

# Achieving compliance

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**Output 1.1.1:** The proper administration and enforcement of the *Trade Practices Act 1974*, the *Prices Surveillance Act 1983* and related laws; and

**Output 1.1.2:** Performance of actions that promote competition and fair trading and enable well-functioning markets.

### PERFORMANCE INDICATORS

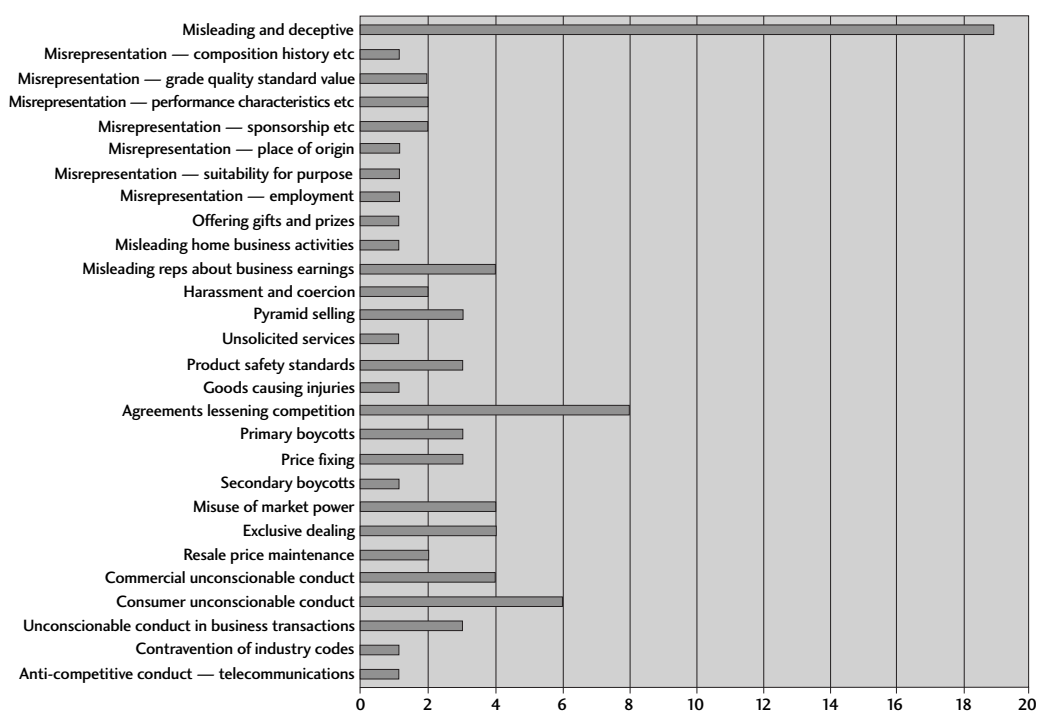
- Responded to complaints and inquiries.
- Appropriate enforcement action taken and goals achieved, i.e. unlawful conduct stopped, compensation gained for loss or damage, compliance with the Act, pecuniary penalties.
- Promoted competitive pricing where possible and restrained price rises in markets where competition is less than effective.
- Publication of new and amended provisions of the Trade Practices Act and the new ACCC procedures.
- Responded to Government inquiries on competition and consumer protection issues including references under s. 28 of the Trade Practices Act relating to dissemination of information, law reform and research.
- Actively participated in the development of effective competition and consumer protection laws internationally.

The Commission's compliance and enforcement activities during the year were heavily influenced by its role under the New Tax System (see chapter 2). Within that environment the Commission still remained focused on its key enforcement and compliance work directed at promoting competition and fair trading. The Commission maintained a strong litigation workload with some 40–50 matters before the courts over the year.

This chapter outlines the various compliance and enforcement activities undertaken during the year. They are grouped according to the type of activity: restrictive trade practices, consumer protection and small business. Because the

professions and e-commerce issues are of increasing importance to the Commission, and because they cross jurisdictions, they are discussed separately within the consumer protection section.

**Figure 3.1. Matters at court 2000–01**



**Figure 3.2. Top five industries pursued 2000–01**

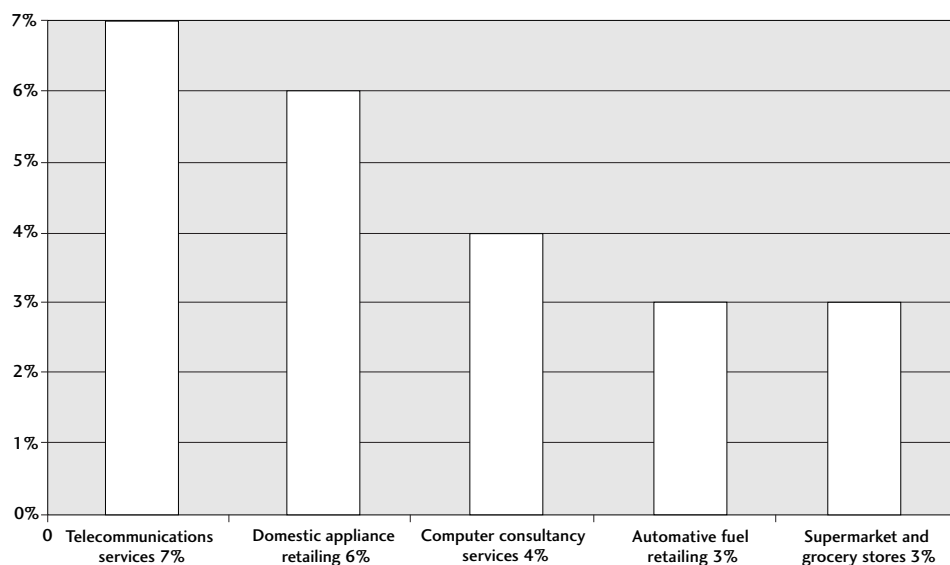
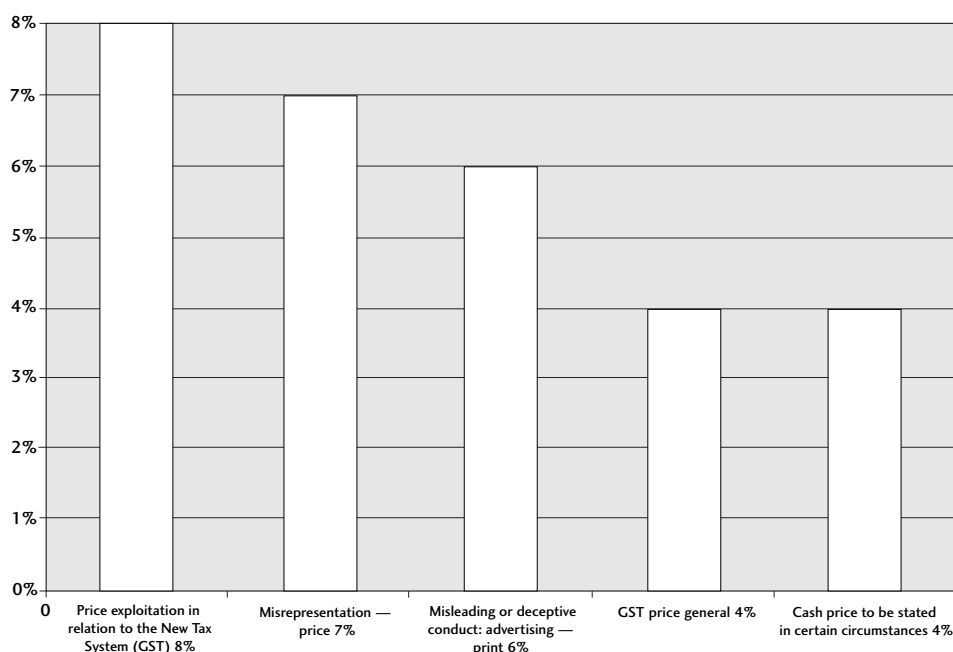


Figure 3.3. Top five conduct issues pursued 2000–01



## Restrictive trade practices

Several court judgments were particularly significant for the Commission in the areas of misuse of market power, price fixing and cartel activity, and unconscionable conduct.

Two judgments were matters instituted by the Commission — Boral Ltd and Rural Press Ltd — where the Federal Court found that both companies had misused their market power in breach of the Act. See full reports on p. 40 and 41. In the Boral case the Full Court found that its below-cost pricing breached s. 46 of the Act. The court endorsed the Commission's approach and recognised that below-cost pricing can be a misuse of market power. The Full Court also rejected the need for recoupment of losses as a necessary element in establishing predatory pricing. Boral is currently seeking leave to appeal to the High Court.

An important private action was the Melways Publishing Pty Ltd case. As recorded in last year's annual report the Commission was granted leave to intervene in this matter. The court accepted in principle the Commission's submissions about the application of s. 46 and in particular how the courts should interpret taking advantage of market power. The Commission believes this gives a clearer direction about how the misuse of market power provision should be interpreted.

Global cartel activity was also a major focus of the Commission's enforcement work during the year. The Commission has publicly proposed that hard core cartel activity by large corporations should be subject to criminal as well as civil sanctions. Criminal sanctions apply in many overseas jurisdictions, including some of Australia's major trading partners such as the United States, Korea, Japan and Canada.

The Commission was successful in proceedings against three multinational vitamin companies who, through a global cartel, set prices for animal feed vitamins in the Australian market. The Federal Court awarded record penalties totalling \$26 million against Roche Vitamins Australia Pty Ltd, Aventis Animal Nutrition Pty Ltd and BASF Australia Ltd. The Commission is currently investigating other global cartels, some concurrently with overseas regulators. The Commission's approach to cartels will be aggressive and its cooperative efforts with overseas agencies will help detect and prosecute them when they affect the Australian market.

The Commission was also successful in pursuing a fire protection equipment cartel in Queensland where the Federal Court imposed fines totalling \$15 million against a large number of corporations and individuals, including Tyco Australia Pty Ltd. Another domestic cartel investigated was an electrical distribution and power generation cartel. The Federal Court imposed fines of \$7 million against one respondent, Alstom, and \$150 000 against a senior executive. Further corporations and individuals involved will appear before the Federal Court in coming months.

The Commission took action for price fixing against the National Australia Bank in relation to credit card interchange fees. This action was withdrawn when the Reserve Bank designated credit card interchange fees under the Payment System Regulation Act.

An important decision by the Full Federal Court in Sydney upheld a claim by the Commission that its powers under s. 155 to gain access to documents should extend to certain documents subject to legal professional privilege. This means that a person or company being investigated by the Commission cannot refuse to provide information by relying on legal professional privilege.

The Commission's commitment to ensuring that the benefits of trade liberalisation are passed on to consumers is apparent in its handling of the 1998 amendments to the Copyright Act allowing parallel importation. In its proceedings against Universal Music Australia Pty Ltd and Warner Music Australia Pty Ltd, the Commission alleges

the corporations tried to prevent retailers, and ultimately consumers, gaining access to legitimate parallel compact disc imports. The Commission recently applied to the Federal Court to be heard on whether the new anti-circumvention provisions of the Copyright Act prevent consumers from having their Playstation consoles modified to permit the playback of imported games and legitimate backup copies. The Commission's application was made in response to proceedings by Sony Computer Entertainment Australia and other related Sony companies against an individual involved in modifying Playstation consoles.

## **Court actions**

### **Price fixing and cartels**

#### **Vitamin suppliers**

On 1 March 2001, following proceedings instituted by the Commission, the Federal Court imposed recommended penalties totalling \$26 million against three animal vitamin suppliers for price fixing and market sharing in breach of the Trade Practices Act. Penalties were imposed against Roche Vitamins Australia Pty Ltd (\$15 million), BASF Australia Limited (\$7.5 million) and Aventis Animal Nutrition Pty Ltd, formerly known as Rhone-Poulenc Animal Nutrition Pty Ltd (\$3.5 million).

The companies' conduct activated a global anti-competitive agreement between their multinational parent corporations. The Commission's investigation followed action by overseas competition agencies. The Commission and the Australian companies jointly recommended that the court impose penalties in the amounts set out above.

#### **Queensland fire protection industry**

In September 1999 the Commission instituted proceedings in the Federal Court against 18 companies and 38 individuals for price fixing and market sharing in the fire protection industry in Queensland.

The Commission alleged that anti-competitive arrangements were made at regular meetings between competitors over many years. At these meetings, which were referred to by participants as the Coffee Club, the companies agreed which of the installation projects out to tender each would win, and at what price.

The proceedings involved almost all of the Brisbane-based companies that provided fire alarm installation services and fire sprinkler installation services between 1992 and 1997, ranging from large multinational corporations to small local operators.

The series of proceedings were concluded in February 2001 when the last of the respondents were ordered to pay pecuniary penalties and received court injunctions. The total penalties came to \$14.79 million, and costs of \$596 000 were awarded against the respondents.

#### **Alstom Australia Limited**

In April 2001 the Federal Court imposed corporate penalties totalling \$7 million against Alstom Australia Limited and an individual penalty of \$150 000 against its managing director, Mr RG Elliot, for price fixing and market sharing. The penalty imposed on Mr Elliot is the equal highest individual penalty awarded by the court for contravening the Trade Practices Act.

The court penalties related to the company's admitted participation in a cartel of transformer manufacturers to fix or maintain prices and prevent competitive conduct in the markets for power and distribution transformers. This matter went before the court in late July and early August. In respect of the respondents heard at that time, the judge reserved his decision. The matter continues against remaining respondents.

#### **National Australia Bank**

On 19 April 2001 the Commission's proceedings on credit card interchange fees against the National Australia Bank were discontinued. The Commission had commenced proceedings against NAB in September 2000. Although the Commission took action only against NAB, it alleged that the price fixing behaviour involved all the major banks and the credit card associations.

The decision to discontinue proceedings was made after the Reserve Bank of Australia decided to use its powers under the *Payment Systems (Regulation) Act 1998* to 'designate' the credit card schemes in Australia. By doing so the Commission considered merchants and consumers would benefit by greater certainty and faster responses.

#### **SIP Australia Pty Limited and Baker Bros (Aust) Pty Ltd**

On 29 June 1999 the Federal Court awarded penalties of \$60 000, injunctions and declarations against Baker Bros and its directors for alleged primary boycott, price fixing and resale price maintenance in relation to the supply of ABAC compressors. Baker Bros agreed to implement a corporate compliance program under an enforceable undertaking. The Commission is awaiting judgment in respect of SIP.

#### **DICL fittings and valves industry**

In November 1999 Tubemakers of Australia Limited and Coastline Foundry (Qld) Pty Ltd were penalised a total of \$1.75 million for their part in price fixing and market sharing in the market for fittings and valves for use with ductile iron cement lined pipe. In March 2000 Associated Water Equipment Pty Ltd was penalised \$1 million. The case was finalised in July 2000 when Geoff Clegg Enterprises was penalised \$100 000 for their part in the conduct. Injunctions were also granted against each respondent.

#### **Visy Paper Pty Ltd**

In the Federal Court, Sydney, on 18 November 1998 the Commission sought orders against Visy Paper alleging Visy had tried to induce Northern Pacific Paper to enter into a market sharing agreement in the collection of recyclable waste paper. The court dismissed the Commission's application with costs and the Commission appealed on 29 November 2000. On 10 August 2001 the Full Federal Court upheld the Commission's appeal that Visy had contravened the Act. This is a significant decision as it ensures businesses cannot escape a liability for collective exclusionary behaviour by invoking a technicality in s. 45(6) of the Act.

#### **Queensland ice industry**

In August 1999 the Commission instituted proceedings against three corporations and eight individuals for price fixing and market sharing in the supply of ice in south-east Queensland.

The Federal Court imposed penalties of nearly \$200 000. The Commission's application against Ansonguard Pty Ltd, Leo Grevis and

Gary Grevis was dismissed. The Commission has appealed against the penalties handed down to Ithaca Ice Works Pty Ltd and Anthony Mee.

**Trevor Davis Investments Pty Ltd, Mans Davis Holdings Pty Ltd, Trevor Davis and Daniel Mans**  
A penalty of \$5000, injunctions and declarations were awarded against Trevor Davis on 28 June 2001 for alleged attempted price fixing and attempted inducement to enter a price fixing arrangement for supplying casual Internet access.

#### **Port Hedland panel beaters**

On 9 July 2001 the Commission instituted proceedings in the Federal Court, Perth, against four panel beating and spray painting businesses (two companies and two sole traders) in the Port Hedland region alleging that the businesses were involved in price fixing.

The Commission is seeking declarations, injunctions, orders requiring the implementation of trade practices corporate compliance programs and attendance at trade practices seminars, and costs.

#### **Quickcat Cruises (QLD) Pty Limited**

In proceedings on 30 March 2001 in the Federal Court, Brisbane, the Commission alleged that Quickcat Cruises had entered into a price fixing agreement with one of its competitors. On 9 April 2001 the Federal Court, Brisbane, made orders by consent against Quickcat Cruises (QLD) Pty Limited, including declarations, injunctions and costs.

### **Secondary boycotts**

#### **Maritime Union of Australia**

In proceedings instituted in the Federal Court, Sydney, on 14 April 2000, the Commission alleged that the union and certain officials unlawfully hindered and prevented vessels sailing from various Australian ports unless the shipowner agreed to use MUA labour to clean the holds. The trial is set down for three weeks from 15 October 2001.

### **Misuse of market power**

#### **PolyGram (now Universal Music), and Warner Music**

In proceedings begun on 30 August 1999 in the Federal Court, Sydney, the Commission alleged that the respondent record companies, as well as some senior personnel, breached the Act in attempting to prevent the importation of recorded music after the Copyright Act was changed to allow for parallel imports.

Proceedings were discontinued against Music Industry Piracy Investigation Pty Ltd, Michael Speck and Adrian Fitz-Alan in March 2001.

Trial commenced on 2 April 2001 and proceedings were discontinued against Sony Music Entertainment (Australia) Ltd and Sony Music Entertainment Holdings (Australia) Pty Ltd. Sony provided undertakings to the court without admitting liability. Sony also undertook to implement a trade practices compliance program. The trial resumes in September 2001.

#### **Boral Ltd and Boral Masonry Ltd (formerly Boral Besser Masonry Ltd)**

In March 1998 the Commission instituted proceedings against Boral Ltd and Boral Masonry Ltd (BML) alleging that BML reduced the prices for supplying concrete masonry products in Melbourne below its manufacturing costs and continued to do so to drive out an efficient new independent operator, C&M Bricks Pty Ltd (C&M). After the Federal Court held that BML had not contravened s. 46, the Commission appealed to the Full Court of the Federal Court in November 1999. The appeal was heard in February 2000. This time the Full Court unanimously held that BML had contravened s. 46 but dismissed the appeal against Boral Ltd. The Full Court found that BML had a substantial degree of power in the concrete masonry products market in Melbourne, had taken advantage of that power in pricing below manufacturing costs, and that this had been done for the purpose of deterring new entrants and driving competitors out of the market.

Boral Masonry Ltd has now applied for special leave to appeal to the High Court of Australia. A hearing date is yet to be set.

### **Rural Press Limited**

On 1 March 2001 the Federal Court, Adelaide, found that Rural Press Limited and its subsidiary, Bridge Printing Office Pty Limited, had misused their market power against a smaller regional publisher, Waikerie Printing House Pty Limited.

Justice Mansfield found that Waikerie Printing House, Rural Press and Bridge Printing had entered into an arrangement to withdraw *The River News* published by Waikerie, from the Mannum area, thus breaching the Trade Practices Act.

He found that Rural Press and Bridge Printing had substantial market power in the Murray Bridge market for regional newspapers because of their financial resources and strength and their capacity to immediately carry out the threat, and had misused their market power by making the threat to Waikerie Printing House.

On 7 August 2001 penalties totalling \$600 000 were awarded against Rural Press Group. A total of \$70 000 was awarded against the general manager of Rural Press' regional publishing division, Mr Ian Law, and its South Australian state manager, Mr Trevor McAuliffe. Penalties of \$75 000 were imposed against Waikerie Printing House and its director, Mr Paul Taylor, for entering into a market sharing arrangement with Rural Press.

### **Melways Publishing Pty Ltd**

The Commission was granted leave by the High Court to intervene in a private action concerning the refusal by Melways Publishing Pty Ltd to supply a retailer, Robert Hicks Pty Ltd, with copies of the popular Melway Street Directory for resale. The court concluded that the characteristics of the particular market in question did not preclude firms, with or without market power, from implementing exclusive distribution systems.

In coming to that conclusion the High Court accepted the Commission's submission that a firm takes advantage of a substantial degree of market power where its action is facilitated, or made easier, by possessing that market power, even though the action may not have been impossible without the power. In this respect the High Court confirmed and enhanced the

interpretation of s. 46 initially set down in its 1989 decision, *Queensland Wire Industries v BHP*.

## **Resale price maintenance**

### **Colgate-Palmolive Pty Ltd**

On 15 November 2000 the Commission instituted proceedings in the Federal Court, Melbourne, against Colgate-Palmolive Pty Ltd alleging that between 1994 and 1998 Colgate tried to stop Tasmanian retailer, Chickenfeed Bargain Stores, from advertising various Colgate lines at cheap prices. The Commission is seeking court orders including pecuniary penalties and injunctions restraining Colgate from engaging in similar conduct.

## **Other**

### **The Daniels Corporation International Pty Limited and Meerkim & Apel**

On 16 March 2001 the Full Federal Court unanimously upheld the Commission's claim that its powers to gain access to information and documents under s. 155 of the Trade Practices Act, are unfettered by any legal professional privilege applying to such information and documents. On 11 April 2001 the company and law firm concerned applied for special leave to appeal to the High Court of Australia. A hearing date for that application is yet to be set.

## **Consumer protection**

In addition to the traditional consumer protection problem areas of product safety, scams and other misleading conduct, and country of origin issues, the Commission focused on five more areas during the year: expanded cooperation with other government agencies, health issues, fine print advertising, e-commerce, and undue harassment and coercion.

### **Expanded cooperation with other government agencies**

The Commission worked closely with other agencies responsible for consumer protection policies and regulation to encourage a more consistent and efficient message to business and consumers about both their rights and

obligations. In Australia these agencies include the State and Territory Fair Trading agencies, ANZFA, the Therapeutic Goods Administration, and the Department of Health and Aged Care. International cooperation involved the members of the following international organisations: International Marketing Supervisory Network (e-commerce), the Consumer Protection Committee of the OECD, and APEC.

The Commission continued its industry education program on the country of origin amendments (*Trade Practices Amendment (Country of Origin Representations) Act 1998*) by expanding its web-based and printed explanatory materials and conducting training seminars in metropolitan and regional locations.

### Health

The Commission undertook several investigations into dubious or unsupportable claims about the health benefits of a range of devices and products. For more information about health issues, see p. 53.

### Fine print advertising

The Commission's focus on the inappropriate use of small print has prompted greater industry education and investigation of misleading advertisements causing significant consumer detriment. The Commission has instituted court proceedings in four matters and accepted undertakings in two others during the year in areas as diverse as health insurance, general retailing, car rentals and bread retailing. Consistent with the Commission's established approach that corrective notices should appear in the same media as the offending misleading advertisement, the Commission sought and obtained corrective television advertisements in the recent Target case (see p. 45).

### Undue harassment and coercion

After running education programs for undue harassment and coercion, culminating in the publication of the guide to undue harassment and coercion in 1999, the Commission investigated several cases. On 1 August 2000 the Federal Court found for the Commission against Cash Return Mercantile Pty Ltd and Mrs Sharyn McCasky in the first case taken under s. 60 (see p. 49). Since then the Commission has instituted proceedings in

two other s. 60 matters: Esanda Finance Corporation Ltd & Ors and Lux Pty Ltd (p. 48–49). It also accepted enforceable undertakings in a third matter involving Khad Pty Ltd, trading as Professionals Edge Hill.

The Commission has continued to encourage industry self-regulation using codes of conduct where the necessary pre-conditions for viable self-regulation exist.

### E-commerce

The Commission has further developed its expertise and capacity to investigate online conduct and is rapidly expanding the content of its own website to communicate more effectively to stakeholders. The Commission has contributed to e-commerce policy debates both domestically and internationally. Enforcement initiatives have included its leadership of international Internet sweep days and participation in several cross-jurisdictional investigations, as well as domestic cases.

With its increased funding the Commission has lifted its resources and work in areas involving e-commerce and computer forensics to assist investigations in Internet markets and marketing. For more information about e-commerce see p. 57.

### Country of origin

The Department of Industry Science and Resources (DISR) provided funding of \$410 000 to the Commission for publications, promotional activities, an Internet presence, legal advice and enforcement action.

About \$180 000 has been spent.

The \$230 000 balance will be used to do the following:

- Convene and lead working parties to visit manufacturers and produce guides for these industries: textile, clothing and footwear; electrical and whitegoods; foods and beverages; furniture and furnishings; and toys.
- Set up a separate interactive webpage on the ACCC website. The page is up and running and includes a frequently asked questions site and an interactive facility that allows inquirers to enter information about their products to determine how they rate in terms of the defences.



- Include inserts in trade journals covering the above targeted industries.
- Monitor investigations and undertake enforcement against breaches of 'Product of' claims. Special funding has been made available for mounting several cases over the next year and the Commission has already instituted proceedings for false country of origin claims in the fruit juice industry.

### **Frequent flyer inquiry**

The Commission commenced an investigation into frequent flyer schemes offered by the main Australian airlines in response to consumer complaints about:

- the limited availability of frequent flyer award seats;
- the airlines' cancellation with limited notice of specific reward offers;
- frequent flyer program customer service levels and standards; and
- the blackout periods for flight awards.

Offering rewards without intending to supply them as represented risks misleading consumers and subsequent action under the Trade Practices Act.

The aim of the inquiry is fairer and more transparent frequent flyer programs. The Commission report is scheduled for release by the end of 2001.

### **Education, liaison and advice**

#### **Consumer communications strategy**

The Commission established an internal communications committee to coordinate its general communication activities with consumers and consumer organisations and to further develop reporting systems both internally and to the Commission's stakeholders.

#### **Advertising and selling**

The publication, *Advertising and selling*, helps businesses selling goods or services and their advertisers identify and avoid common problems and pitfalls. Recent real life examples are used to explain how the law applies and it also includes advertising on television and the Internet as well as recent amendments to the Trade Practices Act. It does not cover the responsibilities

of businesses in relation to the Goods and Services Tax.

Advertising and selling will also be the main theme for the Competing Fairly Forum in October 2001.

### **ACCC Digest**

The *ACCC Digest* is published quarterly by the Law Book Company. The Commission provides the material to LBC. It is a subscriber publication for Australian and international corporations, medium to small business, government, law firms and compliance professionals.

### **Commerce (Trade Descriptions) Act (CTDA)**

The Commission is a member of the Committee of Officials reviewing the CTDA administered by the Australian Customs Service. The CTDA, which has operated since 1905, states that all goods imported or exported must be truthfully described.

The CTDA is scheduled for review under the Commonwealth Legislation Review Schedule established by the Competition Principles Agreement. The review is being undertaken by a committee including representatives from Customs, Industry Science and Resources, Treasury and the Commission. It will focus on those parts of the legislation that restrict competition, impose costs or confer benefits on business including country of origin claims. It is expected to report by February 2002.

### **Petrol**

The Commission liaised with Environment Australia about a compliance regime for the proposed mandatory motor vehicle fuel standards. This will help consumers know if petrol they are buying contains additives and their effect on vehicles and engines.

### **Financial services**

#### **Code of Banking Practice review**

The Commission provided comments to the independent Review of the Code of Banking Practice — the first review since the code began in 1996. The main issues covered in the Commission's submission were undue

harassment and coercion, unconscionable conduct, interchange fees, convergence and shadow ledgers.

#### **Comparison interest rates**

The Commission provided comments to the NSW Department of Fair Trading on the development of the Mandatory Comparison Rate Bill. The bill proposes to amend the *Consumer Credit (NSW) Act 1995* to require mandatory disclosure of an average annual interest rate.

#### **Senate Select Committee on Financial Services and Superannuation**

The Commission made written and oral submissions to the committee providing information on regulatory gaps and overlaps, complaints and enforcement figures and examples of recent enforcement matters and compliance activities.

### **Industry codes**

#### **Australian Entertainment Industry Association**

The Commission was asked to participate in a working party on developing a National Code for Event Ticketing. The Commission was also asked by the NSW Department of Fair Trading to comment on the review of the current NSW Entertainment Industry Code of Conduct. As these two codes relate to the same matters the Commission is liaising with Consumer Affairs Division of Treasury about each agencies' role in the working party and the review of the respective codes. This matter was raised at the Ministerial Council of Consumer Affairs meeting.

#### **Fertility Society of Australia advertising code of practice**

The Fertility Society approached the Commission for its opinion on an advertising code of practice for the IVF industry. This code was drafted to ensure that IVF clinics were engaging in ethical and medically responsible practices in advertising their services and the Commission needed to examine the potential anti-competitive effect of some of the code's clauses. Work on this code is continuing.

#### **Digital TV marketing code**

The Commission participated in the code development working party that comprised industry members, consumer advocacy groups and government agencies. The code will counter potential misleading labelling issues with the transition from analogue to digital television. Work on this code is continuing.

#### **Code of practice for collecting societies**

An initial discussion panel consisting of the Commission and other relevant agencies convened to discuss developing a code of practice to cover collecting societies. These are organisations that collect royalties on behalf of performers and copyright owners from businesses that use the material in the course of their business. The Commission made an initial submission on the codes of conduct and the relevance of the Trade Practices Act.

#### **Australian Fruit Juice Association**

The Commission and the AFJA held regular meetings about the Fruit Juice Industry Code of Conduct. The AFJA made several submissions to the Commission on matters relating to country of origin, 100%, Pure, Fresh and Freshly Squeezed labelling claims. The AFJA referred a number of breaches of the code to the Commission for investigation.

#### **Proposed trucking industry code**

The Commission was involved in the working party to develop a code of conduct for the above 5-tonne freight trucking industry. The Commission discussed with various members of the industry and government the terms of the proposed code and advised on how the Trade Practices Act affected codes.

#### **Compliance programs**

The Commission audits and vets compliance programs that are submitted as part of s. 87B undertakings, consent orders or other court orders. The audit and vetting process is important to ensure compliance programs are consistent, effective and have integrity. The Commission vetted numerous compliance programs throughout the year. A nominated

independent auditor conducts the actual audit and the Commission then reviews the audit reports. The Commission conducted audits on companies such as Hugo Boss Pty Ltd, Sims Metal, Design Plus Textiles Limited and Golden Circle.

## **Court actions and undertakings**

### **Country of origin**

#### **Taj Food Sales Pty Limited**

On 10 July 2000 the Federal Court, Sydney, found that Taj Food Sales Pty Limited and its managing director, Mr Sah Dev Varma, had made false representations about the country of origin of its basmati rice. The Commission alleged that for the past four years Taj Food Sales had been importing basmati rice from Pakistan and packaging it in one-kilogram bags marked with the words 'Produce of India'. Taj Food Sales sold the packaged rice to Woolworths Limited who was unaware that the rice was from Pakistan. Taj Food Sales and Mr Varma agreed to injunctions preventing the offending conduct in the future, and also published corrective newspaper advertising.

#### **Keith Harris & Co Ltd t/a Orchy**

The Commission accepted court enforceable undertakings from Keith Harris & Co Ltd on 4 June 2001. Keith Harris represented that several of its fruit juices were a 'Product of Australia' when they contained imported juice. Keith Harris withdrew offending labels and agreed to implement a trade practices compliance program.

### **Pyramid selling schemes**

#### **Guardian Finance & Insurance Consultants Pty Ltd**

The Commission instituted proceedings on 5 April 2001 in the Federal Court, Brisbane, alleging that Guardian Finance and Insurance Consultants Pty Ltd promoted a scheme that amounted to an illegal pyramid selling scheme or referral-selling scheme. The Commission is also alleging that its sole director, Mr Peter Martin James, was knowingly concerned.

## **Fine print advertising**

#### **Quality Bakers Australia Ltd (Buttercup)**

In May 2001 the Commission instituted proceedings against Quality Bakers Australia Limited (Buttercup) in relation to its promotion 'Help Buttercup to Help Our Babies'. Buttercup's advertisements stated that 30 cents would be donated to the Canberra Hospital 'for each additional Buttercup product purchased' between certain dates. However, the fine print qualification stated that the donation would apply only to products sold over and above the average sales for a defined period. Following Commission intervention Buttercup honoured its promotion by giving a donation to the Canberra Hospital, but the matter remains before the court for final resolution.

#### **Target Australia Pty Ltd**

The Commission instituted proceedings in the Federal Court, Perth, on 5 September 2000 alleging that certain Target television and newspaper advertisements breached the Act. Its 'Every Stitch of Clothing' promotion stated in large print that substantial percentage price reductions applied to a broad category of goods but also used fine print to exclude items from the discount sales.

On 25 June 2001 the court declared that the advertisements, which appeared nationally in early 2000, were false, misleading and deceptive. The court ordered Target to broadcast a corrective advertisement nationally on 88 television stations and to publish corrective notices in 37 newspapers across metropolitan, regional and rural Australia. The orders were made with Target's consent. The court also issued injunctions restraining Target from advertising in the same way for four years, ordered Target to review its trade practices compliance program, and ordered Target to pay Commission costs of \$65 000.

#### **Pocket Money**

Pocket Money Limited (PML) traded in the promotion and sale of phonecards. The Commission considered that its advertising could breach the Trade Practices Act.

PML provided a s. 87B undertaking to correct its advertising and promotions in future and honour its previous offer.

## **False, misleading or deceptive conduct**

### **National Australia Bank**

The Commission accepted a court enforceable undertaking from the National Australia Bank for a breach of s. 52 of the Trade Practices Act when promoting its Wheat Advance product in full-page newspaper advertisements. The NAB advertisements offered wheat farmers a better deal including underwriting costs around 17.5 per cent lower than its competitor. In this case the comparison was not accurate. NAB knew that its underwriting costs were not 17.5 per cent lower. NAB undertook to implement a trade practices compliance program to ensure future breaches of the Act do not occur.

### **Bob Jane T-Marts Pty Ltd**

Following proceedings begun by the Commission on 6 December 2000 Bob Jane T-Marts Pty Ltd gave court enforceable undertakings and provided compensation to affected consumers via public notice. Eleven Bob Jane stores had offered a thrust wheel alignment at a higher cost than a cheaper front two-wheel alignment when the machinery used for both gave the same level of service.

### **Loyalty Pacific Pty Ltd (Fly Buys)**

On 1 January 2001 the Commission accepted court enforceable undertakings from Loyalty Pacific Pty Ltd, the operator of the Fly Buys loyalty scheme, for alleged misleading terms and conditions of a special promotion in mid-2000. The promotion offered members 2000 bonus Fly Buys points for shopping at Shell and Best Western. However, it was not clear that expenditure was required at both Shell and Best Western to qualify for the bonus points.

Loyalty Pacific acknowledged that the terms and conditions of the promotion were ambiguous and agreed to credit the affected Fly Buys members with the 2000 bonus points. This gave 34 000 members bonus points valued at about \$700 000.

### **Sony Australia Limited**

On 1 March 2001 the Commission accepted court enforceable undertakings from Sony Australia Limited for alleged false and misleading

representations in several Sony handycam sales brochures. Sony accepted the Commission's concerns and agreed to determine who may have relied on the representations in the brochures when buying Sony handycams; provide appropriate compensation to those consumers identified as relying on the representations in the brochures; and conduct an independent review of Sony's trade practices compliance program.

### **Billbusters Pty Limited**

In 1998 the Commission obtained interim restraining orders against Billbusters Pty Limited and its director Miles Kendrick-Smith restraining them from making certain representations in the supply of telephone bill-paying services and dealing with their assets. Those orders were discharged in November 1999. The date of the next directions hearing is to be advised by the court.

### **Top Snack Foods Pty Limited**

In proceedings instituted in 1996 the Federal Court, Sydney, found that Top Snack Foods had engaged in misleading and deceptive conduct and that George Manera, a director and manager of Top Snack Foods, and Nick Kritharas, general manager, were knowingly concerned. Damages of over \$400 000 were awarded to franchisees of Top Snack Foods.

In early 2000 a liquidator was appointed to some of the parties. Two individuals were also declared bankrupt. The Commission has secured, through the NSW Supreme Court, access to \$400 000 acting as creditor, although an appeal to this has been lodged.

### **McDonald's Australia Limited**

On 9 March 2001 the Federal Court found that the 34 claimants who presented evidence in a private representative proceeding regarding the 1999 McMatch & Win Monopoly competition had not made out their claim. At a directions hearing in Brisbane on 27 April 2001 Justice Dowsett determined a timetable for hearing be set for the Commission's matter, and the matter is continuing.

**Black on White Pty Ltd trading as the Australian Early Childhood College**

The Commission alleged that Black on White Pty Limited (trading as the Australian Early Childhood College) misled consumers about accreditation associated with courses offered in 1997; the existence of a deferred payment scheme for tuition fees; and had engaged in unconscionable conduct by signing students up to contracts without disclosing the onerous nature of some of the clauses in those contracts. The Commission considered this conduct breached the Act.

The Federal Court made orders that Black on White Pty Limited had contravened the Act by engaging in misleading and deceptive conduct, and unconscionable conduct. The court also found that Mr James Nicholas Poteri was knowingly concerned in misleading and unconscionable conduct and that his son, Mr Nicholas James Poteri, was knowingly concerned in the contraventions with respect to the accreditation representations.

**MT Marketing, One.Tel & Ors**

Moore Talk Communications Pty Ltd, trading as MT Marketing, promoted mobile phone and access plan packages by way of telemarketing activities across Australia. The company failed to provide customers with a full copy of the terms and conditions before asking the customer to sign the application. The Commission also alleged that the company misled consumers about the nature of the 'free phone' promotion as the first approach was by survey. Consent injunctions were obtained from the Federal Court and Moore Talk Communications provided s. 87B undertakings.

**Michigan Group**

In October 2000 the Commission instituted proceedings in the Federal Court against various respondents for alleged false and misleading or deceptive conduct in relation to the promotion, sale and distribution of commercial orange juice machines.

The Commission alleges that from about early 1998 the respondents promoted a scheme where investors would buy a business of one or more commercial orange juicing machines from

Michigan Group Pty Ltd, Imobiliare Pty Ltd and/or Yeppoon Pty Ltd. The Commission alleges that the promoters promised that business would take very little time to operate, the machines were 'state of the art', would be installed in nominated stores very quickly and would make significant profits.

The Commission is seeking court orders, including declarations and injunctions. This matter is continuing.

**inthebigcity.com**

Advertisements in rural and regional areas throughout Queensland and northern New South Wales gave a guarantee of employment and discounts on removal and accommodation costs for callers to a 1900 number. The Commission alleged that there were no guarantees of employment, no discounts available and the information provided is inaccurate, dated or totally false.

On 9 April 2001 the Federal Court made interim orders stopping inthebigcity.com Pty Ltd and its directors from operating or promoting this or any other 1900 employment service.

**Khad Pty Ltd, trading as Professionals Edge Hill**

On 6 September 2000 the Commission accepted undertakings from a real estate agent in Cairns regarding representations made to tenants about the effects of being listed on a defaulting tenancy database. The undertakings included admissions and undertakings not to repeat misrepresentations about the effect of being listed on a defaulting tenancy database together with corrective apologies to affected tenants.

**C7 Pty Ltd**

On 7 February 2001 C7 Pty Ltd provided undertakings in response to the Commission's concerns about representations made by C7 about its Olympic basketball coverage. The undertakings included C7's future programming representations, a form of refunds for affected customers and a donation to charity.

#### **Back to Basics Worldwide Education Aids Systems Pty Ltd**

On 17 May 2000 the Commission filed criminal proceedings in the Federal Court in Adelaide against Queensland-based Back to Basics Worldwide Education Aids Systems Pty Ltd, Hartwich Pty Ltd, and company directors John Moon and Wayne Baker.

It alleged that the companies and their directors placed advertisements in newspapers in several States inviting investments of up to \$65 000 in a business opportunity selling a range of educational aids to schoolchildren and their parents. At least seven distributors were recruited. The Commission alleges that representations about the profitability and risk of the business were false or misleading.

The defendants pleaded guilty and penalty submissions have been made. Justice Spender has reserved judgment.

#### **Stephen Frederick Grant, director Furniture Wizard Pty Ltd (in liquidation)**

On 29 October 1999 proceedings were instituted in the Federal Court, Adelaide, against Stephen Frederick Grant, director of Furniture Wizard Pty Ltd (in liquidation) for misrepresenting to a number of franchisees about the existence of guaranteed work from national contracts, potential income, training and support offered.

On 9 November 2000 the court granted injunctions against Mr Grant ordering that for three years he be restrained from making false or misleading representations in businesses the same or similar to Furniture Wizard Pty Ltd. It made orders for refunds totalling \$169 000 plus interest and the Commission's costs.

#### **Anthony Robert Hassett, director of Commercial & General Publications Pty Ltd**

On 17 January 2001 the Commission instituted proceedings in the Federal Court, Hobart, against Anthony Robert Hassett, director of Commercial & General Publications Pty Ltd (CGP) alleging that he made payment demands on Tasmanian small businesses for unsolicited and unauthorised advertising in CGP publications.

It was also alleged that Mr Hassett accepted payment from a number of Tasmanian small businesses for advertising in a proposed publication when he was aware, at the time of accepting payment, that CGP would be unable to supply the advertising services.

The Commission is seeking orders for fines, injunctions, and damages for advertisers.

#### **Tattersall's Hobart Aquatic Centre**

In March 2001 the Commission investigated advertisements placed by the Hobart Aquatic Centre offering consumers free pairs of cross trainer shoes valued at \$179 on taking out a 12-month membership in February 2001, but did not disclose that the offer was limited to new members only. Following the Commission's intervention, the centre placed corrective advertising, and contacted all existing members who renewed in February offering them the same benefit.

#### **Will Writers Guild Pty Ltd**

On 27 March 2001 the Commission instituted proceedings in the Federal Court, Hobart, against Will Writers Guild Pty Ltd (WWG) and its director Sidney Murray alleging that WWG failed to provide prospective franchisees with disclosure documents as required by the mandatory Franchising Code of Conduct, and misled franchisees about their rights and the risk involved in carrying on a business of writing wills for reward.

The Commission is seeking declarations and orders for penalties, injunctions and damages for losses suffered by franchisees.

### **Undue harassment and coercion**

#### **Esanda Finance Corporation Ltd and Ors**

On 12 April 2001 proceedings were instituted in the Federal Court against Esanda Finance Corporation Ltd, Capalaba Pty Ltd trading as Nationwide Mercantile Services, and several individuals for breaching the Act. The Commission alleged that a consumer who obtained a loan, secured by a chattel mortgage over a motor vehicle, from Esanda was subjected to physical force, undue harassment and coercion, and unconscionable conduct. The Commission also alleged a number of

individuals breached s. 23 of the *Western Australian Fair Trading Act 1987* which mirrors s. 60 of the Trade Practices Act.

The Commission is seeking declarations; injunctions restraining Esanda, Capalaba and the individuals from engaging in or being otherwise involved in similar conduct; orders; compensation for loss or damage; and costs.

#### **Lux Pty Ltd**

On 27 July 2000 the Commission instituted legal proceedings in the Federal Court against Lux Pty Ltd, and one of its door-to-door sales agents for being knowingly concerned, alleging that the parties had engaged in unconscionable conduct. It also alleged they had used undue harassment or coercion by selling a Lux vacuum cleaner to an intellectually impaired couple who could not read or write.

The Commission is seeking declarations, injunctions, a corrective notice, the implementation of a trade practices compliance program, and a declaration that the contract the couple entered into with Lux was void, and costs.

#### **Cash Return Mercantile Pty Limited and Sharyn McCaskey**

On 1 August 2000 the Federal Court, Perth, held that Cash Return Mercantile Pty Ltd (Cash Return) and its former agent Ms Sharyn McCaskey engaged in undue harassment, coercion and misleading conduct while collecting debts from consumers. This was the first case taken by the Commission under s. 60.

The court granted injunctions restraining Cash Return and Ms McCaskey from engaging in similar conduct in the future. It also ordered Ms McCaskey to attend a trade practices compliance seminar; Cash Return to publish a corrective notice in *The West Australian* newspaper; and both parties to pay the Commission's costs.

### **Administrative resolutions**

#### **Who Weekly magazine (Time Inc)**

In mid-1999 Time Inc offered 200 000 customers on their mailing list throughout Australia four weeks of *Who Weekly* magazine free of charge, along with the option to take up a subscription.

The 8467 people who responded 'maybe' were sent four 'free' issues and a letter restating the subscription offer with issue 1 and a subscription invoice with issue 4.

Complainants alleged Time Inc continued over many months into February 2000 to issue magazines and invoices which asserted a right to payment for an unsolicited 26-issue subscription, in breach of s. 64 of the Trade Practices Act.

Time Inc denied that the wording of the invoices was in breach. However, it was admitted that there were some contradictions and in October 2000 the matter was resolved when the Commission agreed to an administrative resolution.

### **Product safety**

The Commission has expanded networks for product safety knowledge and information to raise public and industry awareness of current product safety issues. Over the past year the Commission has attended conferences and seminars and has made presentations on product safety matters.

Several product safety guides have been published and a number of proposed new standards and bans developed (see below). Also detailed in this section are the products that were surveyed by the Commission during its annual product safety survey program. At the end of this section are the product safety matters the Commission took to court or accepted undertakings, some of which proved to have very significant enforcement outcomes for the Commission.

### **Proposed new standards**

#### **Bunk beds**

Injury statistics confirm that bunk beds have been associated with a high incidence of child injuries for some years in Australia. On 15 January a new draft Australian/New Zealand standard for bunk beds (*Draft Australian/New Zealand Standard for Bunk Beds — revision of AS/NZS 4220:1994*) was issued for comment by the Standards Australia/Standards New Zealand Committee (no. CS/3). It is proposed that this standard will be made mandatory.



## Baby walkers

Baby walkers have long been associated with a range of injuries to infants. A regulation to introduce a set of mandatory safety requirements has been drafted for introduction under the Trade Practices Act. It will be based on an existing US standard.

## Trampolines

In March 2001 the Standards Australia Committee (no. CS-005) for Playground Equipment prepared a draft standard (Trampolines — Consumer) for components, packaging information, warnings and maintenance instructions for trampolines. It aims to address safety risks and prevent injuries to consumers who use trampolines. The Commission is participating as a member of the Standards Committee in case the standard becomes mandatory.

## Amended existing standard

### Children's household cots

This standard was amended in April 2001 to take account of antique and collectable cots. The standard now exempts coverage of antique or collectable cots provided they are supplied with a certificate that warns against placing a child in such a cot.

## Bans

### Tinted head light covers

A temporary ban under s. 65L of the Act is likely to be introduced by the end of 2001 for motor vehicle headlight covers which allow less than 85 per cent luminous transmittance (tinted headlight covers).

### Candles with lead wicks

The temporary ban on candles with lead wicks expired on 2 March 2001 and on 28 March 2001 another new unsafe goods notice (temporary ban) under s. 65L was published in the *Commonwealth of Australia Gazette* on candles with lead wicks, for a further 18 months. Whereas the previous temporary ban did not allow for any lead to be present in candles, the new temporary ban allows for some lead to be present — up to 0.06 per cent by weight.

## Information and liaison

### Guides

During the year the Commission issued guides to standards for bean bags, exercise cycles, pedal bicycles, paper patterns for children's nightwear, elastic luggage straps, balloon-blowing kits and cosmetics. These guides contain information about standards that apply to each product, as well as guidance for retailers and suppliers to ensure that the goods they stock comply. They are also available on the Commission's website.

### Conferences, seminars and speeches

*National Injury Prevention Conference* — The fourth National Conference on Injury Prevention was held in Canberra on 23 and 24 November 2000. For the first time the conference program included a consumer safety stream, co-planned by the Commission. In addition to the presentations, two open forums about product safety were held.

*Enforcement and compliance seminar* — The Commission hosted a seminar on enforcement and compliance in Melbourne on 27 and 28 March 2001. It brought together staff from all offices of the Commission and from State, Territory and New Zealand consumer and fair trading agencies, in the consumer protection and product safety fields. It was the first time operational staff from these agencies had come together and another is planned for late 2002.

*Kidsafe Awards 2000* — In February 2001 the Chairman was the keynote speaker at the annual Kidsafe Awards 2000 Luncheon. In his address the Chairman said product safety was the responsibility of government, consumers and industry. He also outlined the Commission's role in promoting and enforcing the product safety provisions of the Trade Practices Act.



**Keith Manch, CEO,  
NZ Ministry of  
Consumer Affairs,  
at ACCC seminar  
in March 2001.**



## International activities

### Visiting international graduate

During the year an international graduate from Samoa came to work in the Product Safety Section under the Commission's International Internship Program for 2000. At the end of her stay she commented on the usefulness of the knowledge she had gained and said she would attempt on her return home to implement many of the work practices and systems she was introduced to during this time.

### Visit to Durban, South Africa

The Manager, Product Safety attended the Consumers International World Congress and a workshop of the International Society of Consumer and Competition Officials in Durban, South Africa in November 2000. These events provided an excellent opportunity to learn about regional systems and developments in consumer product safety.

### Liaison with international bodies

Staff took part in discussions and made submissions to the US Consumer Product Safety Commission (CPSC) which has links and contacts with international bodies. Staff also attended a presentation given by Mr Ronald Medford, Assistant Executive Director, Office of Hazard Identification and Reduction, CPSC.

### Product safety surveys

The Commission enforces mandatory product safety standards, information standards and bans on unsafe goods declared under the Trade Practices Act. Random market surveys are conducted on a strategic risk management basis — products are selected for surveys according to their relative level of hazard and market penetration.

Several products were targeted during the year and the following outlines the surveys conducted. Compliance was generally found to be good; however, several breaches were detected and pursued.

*Balloon blowing kits* — A survey was carried out around the country for the presence of benzene, a known carcinogen in balloon-blowing kits. Balloon-blowing kits usually comprise a tube of synthetic substance and a straw. The user blows through the straw into a plug of the synthetic

substance thus expanding it and forming a balloon. The main hazard of these kits results from the inhalation or ingestion of benzene.

*Bean bags* — Because bean bags appear to be back in vogue Commission offices carried out Australia-wide surveys on the traditional bean bag, and a range of new related products such as bean bag chairs, sofas and ottomans.

*Cosmetics* — Compliance surveys were carried out to ensure the appropriate ingredient labelling is provided for these products at the point of sale. This survey focused on discount stores, smaller non-departmental stores and chemist outlets.

*Disposable cigarette lighters* — The key focus of this survey was to ascertain whether the lighters are resistant to operation by a child under five years. Survey staff were aware of the variety of child resistance features that lighters can have and looked out for devices that disable the child resistant mechanisms on lighters. Special attention was paid to tobacconists, general and discount merchandise stores, supermarkets, convenience outlets and service stations during the survey.

*Elastic luggage straps* — Elastic luggage straps were surveyed at hardware shops, automotive aftermarket suppliers, camping stores, cycle and sports stores, service stations, luggage shops, chain and discount stores, and department stores. Any elastic luggage straps that were not appropriately labelled with warnings as required by the information standard on these products, were removed from sale.

*Exercise cycles* — Random surveys were carried out on exercise cycles in various States. They checked the performance and safety levels of each bike under the requirements of the standard including chain guard checks, flywheel checks and finger entrapment tests.

*Pedal bicycles* — This survey of toy and discount stores was to ensure that only bicycles that comply with the new mandatory standard were being supplied. Survey staff looked for serious safety defaults in bikes such as back-pedal brake failure, sharp edges on children's bikes and protective guards. Survey staff also looked for useful and informative labelling on bikes and whether the bike came with an owner's manual.

*Vehicle and trolley jacks* — Given the extensive surveys carried out on these products in previous years, survey staff targeted trouble areas in this industry.

*Vehicle support stands and portable ramps* — This survey examined the adequacy of marking and instructions for use on these products. In most cases ramps and stands were surveyed at the same time and in the same outlets as vehicle and trolley jacks.

## **Court actions and undertakings**

The Commission has increasingly used court enforceable undertakings under s. 87B of the Act in the product safety area. Many undertakings contain trade practices compliance programs specific to product safety.

### **Dimmays Stores Pty Ltd**

Following criminal proceedings instituted by the Commission against Dimmays in November 2000 the Federal Court, Brisbane, fined Dimmays Stores Pty Ltd \$160 000 for supplying children's nightwear that did not comply with the mandatory consumer product safety standards for children's nightwear. The breaches related to six charges concerning the supply of children's nightwear in Townsville in July 2000 and one further charge for the supply in Melbourne in November 2000. Dimmays pleaded guilty to the seven charges. The court also imposed an injunction which will operate until 2004.

### **MHG Plastic Industries Pty Ltd**

After proceedings were instituted on 13 May 1999 the Federal Court, Sydney, ordered a recall of all helmets and that consumers be given a full cash refund. MHG appealed and the Full Federal Court heard the appeal arguments in November 1999. The Full Federal Court overturned the decision of the lower court in August 2000, holding that the tests relied upon by the primary judge had not been properly performed by the testing agency and thus could not be relied upon.

### **Spotlight Promotions Pty Limited**

In November 2000 the Commission accepted a court enforceable s. 87B undertaking from Spotlight Promotions Pty Limited, a Queensland-based promotional merchandise supplier for

supplying sunglasses that failed to comply with the mandatory safety standard. The undertaking required Spotlight to implement a trade practices corporate compliance program. Spotlight, after being asked, recalled the sunglasses from consumers and offered them a refund or replacement pair. The sunglasses were supplied by Spotlight to Carlton and United Breweries (CUB) for promotional purposes.

### **Jutco Pty Limited, Shinn Fu (Australia) Pty Limited and Super Cheap Auto Pty Limited**

During a national product safety survey in May and June 2000 three companies in separate matters were found to have supplied vehicle and trolley jacks that did not comply with the relevant mandatory product safety standards. All provided court enforceable s. 87B undertakings to the Commission and implemented a trade practices compliance program.

### **ZG Pty Limited**

On 12 October 2000 an Adelaide-based wholesaler agreed to recall a vehicle trolley jack after testing by the Commission found it failed the mandatory standard. The jack which was labelled Macho Pty Ltd was primarily supplied to wholesalers and retailers in South Australia and Victoria. The jack failed to meet some performance characteristics, in one instance becoming unstable when subjected to a load test, as well as failing mandatory requirements for labelling. ZG Pty Limited published recall notices asking consumers to return the jacks to the place of purchase for a full refund. ZG Pty Limited also provided a court enforceable s. 87B undertaking to the Commission and implemented a trade practices compliance program.

### **Regency Importing Company Australia Pty Limited (t/a Leisure World)**

On 12 March 2001 Regency Importing Company Australia Pty Ltd provided the Commission with an enforceable s. 87B undertaking to recall the DT900 Lifestyler exercise cycle after the cycle failed safety tests and was considered to be a safety hazard. The cycles, imported from the United States, were sold exclusively over the past year through Rebel Sport stores around Australia. The undertakings also provided full refunds to consumers and an

agreement to implement a trade practices compliance program.

#### **Apollo Bicycle Co. Pty Limited**

During a routine retail product safety survey staff helmets supplied by Apollo Bicycles were found not to comply with the mandatory standard. The labelling on the helmets claimed they were suitable for cycling; however, they are known as street helmets and are commonly used by skateboarders and scooter riders. Apollo Bicycles provided a court enforceable s. 87B undertaking and implemented a trade practice compliance program.

#### **Pacific Dunlop Limited (PDL) Ansell**

On 21 January 2000 the Commission instituted proceedings in the Federal Court, Melbourne, against PDL Ansell seeking compensation for a consumer who has allegedly suffered a serious

form of latex (rubber) allergy through using PDL's Ansell brand of household rubber gloves. This matter is still before the court.

## **The professions**

Before 1996 unincorporated professional practices were partially excluded from the anti-competitive provisions of the Act. But now all non-employed professionals are liable if they engage in anti-competitive conduct. They are also liable under the consumer protection provisions for misleading and deceptive conduct. Since advertising restrictions were lifted, professionals must be extremely careful in how they represent themselves to the public. The Commission has investigated several cases that potentially have breached the Trade Practices Act.



The Commission continued to investigate allegations that some Royal Australasian College of Surgeons' (RACS) processes restrict entry to advanced medical and surgical training in breach of the Act.

The investigation concentrated on RACS' role in determining how many trainees received advanced training in orthopaedic surgery and how it assesses overseas-trained specialists referred to RACS by the Australian Medical Council. The Commission decided that RACS' procedure and conduct may breach some of the competition provisions of the Act. In November 2000 RACS applied for authorisation of its processes in:

- selecting, training and examining surgical trainees in each of the nine specialities in which it conducts training;
- accrediting hospital posts as being suitable for training surgeons; and
- assessing the qualifications of overseas-trained practitioners.

Since the introduction of the Government's Lifetime Health Cover, which triggered a rapid rise in health fund membership, the Commission has paid particular attention to advertising and promotional campaigns by health funds. As a result the Commission has instituted proceedings against Medibank Private and MBF for misleading and deceptive advertising of health insurance products (see p. 56).

The Commission has continued to monitor the contracting process between hospitals and health funds for potential breaches of the Act. The Commission obtained court enforceable undertakings from Medibank Private over unconscionable conduct concerns about including a unilateral contract variation clause in a proposed contract with an independent specialist psychiatric hospital.

The Commission's second report to the Australian Senate on anti-competitive and other practices by health funds and providers in relation to private health insurance was tabled in the Senate on 8 November 2000. The Commission prepared the report in response to an order agreed by the Australian Senate on 25 March 1999. The Commission is currently finalising the third report to the Senate.

Following concerns raised about the impact of the Trade Practices Act on general practitioners, the Commission has been working closely with the Department of Health and Aged Care and various GP groups on a communication strategy about the implications of the Act for GPs.

It released a draft general practitioners guide to the Trade Practices Act for limited consultation on 6 March 2001. On 30 March 2001 the Commission released a revised draft reflecting some of the initial feedback for broader consultation. The Commission travelled to rural and metropolitan areas of NSW, Victoria and Western Australia to discuss the issues in the revised draft guide with GPs, practice managers and their representative associations. The Commission is considering further submissions and will finalise the guide in the near future. It will be distributed to all GPs around Australia, as well as their advisers and practice managers.

## **Liaison**

### **Tobacco and the Department of Health and Aged Care**

The Commission continues its liaison with the Department of Health and Aged Care. It is a member of the Commonwealth Cross-Government Tobacco Liaison Meeting which meets several times a year to discuss issues relating to tobacco products including advertising, labelling, health effects and overseas developments.

The Commission has made a submission to the Department of Health and Aged Care about its continuing negotiations on the World Health Organisation's Framework Convention on Tobacco Control.

### **Food and ANZFA**

The Commission continues to work closely with the Australia New Zealand Food Authority, negotiating a memorandum of understanding to help manage false and misleading claims where the Joint Food Standards Code and the Act overlap.

It has lodged submissions to ANZFA on various food standards proposals. The Commission was a member of the External Advisory Group for ANZFA Proposal P237 relating to Country of Origin Labelling of Food. It has also provided

comments on Standard A18 (food produced using gene technology) and Proposal P234 (nutrient content and other related claims).

The Commission began work on genetically modified labelling and the Act — an emerging issue of concern to consumers because of the increasing range of GM foods in the marketplace and the new mandatory labelling regime that will begin in December 2001.

In providing guidance to the food industry the Commission spoke at two food industry conferences and published an article in the *ACCC Journal*. The Commission has also spoken with several industry participants about labelling and certification schemes. It expects to release a discussion paper on GM food labelling and the Act in late 2001.

### **Therapeutic Goods and the TGA**

The Commission has worked closely with the Therapeutic Goods Administration (TGA). This has involved sharing information and investigating on the TGA's behalf potential misleading claims about products that fall outside the TGA's jurisdiction. The two agencies decided to finalise a memorandum of understanding to formalise this working arrangement. They met in March 2001 and negotiations on the agreement are continuing.

In January 2001 the TGA invited the ACCC to nominate a representative as Observer on the Therapeutic Goods Advertising Code Council (TGACC).

In Australia all advertisements and generic information about therapeutic goods must comply with the *Therapeutic Goods Act 1989*, the Therapeutic Goods Regulations 1990, the Therapeutic Goods Advertising Code (TGAC) and the Trade Practices Act. A new TGAC came into effect on 19 April 2000.

### **Court actions and undertakings**

#### **Price fixing**

Australian Medical Association & Mayne Nickless Ltd and Ors

On 21 July 2000 the Commission instituted proceedings in the Federal Court, Perth, against the Western Australian branch of the Australian Medical Association (the AMA(WA)) and Mayne

Nickless Ltd (MNL) alleging that they were involved in price fixing and other anti-competitive conduct in breach of the Trade Practices Act.

The Commission also alleges that the AMA(WA) executive director, Mr Paul Boyatzis, and former president, Dr David Roberts, were knowingly concerned in the contraventions, and that former general manager (Western Australia and Asia) of Health Care of Australia (a division of MNL), Mr Martin Day, and former JHC chief executive, Mr Ian MacDonald, were knowingly concerned in the contraventions by MNL.

The Commission is seeking court orders including declarations, injunctions, pecuniary penalties, costs and orders requiring the publishing of public notices and the institution of trade practices compliance programs.

### **Misleading or deceptive conduct**

Listen Systems Pty Ltd, Mr Stephen John Alexander

On 7 April 2000 the Federal Court made declarations and orders relating to misleading and false representations made by Listen Systems Pty Ltd about alternative health therapy devices known as the EQ4 system. The court also found that Mr Stephen Alexander, a director of Listen Systems Pty Ltd, had aided or abetted these breaches of the Act.

Nine months later the Commission instituted contempt of court proceedings against Listen Systems Pty Ltd and Mr Alexander for failing to comply with the orders made against it. Following the contempt action, Mr Alexander took steps to comply with the two orders and within 90 days of return of the EQ4 system paid a full refund to the one purchaser who had sought a refund.

Centrebuy Direct Pty Ltd and Peter Edgar Riley

In proceedings instituted in the Federal Court, Sydney, on 21 March 2001 against Centrebuy Direct Pty Ltd and Peter Riley a director of the company, the Commission alleged that advertisements for the BodyTone machine implied the user could obtain benefits from its use without further effort on their part.

The Commission is seeking declarations and injunctions restraining Centrebuy Direct Pty Ltd

and Peter Riley from making false and misleading representations about electro-muscular stimulation machines generally, an order for corrective advertisements and an offer of refunds to purchasers of the machine.

#### **Emerald Ocean Distributors Pty Ltd, Slendertone Health and Beauty Pty Ltd**

In proceedings in the Federal Court, Perth, against Emerald Ocean Distributors Pty Ltd, Slendertone Health and Beauty Pty Ltd and their director, Mr Sean O'Donoghue, on 19 July 2000 the Commission alleged that Mr O'Donoghue made false and misleading representations about the benefits of using electronic muscle stimulation products, generally referred to by the trade name, 'Slendertone'.

The Commission is seeking declarations, corrective advertisements, refunds for affected consumers, a compliance program, costs and injunctions restraining Mr O'Donoghue and the companies from promoting the supply of Slendertone products using these claims.

#### **Paul and Linda Storer**

On 23 April 2001 the Federal Court, Perth, found that Mr Paul Storer and Mrs Linda Storer, who operated the Perth Chronic Fatigue Advisory Centre, engaged in false and deceptive conduct and made misrepresentations about chronic fatigue syndrome which breached the Trade Practices Act.

The court also handed down orders restraining the Storers from engaging in similar conduct in the future; to offer refunds to consumers who were misled by the representations; to participate in a trade practices compliance program seminar; and to publish corrective notices in prominent newspapers to inform the public of the decision.

### **Fine print advertising**

#### **Medical Benefits Fund of Australia Ltd (MBF)**

MBF and advertising agency John Bevins Pty Ltd are currently defending a matter filed by the Commission in the Federal Court in February 2001. The Commission alleged that MBF advertisements were misleading and deceptive because of the inappropriate use of fine print disclaimers. They contained pregnancy-related

images in an endeavour to entice consumers to transfer and/or join MBF private health insurance. However, the advertisements also contained fine print disclaimers that a 12-month waiting period for pregnancy-related services would not be waived. The matter is continuing.

#### **Medibank Private**

On 26 October 2000 the Commission instituted proceedings against Medibank Private in the Federal Court, Melbourne, alleging false, misleading and deceptive advertising of its health insurance products in two advertising campaigns in breach of the consumer protection provisions of the ASIC Act.

In the first advertising campaign for Medibank Private's Package Plus products, the Commission alleges that, among other things, from early March 2000 Medibank Private advertised 'no rate increase in 2000' when the rates on these products increased on 1 July 2000.

In the second advertising campaign in major newspapers around Australia in August 2000, Medibank Private offered consumers who switched from another fund 'any waiting periods waived' and 'get 30 days free if you change to Medibank Private'. However, it is alleged the advertisements failed to disclose, or adequately disclose, that only the 2-month general waiting period and the 6-month optical waiting period were waived. This was only indicated in very small print at the bottom of the ads. It is alleged the advertisements also failed to disclose, or adequately disclose, that conditions applied to the offer of 30 days free health insurance. Again a mention that 'conditions apply' appeared at the bottom of the ads.

Medibank Private lodged a strike out application which was heard on 13 March 2001. The judge reserved his decision.

Health insurance, as it falls within the definition of financial product, is regulated through the ASIC Act. However, ASIC has formally delegated the regulation of all consumer protection aspects of health insurance to the Commission.

### **Pyramid selling schemes**

#### **Giraffe World Australia**

In proceedings in the Federal Court, Sydney, three years ago, Giraffe World gave undertakings



that it would not represent that the 'negative ion' mat it marketed produced negative ions, relieved health ailments or promoted health. However, in 1999 the court found that Giraffe World had breached that undertaking having engaged in misleading or deceptive conduct, promoted a pyramid selling scheme and engaged in referral selling. The court also found that founder and director of Giraffe World, Mr Akihiko Misuma, and its president and chief executive officer, Mr Robin Han, were party to the contraventions by Giraffe World.

The representative action started by the Commission on behalf of customers was adjourned in February 2000 pending the outcome of the liquidator's recovery action against the directors. This matter is continuing.

## E-commerce

### Electronic complaints

The Commission has developed a system to give consumers quicker, easier access to lodge complaints. *Slam-a-Cyberscam* allows consumers to complain online about Internet traders that may be breaching the Trade Practices Act. Since its launch in April 2001 it has received over 100 complaints, some of which Commission staff have investigated.

The International Marketing Supervisory Network (IMSN) has developed and launched a consumer complaints portal for use by any consumer in the world. Complaints may be entered about any business in the world, and will be accessed by enforcement agencies that are members of the IMSN. The site can be found at <<http://www.econsumer.gov>>.

### International Internet Sweep Day

The Commission was lead agency for the third IMSN sweep held on 14 and 15 February 2001. Websites all over the world were evaluated for their level of compliance with the *OECD Guidelines on consumer protection in electronic commerce*. This was rated as the most uniformly high priority issue for all IMSN members.

The 2001 sweep day tested the level of adoption of Best Practice (OECD Guidelines) by online businesses since they were released a year ago.

Over 3300 sites were swept by 48 agencies in 19 countries.

The Commission has established itself as the sweep coordinator and plans to lead the proposed Sweep Day for 2002. This will test websites all over the world that make claims about health products, another priority for many IMSN agencies.

### Domain name registration

The Commission has investigated many recent cases of consumers renewing their domain name registration after receiving an unsolicited renewal notice. These consumers have also paid a higher price than if they had renewed their registration directly through the registrar. Many are confused because their current service provider gives them a package, which includes renewal of the domain name and many other support services. The Commission issued a press release in January 2001 to raise public awareness.

The Commission has been involved in developing the domain name system in Australia as a member of the .au Domain Administration (auDA). In addition to this ongoing work, the Commission also made a submission to the World Intellectual Property Organisation (WIPO) in June 2001, suggesting firmer discouragement of bad faith registrations of domain names, and measures to ensure accuracy of registration information on WHOIS databases.



## Internet access services

Following a number of actions involving Internet service providers and their marketing practices, the Commission released a publication *Fair.com* in February 2001 to educate ISPs and businesses about fair dealing in regard to websites and Internet access services.

## International liaison

The IMSN includes consumer protection agencies from 30 countries. They meet twice yearly to:

- further international cooperation through sharing information and joint investigations;
- analyse latest developments in cross-border enforcement actions; and
- explore non-enforcement alternatives for gaining redress for consumers.

The IMSN met in Berlin in October 2000 and in New York in April 2001. Most recently they agreed that Australia be appointed President of the IMSN for the year 2002–03. The Commission has close cooperative relationships with the IMSN members, and especially the Federal Trade Commission in the USA.

The Commission was involved in meetings of the Consumer Policy Committee of the Organisation for Economic Cooperation and Development (OECD) in September 2000 and March 2001. At the March meeting the Commission presented a paper giving the results of the Internet Sweep Day on compliance with the OECD guidelines, which was well received. The OECD has been working on alternative dispute resolution, codes of conduct, and implementing their guidelines. It has established an electronic discussion group (accessed by password) to facilitate further development of projects.

## APEC Electronic Commerce Steering Group

The Commission participated in the 2<sup>nd</sup> meeting of the APEC Electronic Commerce Steering Group (ECSG) held in Canberra on 17 March 2001. The group was formed in 1999 to discuss consumer protection in the context of e-commerce in the APEC region.

The New Zealand Ministry of Consumer Affairs is coordinating the group's major project for the short to medium term: a survey of consumer protection laws, voluntary or prescribed codes, charge-back laws and MOUs or other agreements in 10 APEC economies. The survey will later be expanded to include other APEC economies.

## Domestic liaison

The Commission has cooperative relationships with many organisations including the Australian Federal Police, the Australian Customs Service, the Federal Director of Public Prosecutions, the Attorney-General, as well as State and Territory Fair Trading authorities.

These relationships share information where appropriate, undertake joint investigations, examine emerging issues, and avoid duplication of effort.

The Commission has taken part in regular meetings of the Action Group into Electronic Commerce to discuss the law enforcement implications of e-commerce, including public key infrastructure, account aggregation, email monitoring, computer crime such as intrusion and denial-of-service attacks, mutual assistance and information sharing, encryption, and record-keeping requirements to assist investigations.

The Commission made submissions on the proposed Cybercrime Bill 2001 and the *Telecommunications Legislation Amendment Act 2000*. These relate to computer crime, investigative powers, and regulation of electronic addressing, including domain names.

## Forensic investigations

The Commission has further developed its forensic capacity in 2001. Officers have attended training conducted by other organisations, including the FTC. The Commission made presentations at a training seminar in March 2001, endorsed by the Standing Committee of Officials of Consumer Affairs and attended by investigators from consumer protection agencies from States and Territories within Australia.

Already the Commission has used its forensic capacity to successfully prosecute several businesses for online breaches of the Trade Practices Act.



## Competition and B2B activities

The main focus of the Commission's activities in the B2B (business to business) area has been to identify and assess new competitive conduct issues arising in e-commerce.

During 2000–01 the electronic commerce industry grew substantially, and in particular many B2B electronic marketplaces developed in Australia.

The Commission recognises that in many cases, electronic marketplaces can deliver cost savings and greater efficiencies for both buyers and sellers, as well as providing access to a wider range of trading partners. At the same time, the Commission has identified that an increasing number of electronic marketplaces are being established through collaborative ventures between competitors, especially in the banking, health, airline and indirect supplies industries. These may raise issues under Part IV of the Act.

The Commission encourages parties to consult with it on an informal basis about particular proposals that could raise competition issues.

The Commission has liaised with other regulatory bodies including the National Office for the Information Economies (NOIE), ASIC and APRA and international competition authorities (US Federal Trade Commission and the US Department of Justice) to identify potential emerging issues in B2B arrangements. It has also participated in two OECD roundtables on competition issues in e-commerce.

## Court actions and undertakings

### Misleading or deceptive conduct

Stephen Henry Wayt, t/a COM.AU.REGISTER

The Commission instituted proceedings on 5 April 2001 in the Federal Court, Brisbane, alleging that a fax sent by Mr Wayt was likely to mislead or deceive recipients into believing that COM.AU.REGISTER was responsible for registering Internet domain address registration and that it had dealt with those businesses and organisations previously.

Purple Harmony Plates Pty Ltd

On 6 August 2001 the Federal Court in Victoria found that Purple Harmony Plates had misled consumers about the benefits of anodised aluminium discs, claiming they have a protective effect against electromagnetic radiation as well as other unsubstantiated properties. The court orders included interactive corrective advertising on the company's website, refunds for consumers and cessation of the misleading conduct.

### Institute of Taxation Research

For several years both the Institute of Taxation Research (ITR) and Wayne Levick instituted over 35 cases in the Federal and High Courts in an attempt to argue that the various Income Tax Acts, including the recent GST legislation, were illegal. Not one of these cases was successful.

Despite repeated warnings from the courts and heavy costs ordered against them, both ITR and Levick continued to represent that their constitutional arguments could be relied on by Australian businesses and taxpayers to avoid paying tax.

The Commission instituted proceedings in the Federal Court alleging that the representations by ITR and Levick were misleading and deceptive. On 21 February 2001 the Commission obtained final orders in the Federal Court, Brisbane, to prevent ITR and Levick from engaging in misleading and deceptive conduct in providing taxation advice. ITR lodged an appeal against the court's decision. However, ITR was placed into liquidation only days after the appeal was lodged. This matter is continuing.

### Australian Institute of Permanent Make Up

The Commission obtained consent orders in January 2001 against the Australian Institute of Permanent Make Up including orders for the business to amend its website. This business advertised on the Internet offering micro-pigmentation services (tattooing) for cosmetic purposes. The use of the word 'permanent' was considered misleading given that the make-up faded after three to 10 years. The consent orders also included refunds for those who considered they were misled, declarations under both the Trade Practices Act and Queensland fair trading legislation and costs.

#### **David Zero Population Growth Hughes, t/a Crowded Planet**

The Commission was successful in obtaining orders to restrain Mr David Hughes, trading as Crowded Planet, from supplying oral contraceptives to consumers within Australia and ordering him to publish on his website a notice stating that Crowded Planet cannot and will not supply oral contraceptives to consumers within Australia. The Federal Court found Mr Hughes guilty of contempt of court for failing to comply with these orders. The court issued a warrant for his arrest and committal but allowed him 30 days to comply with the orders. The matter is continuing.

#### **The Australasian Institute**

In proceedings instituted in the Federal Court, Sydney, in May 1999 the Australasian Institute undertook to stop promoting the Global Master of Business Administration degree, and to provide the Commission with the names and addresses of students enrolled in the course. Following mediation between the parties, the court ordered that the Australasian Institute display a corrective notice on its website for six months, provide refunds to certain students and contribute \$24 000 to the Commission's costs. On 15 March 2001 a liquidator was appointed.

#### **Info4pc.com Pty Ltd**

On 23 January 2001 the Commission instituted proceedings in the Federal Court, Adelaide. On 24 January the matter was transferred to the Federal Court, Perth. The Commission is seeking an interim injunction against a Perth-based computer retailer, Info4pc.com Pty Ltd, for allegedly advertising, including through the Internet, but not delivering very cheap computers.

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. One motion for contempt of court, dated 31 January 2001, for alleged breaches of the injunctions was heard on 15 June 2001. The hearing for the other motion for contempt of court, dated 7 May 2001, will be heard on 7 September 2001. Judgment for these motions will be handed down together.

### **Pyramid selling schemes**

#### **Golden Sphere**

In proceedings begun in 1996 against Golden Sphere International Incorporated, the Federal Court found the company, Victor Michael Cottrill and Pamela Reynolds had breached the Trade Practices Act and ordered them to pay \$550 000 into a fund to provide refunds to consumers who had invested in its pyramid selling scheme. Over \$250 000 was recovered and paid into the trust fund. The Commission obtained evidence that money had been transferred to Vanuatu and it was successful in enforcing the Australian court orders in the Supreme Court of Vanuatu, and a further \$12 500 was recovered.

#### **World Netsafe and Terence Butler**

On 8 December 2000 the Federal Court ruled that the International ATTM Card Scheme marketed and promoted by World Netsafe Pty Ltd and Terence Butler was an illegal pyramid and referral selling scheme. The court made extensive orders for breaches of various consumer protection sections of the Trade Practices Act. Thousands of consumers in many different countries paid \$2389 to join the ATTM Card Scheme. Among other things, the court ordered that the respondents post an apology on their website and that within 28 days, World Netsafe and Terence Butler return money to all consumers who paid to participate in the scheme.

Permanent injunctions are now in place which restrain both World Netsafe and Terence Butler from making false representations in connection with this scheme or a similar scheme in the future.

#### **Greenstar Cooperative Ltd**

The Commission instituted legal proceedings on 5 June 2001 in the Federal Court alleging that Greenstar had engaged in an illegal pyramid and referral selling scheme during the promotion of an organic fertiliser product and transaction card, and misleading and deceptive conduct and false representations regarding the transaction card.

On 14 June 2001 the Federal Court granted interim injunctions against Greenstar Cooperative Ltd and four of its directors until the

matter is settled. Specifically, a mareva injunction freezing the assets of Greenstar and one of its directors, Kevin Robert Smith, except for limited business and living expenses, was given. Ancillary Anton Piller-type search orders allowing the Commission to inspect the company's accounts and financial records were also made by consent. Notably, the injunctions also prevent Greenstar from inducing any further members joining the scheme. The matter is continuing.

#### Skybiz 2000 Scheme: Mr Kevin Ryan

On 4 August 2000 the Commission instituted proceedings in the Federal Court, Perth, against Mr Kevin Ryan of Perth, a participant in a scheme called Skybiz 2000 Home Based Business. The Commission alleged that Mr Ryan attempted to induce others to become participants in the trading scheme promoted by Skybiz.Com.Inc, and to pay Skybiz.Com.Inc US\$100 per website to obtain the prospect of participating in the scheme.

## Small business

In its third year of operation the Commission's small business program explored some innovative ways to deliver information to the small business sector.

It launched the Competing Fairly Forums, a series of satellite broadcasts to rural and regional towns around Australia. The forums build connections between the Commission, industry and community organisations through local government and business leaders.

The Commission's small business managers in every State and Territory continued to develop networks of contacts in the business community. This provided a two-way flow of information — enabling the Commission to get its message out to the small business sector and, at the same time, learn which trade practices issues were relevant to small business operators.

The small business program also produced a corporate video, *Fair Game or Fair Go*, to explain the concept of unconscionable conduct. It was sent out to convenors as an introduction before the Competing Fairly Forum held in May 2001, which had unconscionable conduct as its topic.

These new high impact ways of information dissemination complemented the small business



program's existing work. The Commission's small business managers in each State and Territory conducted numerous seminars and presentations to industry on the Trade Practices Act in general, and the Franchising Code, unconscionable conduct and the GST in particular. Many of these field trips were in rural and regional areas, reflecting the program's push to increase awareness of the Act in those areas.

## Information programs

### Competing Fairly Forums

The Commission successfully produced two Competing Fairly Forum satellite broadcasts to rural and regional towns throughout Australia.

The broadcasts provided people in regional communities with the opportunity to participate directly with the Commission's Chairman and Commissioners, and other trade practices experts, to have their concerns heard directly. Both broadcasts incorporated a session in which the panel responded to questions put by participants in the regional towns.

The first broadcast, on 8 November 2000, was received in 28 towns and addressed broad trade practices issues. The second broadcast, on 1 May 2001, was received by 62 towns and addressed the issue of unconscionable conduct (a topic on which further information was sought by the participants in the first forum).

Future forums will explore other trade practices issues which are relevant to the rural and regional sectors.

The forums are supplemented by information available at the website  
<<http://forums.accc.gov.au>>.

### **Corporate videos**

In early 2001 the Commission produced a corporate video, *Fair Game or Fair Go*, to explain the legal concept of unconscionable conduct.

The video was released ahead of the May Competing Fairly Forum to assist the audience develop an awareness of the key issues that arise in unconscionable conduct.

Both Competing Fairly Forums were also made available as videos.

### **Communications and publications**

During 2000–01 the small business program gave 95 presentations and seminars, and attended 19 expos and trade shows. Field trips covered over 70 towns in the first part of 2001. Over 100 000 publications were distributed at expos, trade shows, presentations and through the program's regular mailout.

The second edition of *Retail Flash* was published and distributed in time for Christmas trading. *Retail Flash* is produced in conjunction with the Australian Retailers Association and provides small retailers with concise information on trade practices issues useful for improving customer relations.

The communication network of the program was extended to include rural press and trade magazines where articles and advertisements were placed on a regular basis. This included regular columns by the Small Business Commissioner, John Martin.

The small business program continued its regular mailout to small businesses and industry associations, providing accessible information on specific trade practices matters for inclusion in newsletters and magazines.

The program also produced and distributed a number of small business flyers, providing trade practices information in a concise and easy-to-read format. This included four flyers focusing on recent developments in unconscionable conduct law and the effect of those changes on specific industry sectors (retail tenancy, franchising, financial services and retail supply chain).

Small business flyers have been produced in a number of languages. As well as being distributed at festivals and presentations they are now available on the Commission's Small Business website.

### **Cooperation with other agencies and associations**

The small business program further developed its cooperative activities with other Commonwealth, State and Local Government agencies and industry associations that have a business information role.

The Commission liaised regularly with the Federal Office of Small Business, particularly in relation to the Franchising Code of Conduct.

The Commission also continued to liaise with its Small Business Advisory Group (SBAG) which comprises representatives from a wide range of business and professional areas. The group meets every six months to discuss trade practices issues affecting small business.

The success of the Commission's Competing Fairly Forums was largely due to the support and cooperation of business and industry associations, community groups and local governments.

Building upon the enthusiasm shown in the forums the small business program will be exploring partnership relationships with local authorities in regional areas.

### **Rural and regional outreach program**

The small business managers in each State and Territory continued to organise regular seminars, presentations and field trips to increase awareness and understanding of the Trade Practices Act in rural and regional areas.

They attended local trade shows, festivals and business expos giving them further opportunities to meet with small business owners.

In the early part of 2000–01 the main area of concern to small business was the introduction of the New Tax System. The small business managers worked closely with the Commission's GST unit and the Australian Taxation Office to ensure that small businesses understood their rights and obligations under the new GST provisions of the Act.

## Industry codes of conduct

The Commission continued in its role of administering and enforcing the mandatory Franchising Code of Conduct.

In October 2000 the Government announced its response to the review of the code. The review's findings revealed that the majority of participants in the franchising industry support the continuation of the mandatory code. The Government accepted the review's finding and the code continues to apply to franchising activities in Australia as a single generic code.

In responding to other recommendations and conclusions in the review's findings, the Government foreshadowed that several modifications would be made to the code to make it more flexible.

The legislative amendments were announced on 29 June 2001 and they will become operative on 1 October 2001.

In early 2001 the small business program began to take a role in relation to other industry-to-industry codes, including the Code of Conduct for Film Exhibition and Distribution.

## Court actions

### Franchising Code of Conduct

**Australian Industries Group (Half Price Shutters)**  
Proceedings were instituted in the Perth Federal Court on 4 September 2000 against Australian Industries Group (Half Price Shutters), Tony Gulloti (the national manager) and Robert Keirle (a former director). The matter relates to alleged breaches of the Franchising Code of Conduct. There were also allegations of false representation about profitability and unconscionable conduct.

The Commission is seeking court orders including declarations, injunctions, orders requiring the payment of compensation, institution of a trade practices compliance program and costs.

### Unconscionable conduct

**Cheap as Chips Franchising Pty Ltd and anor**  
Proceedings were instituted on 30 June 1999 in the Federal Court, Melbourne. The Commission alleged that Cheap as Chips Franchising Pty Ltd and its director, Mr Peter Hudousek, engaged in unconscionable conduct and contravened the mandatory Franchising Code of Conduct. On 14 March 2001 the Federal Court made orders by consent against the company and the director in relation to their dealings with three franchisees.

### GB Berbatis and Ors t/a Farrington Fayre Shopping Centre

Proceedings were instituted in the Federal Court, Perth, in March 1998 but the trial was adjourned in October 1999 because of concerns about the constitutional validity of s. 51AA. The section was found to be constitutional on 14 January 2000. In September 2000 the court found that the landlord and its representatives had engaged in unconscionable conduct against one of the tenants but had not done so in two other instances. The owners appealed and the Commission launched a cross-appeal. On 27 June 2001 the Full Federal Court upheld the appeal by the owners and dismissed the Commission's cross appeal. The Commission has sought special leave to appeal the decision to the High Court.

### Samton Holdings Pty Limited

Proceedings were instituted in the Federal Court, Perth, in February 1999. On 24 December 1999 proceedings were deferred pending the decision in the Farrington Fayre matter as to the constitutional validity of s. 51AA. On 29 November 2000 the judge concluded that while the company had struck a hard bargain it fell short of being unconscionable. The court dismissed the Commission's application against the company and the six landlords. An appeal was heard before the Full Federal Court on 28 May 2001. The decision is reserved.

### Simply No Knead Franchising Pty Ltd

The Commission instituted proceedings on 16 June 1999 in the Federal Court, Melbourne. On 17 May 2000 the Supreme Court of Victoria ordered that SNK be wound up in insolvency.

In September 2000 Justice Sundberg of the Federal Court concluded that the conduct by SNK disclosed 'an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour' against five franchisees that amounted to unconscionable conduct for the purposes of s. 51AC of the Act.

#### **Avanti Investments Pty Ltd/Barbaro**

On 27 April 2001 the Commission instituted proceedings in the Federal Court in Adelaide seeking injunctions, declarations, findings of fact, and orders to vary the market gardeners' agreements so that they are no longer responsible for the cost of excess water. The first directions hearing is set down for September 2001.

#### **National Australia Bank**

On 3 November 2000 the Commission instituted proceedings in the Federal Court, Hobart, against the National Australia Bank (NAB) and a business banking manager in Tasmania, Carlton Dixon. The Commission alleged that the NAB had engaged in unconscionable conduct in obtaining and enforcing a personal guarantee for \$200 000 from a Tasmanian woman as security for a business loan to a company of which the woman's husband was a director. At the time the guarantee was executed, the woman's husband was seriously incapacitated with amnesia after an accident.

On 5 June 2001 the court made orders by consent declaring NAB had acted unconscionably in obtaining and enforcing the guarantee; restraining the bank in Tasmania and its manager Carlton Dixon from obtaining guarantees without properly explaining their nature and the need to obtain independent legal advice before the guarantee is signed; requiring the bank to notify all lending staff in Australia of new lending requirements. NAB also annulled the guarantee, paid \$28 500 in damages to the Ashtons, and repaid monies recovered in excess of amounts owing on the Ashtons' home mortgage.

## **International activities**

The Commission's international activities are targeted to help other countries achieve effective competition and consumer protection regimes and to develop a 'culture' of competition to develop more competitive and fair overseas markets, while improving access for Australian exporters.

The international impact of the Commission's initiatives is substantial given the wide range of activities currently undertaken by staff. The focus on this work is also increasing as the Commission is more often faced with competition and consumer protection issues with an international dimension.

### **Formal cooperation agreements**

On 17 July 2000 the Commission signed a bilateral cooperation arrangement with the US Federal Trade Commission (FTC) to facilitate information exchange and enforcement cooperation on consumer protection matters. A second agreement gave the Commission access to the US FTC's complaints handling database 'Consumer Sentinel'.

On 26 October 2000 the Commission entered into its first tripartite cooperation arrangement with the Canadian Competition Bureau and the New Zealand Commerce Commission. The arrangement established a framework for notification, coordination and cooperation on competition and consumer protection enforcement activities, exchange of information and avoidance of conflict.

Negotiations with several other competition and consumer protection agencies around the world are currently under way. Positive outcomes of these negotiations will significantly increase the Commission's network of formal cooperation arrangements to facilitate information exchange, cooperation and assistance in enforcement matters, and provide technical assistance to emerging economies.

### **Cooperation in enforcement matters**

The Commission is increasingly cooperating with its international counterpart agencies on competition, consumer protection and regulatory matters to effectively enforce laws in Australia and overseas. In an environment where illegal conduct is increasingly of a cross-border



nature, the Commission places enormous importance on establishing and utilising its international networks to achieve positive outcomes for consumers in Australia and overseas.

Common examples of matters involving enforcement cooperation over the past year have included merger and cartel cases, and international lottery and marketing scams.

## International forums

### OECD

The OECD Competition Law and Policy Committee (CLP) and the Joint Group on Trade and Competition meet three times a year in Paris. One of the priority work areas over the past year has been hard core cartels and the use of sanctions, leniency policies and other investigative tools, and cooperation between competition authorities to combat the effects of global cartels.

During 2000–01 round-table discussions were held in relation to joint ventures; e-commerce; road transport; compliance programs; transnational mergers; intellectual property rights; subsidies and state aid; training programs and telecommunications.

### APEC

The Commission continued its active participation in the Asia–Pacific Economic Cooperation (APEC) Competition Law and Deregulation Group. Meetings in 2001 have taken place under the presidency of the People's Republic of China. Work within this group continues to focus on regulatory reform in APEC economies, technical assistance and development programs, and capacity building and institutional development in the region.

### WTO

The Commission continues to take a keen interest in developments in the World Trade Organisation (WTO) Working Group on the Interaction Between Trade and Competition Policy. The future of the group is likely to be determined at the next WTO ministerial meeting in Doha, Qatar in November 2001.

### ISCCO

On 15 and 16 November 2000 the International Society of Consumer and Competition Officials (ISCCO) conducted its second workshop for the year in Durban, South Africa. The meeting titled, *Governments Delivering Consumer Welfare*, was co-chaired by outgoing ISCCO President, Mr Allan Asher and by the new acting President, Dr David Cousins. The workshop also drew delegates from Argentina, Fiji, Hong Kong, India, Malaysia, Papua New Guinea, South Africa, St. Lucia, Swaziland, Sweden, Trinidad and Tobago, the United Kingdom, the United States, Vietnam, Zambia and Zimbabwe.

The workshop centred around the discussion of four main themes:

- challenges for new competition and consumer protection agencies;
- taking advantage of network tools;
- addressing issues currently confronting government regulators; and
- educational strategies — examining tactics for educating consumers, business and governments on competition and consumer protection issues.

### Technical assistance

The Commission has been involved in several technical assistance activities in the past year, making available its resources and expertise in competition, consumer protection and utility regulation to countries with less developed regimes. One example was the Commission's involvement in a high level briefing on electricity reform in Russia in May 2001 that was coordinated by the OECD. Mr Michael Rawstron, General Manager of the Commission's Electricity Unit, represented the Commission at the meeting.

Another major aspect of the Commission's liaison and technical assistance work involves hosting visits to Australia by our international counterparts. During 2000–01 the Commission hosted short-term visits to Australia by government officials from a range of economies including: Argentina, Canada, the People's Republic of China, Chinese Taipei, Egypt, Fiji, Germany, Hong Kong, India, Japan, Korea, Lebanon, Macau, Malaysia, New Zealand, Papua New Guinea, Peru, the Philippines, Singapore,

Sri Lanka, South Africa, Sweden, the United Kingdom, the United States of America, and Vietnam.

The Commission has also conducted more extensive 'in country' training in a number of emerging economies, as outlined below.

### **Indonesia**

The Commission has participated in an ongoing consultancy project, with funding assistance from AusAID, to provide technical assistance to the Directorate of Consumer Protection of the Indonesian Ministry of Industry and Trade in the implementation of the Prohibition of Monopoly Practices & Unhealthy Competition Law. The assistance has included 'in country' consultancies to develop and define short-term and long-term objectives for the work of the Directorate.

### **India**

In April 2001 the Commission hosted a visit to Canberra by Mr Pradeep Mehta, Director-General of the Consumer Unity and Trust Society (CUTS), India. The visit explored and assessed possible future assistance between Australia and India on the implementation of a competition regime in India. Funding for the visit was received from the Australia-India Council and also for a consultant to provide comprehensive comments on India's draft competition legislation.

### **Thailand**

A consultancy project in the form of a scoping mission in Thailand was undertaken to assess the needs of the Trade Competition Commission (TCC), Department of Internal Trade, and to ascertain future work that could be undertaken by the Commission regarding the implementation and enforcement of new trade competition law. Funding assistance for the project was received from AusAID and future technical assistance work is currently being considered by the Commission.

### **Papua New Guinea**

The Commission has been working with the PNG Consumer Affairs Council, again with funding support from AusAID, to assist in the development of existing staff and organisational structures and resources to cope with the implementation and administration of proposed new trade practices legislation. Discussions have been held with PNG Treasury and the National Planning Office on the implementation of a national competition policy and introduction of a PNG competition and consumer law.

### **South Africa**

Over the past year the Commission has had officers from the South African Competition Commission and Competition Tribunal attend several of its investigations training courses in Canberra. This training assistance is part of a broader program of support from the Commission to assist in the development of an effective competition regime in South Africa.

### **Philippines**

With funding assistance from AusAID, the Commission is currently undertaking an extensive consultancy project for the development of a consumer movement in the Philippines. The project involves a diverse range of deliverables including the purchase of extensive IT equipment; development of a website; work placements in Australia to learn how the consumer movement operates here; preparation of position papers on issues of concern for Filipino consumers; conducting press campaigns on consumer issues; and holding regional conferences for consumer groups throughout the Philippines.

An important output of the project is the drafting of legislation for the Philippines. Amendments to the existing Consumer Act have been drafted to allow consumers to take action at a local court level for possible contravention of the Consumer Act. The project has also initiated the drafting of the country's first comprehensive competition legislation.