

October 2003

From the Small Business Commissioner

The ACCC has been active in small business matters over the past two months involving:

- a major submission to the Senate Economic References Committee Inquiry into Small Business and the Trade Practices Act
- a submission to the Retail Grocery Industry Code Review
- release of an issues paper on the smash repair industry and its relationship with the general insurance sector

ACCC Chairman Graeme Samuel gave keynote addresses to the National Small Business Forum (Convened by Small Business Minister Joe Hockey) and the annual conference of the Franchise Council of Australia. Samuels also announced a major initiative introducing ACCC endorsement of voluntary codes of conduct.

See below for details.

John Martin

SENATE ECONOMICS REFERENCE COMMITTEE

The ACCC, in its submission to the Senate Economic References Committee Inquiry into Small Business and the TPA, called for the section 46 misuse of market power provision of the TPA to be amended. The ACCC argued for clarification, in particular what constitutes 'taking advantage' of market power.

In relation to section 51AC, the unconscionable conduct provision, the ACCC called for the \$3m threshold to be removed, and for the clauses on imposition and exploitation of unfettered unilateral variation to be added to the list of factors indicative of unconscionable conduct.

The government is developing a small business collective bargaining notification process based on the recommendations of the Dawson review.

MR 193, 8.9.03

Competing Fairly Forum Growing good business relationships

The latest Competing Fairly Forum video addressing fresh produce supply chain issues and the TPA is now available. The 40 minute video features a panel including ACCC Chairman Graeme Samuel and grower, wholesaler and retailer representatives along with Retail Grocery Industry Code Ombudsman Bob Gaussen. A copy of the video can be purchased for \$10 by contacting the ACCC Infocentre on 1300 302 502.

UNCONSCIONABLE CONDUCT/FRANCHISING

4WD franchise

4WD franchisor 4WD Systems Pty Ltd misled franchisees about delivery times, the quality and place of origin of goods, and, in contravention of the franchising code, failed to provide a prospective franchisee with mandatory disclosure documents—found the Federal Court on 14 August 2003. It also found that a related company 4WD Systems Australia misrepresented delivery times.

The court was not satisfied that the conduct was unconscionable and refused an ACCC application for refund of the franchise fees to franchisees. Even so, the judgment sends a message to franchisors that they have an obligation to deal fairly and honestly with their franchisees.

MR 170, 15.8.03

Mobile repair franchise

The ACCC settled proceedings against Kwik Fix International, franchisor of mobile repair services for vehicle paint, plastics and interiors, in relation to allegations that a former franchisee was misled about the purchase price of a franchise.

The ACCC also alleged Kwik Fix failed to comply with certain requirements of the Franchising Code of Conduct and acted unconscionably towards the franchisee.

The proceedings were settled after Kwik Fix agreed to repurchase the franchise and consented to court orders restraining them from engaging in similar conduct.

MR 195, 11.9.03

Top Snack Foods franchise

Five franchisees are better off by \$352 000 (in total) after the ACCC took a representative action on their behalf against franchisor Top Snack Foods in 1997. In June 1999 the Federal Court found the company had engaged in misleading and deceptive conduct, saying that it was an important consideration that these proceedings were initiated by the ACCC not simply for the benefit of individuals but in vindication of the public interest. The cheques have just been handed over because the ACCC needed time to enforce the judgment through liquidation and bankruptcy actions against Top Snack.

MR 159, 1.8.03

ACCC Hotspot—Refusal to deal

The ACCC brochure [refusal to deal](#) is a guide for businesses on when refusal to supply is illegal. The brochure is available by phoning the ACCC Infocentre on 1300 302 502 or you can download it from the Internet at www.accc.gov.au

Some items in *ACCC Briefing* refer to media releases and their dates e.g. MR 10, 12.2.03. 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.**

Insurance report

The Australian Government has released the ACCC's *Public liability and professional indemnity insurance monitoring report—July* monitoring costs and premiums in public liability and professional indemnity insurance. The report assesses the impact on premiums of measures taken by governments to reduce and contain legal and claims costs. The report shows an improvement in the profitability of both public liability and professional indemnity insurance and is the first in a series of four reports to be produced over the next two years.

MR 162, 4.8.03

Smash repairers/insurance issues paper

An issues paper on the relationship between the Australian motor body/smash repair industry and the general insurance sector has been published by the ACCC.

The paper was prepared following discussions organised by the ACCC between smash repairers, insurers and consumer representatives.

The ACCC has not found any evidence supporting allegations of breaches of the TPA. However, it has determined there is scope for greater transparency in dealings between insurers, smash repairers and consumers including dispute resolution procedures and the entitlement of consumers to a reasonable level of choice in repairer without being penalised.

MR 203, 19.9.03

Health Services Advisory Committee

The Health Services Advisory Committee has been established following a recommendation by the Wilkinson Committee which reviewed the impact of the TPA on the recruitment and retention of doctors in rural and regional Australia. A key goal of the HSAC is better understanding of and compliance with the TPA.

MR 191, 5.9.03

PRODUCT SAFETY

Car jacks

BMW (Australia) is to recall non-complying vehicle jacks and usage instructions and publish a related notice on its internet website following ACCC allegations that during 2002 BMW supplied vehicle jacks and vehicle owner manuals without the legally required warning notice and safe usage instruction. The Federal Court declared that BMW failed to comply with the mandatory consumer product safety standard for vehicle jacks. BMW is appealing the decision.

MR 155, 17.7.03

Non-compliant trolley jacks

Western Tool Distributors provided a court enforceable undertaking to the ACCC after acknowledging that trolley jacks it supplied in August 2002 did not comply with the mandatory consumer product safety standard for hydraulic trolley jacks.

The labelling on the packaging did not meet the standard's requirements. And the jacks did not meet the requirements that safe usage instructions be supplied.

MR 188, 4.9.03

The ACCC will introduce an endorsement system for high quality voluntary industry codes of conduct. This has the potential to provide effective industry codes of conduct that deliver real benefits to businesses and consumers with the least possible compliance cost placed on either.

Effective codes result in increased compliance and reduced regulatory costs. By providing endorsement the ACCC can work with industry groups to iron out any likely deficiencies in their codes. The ACCC is developing a guideline on endorsed codes and has released a draft for comment.

MR 168, 11.8.03

CONSUMER AND SMALL BUSINESS PROTECTION

Fitness benefit claims misleading

Danoz Direct has been ordered by the Federal Court to broadcast public announcements on television and their website and in *The Australian* informing consumers who purchased the Abtronic Fitness System of the misleading nature of their conduct. The Federal Court declared that advertising claims about the benefits of the Abtronic were misleading or deceptive. The court also declared that Danoz Direct made a false representation when it claimed the Abtronic normally sold for \$220 when it had always been sold for \$165.

Although the ACCC sought refunds the court did not order Danoz Direct to provide them. Consumers who were misled by the advertising and wish to seek a refund can contact Danoz Direct on 1300 135 085.

MR 189, 4.9.03

Property 'scammers'

The ACCC is targeting misleading and deceptive conduct by property 'scammers'. The investigation is on four fronts: two-tier marketing; advice given by financial consultants, solicitors and valuers; unconscionable conduct by financial institutions; and real estate investment seminars.

The ACCC has also targeted 'dummy-bidders', where an auctioneer accepts illegitimate bids in an effort to drive up prices.

MR 185, 2.9.03

Mobile phone \$0 advertising

The ACCC has begun Federal Court proceedings because of its concerns about consumers being misled by telecommunications companies using prominent \$0 symbols for mobile phone handsets in advertisements for mobile phone packages.

The ACCC is concerned about the use of \$0 when the product or service is allegedly not genuinely being provided for free or at no cost to the consumer.

MR 175, 20.8.03

Incorrect labelling livestock feed product

Rural and regional consumers will be given the same protection as city consumers, said ACCC chairman Graeme Samuel after a Federal Court finding that livestock feed supplement company Econovite Pty Ltd contravened the consumer protection provisions of the TPA. It had made false claims about the composition and characteristics of some ingredients on the labels of products it supplies to farmers.

MR 198, 16.9.03

Sony PlayStations can't be 'chipped'

Consumers will suffer a loss of choice and may pay more for their games following the decision by the Full Federal Court that Sony PlayStation owners could not have their games consoles 'chipped'. Chipping had allowed consumers to modify their PlayStation console to play imported and backup copies of games.

While the ACCC supports Sony's right to crack down on the sale of pirated copies of PlayStation games, this decision means Australian consumers will be unable to enjoy games legitimately bought overseas, as well as legitimate backup copies. The ACCC believes region coding is detrimental to consumers as it severely limits their choice and in some cases, access to competitively priced goods.

MR 158, 31.7.03

Alleged misleading 'Green' advertising

The ACCC has begun proceedings in the Federal Court against Sanyo Airconditioners Manufacturing Singapore Pty Ltd, trading as Sanyo Air-conditioning Australia, alleging misleading and deceptive conduct in claiming environmental benefits for its air conditioning units.

Brochures for Sanyo's Eco Multi Series air conditioners claimed '*environmentally-friendly HFC "R407C" added*' and '*for a new ozone era—keeping the world green*'. The ACCC alleges the claims are misleading because they fail to indicate that some substances used in the air-conditioning units are powerful greenhouse gases which do not benefit the environment.

MR 197, 15.9.03

Country of origin—eucalyptus oil

The ACCC instituted proceedings in the Federal Court against National Chemical Pty Ltd alleging misleading and deceptive conduct in relation to the labelling and promotion of 200ml bottles of 'Superior' brand eucalyptus oil as a 'Product of Australia' when the eucalyptus oil was imported from China.

MR 173, 19.8.03

The consumer/barrister relationship

Under the NSW barristers' rules, barristers can accept 'direct access briefs' from clients without the need for clients to engage a solicitor.

The NSW Bar Association says that it could not take any disciplinary action against a barrister accepting a direct access brief. The ACCC notes that it is not a requirement of the rules that barristers must accept such briefs. Many barristers make the individual choice to be briefed through a solicitor.

MR 164, 7.08.03

Contact the ACCC



Infocentre: 1300 302 502



Website: www.accc.gov.au

Westfield/AMP

The ACCC did not intervene in Westfield Trust's takeover offer for units in the AMP Shopping Centre Trust. The ACCC decided that the acquisition would not be likely to substantially lessen competition.

A major factor in the ACCC's decision was that Westfield will only obtain management control of two of the nine regional shopping centres in which the AMP Trust has ownership interests; Mt Gravatt in Brisbane and Kotara in Newcastle. Any change in ownership or management control of the shopping centres would be subject to further ACCC review.

MR156, 24.7.03

RESTRICTIVE TRADE PRACTICES

Fish cull agreement

Atlantic salmon farmer Tassal Limited and the Tasmanian Salmonid Growers Association (TSGA) have been found to be involved in an anti-competitive agreement to restrict the supply of Atlantic salmon.

In proceedings brought by the ACCC the Federal Court found that the TSGA organised an illegal agreement in February 2002 between Tassal and other Atlantic salmon farmers to cull 10 per cent of their salmon stocks. The cull was intended to limit the amount of Atlantic salmon available for sale later in 2002–2003, to reduce the scope of any price reductions caused by supply outpacing demand. The TSGA had obtained legal advice that the cull was unlikely to contravene the TPA. However, the advice was based on a misapprehension of the facts.

The agreement was rescinded after the parties were contacted by the ACCC and had obtained a separate legal advice based on a full appreciation of the facts. Tassal was the only farmer which undertook the cull before the agreement was abandoned.

MR 161, 1.8.03

Safeway price fixing appeal

The ACCC has sought special leave to appeal to the High Court over certain aspects of the Full Federal Court's decision in its case against Australian Safeway Stores Pty Ltd.

The Full Federal Court unanimously held that Safeway had engaged in price fixing in relation to bread sold at the Tip Top Bakers located in Preston markets.

The majority found that on four of nine instances pleaded against Safeway, the company had misused its market power as a wholesale purchaser of bread. The ACCC has sought leave to appeal in relation to the remaining five instances.

Safeway has sought leave to appeal both the findings of misuse of market power and price fixing.

MR 157, 29.7.03

CDs

The Full Federal Court has upheld that Warner Music and Universal Music breached the exclusive dealing provisions of the TPA when responding to the parallel importation of music by small business. At trial, Justice Warner held that Warner and Universal had breached the Act by threatening to refuse to supply Australian retailers who stocked parallel-imported CDs, and later making good that threat.

The Full Court stated that although short-lived, the purpose of that conduct was to snuff out the emergence of a form of competition opened up in the interests of consumers by the amendments to the Copyright Act.

MR 177, 22.8.03

EFTPOS fee agreement authorisation rejected

The ACCC intends to reject an authorisation proposal by banks and others to fix wholesale fees for electronic funds transfer at point of sale (EFTPOS) transactions. The fee-fixing was meant to reform the EFTPOS system but the proposal didn't address a key public interest aspect, namely liberalisation of access to the EFTPOS network.

The proposed agreement would mean that card issuers would no longer pay a wholesale fee to merchant acquirers, making it likely that merchants would experience higher EFTPOS service fees. The ACCC is concerned that without broader reform to the EFTPOS network this likely fee increase may not be determined by competition and that some merchants, in particular small business, and consumers, may suffer detriment. It is also concerned that the proposed agreement could increase the barriers faced by possible new entrants into the EFTPOS network.

MR 166, 8.8.03

Court rejects chicken meat authorisation

An ACCC authorisation allowing Victorian chicken meat growers to collectively negotiate with their respective processors has been set aside by the Full Bench of the Federal Court, with effect from 4 September 2003. The court held that Marven Poultry was not entitled to make the application for authorisation in the terms in which it did; and that accordingly the ACCC should not have granted the authorisation.

The collective bargaining arrangements covered arrangements between groups of growers rather than processors and the chicken growers had not consented to any application being made on their behalf. The Federal Court's decision clarifies some technical aspects of how an application for authorisation must be framed for it to be valid.

MR 165, 7.8.03

Collective negotiation—health funds

The ACCC proposes to authorise a network of Catholic health facilities to collectively negotiate with health funds, the Department of Veterans' Affairs and other suppliers via a common agent. The healthcare facilities are owned either by the Sisters of Charity Health Service, Mercy Health and Aged Care or Holy Spirit Care Services and are located in QLD, NSW, VIC and TAS.

The ACCC is satisfied that the proposal will deliver public benefits in the form of cost savings from the formation of the network. The draft proposal is available on the ACCC website.

MR 176, 21.8.03

Agricultural chemical scheme extended

The ACCC has allowed an arrangement between agricultural and animal chemical manufacturers to be extended because of its environmental benefits.

Farmers are charged a levy on the purchase of chemicals and the levy funds a container collection scheme. The program is a component of the Industry Waste Reduction Agreement which aims to reduce waste at source and reduce the weight of packaging that is going to landfill throughout Australia.

The ACCC believes that a scheme that protects the environment will benefit the public. The scheme will reduce the number of non-returnable chemical containers being disposed of as waste, and provide an environmentally responsible way of collecting and disposing of rigid steel and plastic containers.

MR 169, 15.8.03 & MR 202 19.9.03

Revenue cap for Tasmanian electricity transmission

Transend Networks, Tasmania's electricity provider, will be able to replace aging assets and improve reliability following an ACCC announcement that it intends authorising a revenue cap for Tasmania's electricity transmission services, owned and operated by Transend. The decision accommodates a large increase in investment, from \$44m to \$56m a year—a total of \$307m over 5½ years. The cost to customers should be less than 1 per cent per year. The authorised increases are considerably less than those sought by Transend; the ACCC's draft decision will save Tasmanian consumers \$55m over the 5½ years.

MR 204, 26.9.03

Electricity—changes to market rules

Greater certainty for service providers over who is financially liable for power used by contestable customers will be the result of an ACCC's intention to authorise amendments relating to connection point responsibility in the national electricity code.

The proposed changes relate to the clarification of responsibilities when registering new customers with the National Electricity Market Management Company (NEMMCO). They also help to establish whether the designated service provider or the second tier retailer is financially liable for the power used by a customer.

MR196, 11.9.03

Electricity—regional pricing

The ACCC has authorised a change to the way costs of certain frequency control ancillary services (FCAS) are recovered within the national electricity market.

The changes aim to improve the equity and efficiency of the electricity market when part of the market becomes isolated because of a major failure in the system. This should result in costs being allocated more equitably, contributing to a more efficient electricity market.

Under current national electricity code provisions the costs incurred in these situations are spread across the entire electricity market. The change will result in these costs being limited to market participants within the region where the event occurred.

MR 167, 11.8.03 & MR 201 18.9.03

Review of draft regulatory principles

The ACCC is now reviewing the Draft Statement of Principles for the Regulation of Transmission Revenues (DRP). It issued a discussion paper inviting comments on 29 August.

The DRP is a guide for the regulation of electricity transmission business revenues. The review is focusing on improving incentives for investment and efficiency.

The ACCC's objective is to achieve the right balance of incentives for investment while at the same time protecting the interests of the users of the regulated businesses.

The final DRP guide will be issued next year.

MR181, 29.8.03

Contact the ACCC

Infocentre: 1300 302 502

Website: www.accc.gov.au

Telecommunications reports—competition and prices

The ACCC's three annual telecommunications reports are now available under Utilities, then Telecommunications, in the Publications section of the ACCC website.

- Telecommunications competitive safeguards
- Changes in the prices of telecommunications services
- Telstra's compliance with the price control arrangements

MR 174, 19.8.03

Telecommunications services—bundling

The ACCC has issued a final version of its information paper on the bundling of services in the telecommunications industry. Bundling can provide many benefits to consumers, particularly lower prices and the convenience of having all services supplied on one bill.

However, it can be detrimental when used to reduce or foreclose competition.

A draft paper was issued in January setting out the ACCC's proposed approach when assessing whether bundling conduct in the telecommunications industry is anti-competitive.

The ACCC will assess bundling case by case, taking into account competition in the relevant markets and the price and non-price terms and conditions for the bundle.

MR 163, 5.8.03

Telecommunications—transmission capacity service

The ACCC will hold a public inquiry to review the transmission capacity service declaration. A discussion paper identifies relevant issues and invites comments on particular aspects of transmission markets.

The inquiry will determine whether the declaration of the transmission capacity service should be maintained, varied or revoked by the ACCC.

Transmission capacity is a generic service used for the carriage of voice, data or other communications. Currently the ACCC regulates access to regional to capital, intra-regional, metropolitan and CBD transmission services.

MR 190, 5.9.03

Telecommunications—market indicator report

The ACCC's Telecommunications Market Indicator report which contains selected revenue and usage information for the 2001–02 financial year was released on 17 September. The report is compiled using information provided by carriers that currently report under the Regulatory Accounting Framework (RAF).

The RAF is a collection of rules that require Telstra, Optus, AAPT, Primus and Vodafone to maintain financial records and prepare financial statements in a common format.

MR 200, 17.9.03

Gas code review

In its September submission to the Productivity Commission's Review of the National Gas Access Regime the ACCC said it is delivering positive outcomes for the Australian economy and the gas industry.

The ACCC said that significant progress has been made toward the government's objective of facilitating the development of a competitive national market for natural gas.

MR 199, 16.9.03

WA

Dowerin field Days 26, 27 & 28 August 2003

The Dowerin field days attracted a record 77 000 visitors this year to over 750 exhibits on the 38 hectare grounds. Businesses exhibiting machinery reported early sales and firm interest where trade-ins were involved; all buoyed by expectations of a record grain harvest this season. The question most frequently asked of ACCC staff was 'Is this situation covered by the TPA?'

NSW

The ACCC was active during September Small Business Month. Small Business Month aims to strengthen the links between business owners; between business people and 'helper organisations'; and to remind the public of the contribution small businesses make to the community. Many seminars, workshops and exhibitions were on offer throughout NSW. Contact the ACCC NSW Small Business Manager on (02) 9230 9108 for details and locations of future events.

SA

Storecharter was the focus for Ceduna's business community in June. Storecharter sets out clear fair trading principles and standards by which traders should interact with indigenous customers. A quarter of the regional population is indigenous, with at least five outlying communities relying on Ceduna as a service centre. Thirty traders to date have embraced the charter. This is the first time that Storecharter has been adopted by a majority of traders within a major rural town.

QLD

The QLD Small Business Manager has focused on product safety, franchising and country of origin during recent radio interviews. Contact Paul Jones in the Brisbane office on (07) 3835 4622 for more information.

VIC

The ACCC attended the Melbourne Franchising Expo on 17–19 October. In November we will participate in the National Food Industry Strategy Seminar for Primary Producers in Morwell on the 13th, Shepparton on the 17th, and Mildura on the 27th.

Contact the ACCC



Infocentre: 1300 302 502



Website: www.accc.gov.au