

March 2007

From the Small Business Commissioner

The beginning of 2007 saw the commencement of the collective bargaining notification process, which will enable groups of small businesses proposing to bargain collectively with large customers or suppliers to make formal notification to the ACCC to obtain immunity under the *Trade Practices Act* if the conduct is in the public interest. Details on making collective bargaining notifications can be found on the ACCC website (www.accc.gov.au).

This edition of *ACCC Briefing* carries news of good practice compliance efforts by Cadbury Schweppes who voluntarily reported to the ACCC an isolated instance of conduct which may have contravened the resale price maintenance provisions of the *Trade Practices Act*. While Cadbury Schweppes did the right thing to clear up the problem, it is evident from other items in *Briefing* that some businesses have deliberately breached the resale price maintenance provisions. Court action by the ACCC has led to adverse findings against these businesses, including significant fines.

John Martin

Small Business Commissioner

NEW DEVELOPMENTS

Guides issued to help businesses understand TPA changes

The ACCC issued a number of publications designed to help businesses understand changes to the TPA. To ensure that these guides are useful and practical, the ACCC took into account comments received from the business community and other relevant stakeholders.

The publications include the *Guide to collective bargaining notifications*, *Authorisation—new process from 2007* and *Formal merger review process guidelines*, which will not only assist potential applicants but also help other groups that might be affected by the new processes. If businesses or advisors are contemplating using one of the new processes, they are encouraged to approach the ACCC at an early stage.

MR 001/07

CONSUMER AND SMALL BUSINESS PROTECTION

Substantial refunds after misleading conduct

In June 2005 the ACCC instituted proceedings in the Federal Court of Australia alleging that StoresOnline had engaged in misleading and deceptive conduct regarding its home business

e-commerce software packages. In May 2006 a settlement was reached between the ACCC and StoresOnline, requiring StoresOnline to pay refunds to customers who claimed to have been misled by certain representations, and not to make false or misleading statements about its website packages. Refunds totalling \$679 478.88 were made to 175 Australian customers—that is, 94.4 cents in the dollar for each applicant, an average refund per consumer of over \$3 800.

MR 024/07

Quilt suppliers stop misleading content claims

Leading Australian suppliers of bed quilts will stop falsely representing to consumers that their products contain 100 per cent down following an ACCC investigation. Suppliers, including manufacturers, importers and retailers, have given formal commitments to the ACCC after sample testing found that none of the suppliers' products achieved the claimed 100 per cent down content. Suppliers have undertaken not to make any percentage representations that cannot be substantiated by regular independent testing. They have also undertaken to place corrective advertisements in newspapers and on their respective websites.

MR 325/06

Misleading representations by jewellery chains

An ACCC investigation into Zamel's Pty Ltd's Christmas 2005 catalogue resulted in prosecution proceedings against the jewellery retailer. The ACCC alleges that Zamel's falsely represented, with the use of strikethrough pricing, that the purchase of some items would result in substantial savings to the purchaser.

The catalogue featured a 10.5mm bolt-ring bracelet at a price of \$745 with a strikethrough price of \$1675. The ACCC alleges that Zamel's did not sell the bracelet for more than \$1100 within the six months prior to the sale and has engaged in conduct in breach of s. 75AZC(1)(g) of the TPA, which prohibits false or misleading representations being made in relation to the price of goods. Zamel's ceased using this style of advertising once the ACCC drew its concerns to the company's attention.

The ACCC also began proceedings against Prouds Jewellers Pty Limited for making 'Was/Now' price comparisons that were allegedly false or misleading in contravention of ss. 52 and 53(e) of the TPA. From at least December 2005, Prouds has promoted discounts on its jewellery in catalogues by making statements such as 'Was \$199 / Now \$99.50'.

The ACCC contends that by making 'Was/Now' comparisons, Prouds represented its customers would save the difference between the Was and Now price compared to customers who purchased the items before the catalogue promotions. The

Some items in *ACCC briefing* refer to media releases (MR, with number and year shown). These can be found on the ACCC website <www.accc.gov.au>. Most other reports and documentation are also available on the website. Subscribe to *ACCC briefing* by emailing <small.business@accc.gov.au>. **For information on the Trade Practices Act contact the ACCC Infocentre 1300 302 502 or the ACCC small business helpline 1300 302 021.**

ACCC alleges that this was not the case as Prouds usually sold the items for less than the Was price. The ACCC is seeking injunctions to prevent Prouds from using comparative advertising except in limited circumstances where the promoted saving is genuine.

MR 318/06 and MR 300/06

Pizza bases not made 'fresh in store'

Domino's Pizza Enterprises Ltd corrected claims in its advertising brochures after the ACCC raised concerns that it may have misled consumers. Domino's claimed that all dough used for its pizza bases was made fresh daily in its local stores. The ACCC raised concerns about the accuracy of this claim after it became aware that not all Domino's dough was made fresh daily in its stores.

Whilst Domino's 'Classic' and 'Pan' pizza bases are made fresh daily by Domino's in its stores, Domino's 'Thin 'n' Crispy' pizza bases are made off the premises and delivered snap-frozen to each local store. Domino's has agreed to publish corrective advertisements in major newspapers in each Australian state and territory.

MR 317/06

Menopause Institute deceives patients

The ACCC instituted legal proceedings in July 2006 against the Menopause Institute of Australia alleging it had breached s. 52 of the TPA by making misleading and deceptive representations about the safety and effectiveness of its Natural Hormone Replacement Therapy Program and by comparing NHRT to conventional hormone replacement therapy. Approximately 75 separate medical claims made by the company in various media were misleading and deceptive. As part of a court settlement, the Menopause Institute admitted to misleading and deceiving its patients and potential customers. The Menopause Institute is to alert its former and current patients about the alleged breach, publish corrective notices, place a corrective notice on its website for a period of three months and provide letters to all patients who received treatment between September 2003 and September 2006.

MR 316/06

Ambiguous packaging claims corrected

Optus has taken steps to provide some of its customers with additional mobile phone accessories or call credits, after the ACCC raised concerns about the packaging of its Motorola E398 Mobile Phone Kits. The packaging had illustrations of a Transflash card, USB cable and Mobile Phone CD on it that may have led consumers to believe that these items were included.

Product packaging has a significant influence on a consumer's purchasing decision. Consumers are entitled to expect retailers and manufacturers to fairly represent the product contained within the packaging. The ACCC views misleading promotional material seriously and is pleased with the steps taken by Optus to remedy the effect of this labelling error.

MR 301/06

Comparison advertising by home entertainment retailer

ACCC concerns about aspects of comparative advertising by home entertainment retailer JB Hi-Fi Group Pty Ltd in its February/March catalogue has led to the ACCC accepting

court-enforceable undertakings. The catalogue included 45 home entertainment products advertised at a discount represented as a saving of a nominated sum off each product's recommended retail price. The ACCC was concerned that the catalogue may have contained false or misleading representations in breach of the consumer protection provisions of the TPA.

The ACCC felt consumers may have believed that JB Hi-Fi, within a reasonable time before the catalogue's issue, had sold the products in reasonable quantities at the recommended retail price. This may not in fact have been the case. JB Hi-Fi believes it was entitled to make the representations but has acknowledged the ACCC's concerns. JB Hi-Fi agreed that it will not advertise any product with a discount off its recommended retail price unless the product was advertised and sold at that price in the same markets in reasonable quantities for a reasonable period of time and within a reasonable period of the date of the advertisement.

MR 295/06

PRODUCT SAFETY

Toxic novelty product

A highly toxic novelty seed product was detected on the Australian market in December 2006. Called 'Message in a Bottle', the product is a glass container containing about 12 small red-and-black seeds that have been identified as highly toxic and capable of causing death if ingested.

About 9000 units of the product were imported and sold through small retail outlets and discount stores nationally. The highly toxic nature of the product means it is essential that consumers are warned of the dangers associated with the seeds. A national recall of the product was conducted.

MR 313/06

Recall of 'bus' bunk beds

A line of unsafe 'bus' bunk beds has been recalled, following concern from the ACCC that the beds did not comply with the mandatory product safety standard. In particular, gaps in the bunk bed may have presented a serious entrapment hazard to children.

The Fantasy Bus bunk bed was being imported by two furniture importers and suppliers, Furniture Galore and Eternal Design. Furniture Galore and Eternal Design have stopped supply of the beds and begun retailer and consumer recalls.

MR 003/07

Voluntary recall on LPG tanks

The ACCC has supported a safety warning issued about liquefied petroleum gas (LPG) tanks fitted to motor vehicles between mid-2003 and August 2005. This warning was issued by the Parliamentary Secretary to the Treasurer, Mr Chris Pearce.

Tanks supplied by Manchester Tank and Equipment Co. during the abovementioned period are subject to a voluntary recall. The supplier will replace the pressure relief valves at no cost to the consumer. Since 2005 there have been incidents of pressure ruptures of LPG tanks on motor vehicles. While no injuries have been reported, ruptures can generate significant forces with the potential for serious injury and damage to property.

MR 324/06

Safety checks before Christmas

During the lead-up to Christmas the ACCC specifically targeted Christmas gifts for product safety surveys. As a result, a number of dangerous products—including children's toys, basketball rings and backboards and elastic luggage straps—were removed from sale. These product safety surveys were part of a wider effort by the ACCC to ensure consumer safety is maintained.

In the nine months prior to Christmas, the ACCC surveyed 1166 items in 581 retail outlets across Australia, resulting in 36 products being withdrawn from sale and eight being recalled. Non-compliance with mandatory product safety standards or bans was identified in 5 per cent of products inspected, with follow-up enforcement action being taken on each offending item.

MR 322/06

RESTRICTIVE TRADE PRACTICES

Power station operator penalised \$120 000

A penalty of \$120 000 was imposed following proceedings instituted by the ACCC on IPM Operation and Maintenance Loy Yang Pty Ltd for engaging in conduct in contravention of the TPA. IPM admitted it had breached the Act by entering into an arrangement in August 2001 with the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) that contained a provision which had the purpose of preventing IPM from engaging electrical contractors who did not have an enterprise agreement with the CEPU.

IPM admitted that it had breached the Act by giving effect to the arrangement until November 2003. In addition to imposing a penalty, the court made declarations that IPM had engaged in conduct in contravention of ss. 45E and 45EA of the Act and ordered IPM pay a fixed amount for the ACCC's costs of the proceedings.

MR 032/07

Shield of crown immunity challenge in High Court

The High Court of Australia granted special leave for the ACCC to appeal findings by the Full Federal Court that Baxter Healthcare Pty Ltd was protected from the operation of the TPA by Crown immunity. The appeal arose after the Full Federal Court held that if the state health purchasing authorities with which Baxter was dealing were entitled to Crown immunity, Baxter was entitled to 'derivative' Crown immunity and was protected from the proceedings brought by the ACCC.

On 24 August 2006 the Full Federal Court dismissed the ACCC appeal in which it sought findings that Baxter Healthcare Pty Ltd had breached the misuse of market power and exclusive dealing provisions of the TPA when it entered long-term contracts with state purchasing authorities bundling the supply of sterile fluids with peritoneal dialysis products used by people with kidney failure.

MR 031/07

\$3.4 million in penalties for resale price maintenance

The Federal Court of Australia ordered penalties totalling \$3.4 million against four Jurlique companies and Jurlique founder Dr Jurgen Klein for engaging in resale price maintenance in the sale of Jurlique products between 1991–2003. Dr Klein set the policy against discounting and was

involved in all aspects of the conduct, which affected retailers in Australia and internationally.

The court also declared that one of the Jurlique companies, in operating its day spa stores, entered into an arrangement with Melbourne franchisees in March 2001 to fix prices for Jurlique treatments. The court granted injunctions for five years restraining the Jurlique companies and Dr Klein from engaging in resale price maintenance conduct in relation to Jurlique products, and restraining J&J Franchising from engaging in price fixing in relation to Jurlique treatments. The court ordered the Jurlique companies to pay \$125 000 in costs and Dr Klein was ordered to pay a penalty of \$200 000 and costs of \$20 000. Dr Klein is no longer a shareholder in the Jurlique group, nor is he involved in its management.

MR 029/07

Anticompetitive conduct alleged between Adelaide surgeons

The ACCC instituted proceedings in the Adelaide Federal Court against cardiothoracic surgeons Mr John Lincoln Knight and Mr Iain Kenneth Ross, for alleged breaches of the *Competition Code of South Australia*. The ACCC alleges that Mr Knight and Mr Ross engaged in anticompetitive conduct in relation to two other cardiothoracic surgeons who also operate in the Adelaide metropolitan area.

It is alleged that Mr Knight and Mr Ross took action to hinder or prevent one of the surgeons from gaining accreditation at a private hospital in Adelaide and obtaining appointments at various hospitals. It is also alleged that they took action to hinder or prevent the other surgeon from providing his services at a private hospital in Adelaide and attempted to reach a market sharing arrangement with that surgeon.

MR 028/07

Voluntary reporting praised

Cadbury Schweppes Pty Ltd has voluntarily reported to the ACCC an isolated instance of conduct which it considers may have contravened the resale price maintenance provisions of the TPA. In an effort to ensure that a small retailer did not wholesale some limited lines of Cadbury Schweppes products to other retailers, two relatively junior staff at Cadbury Schweppes provided the retailer with an agreement that contained terms that set a minimum price for the sale of particular products. After realising the potential implications of its conduct, Cadbury Schweppes engaged its lawyers to conduct a thorough and detailed investigation of the conduct and voluntarily reported the conduct to the ACCC and offered to supplement its trade practices compliance program.

MR 017/07

Settlement of action against timber merchants

Three Adelaide timber merchants gave undertakings to the Federal Court as part of a settlement of an ACCC legal action against them. Proceedings were instituted against Auspine Limited, Geo J Bone & Sons Pty Ltd and JAG Timber Products Pty Ltd for alleged price fixing or attempted price fixing of timber estimating services in South Australia. The settlement of the legal action was entered into by all respondents on the basis that they do not admit they engaged in conduct that contravened the Act. The undertakings provided to the court include that, for a period of five years, the companies will not make, or attempt to make any contract, arrangement or arrive at an understanding with competitors regarding the price each charges for estimation

services or give effect to any such contract, arrangement or understanding.

MR 015/07

Union fined \$125 000 for breach of the TPA

The Federal Court imposed a penalty of \$125 000 against the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) for contraventions of the TPA. The ACCC alleged that in 2001, the CEPU made demands on Edison (IPM Operation and Maintenance Loy Yang Pty Ltd, formerly known as Edison Mission Operation and Maintenance Loy Yang P/L) which resulted in the company ceasing to acquire services from an electrical contractor it regularly used at the Loy Yang B site as that contractor did not have a union certified agreement.

The Court found that the CEPU not only instigated the agreement but also induced Edison to give effect to it. The court imposed a pecuniary penalty of \$125 000, declared that the CEPU had by its conduct aided/ abetted and procured contravention of both s. 45E and s. 45EA of the TPA by Edison, injunctions restraining the CEPU from engaging in future such conduct for 3 years, and awarded costs at an agreed figure of \$200 000 against the CEPU to the ACCC.

MR 004/07

\$100 000 penalties for secondary boycott by union

The Federal Court imposed penalties totalling \$100 000 against the state and federal branches of the Construction, Forestry, Mining and Energy Union (the CFMEU and the CFMEU respectively) for engaging in secondary boycott conduct in breach of the TPA. The ACCC alleged that in two instances the CFMEU and the CFMEUW engaged in conduct that contravened the Act.

The conduct involved union officials hindering or preventing third parties from supplying concrete, sand and related services to Doric Constructions Pty Ltd, causing substantial loss or damage to the business. The CFMEU, CFMEUW and the three union officials involved admitted that their conduct contravened the Act. Orders were made that both parties each pay a penalty of \$50 000 as well as declarations that the conduct of the CFMEU, CFMEUW and the three union officials contravened s. 45D of the Act.

MR 305/06

Anticompetitive liquor deals fine of \$7 million

Penalties totalling \$7 million were imposed on Woolworths Limited for entering into, and giving effect to, illegal anticompetitive agreements with small business liquor licence applicants. In June 2003 the ACCC instituted legal proceedings in the Federal Court against Woolworths and Liquorland, alleging that the conduct arose in circumstances where Woolworths and Liquorland objected to certain liquor licence applications and then proposed restrictive agreements in return for withdrawing their objections.

In May 2005 Liquorland admitted that it had entered into illegal agreements with five applicants for liquor licences, which resulted in a fine of \$4.75 million. In June 2006 it was found that four agreements—with liquor licence applicants—entered into by Woolworths had the substantial purpose of lessening competition in local markets. Fines totalling \$7 million were

imposed. Orders were also made restraining Woolworths from relying on or enforcing in any way any of the four agreements.

MR 328/06

Distributor penalised \$238 000 for resale price maintenance

Following proceedings instituted by the ACCC, a penalty of \$238 000 was imposed on Digital Products Group Pty Limited, the national distributor of Topfield-branded digital set-top boxes, for engaging in resale price maintenance in contravention of the TPA. The Digital Products Group had earlier admitted to the court that in its dealings with a Melbourne-based retailer it had breached s. 48 of the Act by on two occasions attempting to induce, and on 17 occasions inducing, the retailer not to advertise certain products at prices less than that specified by the company.

MR 306/06

Navigation products alleged resale price maintenance

The ACCC instituted proceedings against Navman Australia Pty Limited, alleging resale price maintenance in the supply of Navman navigation products. The ACCC has alleged that Navman breached the TPA by conduct that included inducing or attempting to induce dealers not to sell Navman products below a specified price, withholding supply of Navman products for reasons including that the retailer had sold the products below prices specified by Navman, and stating to its Navman dealers prices that were likely to be understood by them as prices below which Navman products were not to be sold. The ACCC alleges that the company's former general manager Mr Baird and current Australasian sales manager Mr King directed and participated in the contravening conduct.

MR 299/06

Computer products supplier admits resale price maintenance

Optima Technology Solutions Pty Ltd, the national supplier of Optima computer products, admitted to the ACCC that it had engaged in resale price maintenance. Under s. 48 of the TPA, a supplier cannot require a business customer to sell their goods at a specified minimum price. Doing so would limit the ability of the business customer to advertise discounts for the products, which is essential for retailers who wish to engage in price competition.

Optima admitted it had told two of its dealers that they should stop discounting and raise their prices. The dealers were threatened with having products withheld or their dealerships cancelled. Optima has undertaken that it will not engage in resale price maintenance for a period of three years, implement an audit process to determine whether any other Optima dealers have been subjected to resale price maintenance and inform all Optima dealers of the outcome of the ACCC investigation.

MR 296/06

MERGERS AND ACQUISITIONS

Santos' proposed acquisition of QGC to be opposed

The ACCC will oppose Santos' proposed acquisition of Queensland Gas Company Limited. Having withdrawn a previous proposal, Santos approached the ACCC on 30 January 2007 with a revised proposal that included undertakings which it submitted would preserve the competitive structure of

wholesale gas supply in Queensland. After comprehensive investigation the ACCC has formed the view that the proposed acquisition is likely to substantially lessen competition. The ACCC will issue a public competition assessment on its decision in due course.

MR 042/07, MR 021/07 and 303/06

Gas company acquisition not opposed

The ACCC announced it would not oppose AGL Energy Limited acquiring up to 30 per cent of Queensland Gas Company Limited. As part of the proposed arrangements, AGL will be able to appoint three of the nine directors to an expanded QGC board of nine directors. Other additional arrangements include AGL entering into a gas market development services agreement with QGC, whereby QGC would obtain rights to AGL's excess pipeline capacity. In considering the acquisition, the ACCC took into account AGL's relatively limited involvement in gas production in southern Queensland. It is expected that the existence of Origin and Santos as key competitors in gas production will lessen any possible competition effects.

MR 016/07

Johnson and Johnson divestitures accepted

The ACCC accepted a divestiture proposal offered by Johnson and Johnson in late December 2006. This offer was made in relation to J&J's proposed acquisition of consumer healthcare business Pfizer inc, which the ACCC will not now oppose. Both parties have provided court-enforceable undertakings to allay the ACCC's competition concerns.

These concerns relate to J&J's acquisition in the worm treatments, anti-diarrhoeal and nicotine replacement therapy product categories. The ACCC decided that, subject to the divestitures, the proposed acquisition will not lead to a substantial lessening of competition in any of the relevant product categories.

MR 327/06 and 307/06

Insurance merger not opposed

The ACCC will not intervene in the proposed acquisition of Promina Group Ltd by Suncorp Metway Limited. The ACCC investigation focused on personal insurance and motor vehicle insurance in Queensland, and home insurance nationally. Market inquiries revealed a large number of competitors within the personal insurance industry. The ACCC formed the view that these competitors will act as a strong competitive constraint on the merged firm. In recent years a number of major banks have used their existing brands, branch networks and customer relationships to expand their insurance distribution. In the ACCC's view, this development will continue to promote competition within the insurance industry.

MR 315/06 and 294/06

Newspaper acquisition approved

The ACCC will not oppose the proposed acquisition of the Federal Publishing Company (FPC) Community Newspaper Group by News Limited. In December 2006 the ACCC published a statement of issues concentrating on potential competition concerns in northern and inner west Sydney. It has been resolved that the proposed acquisition is unlikely to lessen competition in these areas.

Following extensive market inquiries, the ACCC is satisfied that there are sufficient advertising alternatives to provide a competitive constraint to News Limited. Individual advertisers have a range of advertising options at their disposal in northern and inner west Sydney.

MR 005/07 and 298/06

Review of proposed Qantas acquisition

The ACCC is currently reviewing the proposed acquisition of Qantas by a consortium that includes Macquarie Bank. This review includes market inquiries, which seek to determine the potential effects the acquisition may have on competition in the air transport industry. The ACCC will closely assess how the proposal will affect customers, suppliers and other competitors. Areas of concern to the ACCC include Macquarie Bank's 49 per cent interest in Sydney Airport and some of the other consortium members' interests in the air transport industry. The ACCC will undertake this review in accordance with its *Merger review process guideline* and s. 50 of the TPA.

MR 312/06

Private hospital acquisition opposed

The ACCC will oppose Healthe Care Australia Pty Ltd's proposed acquisition of Brisbane Waters Private Hospital. Healthe already owns a private hospital in the Gosford area, the North Gosford Private Hospital. After making market inquiries, the ACCC considers that competition currently exists between the two hospitals to attract doctors and they can use the current competitive situation to benefit their patients' standard of care. The ACCC considers that the proposed acquisition is likely to result in a reduction in the range and quality of services currently offered at North Gosford and Brisbane Waters, resulting in patients having to travel further to receive treatment. The ACCC consulted with other market participants, specialists, health funds and industry bodies to reach this conclusion.

MR 304/06

Variation to Toll undertakings

The ACCC began market inquiries on a proposed variation to the undertakings given to the ACCC by Toll Holdings Ltd in March 2006. The undertakings relate to Toll's proposed acquisition of Patrick Corporation Ltd. The ACCC is particularly concerned with ensuring that the proposed variation to the undertakings will not delay or disrupt the process currently under way to make the East-West Rail Assets available. Toll is still obliged to continue the process to make the East-West Rail Assets available in accordance with the timeframes set out in the current undertaking.

MR 302/06

Proposed acquisition of gas assets

The ACCC began market inquiries into the proposed acquisition of Origin Energy Ltd's gas infrastructure assets by Alinta Ltd. Origin's assets include a 17 per cent interest in Envestra, a 33.3 per cent interest in the SEA Gas pipeline and other transmission and distribution assets. The ACCC will assess the proposed acquisition under s. 50 of the TPA, in accordance with its informal merger review process guidelines.

MR 002/07

Steel pipe and tube joint venture not opposed

The ACCC will not intervene in the proposed joint venture between OneSteel Limited and Smorgon Steel Group Limited. Market inquiries by the ACCC indicate that the pipe and tube products that the joint venture will produce are currently imported in significant quantities into Australia. In deciding not to intervene, the ACCC considered the recent significant increase in the volume of imports and the increasing role they play in competition in the relevant markets.

MR 020/07

AUTHORISATIONS AND NOTIFICATIONS

Discount funerals for WA pensioners

The ACCC issued a draft decision proposing to allow the Western Australian Funeral Directors Association and other individual funeral directors to supply fixed-price discount pre-paid funerals to eligible members of Retirees WA.

Retirees WA administers a pre-paid funeral scheme for aged, invalid and widowed pensioners and certain superannuants in Western Australia. The purpose of the fund is to allow the elderly the benefit of prior planning of a funeral service, at a reduced cost.

MR 027/07

Nestlé withdraws application for review

The Australian Competition Tribunal allowed Nestlé Australia Ltd to withdraw its application to the Tribunal. Nestlé Australia wanted the Tribunal to overturn the ACCC's decision to revoke an exclusive dealing notification it had lodged. Nestlé Australia lodged its notification after Aldi imported and sold Nescafé brand instant coffee manufactured offshore. Nestlé sought to stop supply of all Nestlé products to Aldi unless Aldi complied with certain conditions in relation to the sale of the imported Nescafé products by Aldi.

The ACCC decided that the action proposed by Nestlé should not be afforded protection under the Act. In its decision, the ACCC concluded that Nestlé engaged in the notified conduct for an anti-competitive purpose and the conduct was likely to substantially lessen competition.

MR 018/07

Capped fee structure for medical service authorised

The ACCC granted authorisation to the Canberra After Hours Locum Medical Service (CALMS) to use a revised capped fee structure in its provision of after hours medical services. Under the capped fee structure, CALMS will not charge patients fees above certain levels and doctors will be able to charge lower fees or bulk bill where appropriate. The ACCC considers that the capped fee structure promotes transparency and certainty regarding fees for patients seeking after hours primary medical care in the Australian Capital Territory. Given the possibility of future changes to the Medicare Benefits Schedule, or other relevant changes, the ACCC's authorisation will allow CALMS to lower its capped fees without seeking a further re-authorisation from the ACCC.

MR 011/07

National Library authorised to tender on behalf of others

The ACCC granted authorisation to allow the National Library of Australia (NLA) to tender for the use of certain electronic resources on behalf of Australian libraries. Under its national licensing proposal, the NLA intends to develop standard agreements with electronic resource providers that any library may enter into. The ACCC considers that the proposed arrangements are likely to lead to minimal anti-competitive detriments. It will be open for libraries to negotiate individually with other suppliers and there is no element of compulsion to the arrangements. The ACCC considers that the proposal may provide libraries with access to useful resources on better terms and conditions than would have been available if they were to negotiate individually.

MR 008/07 and 297/06

High Value Clearing System rules to be approved

The ACCC granted authorisation for five years to the Australian Payments Clearing Association for certain provisions of the High Value Clearing System (HVCS) Regulations and Procedures. These provisions relate to suspension and termination of HVCS membership and the requirement that members use the SWIFT payment delivery system in clearing and settling payments. The ACCC took into account the checks and balances within APCA and the HVCS arrangements to guard against the anti-competitive use of the suspension and termination provisions. These include the review power of the APCA board over HVCS Management Committee decisions and the requirement that the Reserve Bank of Australia be consulted in respect of any decision to suspend a member.

MR 034/07 and 007/07

Melbourne councils to collectively tender for bus shelters

The ACCC granted authorisation to allow some Melbourne councils to collectively tender for the installation and maintenance of bus shelters. Councils wishing to participate in the collective tender process will do so by entering into a memorandum of understanding. Currently 11 councils have agreed to participate in the tender process. The ACCC considers that any anti-competitive detriment that may flow from the proposed arrangements is likely to be small and sees a benefit in the supply and maintenance of bus shelters to a number of councils being negotiated and provided through a single process. This may enable the successful tenderer to provide these services at a lower cost, which will likely be reflected in lower rates and improved quality of services for ratepayers.

MR 039/07 and 326/06

Restrictions authorised within coal supply agreement

The ACCC issued a determination granting authorisation to certain restrictions within a coal supply agreement between Tarong Energy Corporation Limited, New Acland Coal Pty Ltd and New Hope Corporation Limited. Under the agreement, Tarong has been granted an option to buy 5.7 million tonnes of coal annually from the New Acland mine in Queensland for 25 years, starting in 2011 and concluding in 2035.

If the parties proceed with the agreement, Tarong will use the coal to fuel its two power stations in the Kingaroy/Nanango region of Queensland. Under the agreement restrictions include a limitation of the volume of coal that New Acland can sell each year to parties other than Tarong and limit Tarong's ability to

on-sell coal to third parties. The ACCC considers that the public detriments arising from the restrictions are limited. The restrictions are intended to ensure that there will be sufficient coal available to Tarong for the life of the agreement.

MR 319/06

ACCC confirms changes to Surgeons' immunity

The ACCC issued a determination removing parts of the Royal Australasian College of Surgeons' authorisation relating to its training program. The accreditation of hospitals, hospital posts and assessment of overseas-trained surgeons will remain protected under a substitute authorisation. Immunity for these aspects will expire in July 2007.

In 2006 the ACCC conducted a review of the college's authorisation that raised concerns that the college's ability to restrict surgical training intakes increased the anti-competitive detriment flowing from its arrangements. A draft decision was issued proposing to revoke and substitute the college authorisation, and the college and governments have indicated they do not oppose the ACCC proposal. The college has advised that it does not intend to seek authorisation beyond July 2007 with the introduction of the new Surgical Education and Training mode.

MR 309/06

Collective negotiations by major sport bodies allowed

The ACCC will allow collective negotiations by major sports bodies with sports betting operators about sports data used for betting. The Coalition of Major Professional Sport (COMPS) members wish to enter collective discussions with sports betting operators, such as Tabcorp, Betfair and the Association of Australian Bookmaking Companies, about the terms and conditions under which their sporting information is used. The decision to grant authorisation reverses an earlier draft proposal where the ACCC questioned the level of public benefit from the collective bargaining arrangements. COMPS has since simplified its negotiating structure and the ACCC considers that the proposal is now more likely to generate efficiencies. Authorisation has been granted for a period of two years.

MR 308/06

Fee guide authorisation for Institute of Building revoked

The ACCC issued a determination revoking the Australian Institute of Building (AIB) authorisation to publish its fee guide, which the ACCC believed was likely to provide little benefit to the public and may have resulted in anti-competitive detriment. The ACCC reviewed the AIB's authorisation as part of a broader review into fee guide authorisations. The ACCC issued a notice proposing to revoke the authorisation based on a material change of circumstances. Revocation of the authorisation does not mean that the AIB is unable to provide assistance to its members with regard to fee setting.

MR 290/06

REGULATED SERVICES

Monitoring petrol prices

According to the ACCC's monitoring report on E10 petrol prices, E10 petrol prices in the December 2006 quarter were on average 2.9 cents per litre (cpl) below regular unleaded petrol prices. Since July 2002 the ACCC has monitored the prices of

regular unleaded petrol, diesel and automotive liquefied petroleum gas across Australia, and in August 2006 the Treasurer announced that this would be extended to include E10 petrol.

E10 petrol is unleaded petrol blended with 10 per cent ethanol, excluding premium E10 petrol and E5 petrol. For the reported quarter, the average difference between the price of regular E10 petrol and regular unleaded petrol—in reported locations—ranged from 2.8 cpl to 2.9 cpl. The ACCC report provides price data for 14 locations across Australia where E10 petrol is available.

MR 013/07

Final decision on gas pipeline access arrangement

The ACCC issued its final decision on APT Petroleum Pipelines Ltd's revised access arrangement for the Roma to Brisbane gas pipeline. For the first time since the gas code began in 1998 the reference tariff for the pipeline is being set by the ACCC. The Australian Energy Regulator proposed that the tariff would stay constant in real terms for the next five years and then increase. The lower reference tariff mainly reflects the ACCC decision that the pipeline's initial capital base should be \$251.1 million rather than the \$346.2 million proposed by APTPL.

MR 323/06

Draft guideline issued on Part IIIA of the TPA

The ACCC issued for public comment draft guidelines concerning changes to arbitration processes that will result from recent amendments to the TPA. The guidelines give effect to the *Trade Practices Amendment (National Access Regime) Act 2006*, which came into operation on 1 October 2006. Amendments in the Act include changes to Part IIIA providing the ACCC with mechanisms to defer arbitration of an access dispute where it is also considering an access undertaking on related issues and to backdate a final determination and apply payment of interest to a backdated determination. The legislative amendments require the ACCC to formulate guidelines for these new provisions within six months of the commencement of the Act (i.e. by 1 April 2007).

MR 321/06

Sydney Airport access dispute

Virgin Blue Airlines Pty Limited notified the ACCC of an access dispute with Sydney Airport Corporation Limited. The dispute relates to the method of allocating costs for access to the Airside Service between airline users of that service and the basis on which the price for access to the Airside Service should be levied. The ACCC has commenced the arbitration process for this access dispute.

MR 025/07

Telecommunication access disputes

Adam Internet Pty Ltd and Primus Telecommunications Pty Ltd have both notified the ACCC of access disputes with Telstra Corporation Limited. The Adam Internet access dispute relates to the charges associated with the supply of the unconditioned local loop service from Telstra. The Primus access dispute relates to the monthly rental charge associated with the Line Sharing Service supplied by Telstra.

Telstra has notified the ACCC of separate access disputes with Optus Mobile Pty Limited and Optus Networks Pty Limited. These access disputes relate to the price paid by Telstra for the Domestic Mobile Terminating Access Service supplied by Optus entities.

MR 291/06 and MR 026/07

Interim determination in telecommunications access dispute

The ACCC published interim determinations in two telecommunications access disputes. These determinations relate to the supply of local call resale services and wholesale line rental from Telstra Corporation to Optus Networks Pty Limited. The ACCC published the interim determinations and accompanying statements of reasons to encourage reasonable local call resale and wholesale line rental prices to apply across the market.

MR 030/07

Line Sharing Services arbitrations

Following a process of consultation, the ACCC issued interim determinations for telecommunications disputes regarding annual charges for the supply of the Line Sharing Service (LSS). These determinations were made in LSS arbitrations between Telstra and two separate parties, Chime Communications Pty Ltd and Request Broadband Pty Ltd. The interim determinations provide that the LSS Annual Charges payable by a party to Telstra for the LSS are \$38.40 per LSS per annum (\$3.20 per LSS per month). The charges will apply between the parties for no more than one year.

MR 010/07

Tribunal supports ACCC position on reasonable access prices

The ACCC welcomed the recent decision by the Australian Competition Tribunal to reject Vodafone's proposed undertaking for the supply of the Mobile Terminating Access Service (MTAS) on its 2G GSM network. Vodafone had proposed the prices for the service should trend towards a proposed target price of 16.15 cents per minute in 2007. The ACCC has maintained that 12 cents per minute is the appropriate price for the period up to 30 June 2007. The decision by the Tribunal means the access undertaking will not come into operation and the benefits of lower MATS pricing can now flow through to consumers making calls to mobiles.

MR 006/07

Telstra accounting separation report issued

The ACCC issued its thirteenth imputation testing and non-price terms and conditions report under the enhanced accounting separation regime for Telstra Corporation Limited. The report presents key performance indicators comparing particular aspects of Telstra's customer services when supplied to wholesale and retail customers but does not reveal systematic discrimination by Telstra against its wholesale customers.

The results for fixed-line voice services show that, although imputed margins for some services or customer segments have deteriorated and others improved, in imputed margins across the bundle of services remained constant in the quarter

MR 320/06

Release of WIK-Consult mobile network and cost model

The ACCC called for submissions from interested parties on the future costing model for the supply of the mobile terminating access services on Australian mobile networks. The ACCC engaged international consultants, WIK-Consult, to construct the model. This cost model will inform the MTAS pricing principles that will apply from 1 July 2007.

MR 023/07

Broadband speed advertising guidance

The ACCC issued an information paper developed to assist internet service providers comply with the TPA when advertising broadband internet. The information paper is a proactive step by the ACCC to help ISPs comply with their obligations under the Act when advertising their broadband services and prevent consumers being misled about the speeds achievable using various technologies. Although directed at all broadband providers, the paper focuses primarily on ADSL2+ broadband services. ADSL2+ is a relatively new technology that is currently becoming available to more and more consumers.

MR 019/07

Discussion paper on licences for new digital services

The ACCC issued a discussion paper seeking stakeholder views on the access regime that will apply to 'Channel B', one of the two licences for new digital television services that will be made available by the government next year. Possible uses for Channel B include mobile television and new services to in-home digital television sets. The ACCC is seeking stakeholder input on the optimal way to ensure the access regime for Channel B enables effective competition between access seekers and the Channel B licensee.

MR 311/06

Foxtel special access undertaking discussion paper

The ACCC issued a discussion paper on a special access undertaking lodged by Foxtel in relation to the pay-TV Digital Set Top Unit service. Foxtel lodged its new special access undertaking on 1 December 2006, to replace an earlier special access undertaking which the ACCC decided to reject.

Foxtel has made various changes to the price and non-price terms and conditions of access to its digital set-top units to address the ACCC's concerns with the original undertaking. One of the most important differences is that the new undertaking is now limited to setting out the terms and conditions of access to Foxtel's digital set top units. Unlike the earlier undertaking, it does not attempt to prevent regulated access to other related services, such as conditional access and service information services.

MR 310/06 and 239/06