
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 has been set down for 8.3.04.

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 has been 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 s. 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 penalty hearing was 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 Liquorland and Woolworths had entered into contracts, arrangements and understandings which had the purpose of substantially lessening competition in a market and also contained an exclusionary provision in contravention of the Trade Practices Act.

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.

A further directions hearing is scheduled for 5.2.04 to argue categories of discovery to be provided by Woolworths.

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.

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.

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

Leahy Petroleum Pty Ltd & ors (Geelong), s. 45. Alleged price fixing and cartel conduct in relation to retail petrol prices in Geelong, Victoria.

The ACCC has instituted court proceedings against eight companies and 10 individuals, alleging that they fixed retail petrol prices in the Geelong area, in contravention of the Trade Practices Act. They are:

- Leahy Petroleum Pty Ltd, Mr Ian Carmichael and Mr Michael Warner
- Apco Service Stations Pty Ltd and Mr Peter Anderson
- Pegasus Retail Pty Ltd, Mr Bruno Gallucci and Mr Andrew Pitman
- United Geelong Pty Ltd and Mr Einokalevi Heikkila
- Brumar (Vic) Pty Ltd and Mr Garry Dalton
- United Retail Pty Ltd and Mr Colin Williamson
- Liberty Oil Pty Ltd and Mr Alan Shuvaly
- Andrianopoulos Motors Pty Ltd and Mr Christos Andrianopoulos.

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 ACCC through the use of nominated ACCC officers as delegates.

The respondents were involved in retailing or distributing petrol in the Geelong area under the BP, APCO, Mobil, Shell and Liberty brands.

The ACCC alleges that they were part of a long-standing price-fixing arrangement during the 1990s until December 2000. The ACCC alleges the respondents entered into arrangements or understandings to increase retail petrol prices by telephoning one another in advance and communicating the size and approximate time of a price rise. Further calls were made between the companies if any site did not raise its prices at the time discussed in an effort to make that site increase to the same price. The ACCC seeks penalties for more than 100 occasions from 1999 and 2000 when it alleges the companies entered into or gave effect to the arrangements.

The ACCC is seeking penalties, injunctions, declarations, findings of fact, the implementation of trade practices compliance programs and costs.

A directions hearing was held on 24 November 2003 before Justice Gray in Melbourne where he made orders setting out a timetable for the progress of the litigation stages between the parties.

A further directions hearing for these matters is listed for 19 April 2004 before Justice Gray in the Federal Court, Melbourne.

Leahy Petroleum Pty Ltd & ors (Ballarat), 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 Chisholm, Mr Levick, Justco and Mr Bentley have been heard and the parties are awaiting judgments. Interlocutory steps are being undertaken regarding the proceedings against the other respondents.

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 direction hearing was held before Justice Heerey on 27.11.03 at which time Fila withdrew its defence to the allegations and the ACCC discontinued its proceedings against Mr Craig Reidy.

On 9.12.03 Fila was placed into voluntary administration.

A penalty hearing has been scheduled for 26.3.04 in relation to the ACCC's proceedings against Fila. The proceedings against David Carney are continuing with the ACCC required to file any additional evidence upon which it intends to rely by 30.4.04.

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 notice of motion is set down for hearing on 5.2.04.

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 regarding contested claims and penalty regarding 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 12.2.04.

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 Commonwealth 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, however, 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.

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 28.1.04.

Consumer protection

Australian Aboriginal Art Pty Ltd, s. 52.

Alleged misleading or deceptive conduct in relation to the authenticity of Aboriginal souvenirs.

Proceedings instituted on 5.9.04 in the Federal Court, Brisbane, against Australian Aboriginal Art Pty Ltd (AAA) and its director, Mr Hank de Jonge and former director Mr Bruce Read. The ACCC alleged that AAA has engaged in misleading or deceptive conduct by making certain representations about the authenticity of the Aboriginal-style souvenirs it manufactured and distributed to souvenir retailers throughout Australia and advertised on its website. The ACCC alleged that by placing stickers on souvenir products stating 'Australian Aboriginal Art', 'Aboriginal Art' and/or 'Authentic', AAA represented that those souvenirs were made by Aboriginal artists or artists who were of Aboriginal descent.

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

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

against AIP and the matter has been stood over to be heard concurrently with the AAA matter.

On 9.10.03 directions providing for an interlocutory timetable were made by consent. The matter was returned for further directions on 8.12.03.

Crowded Planet, s. 52. Alleged misleading or deceptive conduct.

Proceedings for contempt instituted on 30.9.03 in the Federal Court, Sydney, against Mr David ZeroPopulationGrowth Hughes.

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

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

On 18.3.02 Justice Allsop made orders that Mr Hughes be restrained from supplying oral contraceptives in Australia without disclosing in any promotional medium, including any internet site, that:

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

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

A directions hearing was set down for 16.12.03 before Justice Conti in Sydney.

Henry Kaye and National Investment Institute Pty Ltd, s. 52. Alleged misleading or deceptive conduct.

Proceedings instituted on 30.9.03 in the Federal Court, Melbourne, against Mr Henry Kaye and National Investment Institute Pty Ltd (NII) alleging misleading and deceptive conduct over the promotion of a 'millionaires' property investment strategy.

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

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

Similar advertisements were also broadcast on radio.

The ACCC further alleged that Mr Kaye:

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

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

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

The ACCC sought:

- injunctions restraining Mr Kaye and NII from publishing the advertisements

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

On 8.10.03 in the Federal Court in Melbourne, Henry Kaye and NII, agreed not to publish any further advertisements promoting his 'millionaires property investment strategy, pending the final outcome of the court proceedings.

On 25.11.03 NII went into voluntary external administration with Andrew Hewitt of Grant Thornton appointed as the administrator. Accordingly the ACCC's proceedings against the company were automatically stayed under s. 440D of the *Corporations Act 2001*.

At a directions hearing on 24.12.03 Justice Goldberg set down an amended interlocutory timetable after considering factors including issues relating to the appointment of a receiver and administrator to NII. The trial is set down to start on 9.3.04.

Domain Names Australia Pty Ltd and Chesley Paul Rafferty, ss. 52, 64(2A). Alleged misleading or deceptive conduct, unsolicited services—asserted right to payment.

Proceedings instituted on 17.9.03 in the Federal Court, Melbourne, against internet domain name supplier, Domain Names Australia Pty Ltd and its sole director, Chesley Paul Rafferty for alleged breaches of the Trade Practices Act. The ACCC alleges that Domain Names has made false or misleading representations to businesses that held a registered internet domain name since at least June 2003. Domain Names sent notices inviting them to register a new internet domain name that was substantially similar to the business's existing domain name and styled like an invoice.

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

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

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

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

The ACCC is seeking:

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

The matter was heard at trial on 19.11.03 before Justice Finkelstein. Judgment was reserved.

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.

The matter has been listed for hearing on 7 June 2004.

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 regarding 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 22.6.03 we received a letter from the respondents outlining a number of issues with the statement of claim.

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.

On 7.8.03 a notice of motion was filed by 3rd and 4th respondents to strike out the statement of claim and on 13.8.03 the strike out application was heard and judgment was reserved. On 31.10.03 the statement of claim was struck out and the ACCC was given 28 days to file an amended statement of claim. In his judgment Justice Gyles was not critical of the ACCC and was also sympathetic to the difficulty in drafting a statement of claim of this nature.

On 28.11.03 he ordered an extension on filing the further amended statement of claim which was then filed on 18.12.03. The next directions hearing was held on 12.2.04.

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 pay costs on two motions for contempt of court dated 31.1.01 and 7.5.01.

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 in 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 Justice Spender 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. Justice Spender 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.²

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 ACCC 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 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.³

² See footnote 1.

³ See footnote 1.

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.

On 18.12.03, in a lengthy judgment, Justice Kiefel of the Federal Court, Brisbane, declared that companies which represented between 1997 and 1998 that residential units at the Gold Coast would increase in value over a 10 year period by approximately 8 per cent per annum, had engaged in misleading conduct.

Justice Kiefel also found that Mr Christopher Bilborough, Mr Shane Andrews, and Mr Michael Byrom were knowingly concerned in the

misleading conduct of Oceana Commercial Pty Ltd and Markfair Pty Ltd (trading as Investlend (Aust)).

Further, Justice Kiefel found that Mr Dudley Quinlivan (to 9 September 1998) was knowingly concerned in the misleading conduct and that Mr Bilborough and Mr Quinlivan conspired with Oceana Commercial and Investlend (Aust) to effect the contraventions.

The ACCC acted on a complaint received from a couple in Cairns who attended an investment seminar conducted by National Asset Planning Corporation Pty Ltd and were subsequently flown to the Gold Coast to view investment properties and visit a finance consultant, Investlend (Aust). The couple purchased a unit within a marketed development on that day.

Justice Kiefel further declared that a representation to the couple that Investlend (Aust) was a qualified financial adviser who would act in the couple's interests was also misleading.

The court did not, however, find that the conduct of the Commonwealth Bank, financing the couple's purchase of the unit, was unconscionable. The court also did not find that the conduct of the lawyers involved in the conveyancing of the property for the couple or that of the property developers, had contravened the Trade Practices Act.

The ACCC is still considering the judgment and the reasons for Justice Keifel's findings.

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.

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 6.2.04.

Product safety (Part V)

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

Proceedings instituted 28.10.02 in the Federal Court, Melbourne.

BMW Australia Limited has appealed a finding by Justice Marshall on 16.7.03 that BMW Australia Limited had breached the Act by supplying vehicle jacks and vehicle owner manuals between 1997 and 2002 that did not comply with the requirements of the mandatory consumer product safety standard for new vehicle jacks. The appeal was heard before Justices Gray, Weinberg and Goldberg in the Federal Court, Melbourne, on 16.12.03. The court has reserved its judgment.

Adjudication

The following new authorisation applications and notifications have been received by the ACCC. Authorisation applications and notifications under consideration can be found on the ACCC website.

New applications for authorisation

Victorian Brick and Blocklaying Training Foundation Ltd (A90887) Application on behalf of the Clay Brick and Paver Association of Victoria for revocation and substitution of A90738 to extend the current period of authorisation and increase the levy from \$1.00 per thousand bricks sold to \$2.00 per thousand bricks sold.

4.12.03 Application lodged.

Clay Brick and Paver Institute, Concrete Masonry Association of Australia Ltd (A90895) Clay Brick and Paver Institute and Concrete Masonry Association of Australia propose a levy of \$2.00 per thousand to be added to the price of bricks with the levy amount matched dollar for dollar by all members of the institute and a levy of 10 cents per square metre for all blocks sold by the Concrete Masonry Association of Australia. The levy will be used to subsidise employment of apprentice bricklayers.

18.12.03 Application lodged.

Northern Sydney Regional Organisation of Councils (A30231) Application for authorisation for joint tender for the services of qualified contractors to provide waste transfer processing

and disposal services to the respective local government areas.

11.12.03 Application lodged.

Inghams Enterprises Pty Ltd, Baiada Poultry Pty Ltd, Bartter Enterprises Pty Ltd, La Ionica Farming Operations Pty Ltd, Hazeldene Chicken Farms Pty Ltd (A90901) Applications for authorisation for collective negotiation by consenting Victorian chicken meat growers.

22.12.03 Applications for authorisation, interim authorisation lodged.

Inghams Enterprises Pty Ltd (A90888) Application for revocation and substitution of A90659 in relation to collective negotiation by chicken meat growers in Tasmania.

5.12.03 Application for revocation and substitution, interim authorisation lodged.

International Air Transport Association (A90791) Application for second minor variation to A90791, the IATA passenger agency program.

24.12.03 Application for minor variation lodged.

New notifications

Various Telstra Licensed Shops (N40621-60) In relation to the supply of a Telstra Licensed Shop product to retail customers on condition that the customer acquires or agrees to acquire mobile services or particular mobile plans from Telstra.

AGL ACT Retail Investments Pty Limited and ACTEW Retail Limited notification (N91300-1) Offer of a rebate on fixed term contracts for electricity, gas and dial-up internet services for customers within the region surrounding the Australian Capital Territory on condition that the customer enters into a 24-month service agreement with AGL and TransACT.

Perpetual Trustees Australia Ltd (N31264) Offer of the ME Ultimate Account with a Bpay facility on condition that customers open a bank account with Members Equity Pty Ltd from which Bpay payments can be made.

Subaru (Aust) Pty Lat and AutoNexus Pty Ltd (N40616-7) Supply of a vehicle to selected customers on condition the customer acquires the services of a rally service provider and has acquired or will acquire an international rally licence.

Liquorland (Qld) Pty Ltd (N91308–10) Lodged three notifications in relation to the offer of free Guinness Draft or beer if the customer acquires specific products from a Liquorland store.

Melbourne Central Custodian Pty Ltd (N91307) Granting of a licence to occupy retail premises located in the Melbourne Central Shopping Centre on condition the licensee acquires goods and services for fitting out the retail premises from a qualified building contactor nominated by MCC.

The notified conduct applies only to areas within the centre licensed to retail businesses under a proposed Short Term Occupation License.

Coffee Central Australia Pty Ltd & Supanews Franchising Pty Ltd (N40662–3) Lodged three notifications for their franchises in Victoria, NSW and Qld. (Coffee Central Australia Pty Ltd may change its corporate name to Supanews Franchising Pty Ltd (Supanews) in the near future.)

Franchisees are required to enter into an agreement with Tattersall's Sweeps, NSW Lottery Corporation and Golden Casket respectively to sell and process lottery products.

Sensis Pty Ltd (N40665) Supply of an online listing on the Yellow Pages Online site on condition that businesses and government entities will acquire particular services in the next publication of a metropolitan, local or regional Yellow Pages.

Central Queensland Petroleum Pty Ltd (N91315) Provision of a fuel discount to customers who have proof of purchase from Foodland Associated Ltd trading as Action Supermarkets.

Liquorland (Australia) Pty Ltd (N91314) Description of an arrangement with Shopfast whereby customers can buy a 4-pack of Heineken 500 ml cans for an introductory price of \$4.99 when buying \$60 or more worth of groceries from the Shopfast website. Groceries are required to be ordered and delivered between 17 November and 22 November 2003 inclusive and the offer is limited to one Heineken 4-pack per order.

MYOB Australia Pty Ltd (N91311) Offer of MYOB M-Powered bank statements (MPBS) service on condition the customer maintains a bank account and enters into an agreement with a financial institution with whom MYOB has arrangements in respect of MPBS.

At this time, the only financial institution with whom MYOB has arrangements in respect of MPBS, and is therefore available to customers to

use MPBS, is the Commonwealth Bank of Australia. However, MYOB intends to make the MPBS service available to its customers in respect of other financial institutions in the future.

RACV Sale Marketing Pty Ltd (N40547) Offer of discounts or special benefits on travel insurance products on condition that customers are members of Royal Automobile Club of Victoria Ltd.

Schwarz Motor Repairs (N60039) Offering a four cent discount on fuel for customers who produce a receipt from IGA Loxton.

Australian Unity General Insurance Limited, Australian Unity Health Limited (N91302–3) Offering to supply health, home building insurance and or home contents insurance at 10 per cent off standard premiums to members of the Australian Unity Total Super—For Business Superannuation Plan.

Laser Electrical Franchise Group Pty Ltd (N91304) Supply of products from nominated supply partners or listed suppliers to Laser Electrical franchisees in Australia.

UBS Australia Limited (N40619) Offer of UBS Wealth Management Margin Lending to customers on condition that customers use the nominee and sponsorship services of Leveraged Equity Nominees Limited and Levaq Nominees Pty Ltd.

Australian and New Zealand Banking Group Limited (N40666) Offer of 500 bonus points (for the rewards program applicable to their certain credit card) when the customer buys either of the following combinations of 'additional benefits' on their credit card.

Westoil Petroleum Pty Ltd (N91305) Offer of discounted fuel on proof of purchase from Smith Supa Barn West Wyalong.

Australian Unity Health Limited (N91306) Offering members of the Collingwood Football Club, except where the member is currently insured with AUHL, a \$50 CFC merchandise voucher when buying a new health insurance policy with AUHL.

Yarra Valley Water Ltd (N40618) Requiring potential licensees (i.e. other water retailers) to acquire the technical audit services component of the water audit system from a specified provider.

CPG Australia Pty Limited (N91312) Relating to the sale of a house and land package at Moorebank NSW. The customer will acquire building services from CPG on condition that the customer acquires the land on which the building services are to be performed from a specific vendor.

Workout World Pty Ltd (N31266) Requirement for franchisees to buy plasterboard and related products from approved suppliers.

Vodafone Pty Ltd (N31265) Arrangement with Brave Men and Women Pty Ltd (Wayne Cooper). Wayne Cooper offer to provide a 10 per cent discount to Vodafone 'Executive Club' members.

Franklins Pty Ltd (N91320) Discount on a transaction at Wollongong, Thirroul or Woonona Franklins (minimum of \$30) when receipt for petrol, diesel or LPG is produced.

Sabre Corporation Pty Ltd (N31267) Concerning the distribution of Professional hair care products.

Liquorland (Australia) Pty Ltd, Liquorland (Qld) Pty Ltd (N91316-7) Offering a carton of Victoria Bitter 24 X 375ml stubbies from any Liquorland (Qld) or Liquorland (Australia) outlet across Australia, upon production of a voucher from Australian Hardboard.

Leveraged Equities Limited (N91318-9) Concerning the requirement that customers who choose to operate a Leveraged Equities Margin Loan Account transfer all mortgaged listed shares and investments to a CHESS holding controlled by Leveraged Equities Nominees Limited; and require a borrower or guarantor to transfer legal title to LEN or Leveq as nominee holder, where the shares or other investments are unlisted.

Telstra eBusiness Services Pty Ltd (N31268) Requirement that after obtaining control of assets from AANX Operations that network subscribers obtain carriage services from a service provider approved by Telstra eBusiness, obtain a PKI certificate from a nominated provider and procure a nominated brand of security gateway device to access the network.

RACV Sales and Marketing Pty Ltd (N40667-8) Two notifications the first of which relates to 12 months of free home security monitoring services to Victorian consumers who buy a house built by Devine Homes that are sold with a built in home security system from RACV Home Security, and at no extra cost to RACV members, a longer warranty period on home security detection devices from RACV Home Security.

Marclef Pty Ltd t/a Hayes Petroleum (N91321) Allowing customers of Top Wash who spend \$12 on either an 'Executive Wash' or 'Touch Free' wash in one transaction a 4 cent discount fuel discount from selected outlets.

Esperance Power Station Pty Ltd (N91323) Relating to a power purchase agreement with Western Power Corporation. Western Power Corporation is obliged to purchase all of its required electricity from Esperance Power Station Pty Ltd. Exceptions are, the power purchase agreement allows:

- for a buy-out by Western Power Corporation of the power purchase agreement in certain circumstance, including technical obsolescence
- Western Power Corporation the opportunity to buy some if its energy requirements from other suppliers and to buy down some of its capacity requirements from third parties.

Exmouth Power Station Pty Ltd (N91322) In relation to a power purchase agreement with Western Power Corporation. Western Power Corporation is obliged to buy all of its required electricity from Exmouth Power Station. Exceptions are included in the agreement.

Telstra Corporation Limited (N40669) Offering a discount on a Telstra internet product to customers who acquire a Toshiba product.

Rams Home Loans Pty Ltd (N91066) Requirement of franchisees to acquire the services of Clifton Coney Stevens to project-manage store fit-outs.

Vcubed Pty Ltd ((N70375-7) Relating to the licensing of persons to supply goods and services to business clients of the V3 travel system.

Henley Investment Projects Pty Ltd (N40563) Offer of house and land packages in Victoria on condition the purchaser acquires the services of Northridge, a nominated builder.

Eversung Pty Ltd t/a IGA Loxton (N60039) Supply of discounted fuel with proof of purchase.

Geelong Otway Tourism Inc (N40671) Requiring tourism operators to acquire membership of a local tourism association before having their brochures displayed in an accredited Visitor Information Centre.

Arthur J Gallagher Australasia Pty Ltd (N31269) Offer of a discount on risk management software (CARES: computer assisted risk evaluation system) to public liability insurance customers of Community Care Underwriting Agency.

Mattnick Pty Limited t/a Scolari Software (N31270) Offer of a discount on CLUBSINC software to public liability customers of Community Care Underwriting Agency.

Australian Competition Tribunal

Australia and New Zealand Banking Group, Australian Settlements Ltd, Bank of Queensland, Bank of Western Australia Ltd, Bendigo Bank, Cashcard Australia Ltd, Commonwealth Bank of Australia, Credit Union Services Corporation (Australia) Ltd, National Australia Bank, St George Bank Ltd, Suncorp Metway Ltd and Westpac Banking Corporation (A30224-5) Collective setting of EFTPOS interchange fees.

11.12.03 Final determination issued granting authorisation.

22.12.03 Appeal to Australian Competition Tribunal.

New South Wales Department of Health (A90754-5) 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

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

25.8.03 Initial assessment issued.

18.12.03 Final assessment issued.

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

25.9.03 Initial assessment issued.

9.12.03 Final assessment issued.

Association of Certified Turnaround Professionals Inc (CTM 890532)

25.9.03 Initial assessment issued.

17.12.03 Final assessment issued.

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

17.10.03 Initial assessment issued.

18.12.03 Final assessment issued.

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

10.10.03 Initial assessment issued.

18.12.03 Final assessment issued.