

From the Small Business Commissioner

Over recent months the ACCC has experienced mixed fortune in outcomes from court actions which are important to small business. In the case against Safeway (Woolworths' retail grocery outlet in Victoria) the court rejected the ACCC's allegation of misuse of market power. The ACCC is appealing the decision. In the Samton case in WA where a landlord in dealing with a small business tenant was alleged to have breached s51AA (the unconscionable conduct provision which preceded s.51AC) the court was not satisfied the circumstances were sufficiently "extreme" to warrant a positive decision.

Following an earlier negative decision on a s.51AA retail tenancy case (Farrington Fayre) it is clear there are serious challenges in convincing courts on the degree of disability or disadvantage suffered by a complainant in cases brought under this provision of the TPA. The ACCC currently has lodged an appeal to the High Court on the Farrington Fayre s.51AA matter.

Meanwhile as demonstrated in the Avanti case in this edition of *Briefing*, the ACCC is continuing to have success in litigation taken under s.51AC of the Act. The ACCC has also filed in the Federal Court in Brisbane against Shopping Centre manager Westfield, alleging misleading and deceptive conduct and unconscionable conduct (under s51AC) against a small business tenant.

Rural and Regional Program Launch

Small businesses, farmers and consumers outside metropolitan areas can benefit from the roll out of the ACCC's Rural & Regional Program. The National Launch of the Program by the Chairman Professor Fels and Regional Services, Territories and Local Government Minister Wilson Tuckey will be held in Bendigo on 19 March.

Regional Outreach Officers (ROOs) have been appointed to all ACCC offices. They are actively involved in field visits and setting up the Regional Supporters Network.

Competing Fairly Forums 2002

Using a live satellite link to regional venues around Australia the Competing Fairly Forums have been an effective means of exchanging information on trade practices issues. The Forum provides business owners in regional areas an opportunity to interact with the ACCC's Chairman, Commissioners, and other expert panelists.

Previous Forums have dealt with such trade practices issues as unconscionable conduct and advertising and selling. This year the theme of the forums is that 'prevention is better than cure'. They will explain how small business and consumers can avoid problems and, if any disputes do arise, how to prevent them from getting out of hand. The first satellite Forum will be held on Tuesday 21 May, with the second on Tuesday 15 October. For details visit the Competing Fairly Forum website, www.forums.accc.gov.au.

Supply Chain Relationships

The ACCC receives complaints about dealings between farmers and the businesses that transform their produce. Some of these complaints are being investigated under the TPA however this can be very costly to both parties in terms of time, money and potentially irreparable damage to the commercial relationship.

Recently the Winegrape Growers Council of Australia and Winemakers Federation of Australia formed a liaison group to address concerns about these relationships. The liaison group is looking at issues such as standards and specifications, and timing of various aspects of contracts. The ACCC supports this sort of approach as it leads to greater understanding of the issues that face different parts of the industry, leading to the long-term viability of the industry. Industries considering this type of process still need to be mindful that they do not make agreements on issues such as prices or otherwise behave in a way that is anti-competitive.

Other produce sectors have taken advantage of the Retail Grocery Industry Ombudsman's mediation of disputes between parties that are in a vertical relationship along the supply chain from growers to retailers. For information on the code see www.mediate.com.au

Unconscionable Conduct Market Gardeners Win Dispute

The Federal Court of Australia declared that Avanti Investments had engaged in unconscionable conduct and made various misrepresentations to the lessees who were Vietnamese farmers with little formal education or knowledge of English. In 1994 Avanti entered into agreements with two farmers to lease the land for eight years with no limitation on bore water use. This land was later sub-let to the five farmers in dispute who invested considerable resources into working the land. In 1998 Avanti unlawfully claimed a right to break and vary the leases, and in 1998 and 1999, made the farmers sign new leases reducing the amount of water available. The farmers were also told that the leases were the same as the 1994 lease except for the rent and the terms. Avanti demanded payment from the farmers of over \$67,000 for excess water for the years 1998/1999 and 1999/2000. **MR 5/3/02**

Items in *ACCC Briefing* at times refer to Media Releases and their dates eg MR 6/2/02. These can be found on the ACCC website www.accc.gov.au.

For e-mail copies of *Briefing* please send details to therese.dupe@accc.gov.au or phone 02 6243 1069.

For TPA information - ACCC Infocentre 1300 302 502

Unconscionable Conduct

Westfield Shopping Centre

The ACCC instituted proceedings in the Federal Court, Brisbane against Shopping Centre Manager, Westfield alleging misleading or deceptive conduct and/or unconscionable conduct in relation to its dealings with one of its former tenants. Allegations include that Westfield made misleading representations with regards to:

- the development of the area adjacent to the tenants' site into an outdoor dining precinct and the construction, by a certain date, of a number of specified restaurants that would attract patronage to the area;
- the consistent flow of customers past the site because of its location and the design of the food court; and
- that the plans discussed with the former tenants for the food court were final and not subject to revision.

It was further alleged that Westfield had acted unconscionably towards the tenant by refusing to finalise a settlement unless the former tenants agreed to certain conditions including withdrawing their complaint to the ACCC and notifying it that they were satisfied with the settlement. **MR 8/3/02**

Consumer and Small Business Protection

Internet Check for Health Scams

The International Marketing Supervision Network (IMSN) Internet Sweep targeted websites which offer 'miracle' health products and services, as well as sites of well-established products promoting properties they do not have. The IMSN is a network of consumer protection authorities from 30 countries. Its main objective is to take action to prevent and redress deceptive marketing practices with an international component. The ACCC is an active player in the IMSN, coordinating the International Sweep Day and taking on the Presidency of the Network in 2002. Past cases where the ACCC has achieved success in stopping cyber health scams include Purple Harmony Plates, advice about Chronic Fatigue Syndrome, Australian Institute of Permanent Makeup, Giraffe World, and Listen Systems. **MR 29/1/02**

Harvey Norman Withdraws Challenge

The Federal Court allowed Harvey Norman to discontinue legal proceedings attacking the ACCC's investigatory processes. The ACCC had conducted investigations to determine whether Harvey Norman catalogue advertising in the lead up to the GST were bait advertising and false, misleading or deceptive. Harvey Norman had refused to provide all relevant information. The ACCC used its statutory powers requiring Harvey Norman executives and franchisees to provide information. Harvey Norman claimed a potential conflict of interest on the part of the ACCC's legal representative and launched Federal Court proceedings. The ACCC investigation is continuing. **MR 22/1/01**

New Labelling of GM Foods

The labelling provisions of the Standard for GM foods are a new priority for the ACCC. *News for Business: genetically modified organisms and foods* explains how the consumer protection provisions of the TPA apply to the labelling and promotion of GM foods and the relationship between the Act and the Standard. *News for Business* is a free publication available from the [ACCC website](#), or the Publishing Unit. **MR 18/1/01**

Australian Owned

The Federal Court made orders by consent against Architectural & Structural Adhesives relating to claims of Australian ownership. In November 2001, the ACCC instituted legal proceedings against ASA alleging that ASA claimed to be 'Wholly Australian owned' and 'Australian owned'. ASA had been Australian owned but in June 2000 a substantial portion of shares was sold to a French company. ASA makes adhesives and other building materials used extensively across Australia in the construction and DIY industry. **MR 17/12/01**

Country of Origin Guide TCF Industries

The ACCC has published country of origin labelling guidelines for the textiles, clothing and footwear industries. The publication working party included representatives from the Council of Textile and Fashion Industries of Australia Limited, and the Business Law and Competition Reform Section of the Department of Industry, Science and Resources. The Guide is on the ACCC website www.accc.gov.au, or from the ACCC Publishing Unit for \$10 on (02) 6243 1143. **MR 17/1/02**

Furniture Ads

The ACCC instituted legal action against Furniture Direct and Furnelect alleging false, misleading and deceptive conduct over a 'Store Cost Plus \$1' advertising campaign. The ACCC alleges that the prices which Furniture Direct and Furnelect advertised were calculated by adding approximately 60 per cent to the prices paid for the items by the stores, plus one dollar. Some advertisements contained a fine print disclaimer: "store cost includes all store outgoing". **MR 16/1/02**

Cellulite Claims

The ACCC received court-enforceable undertaking from the Australian company, Pierre Fabre, resulting from representations made about Cellu-stop. The ACCC is concerned about products that say they have an effect on cellulite when the company marketing and promoting the product does not have reasonable grounds for making the representations. These products are expensive and create unrealistic consumer expectations. **MR 21/12/02**

Consumer and Small Business Protection

Yellow Pages Service

The ACCC instituted legal proceedings against Telstra-owned Pacific Access regarding the operation of its Yellow Pages Connect service. For a charge, the service provides the best or closest match to search criteria specified by a consumer, plus a connection fee if the consumer wishes to make contact. Businesses can also pay to be listed as a Priority Advertiser which guarantees that the business will be referred to consumers ahead of non-Priority Advertisers. The ACCC alleges that Pacific Access refers a Priority Advertiser ahead of a non Priority Advertiser even when the non-Priority Advertiser may be a better or closer match to the search criteria given by the consumer calling the service. **MR 19/12/01**

Don't Bag the Standard

Beanbags, beanbag covers and the packaging of beanbag filling are covered by a mandatory product safety standard under the TPA. Polystyrene beanbag filling was responsible for the unfortunate death by choking of two toddlers in the 1980's resulting in the introduction of a mandatory product safety standard in 1987 that aimed to reduce the chance of injury. The standard requires that beanbags carry a specific warning label and have a child-resistant slide-fastener. The ACCC carries out national surveys on all products covered by a mandatory standard under the Act. Product safety information booklets on bean bags and other products can be obtained by calling the ACCC Infocentre. **MR 23/11/02**

Action Against Internet Service Provider

The ACCC instituted legal proceedings against Dataline.net.au, Australis Internet and World Publishing Systems over the supply of Internet related services to small businesses and consumers throughout Australia. It is alleged that Dataline, Australis and WPS engaged in unconscionable conduct, misleading and deceptive conduct, undue harassment, resale price maintenance and made false representations. **MR 18/1/02**

Restrictive Trade Practices

Adsteam's Harbour Towing Notification

The ACCC announced that it had found that the proposed price increases by Adsteam Marine were unjustified. As Adsteam is the sole provider of harbour towing services at major ports it is a 'declared' company under the Prices Surveillance Act, and is therefore required to notify the ACCC of proposed price increases. Should Adsteam choose not to adopt the ACCC's decision there are no powers under the Act that can prevent prices increasing. The reasons behind the decision are available at the ACCC's Melbourne office and on the ACCC website.

MR 28/2/02, MR 20/2/02, MR 1/2/02

AMA (W.A.) Price-Fixing

The Federal Court ordered the AMA (WA branch) to pay penalties and costs for price-fixing and primary boycotts. Legal action related to the supply of medical services to Joondalup Health Campus in Perth. Joondalup is controlled by Mayne Nickless (trading as Health Care of Australia). This is the first time the Federal Court has imposed penalties on a professional association for price-fixing and primary boycotts. **MR 24/12/01**

ACCC and Safeway

The Federal Court decided that Australian Safeway Stores did not breach the TPA in relation to its policy for the display and sale of bread during 1994 and 1995. The ACCC had alleged that Safeway's conduct involved anti-competitive agreements, misuse of market power, exclusive dealing and resale price maintenance. The ACCC alleged that when Safeway discovered that its retail competitors were selling bread at what it regarded as an unacceptably low price, it put pressure on the baker which was supplying that retailer by refusing to accept further supplies from that baker until the retailer stopped selling the cheap bread. **MR 21/12/01**

ACCC and Boral

The High Court granted leave to Boral Masonry to appeal the decision of the Full Court of the Federal Court which had held that Boral Masonry's pricing below manufacturing costs contravened the TPA through misuse of market power. In March 1998 the ACCC instituted proceedings against Boral Masonry alleging that Boral Masonry had reduced its prices for concrete masonry products below manufacturing costs in order to drive out an efficient new independent operator, C&M Bricks. **MR 14/12/01**

Code of Ethics & Practice Models

The Recruitment & Consulting Services Association will amend some anti-competitive arrangements contained in its Code of Ethics and Practice Models. In 2001 the RCSA had approached the ACCC with concerns relating to the Code suggesting that it contained exclusionary provisions in breach of the TPA such as placing various limitations or restrictions on the ability of RCSA members to supply or acquire services in a variety of situations; or contained provisions which lessened competition, or maintained a price. The revised arrangements, agreed to by the Association, formed part of consent orders granted by the Federal Court in Brisbane. **MR 4/12/01**

Whistleblower

The ACCC recently placed ads in major newspapers to encourage an anonymous informant to come forward. The informant was guaranteed his or her identity would remain confidential. Information regarding a possible national breach had been received in a letter written on green paper in an italic typeface and was posted in a company envelope. The ACCC has in the past received such information from other whistleblowers which has resulted in substantial penalties for companies breaking the law. **MR 15/12/01**

E-commerce

E-commerce for Small Enterprises

The Small Enterprise Telecommunications Centre Limited (SETEL) is a national consumer association advancing the telecommunications and e-commerce interests of Australian small business. In February SETEL together with Telstra and Pacific Access conducted its e-commerce forum to discuss a number of e-commerce issues affecting small businesses across all industries including: security; privacy; understanding; affordability; support and assistance; promotion; and leadership.

The ACCC participated in the Conference. For further information see www.setel.com.au.

Mergers/Takeovers

Acquisition of Galvanizing Business

The ACCC opposed Industrial Galvanizers Corporation's acquisition of Transfield's Brisbane galvanizing business. The ACCC believes that the acquisition by IGC would have led to a substantial lessening of competition in the provision of galvanizing services in the Brisbane region by giving IGC more than 80% of the market. The market is mainly regional with customers rarely shipping goods large distances to be treated and the ACCC noted recent legislative changes requiring that it consider the competitive impact of proposed mergers and acquisitions on regional markets. **MR 10/1/02**

Franklins Sell-down

The ACCC confirmed a draft decision to allow joint promotion agreements between Franklins and buyers of some of its supermarkets. The promotions will benefit consumers through discounted products and will also assist the new businesses to consolidate during the transfer. This will result in greater competition in the eastern States. **MR 17/12/01**

Regulated Services

PC Report on Telecommunications

The ACCC welcomed the Productivity Commission's Final Report into Telecommunications Competition Regulation and its support for keeping the telecommunications competition provisions of the TPA in. In particular, the ACCC welcomed support for keeping the provisions which regulate the exercise of market power in the telecommunications industry.

MR 21/12/01

Mobile Phone Regulation

The ACCC announced its draft decision which aims to put GSM and CDMA mobile phone services on an equal regulatory footing by proposing to vary the service declaration for GSM services to include CDMA services. The draft decision assists developing a level playing field for carriers and helps to remove potential inefficiencies. For copies of the draft report call the ACCC Infocentre or visit the website. **MR 10/12/01**

Container Stevedoring Prices

The latest ACCC container stevedoring monitoring report shows that average prices for container movements across wharves by stevedoring services had stabilised over the 2000-2001 financial year and are now at their lowest level since 1985 when monitoring data became available. For a copy of the report call the ACCC Infocentre. **MR 4/12/01**

National Electricity Market

The ACCC issued a work plan for its assessment of the proposed code changes to the National Electricity Market rebidding arrangements. The proposed changes, submitted for authorisation by the National Electricity Code Administrator in October 2001, include measures designed to give better price outcomes in the NEM. The need for the changes arises from concerns about generator market power and the ability of generators to use their bidding and rebidding strategies to force prices up, compromising the efficiency of the market outcomes. Further details will be released as they are finalised. It should be noted that a major review of energy regulation in Australia is currently being conducted by a committee lead by former senator and government minister Warwick Parer.

Authorisations and Notifications

Showmen's Code of Conduct

The ACCC issued a draft approval to a showmen's code of conduct after the Showmen's Guild of Australasia lodged an application for authorisation for its code of conduct. The code would cover all guild members and sets out standards of conduct for people providing sideshow entertainment. The ACCC considers that there are public benefits from a self-regulatory scheme for showmen, particularly in relation to safety requirements within Sideshow Alley. The ACCC proposes to grant authorisation for five years. **MR 21/12/01**

Dairy Farmers to Collectively Negotiate

The ACCC confirmed a draft decision to grant authorisation to dairy farmers wishing to collectively negotiate contractual terms and conditions of raw milk supply with dairy processors. This will benefit the many rural communities that depend on dairying for a large part of their income. Collective bargaining should deliver other public benefits by giving farmers more confidence in their dealings with processors, and an increased ability to take advantage of new market opportunities. The authorisation is current until 1 July 2005.

MR 13/3/02

CPI and the New Tax System

Unlawful GST Charges

A West Australian publican has offered refunds to its customers who were incorrectly charged GST on credit card cash advance transactions. The ACCC obtained a private ruling from the Australian Taxation Office which stated that a credit card cash advance transaction is not considered a taxable supply and therefore is not subject to GST. **MR 30/11/02**

ACCC State Briefing

Northern Territory

The Top End experienced a late onset of the wet season with only half the annual rainfall. A late wet season can cause severe disruptions. Many small businesses are organised around the expected rains, including plans for deliveries of stocks and goods. Recently Katherine was on flood alert. Fortunately the floods did not come but some small businesses did experience difficulties in receiving stock due to the trucks being stranded on the Stuart Highway. In addition tourism in the Territory has been struggling since September 11 and the collapse of Ansett.

Fiona MacRae Manager Small Business /ROO NT ph 08 8946 9603

Queensland - Townsville

The year has started out as both a hot and busy one. January and February has seen inaugural trips into some of the more remote areas of north western Queensland such as Boulia and Camooweal to meet with potential supporters for the ACCC's Rural and Regional Supporters Network, spread the word about the program and meet key personnel in the region. There were also meetings with potential convenors for the ACCC's Competing Fairly Forum. Work began in earnest to find vendors wishing to participate in the voluntary Storecharter, a recent joint initiative by the ACCC and a number of other agencies. The Storecharter is a response to a growing number of complaints and concerns about fair trading issues associated with stores serving rural and remote indigenous communities.

Western Queensland's media has proven to be very supportive of the initiative with interviews being conducted in Mount Isa on local ABC radio as well as Mount Isa's MOB FM. An article was also published in the North West Star, Mount Isa's daily newspaper.

Ralph Lake ROO Officer Townsville Ph: (07) 4729 2666

Queensland - Brisbane

Trade Practices compliance is often seen by small business as adding to the administrative burden of the day to day operations. In Queensland we are correcting that impression by providing information about the protection and obligations that the Act provides for small business. Industry groups, cooperatives, franchises and associations have taken advantage of the free seminars conducted in Brisbane and the Gold and Sunshine Coasts about the role of the ACCC and the Trade Practices Act. For more information or to organise a seminar call Paul Jones on 07 3835 4666.

Paul Jones Manager, Small Business Qld 07 3835 4666

Tasmania

During February, an ACCC team visited potential Community and Regional Supporters to discuss their role in the ACCC's Rural and Regional network. On 21 February, Commercial Radio Australia (Federation of Australian Radio Broadcasters) and the ACCC presented seminars in Hobart and Launceston on "Broadcasters and the Trade Practices Act". The seminars were well attended by radio executives and operational staff. As I am being seconded to the Taiwan Fair Trade Commission for several months, Shane Jeppson will be the Tasmanian contact.

His email address is shane.jeppson@acc.gov.au or telephone 03 6215 9306.

John Bardenhagen Manager, Small Business /ROO Tas.

New South Wales

The ACCC participated in a workshop organised by the Central Coast Area Consultative Committee in Gosford. The discussion focused on the many thousands of home based businesses and the need for them to be aware of their rights and obligations under the various local, state and federal governments. A key initiative of the workshop was to develop a number of strategies to ensure that these businesses have access to the range of free government services provided. The ACCC was also part of the Government Business Education Network marquee at the Vietnamese New Year Festival held at Warwick Farm racecourse on the 15, 16 & 17 February. The festival enabled people from the area to access a range of services provided to the Community. Mid-March the ACCC will be present at the Riverina Small Business Expo which is being held in Wagga Wagga.

Nick Heys, Manager, Small Business NSW ph 02 9230 9151

Victoria

The ACCC was pleased to participate in the Vietnamese (TET) and Chinese New Year Festivals this year. Melbourne staff were on hand to answer questions and to provide Vietnamese and Chinese publications on franchising, small business issues, the Trade Practices Act and advertising and selling issues.

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