

January 2005

From the Small Business Commissioner

This edition highlights an upgraded ACCC strategy to identify and close down cartel activities, and our submission to the Productivity Commission identifying further areas of necessary competition policy reform. This issue also flags the release of a new guide on the treatment of unconscionable conduct by larger businesses in dealing with smaller businesses.

The ACCC has also recently released important reports on stevedoring, telecommunications and private health funds which are all covered in this briefing.

NEW DEVELOPMENTS

The ACCC has stepped up its fight against cartel activities with a review of its leniency policy, the establishment of a dedicated cartel detection team, and a new campaign to help government agencies detect and report cartels.

This follows the recent Cartels and Leniency Workshops, hosted in Sydney by the International Competition Network, where investigators from all over the world swapped notes on the tools and techniques used to detect and break up cartels, with a focus on international coordination and cooperation.

Addressing the conference, ACCC Chairman Mr Graeme Samuel said he regarded fighting cartel behaviour as a major priority of the ACCC's enforcement program, stating that the ACCC has identified 40 suspected cartels, with 21 under intensive investigation and a further five in litigation.

The ACCC will raise awareness of its leniency policy and will collaborate with its counterparts overseas to coordinate and conduct anti-cartel investigations, and to identify emerging issues.

MR 261/04, 23.11.04

MR 263/04, 24.11.04

Contact the ACCC



Infocentre: 1300 302 502



Website: www.accc.gov.au

More needed to enhance and protect competition: ACCC

In early December the ACCC presented a submission to the Productivity Commission's draft report into National Competition Policy Reforms. The submission outlined the ACCC's views on measures that could be undertaken to enhance and protect competition.

In a statement accompanying the submission, ACCC Chairman Graeme Samuel spoke about the importance of matters such as reforms within the telecommunications and electricity industries, the restructuring of Telstra and changes within consumer protection policy.

MR 278/04, 13.12.04

UNCONSCIONABLE CONDUCT

Updated guide to unconscionable conduct law launched

The ACCC has released an updated *Guide to Unconscionable Conduct*. The guide adds to the existing education campaign, and will be supplemented by a forthcoming 'simple English' guide for businesspeople.

The Trade Practices Act encourages vigorous competition between firms and a robust approach to business dealings. However, there are limits on how far businesses can go. Unconscionable conduct law aims to protect businesses and consumers from harsh or oppressive conduct which extends beyond merely driving a hard bargain.

The guide contains recent interpretations of unconscionable conduct law and provides guidance on how the law applies in dealings with business and consumers. It is available from all ACCC state and territory offices, and the ACCC website.

MR 228/04, 19.10.04

Debt collection under scrutiny by ACCC and ASIC

The ACCC and the Australian Securities and Investments Commission (ASIC) issued a joint brochure outlining their roles in regulating debt collection activities. Both agencies oversee laws protecting consumers from inappropriate behaviour by collectors.

The new brochure can be obtained free of charge from either the ACCC on 1300 302 502 or ASIC on 1300 300 630.

ASIC and the ACCC will also issue a revised version of the *Debt collection guidelines* in mid 2005, reflecting market developments and recent court decisions.

MR 245/04, 8.11.04

Some items in *ACCC briefing* refer to media releases and their dates e.g. MR 12.2.04. These can be found on the ACCC website <www.accc.gov.au>. Other reports and documentation are also generally available on the website. Subscribe to *ACCC briefing* by emailing small.business@accc.gov.au. For TPA information - ACCC infocentre 1300 302 502.

Report on private health sector

The ACCC raised a number of concerns in a report to the Senate on anti-competitive practices by health funds and providers in relation to private health insurance. These concerns included the accessibility of information available to consumers about exclusions and restrictions under their policies, the effectiveness of 'key features' guides, the ability of members to transfer between funds without penalty and the difficulties involved in negotiations between hospitals and health funds.

Copies of this report are available from the ACCC's website.

MR 272/04, 8.12.04

Warning to air conditioning industry on environmental claims

Manufacturers making claims about environmental friendliness have been cautioned that such claims must be true, following successful ACCC challenges to advertising by an air conditioning manufacturer and importer.

Daikin claimed in numerous advertisements that the hydrofluorocarbon (HFC) refrigerants and Daikin air-conditioning units using those refrigerants were environmentally friendly, and that their use would prevent, or at least not contribute to, global warming. The ACCC believed these statements were misleading, as the refrigerants in question are potent greenhouse gases that do not benefit the environment and will contribute to global warming.

Daikin has undertaken that it will not make the claims for a period of five years, will place corrective advertisements on its website, write to its distributors explaining the undertaking and review its existing trade practices compliance program, ensuring that staff are trained in the area of environmental claims.

MR 227/04, 19.10.04

Garments fibre content labelling

The ACCC accepted court enforceable undertakings from Sherpa Outdoor Equipment Pty Limited about the labelling of its thermal underwear garments. The undertakings address ACCC concerns that misleading and false fibre content labelling may have breached the Trade Practices Act.

Sherpa has given a range of undertakings, including not supplying mislabelled garments, ensuring that garments are independently tested before making claims about fibre content, and placing corrective advertisements in major newspapers.

MR 230/04, 20.10.04

Federal Court finds breach over 'millionaires' advertising

The Federal Court has found that Mr Henry Kaye and his company, National Investment Institute Pty Ltd (which is now in administration), breached the Trade Practices Act by engaging in misleading conduct in the promotion of a 'millionaires' property investment course.

The court found that the advertisements promoting the course, which claimed that Mr Kaye could turn ordinary Australians into millionaires with no money down, no equity, no debt and a price protection guarantee, were misleading and deceptive. The court also found that claims by Mr Kaye and his company that a

thousand ordinary people taught property investment strategies by him would become property millionaires within 12 months, was deceptive, as there were no reasonable grounds for making the representation. The ACCC returns to court at a later date to deal with the injunctions, declarations and awarding of costs.

MR 232/04, 22.10.04

ACCC takes action against property investment seminar promoters

The ACCC instituted legal proceedings against Morgan Pacific Pty Ltd and its directors, alleging misleading and deceptive conduct in the promotion of property investment seminars. The advertisements in question promoted three-hour property investment seminars, presented by self-described 'multi-millionaire property investors and developers', Danny and Paul Hanna.

The advertisements in question claim that people who use the strategies would be likely to become wealthy and build multi-million dollar property portfolios and acquire property valued at hundreds of thousands of dollars using none of their own money and with zero debt.

The ACCC asserts that these claims are untrue, and the possibility of the investment strategies performing as advertised is remote. The ACCC is seeking declarations that the company and its directors have breached the Trade Practices Act, injunctions preventing the advertisements from being published, corrective newspaper advertising and costs.

MR 234/0, 28.10.04

Real estate firm admits to misrepresenting ACCC 'approval'

The Federal Court has found that Set Sale Realty Pty Ltd and its director, Mr David Pilling, engaged in false and misleading representations when claiming ACCC approval for its real estate property selling system.

In January 2004 Set Sale Realty sent various real estate agents an email with the subject heading 'ACCC APPROVES PILLING SYSTEM', and attached an unsigned extract from an ACCC letter to Mr Pilling. The email suggested that agents use this unsigned extract in information kits for prospective vendors. The ACCC alleged that the representations were false, as the system did not have ACCC approval.

The court declared by consent that the company had engaged in misleading and deceptive conduct in breach of s. 52 of the Act, and had represented that the system had approval that it did not have in breach of s. 53(c) of the Act. A three year injunction restraining the company from making the claims was granted, along with orders that the company write to each of its agents to inform them of the decision. Corrective newspaper advertising and costs of \$6000 to the ACCC were also ordered.

MR 236/04, 1.11.04

Retailer admits sale prices may have misled

Harris Scarfe Australia Pty Ltd has admitted to the ACCC that claims in its advertising may have misled consumers. The advertisements showed two prices, a present price and an after-sale price, claiming a saving of the difference. Following consumer complaints, the ACCC raised the concerns with the company. It was found that the company had used a formula to create the 'after-sale' price, rather than use the regular sale price

of the items. Furthermore, certain items did not revert to the 'after-sale' price once the sale had concluded.

The company agreed to immediately stop the conduct, place corrective advertising in major newspapers and implement a trade practices compliance program.

MR 239/04, 4.11.04

ACCC action against misleading employment advertising

The ACCC instituted proceedings in the Federal Court against Wizard Home Loans Pty Ltd, alleging misleading or deceptive conduct in relation to newspaper advertisements for Mobile Lending Managers. The ACCC alleges the advertisements were likely to mislead people into believing the positions were employed positions, when they were actually self-employment opportunities. The ACCC also alleges that potential remuneration figures given were exaggerated.

The ACCC is seeking a range of orders, including declarations, compensation, injunctions restraining similar conduct, costs, and orders for greater disclosure of actual remuneration to those interviewed for the positions. The ACCC is also taking a representative action seeking compensation on behalf of an individual that responded to an advertisement and accepted one of the positions.

MR 247/04, 9.11.04

Telecommunications retailer gives court undertakings

The ACCC has instituted proceedings against Australian Communications Network Pty Ltd, a seller of telecommunications services, for an alleged pyramid selling scheme. Proceedings were also instituted against a number of individuals involved in the company's operation, as well as an incorporated representative and its directors.

Under the system, 'individual representatives' pay ACN a fee to sell services to consumers. They may also recruit additional 'individual representatives' and receive commissions from sales made by them. Bonuses are also paid on the number of qualified individual representatives ACN has cooperated with the ACCC's investigation and provided substantial information about the operation of the scheme, but asserts that the system does not breach the Act.

The ACCC is seeking declarations, injunctions, corrective notices, findings of fact and costs, alongside an interim injunction that would prevent ACN from accepting payments from participants.

MR 264/04, 24.11.04

Changes to 'GM-free' chicken labelling under way

Following discussions with the ACCC, two of the largest manufacturers of poultry products in Australia have agreed to relabel their merchandise, omitting claims that the product is 'not genetically modified'.

The ACCC believes that claims of 'not genetically modified' could mislead consumers where genetically modified feed was being used. Baiada Poultry Pty Ltd and Bartter Steggles Pty Ltd have both agreed to stop using packaging containing such claims, and to rollout new packaging without the claims.

MR 268/04, 6.11.04

HOT SPOT—SCAMS AWARENESS MONTH

February is Scams Awareness Month! Coinciding with International Consumer Fraud Prevention Month, the ACCC will run a number of different campaigns to alert consumers and businesses to scams they may encounter, and help them avoid falling victim.

Among the activities planned are special editions of *ACCC Infolink* and *ACCC Consumer express*, both specifically dealing with scams and the distribution of education material in rural and remote areas.

For further information on scams, or to report a scam, call the ACCC Infocentre on 1300 302 502.

MERGERS AND ACQUISITIONS

Sydney CBD acquisitions by Westfield

The ACCC did not intervene in the acquisitions by Westfield of Skygarden and Imperial Arcade in Sydney's central business district. Following market inquiries among retailers and landlords, the ACCC considers that the acquisitions are unlikely to substantially lessen competition.

After the acquisitions, Westfield will control a significant proportion of the available retail space in the Pitt Street mall precinct. However, significant competition from alternative retail sites in the CBD shall act to constrain Westfield.

MR 229/04, 20.10.04

San Miguel acquisition of Berri

The ACCC did not intervene in the acquisition of Berri Limited by San Miguel Corporation. The acquisition of Berri by a company with a long standing involvement with The Coca-Cola Company raises the possibility of competition concerns similar to those identified by the ACCC in relation to Coca-Cola Amatil's proposed acquisition of Berri last year.

However, San Miguel has stated to the ACCC that it does not have any intention to enter into any arrangement with The Coca-Cola Company relating to the manufacture, distribution, marketing or supply of any non-alcoholic beverage in Australia. ACCC Chairman Mr Graeme Samuel stated that the ACCC will closely scrutinise any such arrangement made in the future.

MR 231/04, 20.10.04

Acquisition of ALH by Bruandwo Limited

The ACCC did not oppose the proposed acquisition of Australian Leisure and Hospitality Group Limited (ALH) by Bruandwo Limited. The acquisition shall increase Bruandwo's market share in the markets for the retailing of packaged liquor for off-premises consumption, the retailing of liquor for on-premises consumption, the acquisition of liquor for retailing and the electronic gaming machine market.

However, as these markets consist of a large number of small independent players, the acquisition does not cross the ACCC's concentration thresholds, except in certain local retail markets, where the company will be constrained by competitors. The ACCC therefore concluded that no substantial lessening of competition is likely to arise from the acquisition.

MR 233/04, 28.10.04

Bayer acquisition of Roche

The ACCC did not oppose the proposed acquisition of F Hoffmann-La Roche by Bayer Healthcare AG. Bayer is proposing to acquire, on a global basis, most of the current Roche consumer health business including the supply, licensing, marketing, and distribution rights of over-the-counter pharmaceuticals.

The acquisition will lead to only a small increase in Bayer's market share in Australia. In addition, competition from a number of domestic and multinational pharmaceutical companies will act to constrain the new entity.

The global merger remains conditional on approval from a number of international antitrust authorities who have not yet completed their evaluation.

MR 252/04, 12.11.04

ACCC opposes Origin Energy LPG acquisition in Tasmania

The ACCC opposed the proposed acquisition by Origin Energy of the jointly owned Mobil, Euphoric and Norvac LPG assets in Tasmania. Origin is the largest participant in the Tasmanian LPG market, with the Mobil/Euphoric/Norvac joint assets ranked second largest.

Following market inquiries the ACCC determined that the acquisition, which would lead to Origin Energy having over 90 per cent of LPG sales in Tasmania, would likely have the effect of substantially lessening competition in the Tasmanian LPG market.

While Origin proposed a number of measures to limit the impact of the proposed acquisition, the ACCC found that these measures were not sufficient to address the anti-competitive detriment of the arrangement.

MR 260/04, 22.11.04

Acquisition of Peoplesoft by Oracle

The ACCC did not oppose the proposed acquisition of Peoplesoft Inc. by Oracle Corporation. Both companies are significant players in the market for the provision of complex enterprise financial and human resource management software, primarily used by large corporations and government institutions.

Following industry-wide liaison and investigation by the ACCC, it was determined that the global nature of the market and the number of significant competitors both within Australia and abroad meant that there was not sufficient evidence that the merger would result in a substantial lessening of competition.

MR 262/04, 24.11.04

ABC and Peppercorn Childcare merger

The ACCC advised ABC Learning Centres that it will not oppose its acquisition of Peppercorn Management Group Limited and Child Care Centres Australia Limited, purchases that would result in ABC owning or managing 771 centres nationwide. This would make ABC the largest childcare provider in Australia.

This decision follows an undertaking from ABC that it will sell a number of childcare centres in regional NSW, Queensland and WA, and that it will not acquire further childcare centre licences in these areas. The ACCC believes that these measures will

ensure that competition and choice in childcare centres are preserved in regional areas.

MR 269/04, 7.12.04

Cooper companies' acquisition of Ocular Sciences

The ACCC did not oppose the acquisition by The Cooper Companies Inc. of Ocular Sciences Inc., both US-based suppliers of contact lenses. Following market inquiries among competitors, retailers and optometrists, the ACCC found that the merger was unlikely to result in a substantial lessening of competition, as the merged firm would face significant competition from other global suppliers.

MR 275/04, 9.11.04

RESTRICTIVE TRADE PRACTICES

Demolition companies face penalties of more than \$500 000 for price fixing

Following action by the ACCC, the Federal Court imposed penalties totalling \$535 625 on McMahon Services Pty Ltd, SA Demolition & Salvage Pty Ltd, DCD Enterprises Pty Ltd and a number of their representatives for price fixing a \$2.4 million tender for demolition and asbestos removal work for the Department of Defence.

By consent, each of the companies and individuals involved gave undertakings to the court that the companies would not share or discuss information relating to the price which they are likely to offer, act upon documents provided by competitors concerning prices that they are likely to tender, or knowingly fix or attempt to fix the price in any tender.

MR 241/04, 4.11.04

VISY penalised \$500 000 for attempted boycott

The Federal Court imposed penalties of \$500 000 on Visy Paper Pty Ltd and penalties of \$25 000 on two senior executives for trying to stop a competitor, Northern Pacific Paper (NPP), from taking Visy's customers. The court also ordered injunctions restraining Visy and the executives from engaging in similar conduct in future, and ordered trade practices compliance programs be implemented.

The penalties follow the High Court's finding that Visy attempted to implement a non-compete clause in its contracts with NPP, which required NPP to boycott customers or potential customers of Visy—and thereby not compete for market share. The court found that this arrangement was anti-competitive in breach of section 45 the Trade Practices Act.

MR 258/04, 18.11.04

\$485,000 penalties for NSW scrap metal bid-rigging cartel

Following ACCC action, the Federal Court penalised five companies and nine individuals a total of \$485 000 for cartel behaviour involving price fixing and boycotts in the NSW scrap metal market, plus costs of more than \$100 000.

Evidence was given that those involved had operated at scrap metal auctions in NSW for decades, collectively purchasing scrap metal at auction and then allocating the purchases between themselves later at a nearby club or hotel—thereby avoiding the need to compete for the metal at auction.

MR 273/04, 9.12.04

AUTHORISATIONS AND NOTIFICATIONS

EFTPOS and ATM clearing rules approved

The ACCC re-authorised minimum standards and procedures imposed by the Australian Payments Clearing Association (APCA) for the conduct and settlement of exchanges of ATM and EFTPOS payments. The ACCC believes that the rules provide public benefit by protecting the integrity and security of the ATM and EFTPOS networks.

The ACCC is satisfied that there are provisions to ensure that the rules continue to be set at an appropriate level which is not detrimental to the growth and use of the ATM and EFTPOS networks.

MR 225/04, 18.10.04

ACCC allows levy schemes to alleviate shortage of skilled bricklayers

The ACCC granted authorisation to a number of schemes which aim to help alleviate the current shortage of skilled bricklayers in Australia. The Clay Brick and Paver Institute, the Concrete Masonry Association of Australia, the Victorian Brick and Blocklaying Training Foundation Ltd and the Clay Brick and Paver Association of Victoria had applied to the ACCC to be able to impose or increase small levies on products manufactured by them.

ACCC Chairman Graeme Samuel stated that the ACCC accepts that there are benefits in allowing levies to be implemented that aim to increase bricklayer numbers. He further said that an increase in bricklayer numbers is likely to have positive flow-on effects for consumers, such as reducing construction times and costs and improving quality of workmanship.

MR 246/04, 8.11.04

Victorian chicken growers allowed to collectively bargain with processors

A draft determination by the ACC has proposed to authorise Victorian chicken growers to collectively bargain when negotiating growing contracts with their processors. The draft also proposes allowing collective boycott activity where negotiations fail. This proposed ruling applies to chicken growers who are members of the Victorian Farmers Federation.

The ACCC believes that the possible anti-competitive effect of the collective bargaining arrangement is far outweighed by the potential public benefit. The proposed authorisation is for a period of five years.

MR 256/04, 18.11.04

Tasmanian vegetable growers allowed to collectively bargain

The ACCC authorised Tasmanian vegetable growers to collectively bargain with Tasmania's two vegetable processors, McCain and Simplot. Following assessment of the proposed arrangement, the ACCC concluded that it was likely that the benefits from the arrangement would outweigh any possible detriment.

This authorisation permits Tasmanian growers to band together when negotiating contracts with the larger processors, allowing

them the opportunity to have more effective input into the terms and conditions of their contracts. Cost savings may also arise.

MR 257/04, 18.11.04

REGULATED SERVICES

Future Telstra price controls

Following extensive consultation with interested parties, including 12 public meetings throughout Australia, the ACCC has published its draft view on the price control arrangements that presently apply to Telstra, and the arrangements that should apply after 1 July 2005.

The draft recommendation is that price cap regulation be retained on the applicable services, with allowances for minor increases linked to CPI. Additionally, the ACCC believes that line rental prices should be subject to price controls.

The ACCC will consider further whether (and how) business services, national long distance and international calls should be excluded from price-cap regulation. The ACCC is due to submit its final views to the minister by 31 January 2005. The report can be obtained from the ACCC's website.

MR 248/04, 9.11.04

3G radio access network sharing arrangement

The ACCC announced that it does not intend to oppose third generation (3G) mobile radio network infrastructure sharing arrangements between Hutchinson 3G Australia and Telstra Pty Ltd, or between Optus and Vodafone.

These announcements follow independent ACCC assessment of the proposed arrangements, which determined that while the arrangements may reduce infrastructure-based competition, the long-term cost benefits would ultimately avoid unnecessary duplication of mobile network infrastructure and encourage the deployment of more extensive 3G networks.

MR 276/04, 10.12.04

MR 279/04, 14.12.04

Telstra accounting separation current cost reports

During December the ACCC issued the third accounting separation report relating to Telstra's operations in 2003-04. The report is intended to provide greater transparency of Telstra's operations, ensuring that the company does not unfairly discriminate between access seekers using its network services and its own retail operations.

The report contains financial information for core telecommunications access services, including the local carriage service, PSTN originating and terminating access, and the unconditioned local loop service.

MR 277/04, 13.12.04

Data network access service number portability

In mid-November, the ACCC issued a discussion paper on number portability for data network access services. Number portability is the ability of customers to change their network and/or service provider while retaining the same service number. The inability to retain existing phone/fax numbers when switching providers may result in consumers being unwilling or unable to change service providers—effectively locking them into their existing service provider.

The ACCC's preliminary view is that competition would be promoted by lowering entry barriers if number portability was introduced.

MR 259/04, 19.11.04

Telecommunications services in the corporate market

The ACCC has issued a discussion paper looking at how it could better assess the level of competition in the corporate customer segment of the Australian telecommunications market.

The discussion paper proposes the establishment of a number of information gathering and monitoring measures relating to the provision of products and services in that market. A copy of the discussion paper can be found on the ACCC website.

MR 271/04, 8.12.04

Stevedoring report

Users of stevedoring services are facing new challenges as the industry seeks to consolidate the benefits of reforms implemented since the mid-1990s, according to the ACCC's sixth *Container stevedoring monitoring report*. The report notes that a rise in revenue over 2003–04 was partly due to slightly higher rates in the loading and unloading of containers, but mostly to higher revenue from other activities, particularly container storage.

The ACCC monitors stevedoring revenues, costs and margins to provide the Australian Government and the community with information on the progress of waterfront reforms at Australia's major container terminals.

Following industry criticism of the report's finding that waterfront reform had stalled, ACCC Chairman Mr Graeme Samuel pointed to figures showing exceptionally high returns on assets of around 27.8 per cent EBIT within the industry, stating that these rates of return are a direct result of low levels of investment in expanded capacity.

The report is available on the ACCC website.

MR 253/04, 15.11.04

MR 255/04, 17.11.04

Long-term pricing proposal for aviation services

The ACCC has welcomed a decision by Airservices Australia to adopt a long-term, five year approach to pricing arrangements for air navigation and fire fighting services.

In a draft decision, the ACCC has agreed to proposed changes in terminal navigation and en route charges, but refused those related to fire fighting services. The ACCC believes the basis Airservices has adopted for charging for fire fighting services is not likely to lead to efficient outcomes.

ACCC Chairman Graeme Samuel stated that this was the first time Airservices had proposed a long-term pricing arrangement, and that the ACCC welcomed the new approach.

MR 244/04, 5.11.04

Draft decisions on GasNet proposals

The ACCC issued draft decisions on four proposed revisions by GasNet to its access arrangement for its Victorian gas transmission system. The ACCC proposes to approve three of the revisions, and reject the remaining one—a change to the

tariff GasNet charges for transporting gas withdrawn from its system at a storage facility where a concessional tariff applies.

The ACCC is concerned that this revision would adversely affect customers who entered into contracts based on the existing tariffs, approved through to December 2007.

MR 250/04, 11.11.04

Draft decision on metering responsibilities in electricity retail markets

The ACCC issued draft determinations on applications by the Victorian and New South Wales governments for authorisation of metering arrangements for domestic and small business electricity customers.

The proposed system would allow the states to make arrangements for certain electricity distributors to be exclusively responsible for metering services for accumulation meters, manually read interval meters, and data services for unmetered electricity supplies.

The decision will increase competition for the provision of all remotely read interval meters in Victoria and New South Wales, ultimately enhancing retailers' ability to offer different price and service packages to customers, and allow retailers to install remotely read interval meters without having to rely on the distribution company.

The ACCC is seeking submissions on the draft determinations by 21 January 2005.

MR 267/04, 3.12.04