. There was deliberate and dishonest conduct designed to trick consumers. It was conduct that went on for a substantial time and might have continued indefinitely if not accidentally discovered.

Heerey J also commented in his judgment that he would have imposed a substantially greater fine on Mr Thompson had it not been for Mr Thompson's personal circumstances. Mr Thompson is 66 years old, retired and of limited financial means.

Heerey J stated that providing false or misleading information in response to a s. 155 notice is a serious offence as it hinders and obstructs the administration of the Trade Practices Act, and thus the protection of consumers and the interests of fair trading.

The defendants were ordered to pay the Commission's costs.

Wizard Mortgage Corporation Limited

Misleading or deceptive conduct (s. 52), misrepresentations about the performance characteristics of goods (s. 53(c)), misleading representations about the standard, quality, value, grade, composition, style, model, or history of goods or services (s. 53(aa))

On 20 October 2002 the Federal Court, Melbourne, found that Wizard Mortgage Corporation Limited engaged in misleading or deceptive conduct when advertising its home loan products on television. Merkel J made an order to restrain Wizard for 18 months from publishing or broadcasting advertisements for housing loans at specific interest rates with features the loans do not have.

The Commission alleged that a television advertisement, broadcast in Melbourne, Brisbane and the Gold Coast during June and July 2001 for Wizard, misled consumers about features available with Wizard's 'Rate Breaker' 5.64 per cent interest rate housing loan. These were:

- the capacity to have loan repayments directly credited from salary
- the option of changing from monthly repayments to fortnightly or weekly repayments
- the absence of ongoing monthly fees.

The features were available only to consumers who took out one of Wizard's other housing loans at a higher interest rate, not the Rate Breaker loan.

Merkel J stated:

> The contravening advertisement resulted from a systemic failure within Wizard to set in place procedures that ensured all advertising received legal approval.

In ordering the injunction sought by the Commission, he said:

> I am not satisfied that the procedures that Wizard has set in place since the advertisement are adequate to prevent a repetition of contravening conduct of the kind that has occurred.

While the injunction is to run for 18 months rather than the three years sought by the Commission, Merkel J said that he expected that within that time Wizard would establish and maintain appropriate and adequate procedures to ensure that the contravening conduct is not repeated.

He declined to order that Wizard implement a corporate compliance program or corrective advertising as sought by the Commission, stating he was satisfied the injunction ordered was, in the circumstances, a sufficient inducement for Wizard. He did not regard it as appropriate or necessary for the court to exercise its injunctive power to impose such a program on Wizard.

The South Australian Olive Corporation Pty Ltd, Inglewood Olive Processors Limited

Alleged misleading or deceptive conduct (s. 52), misleading representations about the standard, quality, value, grade, composition, style, model, or history of goods or services (s. 53(a)), false or misleading representations as to place of origin (s. 53(eb)), misleading representations as to the nature, manufacturing process, characteristics, suitability for their purpose or quantity of any goods (s. 55)

On 15 October 2002 the Commission instituted proceedings in the Federal Court, Adelaide, against The South Australian Olive Corporation Pty Ltd and Inglewood Olive Processors Limited, the producers and marketers of Viva brand olive oils, alleging misleading and deceptive conduct and false and misleading representations in relation to

country of origin on product labels, in television and magazine advertising, and on the website <http://www.barkworth.com.au>.

The Commission alleges that The South Australian Olive Corporation and Inglewood Olive Processors Limited engaged in misleading conduct by making various representations to the effect that Viva olive oils are Australian when, in fact, each bottle of Viva brand olive oil contains about 33 per cent imported olive oil.

The Commission is also taking action against Mr Mark Troy, a director of The South Australian Olive Corporation, for allegedly aiding or abetting or being knowingly concerned in the breaches.

The Commission is seeking court orders including:

- declarations
- injunctions
- corrective advertising
- a trade practices compliance program
- costs.

A directions hearing was held on 4 November 2002 and a further one listed for 5 February 2003.

Rod Turner Consulting Pty Ltd

Misleading or deceptive conduct (s. 52), sponsorship, approval or affiliation of a corporation (s. 53(d)) false or misleading representations (s. 53(e))

On 2 October 2002 the Federal Court made orders by consent granting declarations and injunctions against an accounting firm for its representation that it was a firm of chartered accountants when this was not so. The declaration also covered misrepresentations on the application of GST to residential rent and to water rates.

The Commission took legal action against Rod Turner Consulting Pty Ltd and Mr Rod Turner, its sole director, in July 2000. The firm, representing itself as chartered accountants, had written a letter signed by Mr Turner to a tenant that made false statements about the effect of the introduction of the then New Tax System. The letter claimed that because of the introduction of the GST from 1 July 2000 an extra 10 per cent would be payable on residential rent charged by a landlord—and that, from 20 June 2000, the landlord was including a GST component in the increased rent. The letter also claimed that water rates for the rented premises would carry a GST cost to the landlord.

The court found that Rod Turner Consulting Pty Ltd had breached s. 52(1) because of its chartered accountants' misrepresentation. The court also found the firm to be in breach of s. 52(1) for the misrepresentations it had made about the effect of the GST on residential rents and water rates. The court found that Mr Turner had been knowingly concerned in these breaches. The court restrained Rod Turner Consulting Pty Ltd from representing that it was a firm of chartered accountants and also Mr Turner from representing that he was a chartered accountant.

The court also ordered Mr Turner to attend a trade practices seminar, and for the firm and Mr Turner to contribute towards the Commission's costs.

Rod Turner Consulting Pty Ltd admitted promptly that its conduct of misrepresenting its professional qualifications and status was misleading and deceptive under the Trade Practices Act.

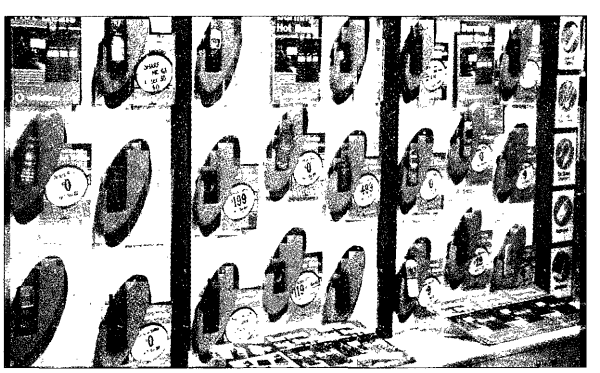
Vodafone

Misleading or deceptive conduct (s. 52)

On 4 October 2002 the Commission accepted from Vodaphone court enforceable undertakings to offer refunds to some pre-paid mobile telephone customers and provide full disclosure of contract conditions.

The undertakings resulted from a Commission investigation prompted by numerous complaints from Vodafone customers who alleged they were misled about a cut in the expiry period for their FastFone pre-paid call credits. Credits previously ran for 365 days but from 3 September 2001 Vodafone cut this to between 40 days and 200 days, depending on the amount of FastFone call credits a customer bought.

Vodafone acknowledged it did not inform all customers of the cut in the expiry period. Also, old advertising material at point-of-sale remained available after the change was introduced. Vodafone has subsequently re-introduced the 365-day call credit expiry period to the FastFone pre-paid service.



In the undertaking Vodaphone acknowledged that its conduct would be likely to breach the misleading conduct sections of the Trade Practices Act.

It agreed to:

- credit FastFone customers the number of call credits that were lost from their first activation between 3 September 2001 and 24 June 2002
- offer to supply any FastFone customer whose service has been de-activated with a new starter pack with appropriate call credits
- not misrepresent the expiry period of Vodafone FastFone pre-paid call credits for 12 months
- place corrective advertisements in *The Australian* newspaper
- review and report on its trade practices compliance program and internal policies.

The Commission noted that Vodafone cooperated with it once the matter had been brought to its attention.

Internet Name Protection Pty Ltd t/a Internet Name Group

Alleged misleading or deceptive conduct (s. 52), misleading representations about the standard, quality, value, grade, composition, style, model, history of goods or services (s. 53(aa)), performance characteristics of goods (s. 53(c)), sponsorship, approval or affiliation of a corporation (s. 53(d)), price of goods or services (s. 53(e)), a buyer's needs for goods or services (s. 53(f)), existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (s. 53(g)), certain misleading conduct in relation to services (s. 55A), accepting payment without intending or being able to supply as ordered (ss. 58(a)(ii), 58(b)), and assertion of right to payment for unsolicited goods or services or for making entry in directory (s. 64)

On 14 October 2002 orders by consent were made by Ryan J against Melbourne-based Internet Name Protection Pty Ltd (formerly trading as Internet Name Group or ING) and its directors, Mr Sasha Sudakov and Mr Mark Spektor, and a former employee of Internet Name Group.

The orders settle Federal Court proceedings brought by the Commission early this year against Internet Name Group (now in administration and subject to a deed of company arrangement), Mr Sudakov, Mr Spektor and the former employee. Internet Name Group had sent unsolicited invoices to small businesses throughout Australia seeking payment for domain name services including the registration and renewal of domain names.

The orders include injunctions restraining Internet Name Group from engaging in conduct that is misleading or deceptive, or likely to mislead or deceive, in connection with Internet domain names.

Internet Name Group will display an advertisement on its website, correcting its misrepresentations. In addition, the Federal Court made declarations that Internet Name Group had breached sections of the Trade Practices Act.

Mr Sudakov and Mr Spektor have been restrained by injunction from being knowingly concerned in or a party to any conduct of a similar nature in the future. A breach of those orders would put ING and Mr Sudakov and Mr Spektor at risk of proceedings for contempt of court. Both have also agreed to undertake, at their own expense, trade practices compliance training focussing specifically on the consumer protection provisions of the Act.

A former Internet Name Group employee, Mr Craig Missell, also a party to the Commission's action, agreed to injunctions by consent relating to a part of Internet Name Group's conduct, and to undertake trade practices compliance training.

In August this year Internet Name Group entered voluntary administration. On 8 October 2002 creditors in the administration voted that Internet Name Group enter a deed of company arrangement, allowing the former directors to regain their directorship of Internet Name Group, while the deed administrator retained control of the company's assets for the benefit of its creditors. Negotiation of the settlement of the Commission's Federal Court proceeding also involved an undertaking by the directors of ING to table a deed of company arrangement, with a view to maximising the possible cent per dollar refund for creditors. A majority of creditors were consumers who were worst affected by Internet Name Group's conduct—those who had paid for a service but did not receive any service at all.

Westfund Health Insurance Fund Limited

Misleading or deceptive advertising (ss. 12DA, 12DB(c), 12DG(g) and 12DF of the ASIC Act)[1]

On 16 October 2002 the Federal Court declared that Western District Health Fund Limited, trading as Westfund, engaged in misleading and deceptive conduct in relation to advertising its health insurance products to consumers.

The Commission instituted proceedings against Westfund in January 2002 alleging that in a television advertisement and on its website, Westfund represented that the fund would pay all hospital and medical expenses associated with all operations and that members would not be required to pay any excess or co-payment.

In fact, Westfund by law[2] could not pay all medical expenses for all operations and there were circumstances in which a member could be required to pay an excess or a co-payment. These representations also included two fine print disclaimers which failed to detract from the overall impression conveyed by the advertisement that a Westfund member would not be required by the fund to make any payment toward hospital or medical expenses associated with any operations.

As well as declaring that Westfund's conduct was misleading and deceptive, the Federal Court made orders, all with the consent of Westfund, for Westfund to:

- write to consumers who purchased health insurance from the fund between 15 February 2001 and 22 September 2001, informing them that they may have been misled by the advertisements and/or the website and that Westfund, for those members, offer to refund, to the extent possible:
  - hospital expenses not paid by Westfund
  - certain medical expenses
  - any excess or co-payment paid by the member
  - the cost of membership for those members who, as a result of having been misled, choose to leave Westfund
- publish a corrective statement on its website
- not make representations in the future about health insurance benefits without clearly and prominently displaying the extent to which an insured person is required to make any payment in respect of hospital and/or medical expenses associated with operations
- establish a trade practices compliance program.

Telstra Corporation Limited

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

On 15 November 2002 the Federal Court, Melbourne, declared that Telstra Corporation Limited engaged in misleading and deceptive conduct when advertising its pre-paid long distance 'Say G'day' calling card product.

1 The proceedings were instituted by the ACCC under the consumer protection provisions of the *ASIC Act 2001* that mirror provisions found in Part V (consumer protection) of the *Trade Practices Act 1974*. The Chief Executive Officer of the ACCC alleged that Westfund had contravened sections 12DA, 12DB(c), 12DB(g) and 12DF of the ASIC Act. At the time of the alleged conduct, health insurance fell within the definition of a financial product and was regulated through the ASIC Act. At this time, the Australian Securities and Investments Commission had formally delegated the regulation of all consumer protection aspects of health insurance to the ACCC through the use of nominated ACCC officers as delegates. Since 11 March 2002, health insurance has been subject to the consumer protection provisions of the *Trade Practices Act 1974*.

2 With exceptions, the *National Health Act 1953* proscribes the benefits an insurer can pay in relation to a procedure which is listed in the Medical Benefits Schedule.

The Commission instituted proceedings on 24 October 2002 alleging misleading and deceptive conduct, and false and misleading representations on the Say G'day cards and vouchers, website and associated marketing materials. All the alleged breaches relate to the charges incurred in accessing the long distance service using the 'FREECALL™ 1800 099 032' phone number.

The Commission also alleged that Telstra made various representations to the effect that the 1800 access number was 'free' or was 'a free call from fixed phones' and/or would not be material or significant in the context of the overall charges of the call to be placed. However, the Commission alleges the 1800 access number is not free but costs 53 cents per minute in addition to the call rates. It alleged that, in contrast with the 1800 access charge, the promoted call rate for overseas locations range from 5.9c per minute to $1.95 per minute.

The court made orders restraining Telstra from continuing to make misleading claims in relation to the costs associated with the calling cards.

Telstra also offered undertakings to the Commission, including a commitment to review its trade practices compliance procedures. Telstra has undertaken to waive the 53c per minute charge until corrected cards, vouchers and promotional materials are distributed to retailers.

Commonwealth Bank of Australia

Alleged misleading or deceptive conduct (s. 52)

On 25 October 2002 the Commission instituted proceedings against the Commonwealth Bank of Australia alleging false, misleading or deceptive advertising in one of its home loan campaigns, the Cricket Home Loan Campaign, which ran from 22 November 2001 to 27 January 2002 as part of the bank's No Regrets themed advertising.

The advertisements were broadcast during cricket telecasts. The advertisements featured cricket spectators and a cameraman doing things they would later 'regret' and promoted the bank's home loan as 'something you won't regret'. Prominently displayed during these advertisements was the caption 'No establishment fee'. In fine print at the bottom of the advertisements were the words 'Limited offer for selected Home Loans. Other fees and charges are payable. Minimum loan amount and conditions apply'.

In-branch advertising also carried 'no establishment fee' captions in bold text, with footnote conditions saying 'Fees and charges are payable. Conditions apply'.

To obtain a home loan without paying an establishment fee prospective home loan customers had to either currently hold, or take out, an additional two or three bank products such as a credit card, deposit account, combined home and contents insurance policy or mortgage protection insurance.

The Commission alleged that the clear impression conveyed by the advertisements was that customers applying for these home loans who met standard home loan requirements (such as creditworthiness) would not incur an establishment fee.

The Commission has alleged that the fine print conditions were inadequate to dispel that impression.

The Commission is seeking court orders including:

- declarations that the bank has breached ss. 52, 53(c), 53(e) and 53(g) of the Act
- injunctions restraining the bank from advertising home loans as being available without payment of an establishment fee if other products are required to be held or obtained by the customer to qualify, unless this is clearly specified
- refunds
- orders requiring the bank to publish corrective advertising nationally on the same television station and in branches
- costs.

The Commission's investigation and court action followed complaints from December 2001 from prospective home loan customers that they would have to pay an establishment fee.

A directions hearing was listed for 24 October 2002.

Commercial and General Publications Pty Ltd

Accepting payment without intending or being able to supply as ordered (s. 58), demanding payment for unsolicited services without a reasonable basis (s. 64(2A))

On 1 November 2002 the Federal Court imposed a fine of $5000 on the director of Commercial and General Publications Pty Ltd, Mr Anthony Hassett, for contraventions of the Trade Practices Act.

The court found that in late 1999 CGP and Mr Hassett accepted payment from five small businesses in Tasmania for advertising in a proposed Returned Services League publication when there were reasonable grounds for believing that his company would not be able to supply the advertising.

The defendants were acquitted on charges of demanding payment for unsolicited advertising from eight small businesses without a reasonable basis.

The unsolicited advertising charges concerned alleged unauthorised advertising appearing in the Tasmanian CWA and RSL annual magazines published by CGP. The CWA and RSL both advised the Commission that they had received complaints from Tasmanian small businesses alleging receipt of payment demands for unauthorised advertising appearing in their respective magazines published by CGP.

In setting the fine on Mr Hassett for the s. 58(b) contraventions, Heerey J considered that the risk/reward calculation was relevant to this kind of offence. The court noted that traders should not be encouraged to think that it is a worthwhile risk to accept and retain payments for services that are not likely to be delivered. Traders needed to be aware that the amount of the penalty imposed is likely to be substantially more than the amount of the payment accepted.

Product safety (Part V)

Lane Wrigley Pty Ltd

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

On 3 October 2002 the Commission accepted court enforceable undertakings from Lane Wrigley Pty Ltd, which imported children's cots that did not comply with the mandatory product safety standard.

Lane Wrigley undertook to implement a trade practices compliance program to reduce the possibility of similar breaches.

The Commission found that the cot was not deep enough to minimise the risk of a child climbing or falling out of it and contained protrusions and hazardous openings. Lane Wrigley had supplied the cots, known as the 8036 Baby Bed, to discount variety stores throughout Australia. The cot was designed and marketed as one that could also be converted into a bed.

The Commission noted that after it raised its concerns with Lane Wrigley the company acted promptly to cease further supply, to recall supplied cots and to cooperate fully in resolving the matter.

BMW (Australia) Limited

Alleged product safety standards and unsafe goods (s. 65C)

On 28 October 2002 the Commission instituted proceedings against BMW (Australia) Limited in relation to the safety warning carried on vehicle jacks supplied with BMW vehicles and in the vehicle owner's manual in respect of safe usage instructions for the jack.

The Commission has alleged that BMW has supplied vehicles equipped with a vehicle jack and a vehicle owner's manual that do not comply with the prescribed consumer product safety standard for vehicle jacks, namely, Australian/ New Zealand Standard AS/NZ 2693:1993—Vehicle Jacks.

The Commission alleges that BMW breached the Trade Practices Act by failing to include the full text of the warning to consumers: 'do not get under a vehicle supported only by a jack: use vehicle support stands'. The text of the warning is prescribed in the standard.

The Commission is seeking:

- a finding of facts
- a declaration that BMW has contravened the Act
- an injunction
- an order for a recall program
- an order for public notices
- an order that BMW have its trade practices compliance program independently audited and reported on
- costs.

A directions hearing was held on 13 December 2002 at which time the interlocutory timetable was set down. A further directions hearing is listed for 21 March 2003.