

August 2005

From the Small Business Commissioner

This *Briefing* highlights that small businesses and in particular home businesses need to take care of e-commerce packages and accounting software being promoted in the market following court action against a supplier for misleading or deceptive conduct and other breaches of the Trade Practices Act.

On the supermarket front there has been an important development with the release of a new charter agreed to by Coles, Woolworths and Metcash ensuring greater transparency and competition for takeovers of independent supermarket retailers.

It should be of interest, with the current public debate over the future regulation of Telstra, that this *Briefing* reports on a number of important telecommunications reports and decisions by the ACCC.

This *Briefing* also describes other important material released by the ACCC on a cartel information package for government procurement; a joint review of Medical Colleges in Australia; and a discussion paper on the agreement of international airfares between members of the International Air Transport Association (IATA).

John Martin
Small Business Commissioner

NEW DEVELOPMENTS

ACCC paper on international airline fare agreements

The ACCC has issued a discussion paper on the agreement of international airfares between airline members of IATA (International Air Transport Association). The paper is part of the ACCC's review of the immunity it gave a range of IATA's activities 20 year ago and questions the extent of the public benefits claimed by IATA.

IATA members provide more than 95 per cent of international scheduled air traffic and work to a passenger tariff system under which passenger fares and associated conditions are agreed to between the airlines. The discussion paper identifies several competition concerns about the agreements. These include the potential for competing airlines to share market knowledge; the impact of the agreed fares on certain categories of airline market fares, the flow-on effect of IATA seasonality periods and the agreement of fare conditions, including children's fares.

MR 166/05

New charter for supermarket takeovers

A new charter promoting fair competition between potential

buyers of independent supermarkets started on 1 July. The charter will prevent Metcash, Woolworths and Coles from limiting independent supermarket retailers' ability to look for alternative purchasers for their store and will require them to give the owners written notice of this fact when they make an offer to buy a store.

It is expected the charter will benefit consumers by promoting competition in the supermarket sector. Independent supermarket owners should benefit by receiving the highest possible price when selling their stores. The charter will also ensure each of the major supermarket owners has a fair opportunity to acquire new businesses as they come onto the market.

MR 169/05

Debt collection guideline

The ACCC and ASIC have issued a second draft of the guideline on consumer protection laws for the debt collection industry. Because so many submissions were received in response to the first draft, the ACCC and ASIC will hold another round of consultations before finalising the guidelines.

MR 170/05

Cartel information package

The ACCC has launched an information package designed to raise awareness of the signs of possible cartel behaviour affecting government procurement.

Government procurement, both in Australia and overseas, has been shown to be an area that is particularly susceptible to cartel conduct.

The package provides information about how cartels act, warning signs in the procurement process, what to do if you suspect a cartel is operating and the penalties for cartel conduct.

MR 175/05

Medical colleges report

The ACCC and the Australian Health Workforce Officials' Committee (AHWOC) have completed their joint review of the medical specialist colleges' key areas of operation. The Australian Health Ministers' Conference welcomed the report and approved the 20 recommendations it contains.

The colleges were willing and valuable contributors to the report, which is expected to result in reforms that benefit the community and health system trainees.

MR 181/05

Some items in *ACCC briefing* refer to media releases and their dates e.g. MR 166/05. 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.

CONSUMER AND SMALL BUSINESS PROTECTION

Auctioneers, GST and property sales

Property auctioneers who do not clearly represent to all bidders in an auction that bids are being taken on a GST-exclusive basis when that is the case, could face significant consequences under the *Trade Practices Act 1974*.

The ACCC recently accepted court enforceable undertakings from Manningham Real Estate Pty Ltd, trading as Barry Plant Doherty, for the promotion and sale of three blocks of residential land. The land was promoted without an indication of whether prices were GST-inclusive and one auctioneer advised a buyer that GST was not applicable when in fact it was.

The ACCC believes the conduct of the real estate agency could have breached ss. 52 and 53A of the Act. The real estate agency acknowledged its conduct may have raised implications under the Act and has undertaken to ensure its future activities comply with the Act.

MR 177/05

Compensation for NT indigenous consumers

The Federal Court in Darwin has ordered Mr Ramon Keshow to pay compensation totalling \$26 530 to eight indigenous women who were victims of his unconscionable and misleading and deceptive conduct.

Mr Keshow conducted business under the business names National Maths Academy, Drysdale Correspondence Schools and Easy Buying Services. The women who will receive the compensation had paid money to those businesses and received little or nothing in return.

MR 178/05

Home business e-commerce packages

The ACCC has taken court action against StoresOnline International Inc., Galaxy Mall Inc and Gold Coast resident Mr Brett Perkins over the sale and promotion of home business e-commerce software packages. The ACCC alleges the parties engaged in misleading or deceptive conduct and other breaches of the Act.

The Federal Court has ordered an injunction against StoresOnline and Mr Perkins transferring funds to areas outside the jurisdiction of Australian courts. The Court has also ordered StoresOnline to inform participants in any of its remaining seminars or workshops of the ACCC's legal action.

MR 153/05

Whitegoods pricing investigation completed

The ACCC has completed its investigations into Fisher & Paykel's retail pricing practices and whether the company was discouraging retailers from discounting its products.

Fisher & Paykel assisted the ACCC in its investigations and has now prepared a guide for its sales staff, will hold trade practices training and has written to retailers confirming they are free to set their own retail prices. The letter also said Fisher & Paykel will not become involved in disputes between retailers over the

prices they set for the company's products.

MR 143/05

Electronics retailer to improve advertising

Electronics and computer retailer IT Warehouse Pty Ltd has given court enforceable undertakings to improve its catalogue advertising and its trade practices law compliance.

Several editions of the company's catalogues advertised a product for sale when many of its stores had non-existent or inadequate stock levels. The ACCC was concerned the representations in the catalogues were misleading and deceptive or likely to mislead or deceive.

MR 137/05

Security firms to compensate customers

Tyco Australia Pty Ltd, trading as ADT Security, has provided the ACCC with a court enforceable undertaking to compensate customers who did not receive their promised grade of alarm monitoring service from ADT.

An ACCC investigation found most residential and small business customers of ADT did not receive the certified Grade One or Grade A1 service they were promised. This raised concerns that ADT's conduct may have breached s. 53(aa) of the Act, which prohibits false representations about services.

ADT will write to all its customers who currently receive alarm monitoring services and offer them compensation when they show they were misled about the grade of services they would receive.

MR 144/05

Customers of Custom Security Services Pty Ltd (CSS) are also due to receive compensation from their security company. ACCC investigations have resulted in CSS undertaking to compensate customers whose security services were 'upgraded' in early 2001, resulting in undisclosed cost increases and demands of payment for unsolicited services.

CSS admits its conduct contravened ss. 52, 53(e), (f) and (g) and 64 of the Act. The company has undertaken to stop demanding payment for security system upgrades, write to customers offering refunds or account credits and to implement a trade practices law compliance program.

MR 156/05

Changes to internet classifieds

An ACCC investigation into a complaint about the *Trading Post's* online marketing practices has led to the company making significant changes. The *Trading Post* has stopped linking its autotrader website to the name of a competitor through a sponsored link with an internet search engine.

The ACCC was concerned the sponsored link was potentially misleading as internet users could mistakenly believe the autotrader website was affiliated with the competitor's business. The *Trading Post* agreed to change its marketing practices, but

did not admit its conduct was misleading under the *Trade Practices Act 1974*.

MR 150/05

Refunds and upgrades for accounting software

The ACCC has accepted administrative undertakings from Reckon Ltd over allegations of misleading and deceptive conduct regarding the disclosure of terms and conditions.

Customer complaints about Reckon's pre-purchase terms and conditions disclosure led to an ACCC investigation which found several areas of concern. The ACCC considered Reckon may have breached the misleading and deceptive conduct provisions of the Trade Practices Act and advised the company of this.

Reckon has offered undertakings to address the ACCC's concerns and ensure future compliance with the Act. As part of these undertakings, customers who paid the re-registration charge will receive a refund of the charge and a discount off the cost of a Reckon upgrade.

MR 151/05

Court orders against discount call scheme

The Federal Court has issued an order restraining 1Cellnet LLC from any form of participation in the 1Cellnet Scheme or any other discount telephone call service.

The ACCC first acted against 1Cellnet and three other parties in August 2004 for alleged breaches of the Trade Practices Act's prohibitions on pyramid selling schemes.

The latest orders include that 1Cellnet must publish a notice at any website it owns, operates or maintains, and an ad in nominated Australian newspapers, explaining the court's orders.

MR 162/05

Industrial piping systems undertakings

Calair Systems Pty Ltd has given court enforceable undertakings regarding alleged misleading claims about the quality and performance of its polypropylene pipe products. The claims were published in a brochure which was also available on the company's website.

The undertakings include Calair; not making any representation the Pro-Pipe II System is of a particular standard or quality; sending licensed distributors a corrective letter explaining the ACCC's concerns and a similar letter to all persons who were supplied with a Pro-Pipe II System in the last three years; and sending its director to trade practices law compliance training.

MR 160/05

PRODUCT SAFETY

Refunds for non-compliant trolley jacks

Consumers who bought non-complaint trolley jacks at Smith Broughton's Perth auction are now eligible for a refund. Smith Broughton acknowledged it had sold a number of trolley jacks

that did not comply with the consumer product safety standard for trolley jacks.

The ACCC believed Smith Broughton was likely to have breached the Trade Practices Act by supplying goods that do not comply with the prescribed consumer product safety standard for the product. Smith Broughton admitted that by supplying the jacks it had contravened s. 65C of the Act.

The company will write to all customers who bought the jack and give them a full refund of the purchase price, will not provide goods which do not comply with a prescribed consumer product safety standard where one exists and will implement and maintain a trade practices compliance program.

MR 149/05

Luggage straps fail mandatory safety standard

Coventry Group Limited, trading as Independent Motor Mart, has undertaken to employ a product safety compliance manager and improve staff training and procedures on product safety.

IMM was supplying elastic luggage straps which the ACCC alleged did not meet the product safety requirements, in the Ratchet Tie Down Set. The ACCC took court action against the strap's importer, Pro-Kit Pty Ltd, in December 2004.

The mandatory product safety standard for elastic luggage straps requires them to have a permanently attached warning label showing information about their usage and the eye injuries they can cause.

MR176/05

MERGERS AND ACQUISITIONS

Informal merger process to stay

The ACCC will retain its informal merger review process after the commencement of the new formal merger clearance process expected to start later this year.

A recent Global Competition Review said the ACCC is 'at the forefront of international regulation of mergers' and that the informal review system is effective and popular with business.

An internal review of the ACCC guideline for informal merger review is currently being conducted to identify any possible improvements to the process.

MR 059/05

Ramsay to sell three more hospitals

A Statement of Issues released by the ACCC regarding Ramsay Health Care's acquisition of Affinity Health identified the ACCC's competition concerns for a number of regions where, according to the ACCC's understanding of the acquisition, Ramsay would become the sole or main provider of private hospital services if the acquisition proceeded.

In April Ramsay provided court enforceable undertakings that it would sell 17 of its hospitals before acquiring Ramsay. The ACCC has now said Ramsay must sell a further three hospitals if it is to secure the ACCC's approval for the takeover.

MR 171/05 and 207/05

RESTRICTIVE TRADE PRACTICES

Set-top box supplier fined for resale price maintenance

The Federal Court has fined Humax Pty Ltd \$150 000 after the company admitted contravening the resale price maintenance provisions of the Trade Practices Act. Humax had attempted to induce several small retailers not to sell its high-definition set-top boxes for less than \$599.

The court said the penalties would have been 'significantly higher' were it not for factors such as Humax's cooperation with the ACCC, its offer to undertake trade practices training for its staff after the ACCC first raised the issue and the relatively brief time over which the conduct occurred.

It is expected the penalty will act as a warning to other businesses that engaging in anti competitive conduct, even for a short time, can have serious consequences.

MR 141/05

'Crown immunity' for anti-competitive behaviour

The Federal Court has ruled that while the conduct of Baxter Healthcare Pty Ltd was likely to hinder competition, the company had not breached the Act because it was dealing with state government departments which were not 'carrying on business.'

The ACCC alleged Baxter had made arrangements which were structured to prevent, hinder or deter other suppliers from competing with it for the sale of peritoneal dialysis products.

The court ruled that because Baxter was supplying state purchasing authorities that were not carrying on a business, their Crown immunity extended to protect Baxter from the application of the Act. Justice Allsop stated that, but for Crown immunity, he would make directions and injunctions and consider imposing penalties in relation to Baxter's conduct.

MR 154/05

AUTHORISATIONS AND NOTIFICATIONS

ACCC to authorise joint venture for iron ore mining

The ACCC will authorise agreements for a joint venture between BHP Billiton Minerals Pty Ltd and four Chinese steel manufacturers for the mining and export of iron ore.

Concerns had been raised that the joint venture would result in lost opportunities to promote competition because of its impact on parties seeking access to the Mount Newman railway line but the ACCC considers the rail access issue to be independent of the application for the authorisation.

MR 139/05

Queensland dairy farmers' collective bargaining to continue

The ACCC has granted interim authorisation for Premium Milk to continue acting on behalf of a group of Queensland dairy farms in their negotiations with Parmalat Australia Pty Ltd.

Premium's existing authorisation expired on 30 June 2005 and Premium has sought re-authorisation until 1 July 2010, claiming the existing arrangements have resulted in benefits including

cost savings and increased certainty for the dairy farmers.

MR 148/05

Electronic clearing rules approved

Regulations for the operation of the Bulk Electronic Clearing System (BECS) are now covered by a five-year authorisation granted to the Australian Payments Clearing Association.

The ACCC granted the authorisation, which relates specifically to regulations of the suspension and termination of BECS membership, as it considers these regulations are 'likely to see a continued public benefit through the protection of the security, efficiency and integrity of bulk electronic clearing processes.'

MR 158/05

Capped fees for after-hours medical service authorised

The ACCC will authorise the Canberra After Hours Locum Medical Service (CALMS) to introduce a capped fee structure for its services. The new structure puts an upper limit on what CALMS doctors can charge patients for after-hours treatment.

While the capped fee structure could potentially raise competition concerns, any anti-competitive pricing in this situation is limited because doctors can still choose to charge below the cap or to bulk bill.

MR 168/05

WA TAB agents' collective bargaining authorised

The ACCC has authorised collective bargaining by the WA Tab Agents' Association with Racing and Wagering Western Australia. The ACCC believes any detriment that may flow from the arrangements would be negligible and that there is a public benefit in giving TAB agents greater input into contracts.

MR 172/05

Priority access to new wharf authorised

The ACCC will authorise Perkins shipping companies to give Alcan priority use of a new heavy lift wharf at the Port of Gove for three years. The agreement aims to minimise delays to the expansion of Alcan's Gove alumina refinery.

The ACCC considers that the expected public benefits from allowing the priority access agreement outweigh any potential anti-competitive detriment.

MR 174/05

Temporary increase in aviation fire fighting charges allowed

The ACCC will allow Airservices Australia to increase the prices of its aviation rescue and fire fighting services temporarily. Airservices, as the monopoly provider of these services at airports, is required under the Act to advise the ACCC of proposed price increases.

The temporary increase has been allowed so that Airservices can conduct a comprehensive review of its charging structure. ACCC concerns about the efficiency of the structure of charges

in the long term mean that the review must be undertaken before Airservices can introduce new long-term prices.

MR 167/05

Airport services collective negotiations authorised

The ACCC has authorised the Board of Airline Representatives of Australia (BARA) to collectively negotiate the acquisition of airport services with airport operators and other service providers at international airports.

BARA's proposal is expected to bring about public benefits including transaction cost savings while any anti-competitive detriment from the conduct would be minimal.

The ACCC also considers the proposed arrangements may lead to more efficient and relevant infrastructure investment.

MR 140/05

Architects' authorisation denied subject to review

The ACCC has issued a draft decision proposing to deny a request by the Royal Australian Institute of Architects for authorisation. The ACCC is concerned by several areas of the application, but has also indicated these could be easily remedied by the institute and that if they were addressed the ACCC would be more likely to grant the authorisation.

Particular provisions in the institute's proposed code of conduct and fee guidance material were of concern to the ACCC, which considers the proposed code has the potential to unduly restrict competition to the detriment of the public and that the fee graphs used by the institute are likely to harm competition.

MR 179/05

REGULATED SERVICES

Role of consumers in efficient National Electricity Market

Consumers have been identified as a group which could play a key role in the efficiency of the National Electricity Market (NEM). If consumers could receive and react to price signals through different incentives, they would be in a position to contribute to the overall efficiency of the market.

Residential electricity customers have only a limited ability to respond to price signals from the wholesale market, meaning that users of around 40–50 per cent of the NEM load are basically excluded from accessing products that could bring about load reduction at peak times.

Regulatory frameworks that allow retailers the opportunity to develop innovative tariff solutions could then give consumers an incentive to reduce and shift load.

MR 163/05

Electricity metering responsibilities determined

The ACCC has issued determinations on the ACT and South Australia governments' applications for authorisation of metering arrangements for domestic and small business electricity customers. Both governments had sought approval of arrangements to enable electricity distributors to be exclusively

responsible for the provision of metering services for accumulation meters, manually read interval meters and data services for unmetered electricity supplies. It is expected the decision will increase competition in the provision of remotely read interval meters in the relevant areas and that this will enhance retailers' abilities to offer customers a range of price and service packages.

MR 157/05

Final determination on B2B electricity code changes

The ACCC has released its final determination on changes to business to business (B2B) communications under the National Electricity Code.

The code changes are expected to allow for improved B2B electricity governance arrangements to be implemented, further enhancing retail competition.

Industry also supports the new arrangements, under which B2B activity across the NEM will be standardised and automated.

MR 155/05

ACCC reports on telecommunications sector

The ACCC has issued its third reports on telecommunications market indicators and on telecommunications infrastructure, which it completes as part of its responsibilities for overseeing the development of a competitive telecommunications industry.

The reported market share data for the period covered by the report has largely remained stable, with Telstra still the dominant carrier in the fixed line market.

The telecommunications infrastructure report shows more than \$2.5 billion was invested in the sector in 2003–04, almost half of which was spent on mobile network infrastructure.

MR 145/05

ACCC will not demand number portability for DNAS

The ACCC's final report on data network access services (DNAS) number portability has found it would not be in the long-term interests of end-users to mandate DNAS number portability.

In making the decision, the ACCC had to consider whether portability of an allocated number is required to promote the end-users' long-term interests.

As the ACCC is not satisfied the introduction of DNAS number portability would promote competition in the market to a material extent, it will not issue a direction to the Australian Communications Authority on the issue.

MR 142/05

Reduced regulation of DDAS and ISDN services

Declaration of digital data access (DDAS) and ISDN services in city areas will be removed by 30 June 2006 now the ACCC has announced its final decision on the issue.

The DDAS is an access service for the domestic carriage of data, while ISDN is used for the carriage of information over

the public switched telephone network.

The ACCC is also proposing that existing declarations relating to DDAS and ISDN in regional areas should remain for at least the next three years because of the lack of competition for the provision of those services in the current market.

MR 146/05

Negotiated settlements on local carriage service encouraged

The ACCC has announced its interim position on the pricing of Telstra's local carriage service (LCS) to assist the negotiation of agreements while the local services review continues.

In 1999 the ACCC 'declared' LCS and in 2004 it accepted Telstra's undertakings on the price at which the company supplies LCS. Those undertakings expired at the end of June 2005, along with a number of negotiated agreements between Telstra and users.

The ACCC is currently examining issues relating to the regulation and pricing of local services, so rolling forward the current agreements until the local services review is complete seems appropriate.

MR 147/05

Telecommunications access disputes

Primus Telecommunications Pty Ltd, under Part XIC of the Trade Practices Act, has notified the ACCC of an access dispute with Telstra Corporation Limited.

The ACCC has started arbitration for the dispute, which relates to the charge Telstra levies on Primus for connection of the unconditional local loop service it provides.

The ACCC is vested with arbitration powers under which it may make directions and 'do all things necessary for the speedy hearing and determination of an access dispute. Arbitration by the ACCC is considered a final solution for parties in dispute.

MR 152/05

Under the same provisions, AAPT Limited has notified the ACCC of its own access dispute with Optus. This dispute relates to the price AAPT pays for the domestic mobile terminating access service supplied by Optus. The ACCC has started the arbitration process for this dispute.

MR 164/05

ACCC issues report on Telstra

The ACCC has issued its seventh imputation testing and non-price terms and conditions report on Telstra. The report presents data from the quarter ending 31 March 2005 and is a product of Telstra's enhanced accounting separation regime.

The report compares Telstra's customer service performance in meeting certain non-price terms and conditions for its retail and wholesale customers. Specific areas of concern to the ACCC include; wholesale residential customers receiving inferior service for faults handling and some service connections; insufficient margins for local call services; and margins in the provision of ADSL.

MR 165/05

Telstra needs robust operational separation

The ACCC identified robust operation separation for Telstra as a crucial part of ensuring the effectiveness of the telecommunications access regime.

The ACCC previously indicated concern that the enhanced accounting separation arrangements introduced in 2002 have not been sufficient in providing the ACCC with an accurate indication of how Telstra operates its business.

Meaningful operational separation for the telecommunications would involve several factors, including the robust separation of key business units, appropriate coverage of the monopoly services Telstra provides and appropriate interplay with the relevant competition and access provisions of Parts XIB and XIC of the Trade Practices Act.

MR 180/05

1.8 million broadband services connected

The ACCC *snapshot of broadband deployment*, released on 28 June 2005, shows there are more than 1.8 million broadband services connected in Australia. ACCC Commissioner, Mr Ed Willett, said the figure represents an increase of over one million customers over the preceding year.

MR 161/05

REGIONAL OUTREACH

SA Farmers Federation summit

South Australian Outreach staff attended the recent SA Farmers Federation's summit on Sustainability & Viability of Agriculture in SA. The summit attracted multi-partisan support and speakers from overseas and interstate, addressing issues including health, education, environment, marketing climate, future of young farmers and industry communications.

The summit's main focus was on how the agricultural industry must react to increasing global competition. Significantly, collective bargaining was seen as a crucial mechanism for primary producers to improve the prices received for their goods.

New small business manager for ACCC Sydney

The ACCC National Outreach Team has been joined in NSW by Martino Santi. Martino will assume the role of small business manager in the ACCC's Sydney office and will continue to ensure that business organisations and consumers are being kept informed about the role of the ACCC and topical issues relating to the Trade Practices Act.

Martino hopes to build on the existing partnerships that exist with the ACCC in the Sydney metropolitan area. If you would like more information or consider that your organisation can benefit from working in partnership with the ACCC, call Martino on (02) 92309108.