

A newsletter for consumers and the consumer movement

Want to make a complaint? Contact the ACCC Infocentre on **1300 302 502** Want to forward suggestions for future articles?

Email the Consumer express team at express@accc.gov.au

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What's news

IMSN—international consumer agencies combating cross-border fraud

The International Marketing Supervision Network (IMSN) met in Sydney from 23–25 September.

The IMSN is a network of law enforcement agencies from 30 countries whose aim is to take action against traders regardless of where they are located. This is achieved through information-sharing and investigative assistance, to prevent and redress cross-border deception and fraudulent marketing practices.

This is the first conference during the ACCC's presidency of the IMSN.

Issues discussed at the Sydney conference included investigations and cases resulting from the 2002 international Internet Sweep (which focused on misleading and deceptive claims about health products) and the planning of future activities.

Internationally, eighteen companies are still facing legal action and 209 investigations are running in the participating member countries of the IMSN after the last Sweep. A large number of traders have settled out of court, have pulled the offending products and claims from distribution or from advertising, or have had their websites shut down entirely. This number is likely to increase as current investigations progress.

Actions to date in Australia: out-of-court settlements have been reached with businesses promoting:

- pheromone products claimed to increase sex appeal
- magnetic fields and colloidal silver (silver suspended in water) claimed to cure AIDS and boost the immune system
- magnetic devices claimed to be effective in treating headaches, back injuries and a range of other ailments
- treatments that could 'diagnose and treat ageing' thereby 'reversing the ageing process'
- a multi-coloured shirt claimed to make the wearer more intelligent and perceptive and boost the immune system.

Matters not arising during the Sweep, but concerning similar health – related claims include the ACCC's current proceedings against Danoz Direct. The ACCC has alleged

that advertising claims made about the Abtronic muscle stimulation device are false and misleading. Danoz Direct is contesting the allegations. The ACCC has also filed against Transformation2012.com.au regarding website claims that their products could treat or assist in curing cancer, AIDS, diabetes, herpes, hepatitis, MS, chronic fatigue and a range of other ailments.

Cross-border actions taken by the ACCC have included the successful prosecution of Skybiz.Com Inc, an American-based company, for illegal pyramid selling and various associated misrepresentations affecting consumers in Australia. The ACCC was greatly assisted in this action by its international counterparts, in particular the FTC.

Consumers wishing to report cross-border and on-line fraudulent behaviour may wish to contact the <http://www.econsumer.gov> website in addition to contacting the ACCC on **1300 302 502** and their local Office of Fair Trading.

Morgan poll finds most Australians support jail terms for anti-competitive collusion

An independent poll conducted by the Roy Morgan Research Centre, released on 19 September 2002, found that eighty seven per cent of respondents to the poll agree that changes to the *Trade Practices Act 1974* (the Act) should be made to allow jail sentences to be imposed on individuals convicted of hard-core collusive conduct.

Only 6 per cent of Australians polled did not agree with the changes as they were articulated in the poll.

When asked why respondents thought that penalties including jail sentences for hard-core collusive conduct should be contemplated, the main reasons and sentiments 'centred around their [respondents] belief that executives should be responsible and accountable for their actions, just as other members of the community are ... and that white collar crime should be treated the same as any other ... such crime goes relatively unpunished'.

The ACCC suggests (in its submission to the Dawson review of the Act) that only large companies which satisfied two of the following three criteria should be liable for criminal penalties: gross revenue in excess of \$100 million, gross asset value in excess of \$30 million, or more than 100 employees.

If enacted, criminal provisions would operate concurrently with the existing civil provisions for anti-competitive conduct. The Director of Public Prosecutions would prosecute the matters. Cases would be tried before a judge

and jury, would require a unanimous verdict, and proof beyond reasonable doubt.

More information:

<http://www.roymorgan.com.au/polls/2002/3555>

Insurance industry market pricing report

Late in March 2002, the Senator the Hon. Ian Campbell, Parliamentary Secretary to the Treasurer, asked the ACCC to update its March 2002 *Insurance industry market pricing review*. The ACCC updated this first report with the release of its September 2002 *Insurance industry market pricing review*. The second report concludes that the overall industry performance outlook for the 2002–03 financial year is positive.

The report indicates that factors other than ‘rising personal injury awards’ are contributing to the current insurance problems that have been highlighted in the review of the law of negligence.

It concludes that successive years of considerable premium increases will significantly improve the profitability of the professional indemnity and public liability classes for the 2002–03 financial year.

The review finds that compulsory third party (CTP), commercial motor, domestic motor, marine and aviation, mortgage, consumer credit, and other accident classes of general insurance are considered to be producing ‘high’ or ‘very high’ returns for the industry.

The second insurance review analyses in detail the factors affecting the performance of the public liability and professional indemnity sectors. It updates the data on overall market performance and premium increases.

The Commission’s analysis of the general insurance market is primarily based on statistics published by APRA, premium and claims data and commentary provided by sixteen general insurance companies.

More information:

http://www.accc.gov.au/pubs/publications/industry/Insurance%20report_Sept2002.pdf

In the consumers’ interest

Statutory warranties—what are your rights?

Consumers often ring state or territory fair trading offices or the ACCC with a general warranty issue to request that these offices take action on their behalf.

It is worth noting that the ACCC and fair trading offices are unable to take action on behalf of consumers for breaches of statutory warranties or conditions. Why is this?

The Trade Practices Act is a national statute and the provisions in Part V of the Act imply certain non-excludable rights, conditions and warranties into all consumer transactions. These statutory rights are implied into the contract between you and the vendor of the goods or services, regardless of whether or not there is a written contract in place.

This means that a breach of these warranties and conditions is a breach of the contract. Consumers must take their own action for a breach of contract. The law does not provide for agencies to intervene and enforce these conditions.

Statutory conditions are the essential terms of a contract. If these are breached, consumers can cancel the contract and obtain a refund. Many complaints to the ACCC are in fact disputes encountered by consumers when they try to enforce statutory warranties. Statutory warranties entitle consumers to practical remedies - such as replacement or repair of the goods or services.

If a dispute is heard by a court, it can order compensation for any additional losses that occurred as a result of deficiencies in the product.

What do I do if I have a problem claiming a warranty or obtaining a refund?

The first step may often be the most effective—putting your complaint in writing directly to the trader. When writing to the trader, you should include as a minimum: the date of purchase, an outline of the problem, your request for a remedy, a date that you expect to hear from them, supporting documentation and your contact details.

Supporting documentation such as receipts or packaging should be retained, and a copy of any documentation provided to the retailer kept for your records.

Where do I get help?

State or territory fair trading agencies may informally mediate disputes between consumers and traders, or investigate breaches of the law if you are unable to resolve the dispute with the trader.

The ACCC publication [Warranties & Refunds](#) provides more detailed information about all these issues for both consumers and traders. It provides examples of what consumers can do in most situations, as well as a letter template to help consumers claim for warranties or refunds.

The trade or industry association of the trader, your local consumer affairs or fair trading agency, consumer claims tribunals, or small claims courts may also be able to help or enforce a warranty on your behalf.

Consumers should remember that their first step is to inform the trader that they have a problem with goods or services.

Action the ACCC can take

The use of signs such as ‘no refunds’ or statements by sales staff which deny or imply that no right of refund exist are unlawful and ineffective, and may render traders liable for breaches of the misleading and deceptive conduct provisions of the Act.

The ACCC (and fair trading agencies) monitor trends and complaints and take very seriously any such attempts by businesses to mislead consumers regarding their rights in relation to these implied warranties and conditions.

Additional express warranties may be provided by businesses. These warranties are in addition to the implied warranties. Seller risk breaching the Act if they misrepresent the benefits of these express warranties.

Recent decisions

Authorisation for Pharmaceuticals merger declined by the ACCC

The ACCC declined authorisation for the proposed merger between API and Sigma because the likely public benefits flowing from the merger would not outweigh the harm to competition. The merger would create a company with 60 per cent of the wholesale pharmaceuticals market in NSW, VIC and Queensland, and more than 50 per cent in other states.

API and Sigma are full-line wholesalers of pharmaceutical products. As the name implies, they provide the complete range of products required by retail pharmacies—including PBS products, non-PBS products and pharmacy-only products—typically over 15 000 product lines.

The companies claimed that efficiency gains worth \$20 million a year would flow from the merger, on a combined revenue base of \$3,500 million. The companies also claimed that several other benefits would flow from the merger. The Commission accepted that some public benefit would result from the merger.

However, the ACCC considered that these benefits would not outweigh the significant public detriments that were likely to result from the merger. The Commission was particularly concerned that price rises and/or declines in service levels would be likely if the merger proceeded.

More information:

http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=798

Recent investigations and actions

Vodafone 'pre-paid' pays consumers back

Some Vodafone FastFone customers will be refunded the number of call credits that were lost in certain circumstances after Vodafone acted to address concerns raised by the ACCC.

Customers of certain pre-paid mobile telephone services complained to the ACCC that they were misled about a cut in the expiry period for their call credits. Vodafone acknowledged that it did not inform all its customers of this change, and has provided a range of remedies for affected consumers in court enforceable undertakings.

Companies must fully disclose terms and conditions and inform their customers of any material changes about their service supply, or risk being in breach of the misleading conduct sections of the Act.

More information:

http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=810

Domain name reseller in court

The ACCC has instituted Federal Court proceedings against a domain name reseller, Internet Registrations

Australia (IRA), for allegedly misleading and deceptive conduct, and false or misleading representations.

The ACCC alleged that since January 2001 IRA falsely represented that they had pre-existing relationships with businesses, had the authority to register or renew a consumers domain name and could provide these services, and that they could register '.com.au' domain names on the internet for periods of four, six, eight or ten years.

More information:

http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=802

Internet access – consumer rights are not excludable

The ACCC has instituted proceedings against Dodo Internet Pty Ltd (Dodo) alleging misleading and deceptive conduct and false and misleading representations regarding representations made by Dodo about the cost and nature of its Internet access services.

The ACCC has alleged that Dodo made representations to the effect that its customers have no rights or remedies against Dodo about the provision of its services.

The ACCC alleged that Dodo's terms and conditions contain clauses that claim to exclude consumers' rights and remedies under statute and the common law. The ACCC alleged that Dodo engaged in unconscionable conduct in its dealings with consumers who received large STD telephone bills because they relied on Dodo's misrepresentations.

More information:

http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=803

'Investment' was a gambling scam

The Federal Court has made orders by consent that a Gold Coast businessman, Robert James Price, had misled consumers, and in one instance, acted unconscionably in connection with the marketing and sale of horse race betting software in Australia and New Zealand.

The court found that the software was a gambling program, not an 'investment program', did not have a strike rate of success of between 70 and 95 per cent and that the number of people who purchased the program would in fact render the program less effective. The court also found that the program was not affiliated with the TAB and that there were no reasonable grounds for representing that purchasers could expect to earn income or profit using the program.

In late 2001 the ACCC obtained interlocutory orders to stop the offending claims pending final orders from the court. The companies involved included Solutions Software International Pty Ltd, and companies formerly known as Acepark Pty Ltd and Offtrack Investments Pty Ltd.

More information:

http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=793

Publications

Food labelling

When are goods 'Made in Australia' and when are they a 'Product of Australia'? Consumers have the right to be confident that claims made on food and beverage labels are accurate. These claims are the subject of a recently released [Country of Origin Guide for the Food and Beverage Industry](#).

Goods that are 'Made in Australia' must have been substantially transformed; and 50 per cent or more of the cost of production must be performed in the country claimed to be the origin.

'Product of Australia' claims have a more stringent test. Each significant component of the goods must have originated from, and all or virtually all processes involved in the production or manufacture of the goods must have occurred in the country claimed to be the origin.

More information:

http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=794

Free Internet-based trade practices training program

The ACCC has recently launched *Best & Fairest*, a free Internet-based training package to assist businesses understand their trade practices rights and responsibilities.

Best & Fairest is comprised of several discrete training modules that can be tailored to suit the individual needs of an organisation. There are examples for staff to work through, with questions and answers at the end of each module. It also includes guides for specific industries to help them identify their trade practices risks.

Best & Fairest is also available on hardcopy (\$100) and on CD-ROM (\$20).

More information:

http://www.accc.gov.au/smallbus/best_fairst/default.htm

Updates to matters reported in previous editions

Sony appeals PlayStation region coding decision

In the July 2002 edition of *ACCC consumer express*, the ACCC reported that the Federal Court agreed with the ACCC's interpretation of s. 116A of the Copyright Act on the circumvention of region coding measures by the use of 'mod-chips'.

Sony has filed a notice of appeal with the Federal Court. The ACCC will update readers with the outcome of this appeal after the Federal Court has considered the matters and handed down a judgment.

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September media releases

- 30 September 2002 'Milestone' for Merger Review, International Competition Advocacy at Inaugural International Competition Network (ICN) Meeting
- 30 September 2002 A.C.C.C. Report to the Senate on Wholesale Grocery Prices
- 27 September 2002 Vodafone Refunds Customers Misled by Fastfone Changes
- 27 September 2002 U.S. Web-Based Pyramid Selling Scheme Banned
- 25 September 2002 ACCC Institutes Against Commonwealth Bank Over 'Cricket' Home Loan Advertising
- 23 September 2002 ACCC Alleges Misleading Internet Marketing of Health Products
- 23 September 2002 Global Enforcement Action Brings 'Sweep'ing Change
- 18 September 2002 ACCC to Keep Telco Industry Informed on Access Prices
- 17 September 2002 ACCC Alleges Predatory Pricing in Barge Matter
- 17 September 2002 ACCC Institutes Against Dodo Internet Pty Ltd
- 17 September 2002 ACCC Alleges Misleading Conduct by Internet Registrations Australia
- 17 September 2002 ACCC Launches Free Internet-Based Training Program
- 16 September 2002 ACCC Approves Access Arrangement for Wallumbilla to Brisbane Pipeline
- 16 September 2002 ACCC Approves Access Arrangement for Ballera to Mt Isa Pipeline
- 12 September 2002 ACCC Denies Authorisation for API - Sigma Merger
- 11 September 2002 Utility Regulators' Forum Reports on Network Access Regulation
- 11 September 2002 Naptha Investigation Closed
- 10 September 2002 Broadband Take-Up Continues Solid Growth
- 10 September 2002 Country of Origin Guide for the Food and Beverage Industry
- 9 September 2002 ACCC Trifecta Against Gold Coast Punting Software Promoters
- 6 September 2002 ACCC Decision on Postal Prices
- 6 September 2002 ACCC Updates Advice for Rural Industry
- 5 September 2002 ACCC Institutes Legal Action Against FILA for AFL Licensed Apparel Policy
- 5 September 2002 ACCC Seeks Comment on Section 87B Undertakings for Foxtel/Optus Proposal
- 2 September 2002 Consumers To Lose From Negligence Review Proposals: ACCC