FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (in liquidation) [2005] FCA 1212

CORRIGENDUM

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v CHASTE CORPORATION PTY LTD (IN LIQUIDATION) (ACN 089 837 329) & ORS

QUD 252 of 2001

LANDER J
2 SEPTEMBER 2005 (CORRIGENDUM 12 SEPTEMBER 2005)
ADELAIDE (HEARD IN BRISBANE)
IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **QUD 252 OF 2001**

BETWEEN:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** **APPLICANT**
AND:	**CHASTE CORPORATION PTY LTD (IN LIQUIDATION) (ACN 089 837 329)** **FIRST RESPONDENT**
	BRADDON RALPH WEBB **SECOND RESPONDENT**
	ORLAWOOD PTY LTD (ACN 059 294 334) **THIRD RESPONDENT**
	PETER CLARENCE FOSTER **FOURTH RESPONDENT**
	SEAN PETRIE ALLEN COUSINS **SIXTH RESPONDENT**
	KEVIN ANTHONY MCMULLAN **EIGHTH RESPONDENT**
	ALAN KENNETH COOPER **NINTH RESPONDENT**
	STEPHEN D'ALTON **TENTH RESPONDENT**
JUDGE:	**LANDER J**
DATE OF ORDER:	**2 SEPTEMBER 2005 (CORRIGENDUM 12 SEPTEMBER 2005)**
WHERE MADE:	**ADELAIDE (HEARD IN BRISBANE)**

CORRIGENDUM

1. In paragraphs 20.1 and 20.2 of the orders replace 'the second respondent' with 'the third respondent' in each of those paragraphs.
2. On page 69, par [301] of the reasons for judgment, at paragraphs 20.1 and 20.2 of the orders, replace 'the second' respondent' with the 'third respondent' in each of those paragraphs.

I certify that the preceding two (2) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lander.

Associate:

Dated: 12 September 2005

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (in liquidation) [2005] FCA 1212

TRADE PRACTICES – resale price maintenance – misleading and deceptive conduct – application for injunctions, declarations and pecuniary penalties arising out of the operation of a scheme whereby products were distributed through a network of sales representatives – penalties to be imposed for contravening conduct – factors to be considered in determining appropriate penalties.

Trade Practices Act 1974 (Cth), ss 4, 48, 51AD, 52, 53(a), 53(c), 75B, 76, 80, 82, 83, 88(8A), 96
Corporations Act 2001 (Cth), s 553B
Therapeutic Goods Act 1989 (Cth), s 26A

ACCC v Goldy Motors Pty Ltd (2001) ATPR 41-801 cited
ACCC v Chen (2003) 201 ALR 40 cited
ACCC v Francis [2004] FCA 487 cited
Mathers & Anor v Commonwealth of Australia (2004) 134 FCR 135 cited
ACCC v SIP Australia Pty Ltd (2003) ATPR 41-937 cited
ACCC v Fila Sport Oceania Pty Ltd (2004) ATPR 41-983 cited
ACCC v The Vales Wine Company Pty Ltd (1996) ATPR 41-528 cited
ACCC v GIA Pty Ltd (2002) ATPR 41-902 cited
TPC v Stihl Chainsaws (Aust) Pty Limited (1978) ATPR 40-091 cited
TPC v CSR Ltd (1991) ATPR 41-076 cited
ACCC v Leahy Petroleum Pty Ltd (No 3) (2005) 215 ALR 301 cited
ACCC v Midland Brick Co Pty Ltd (2004) 207 ALR 329 cited
TPC v TNT Australia Pty Ltd (1995) ATPR 41-375 cited
ACCC v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36 cited
NW Frozen Foods Pty Ltd v ACCC (1996) 141 ALR 640 cited
J McPhee & Son (Aust) Pty Ltd v ACCC (2000) 172 ALR 532 cited
Richardson & Wrench (Holdings) Pty Ltd v Ligon No 174 Pty Ltd (1994) 123 ALR 681 cited
ACCC v Black on White Pty Ltd (2001) 110 FCR 1 cited
Matheson Engineers Pty Ltd v El Raghy (1992) ATPR 41-192 cited
TPC v Allied Mills Industries Pty Ltd (No 4) (1981) 37 ALR 256 cited
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd (2004) ATPR 41-993 cited

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v CHASTE CORPORATION PTY LTD (IN LIQUIDATION) (ACN 089 837 329) & ORS

QUD 252 of 2001

LANDER J
2 SEPTEMBER 2005
ADELAIDE (HEARD IN BRISBANE)

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **QUD 252 OF 2001**

BETWEEN:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** **APPLICANT**
AND:	**CHASTE CORPORATION PTY LTD (IN LIQUIDATION) (ACN 089 837 329)** **FIRST RESPONDENT**
	BRADDON RALPH WEBB **SECOND RESPONDENT**
	ORLAWOOD PTY LTD (ACN 059 294 334) **THIRD RESPONDENT**
	PETER CLARENCE FOSTER **FOURTH RESPONDENT**
	SEAN PETRIE ALLEN COUSINS **SIXTH RESPONDENT**
	KEVIN ANTHONY MCMULLAN **EIGHTH RESPONDENT**
	ALAN KENNETH COOPER **NINTH RESPONDENT**
	STEPHEN D'ALTON **TENTH RESPONDENT**

JUDGE:	**LANDER J**
DATE OF ORDER:	**2 SEPTEMBER 2005**
WHERE MADE:	**ADELAIDE (HEARD IN BRISBANE)**

THE COURT DECLARES AND ORDERS THAT:

In relation to the first respondent, Chaste:

1. I declare that:

   1.1 The first respondent, between December 1999 and November 2001, by in trade or commerce offering and entering into agreements for the supply of

goods, namely weight loss tablets, together with point of sale material and other related products, under an agreement, one of the terms of which was that area managers to whom the goods were supplied would not sell the said goods at a price less than the price specified from time to time by Chaste, has engaged in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

1.2 The first respondent by, between December 1999 and November 2001, using in trade or commerce in relation to goods supplied by Chaste to area managers for resale, the statements:

(a) '… the company will be solely responsible for fixing, from time to time, the recommended retail price and the price at which the Area Manager purchases stock';

(b) '… it is most important that a regulated price policy be adhered to in the interest of all parties involved.';

(c) '… we have therefore established the following as the costing structure to be applied in all markets:

PROFIT STRUCTURE TRIMit™		
Area Manager Cost	$19.50	
Profit	$10.00	51%
Retailer Cost	$29.50	
Retailer Profit	$20.45	70%
Recommended Retail	$49.95	

(d) '15. Who determines the price at which I sell my stock?

The company will set the recommended retail price and wholesale price that must be adhered to by all Area Managers. There must be no discounting or price cutting without the written permission of the company. This ensures that everyone is protected from unnecessary price wars.'

(e) 'Cost to you…

What will TRIMit cost you?

Retailer Cost	$32.45
Recommended Retail	$54.95
Retailer profit	$22.50
PROFIT	**70%**’

being statements of prices that were likely to be understood by area managers as the prices below which the goods were not to be sold, has engaged in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

I order that:

2. The first respondent pay to the Commonwealth of Australia a penalty of $600,000 in respect of its conduct which constituted engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

In relation to the second respondent, Mr Webb:

I declare that:

3. The second respondent, having directed the operations of the first respondent, being a corporation engaged in the supply or possible supply in trade or commerce, through distributors (area managers) of a purported weight loss aid named TRIMit, by making on behalf of Chaste, or causing or permitting to be made on behalf of Chaste:

   3.1 a representation in documents provided to area managers and potential area managers that Chaste would promote TRIMit by an extensive national television, radio and magazine campaign with a forecast expenditure of over $1.5 million in the first year of sales and would further provide a national team of marketing, management and advertising experts to assist area managers when in fact and to his knowledge Chaste had no such plans or arrangements in place, had no apparent means of executing them, had not engaged in the represented marketing, management and advertising experts, and to the second respondent’s knowledge had no financial means to fund the represented expenditure;

3.2 representations to area managers that delays in commencement of the said campaign were due to the actions of persons other than Chaste and its officers when in fact and to his knowledge the campaign had not proceeded because it had not been arranged or agreed to by Chaste and Chaste at his direction continually refused to pay deposits or other payments required for aspects of the campaign to proceed;

3.3 a representation to area managers and potential area managers that if they wished to discontinue their distribution arrangement with Chaste, Chaste would upon ninety days notice, repurchase all unsold stock and point of sale material supplied to the area manager and arrange a new area manager for the distribution area when in fact and to his knowledge during the period when Chaste was making the representation, Chaste and the second respondent had no intention of making good the representation but wrote correspondence to area managers who sought to terminate their agreements, requiring them to continue to perform their obligations under the agreements, or refusing to refund their deposits in full, until such time as their areas were re-sold;

3.4 Representations that:

3.4.1 TRIMit was a thoroughly researched and scientifically tested product;

3.4.2 TRIMit's efficacy as a weight loss product was without question;

3.4.3 TRIMit (or an equivalent product) had been successfully launched in the United States and had been scientifically tested at eleven universities;

when in fact and to the knowledge of the second respondent TRIMit was a new and unique formulation and none of these matters was true;

3.5 Representations that:

3.5.1 clinical studies had shown the combination of ingredients in TRIMit were 700% more effective than hydroxycytric acid alone;

3.5.2 Chaste had the results of independent clinical trial of TRIMit (or an equivalent product) which proved it was a quality product, safe to use and effective as a weight loss aid;

when in fact and to the knowledge of the second respondent, Chaste did not have such results, and such clinical trials as were conducted for Chaste were conducted without scientifically acceptable protocols or design, without

scientifically controlled conditions, and largely involved subjects who had an interest in the business of Chaste;

3.6 Representations that claims made by Chaste as to TRIMit's potency, use and effectiveness had a scientific basis and *Therapeutic Goods Act* approval, when in fact and to the knowledge of the second respondent, the claims did not have a scientific basis, and such approval as was obtained under the *Therapeutic Goods Act* did not provide verification of the product's efficacy;

3.7 A representation to area managers and to the public that Chaste was a genuine business conducted on an ordinary commercial basis and that the opportunity offered by it to area managers was a genuine business opportunity when:

3.7.1 It was the fact that the fourth respondent had extensive involvement in the management and marketing of Chaste which involvement was, at the direction of the second respondent, deliberately concealed from the public and area managers;

3.7.2 It was the fact that the fourth respondent had convictions in relation to the unlawful sale and promotion of weight loss products, and a reputation as the instigator of dubious and failed schemes for profit for the conduct of businesses promoting and selling or purporting to sell purported slimming or weight loss products, and that Chaste and the second respondent were deliberately concealing the involvement of the fourth respondent in Chaste because the public and potential area managers of Chaste would be unlikely to buy its weight loss products or become its distributors if they knew of the involvement of the fourth respondent in Chaste;

3.7.3 It was the fact and he knew, but did not inform area managers or the public that it was his intention and the intention of the fourth respondent as the controllers of Chaste that gross income from sale of distributorships and goods by Chaste would be distributed to, or at the direction of the second and fourth respondents, and Chaste would not retain adequate funds to make good on representations of future expenditure by Chaste;

3.7.4 It was the fact and he knew, but did not inform area managers or the public, that gross income from sale of distributorships and goods by

chaste had been distributed to, or at the direction of the second and fourth respondents, and Chaste did not retain adequate funds to make good on representations of future expenditure by Chaste;

3.7.5 It was fact, and the second respondent knew, that Chaste was operated by him and others for the purpose of:

3.7.5.1 Extracting the maximum revenue from area managers without regard for the long term viability of Chaste;

3.7.5.2 Inducing persons to become area managers and purchase TRIMit only so that Chaste would receive money from those persons;

3.7.5.3 Distributing to the second respondent and others the maximum possible gross income of Chaste whilst retaining the minimum funds in Chaste necessary for Chaste to maintain the appearance in the short term of conducting a genuine business;

3.8 Representations to potential area managers that Chaste was a good business opportunity; while deliberately not revealing the involvement of the fourth respondent to area managers and potential area managers, and thereby misrepresenting the risks associated with Chaste's business opportunity;

has, in respect of each representation, been directly knowingly concerned in Chaste engaging in conduct that was misleading and deceptive in contravention of section 52 of the *Trade Practices Act 1974* (Cth).

4. The second respondent, by representing to area managers and potential area managers of Chaste that the area management agreements offered by Chaste were not franchise agreements when in fact and to his knowledge under those agreements:

4.1 Chaste granted to the area manager, the right to carry on the business of offering, supplying or distributing TRIMit in a specified geographical territory in Australia under a system or marketing plan which was substantially determined, controlled or suggested by Chaste;

4.2 The operation of the above business was substantially or materially associated with the trade mark, advertising or commercial symbol, known as TRIMit, which is or was owned, used or licensed by Chaste; and

4.3 Before starting the business, the area manager was required to pay Chaste an amount including a payment for TRIMit and associated franchise services;

and the agreements were thereby franchise agreements within the meaning of subcl 4(1) of the Franchising Code of Conduct, has, in respect of each representation, been directly knowingly concerned in Chaste engaging in conduct that was misleading and deceptive in contravention of s 52 of the *Trade Practices Act 1974* (Cth).

5. The second respondent, by on behalf of Chaste, on 6 February 2001:

   5.1 threatening to suspend advertising by Chaste in New South Wales unless area managers cancelled a proposed meeting between them;

   5.2 threatening to terminate without further notice the area management agreements of area managers who attended any gathering of area managers to discuss Chaste's business unless such gathering had been sanctioned by Chaste;

   5.3 thereby directing area managers not to associate with one another for a lawful purpose;

   was knowingly concerned in and aided, abetted, counselled or procured Chaste, in trade or commerce, to contravene cl 15 of the Franchising Code of Conduct, and thereby to contravene an applicable industry code in contravention of s 51AD of the *Trade Practices Act 1974* (Cth).

6. The second respondent, between December 1999 and November 2001, knowingly permitting, assisting and authorising Chaste in trade or commerce to enter into agreements for the supply of goods, namely, weight loss tablets, together with point of sale material and other related products, under an agreement, one of the terms of which was that area managers to whom the goods were supplied would not sell the said goods at a price less than the price specified from time to time by Chaste, which term was known to the second respondent, has been directly knowingly concerned in Chaste engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

7. The second respondent by, between December 1999 and November 2001, knowingly permitting, assisting and authorising Chaste to use in trade or commerce in relation to goods supplied by Chaste to area managers for resale, the statements:

   (a) '… the company will be solely responsible for fixing, from time to time, the recommended retail price and the price at which the area manager purchases stock';

(b) '… it is most important that a regulated price policy be adhered to in the interest of all parties involved.'

(c) '… we have therefore established the following as the costing structure to be applied in all markets

PROFIT STRUCTURE TRIMit™		
Area Manager Cost	$19.50	
Profit	$10.00	51%
Retailer Cost	$29.50	
Retailer Profit	$20.45	70%
Recommended Retail	$49.95	

(d) '15. Who determines the price at which I sell my stock?

The company will set the recommended retail price and wholesale price that must be adhered to by all area managers. There must be no discounting or price cutting without the written permission of the company. This ensures everyone is protected from unnecessary price wars.'

(e) 'Cost to You…

What will TRIMit cost you?

Retailer Cost	$32.45
Recommeded Retail	$54.95
Retailer Profit	$22.50
PROFIT	70%'

being statements of prices that were likely to be understood by area managers as the prices below which the goods were not to be sold, has been directly knowingly concerned in Chaste engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

I order that:

8. The second respondent pay to the Commonwealth of Australia, within 45 days of the date of this order, a penalty of $150,000 in respect of being knowingly concerned in the conduct of a corporation engaging in the practice of resale price maintenance in

contravention of section 48 of the *Trade Practices Act 1974* (Cth), as alleged in paragraphs 106 and 112(c) of the statement of claim.

9. The second respondent be restrained, for five years from the date of this order, from being directly or indirectly knowingly concerned in the promotion or conduct by a corporation of any business relating to weight loss, cosmetic or health industry products or services of any kind.

10. The second respondent be restrained, for five years from the date of this order, from promoting or taking part in any business in relation to weight loss or health industry products or services with which the second respondent knows or believes the fourth respondent to be directly or indirectly involved, unless he discloses to any prospective customer or franchisee of the business with whom he deals in the course of or in the promotion of the business, his knowledge or belief as to the fact of, and the nature of, the involvement of the fourth respondent.

11. The second respondent be restrained, for five years from the date of this order, from being directly or indirectly knowingly concerned in or party to, or aiding, abetting, counselling or procuring, a corporation, which supplies to another person products said to have health, weight loss or cosmetic benefits:

    11.1 inducing or attempting to induce that other person not to sell those products at a price less than a price specified by that corporation; or

    11.2 using in relation to those products a statement of price likely to be understood by that other person as a price below which the products are not to be sold.

12. The second respondent be restrained for five years from the date of this order from in any manner being knowingly concerned in any corporation in trade or commerce, making, or permitting to be made, any representation as to the nature, quality, fitness for any purpose, testing, history, composition, standard, approval by any person, performance characteristics, uses or benefits of any goods or services unless, prior to making the representation:

    12.1 the respondent believes the representation to be true and accurate;

    12.2 the respondent informs the representee in writing of all information of which he is aware that refutes, qualifies or contradicts any part of the representation; and

    12.3 the respondent provides the representee with a copy of these orders or informs the representee of the existence of these orders and gives the representee the

address of the Federal Court website, namely www.fedcourt.gov.au, from which a copy of these orders can be obtained.

13. The second respondent be restrained for five years from the date of this order from in any manner being knowingly concerned in any corporation in trade or commerce making any representation as to the future payment by it of any sum to any person or the future giving by it of any benefit to any person unless:

    13.1 the second respondent has made all necessary enquiries to satisfy himself that the corporation intends to make the payment or give the benefit and has reasonable grounds to believe it can make the payment or give the benefit; and

    13.2 the second respondent has fully recorded in writing the details of all matters he has relied upon in so satisfying himself (including the source of the information and the time it was obtained) and has retained copies of all documents relied upon.

14. The second respondent shall retain the records and copies of documents prepared by or relied on by him pursuant to order 13 or above for at least six years from the date of this order and shall produce a complete and true copy of such material to the applicant upon request within 7 days of receiving any such request.

15. The seal of the Court be affixed to the reasons for judgment for the purposes of s 83 of the Act.

16. The second respondent pay the applicant's costs of and incidental to these proceedings, such costs to be taxed if not agreed within 28 days of the date of this order.

In relation to the third respondent Orlawood:

I declare that:

17. The third respondent, between December 1999 and November 2001, to the extent that the conduct of the second respondent in respect to the declarations in paragraph 3 hereof constituted consultancy services provided by the second respondent, via the third respondent, to the first respondent, for which payments were made to the third respondent by the first respondent, pursuant to arrangements between them dated 6 October 1999, has, in respect of each representation, been directly knowingly concerned in Chaste engaging in conduct that was misleading and deceptive in contravention of s 52 of the *Trade Practices Act 1974* (Cth).

I order that:

18. The third respondent be restrained, for five years from the date of this order, from being directly or indirectly knowingly concerned in the promotion or conduct by a corporation of any business relating to weight loss, cosmetic of health industry products or services of any kind.

19. The third respondent be restrained, for five years from the date of this order, from in any manner being knowingly concerned in any corporation in trade or commerce, making, or permitting to be made, any representation as to the nature, quality, fitness for any purpose, testing, history, composition, standard, approval by any person, performance characteristics, uses or benefits of any goods or services unless, prior to making the representation:

    19.1 the respondent believes the representation to be true and accurate;

    19.2 the respondent informs the representee in writing of all information of which he is aware that refutes, qualifies or contradicts any part of the representation; and

    19.3 the respondent provides the representee with a copy of these orders or informs the representee of the existence of these orders and gives the representee the address of the Federal Court website, namely www.fedcourt.gov.au, from which a copy of these orders can be obtained.

20. The third respondent be restrained, for five years from the date of this order, from in any manner being knowingly concerned in any corporation in trade or commerce making any representation as to the future payment by it of any sum to any person or the future giving by it of any benefit to any person unless:

    20.1 the second respondent has made all necessary enquiries to satisfy himself that the corporation intends to make the payment or give the benefit and has reasonable grounds to believe it can make the payment or give the benefit;

    20.2 the second respondent has fully recorded in writing the details of all matters he has relied upon in so satisfying himself (including the source of the information and the time it was obtained) and has retained copies of all documents relied upon.

21. The seal of the Court be affixed to the reasons for judgment for the purposes of s 83 of the Act.

22. The third respondent pay the applicant's costs of and incidental to these proceedings, such costs to be taxed if not agreed within 28 days of the date of this order.

In relation to the fourth respondent, Mr Foster:

I declare that:

23. The fourth respondent, having controlled and directed the operations of the first respondent (Chaste), being a corporation engaged in the supply or possible supply in trade or commerce, through distributors (area managers) of a purported weight loss aid named TRIMit, by making on behalf of Chaste, or causing or permitting to be made on behalf of Chaste:

    23.1 a representation in documents provided to area managers and potential area managers that Chaste would promote TRIMit by extensive national television, radio and magazine campaign with a forecast expenditure of over $1.5 million in the first year of sales and would further provide a national team of marketing, management and advertising experts to assist area managers when in fact and to his knowledge Chaste had no such plans or arrangements in place, had no apparent means of executing them, had not engaged the represented marketing, management and advertising experts, and to the fourth respondent's knowledge had no financial means to fund the represented expenditure;

    23.2 representations to area managers that delays in commencement of the said campaign were due to the actions of persons other than Chaste and its officers when in fact and to his knowledge that campaign had not proceeded because it had not been arranged or agreed to by Chaste and Chaste at his direction continually refused to pay deposits or other payments required for aspects of the campaign to proceed;

    23.3 a representation to area managers and potential area managers that if they wished to discontinue their distribution arrangement with Chaste, Chaste would, upon ninety days notice, repurchase all unsold stock and point of sale material supplied to the area manager and arrange a new area manager for the distribution area when in fact and to his knowledge during the period when Chaste was making the representation, Chaste and the fourth respondent had no intention of making good the representation but wrote correspondence to area managers who sought to terminate their agreements, requiring them to

continue to perform their obligations under the agreements, or refusing to refund their deposits in full, until such time as their agreements were re-sold;

23.4 representations that:

23.4.1 TRIMit was a thoroughly researched and scientifically tested product;

23.4.2 TRIMit's efficacy as a weight loss product was without question;

23.4.3 TRIMit (or an equivalent product) had been successfully launched in the United States and had been scientifically tested at eleven universities;

when in fact and to the knowledge of the fourth respondent TRIMit was a new and unique formulation and none of those matters were true;

23.5 representations that:

23.5.1 clinical studies had shown the combination of ingredients in TRIMit were 700% more effective than hydroxycitric acid alone;

23.5.2 Chaste had the results of independent research into, scientific testing of, or independent clinical trials of TRIMit (or an equivalent product) which proved it was a quality product, safe to use and effective as a weight loss aid;

when in fact and to the knowledge of the fourth respondent, Chaste did not have such results, and such clinical trials as were conducted for Chaste were conducted without scientifically accepted protocols or design, without scientifically controlled conditions, and largely involved subjects who had an interest in the business of Chaste;

23.6 representations that claims made by Chaste as to TRIMit's potency, use and effectiveness had a scientific basis and *Therapeutic Goods Act* approval, when in fact and to the knowledge of the fourth respondent, the claims did not have a scientific basis, and such approval as was obtained under the *Therapeutic Goods Act* did not provide verification of the product's efficacy;

23.7 a representation to area managers and the public that Chaste was a genuine business conducted on an ordinary commercial basis and that the opportunity offered by it to area managers was a genuine business opportunity when:

23.7.1 it was the fact that the fourth respondent had extensive involvement in the management and marketing of Chaste which involvement was, at

the direction of the fourth respondent, deliberately concealed from the public and area managers;

23.7.2 it was the fact that the fourth respondent had convictions in relation to the unlawful sale and promotion of weight loss products, and a reputation as the instigator of dubious and failed schemes for profit for the conduct of businesses promoting and selling or purporting to sell purported slimming or weight loss products, and that Chaste and the fourth respondent were deliberately concealing the involvement of the fourth respondent in Chaste because the public and potential area managers of Chaste would be unlikely to buy its weight loss products or become its distributors if they knew of the involvement of the fourth respondent in Chaste;

23.7.3 it was the fact and he knew, but did not inform area managers or the public that it was his intention and the intention of the second respondent as the controllers of Chaste that gross income from sale of distributorships and goods by Chaste would be distributed to, or at the direction of the second and fourth respondents, and Chaste would not retain adequate funds to make good on the representations of future expenditure by Chaste;

23.7.4 it was the fact and he knew, but did not inform area managers or the public that gross income from sale of distributorships and goods by Chaste had been distributed to, or at the direction of the second and fourth respondents, and Chaste did not retain adequate funds to make good on representations of future expenditure by Chaste;

23.7.5 it was the fact, and the fourth respondent knew, that Chaste was operated by him and others for the purpose of:

23.7.5.1 extracting the maximum revenue from area managers and purchase TRIMit only so that Chaste would receive money from those persons;

23.7.5.2 inducing persons to become area managers and purchase TRIMit so that Chaste would receive money from those persons;

23.7.5.3 distributing the fourth respondent and others the maximum possible gross income of Chaste necessary for Chaste to maintain the appearance in the short term of conducting a genuine business;

23.8 representations to potential area managers that Chaste was a good business opportunity, while deliberately not revealing the involvement of the fourth respondent to area managers and potential area managers, and thereby misrepresenting the risks associated with Chaste's business opportunity'

has, in respect of each representation, been directly knowingly concerned in a corporation engaging in conduct that was misleading and deceptive in contravention of section 52 of the *Trade Practices Act 1974* (Cth).

24. The fourth respondent by, between December 1999 and November 2001, knowingly permitting, assisting and authorising a corporation in trade or commerce to enter into agreements for the supply of goods, namely weight loss tablets, together with point of sale material and other related products, under an agreement, one of the terms of which was that area managers to whom the goods were supplied would not sell the said goods at a price less than the price specified from time to time by Chaste, which term was drafted by the fourth respondent, has been directly knowingly concerned in Chaste engaging in the practice of resale price maintenance in contravention of s 48 of the Act.

25. The fourth respondent by, between December 1999 and November 2001, knowingly permitting, assisting and authorising a corporation to use in trade or commerce in relation to goods supplied by that corporation to area managers for resale, the statements:

(a) '… the company will be solely responsible for fixing, from time to time, the recommended retail price and the price at which the area manager purchases stock';

(b) '… it is most important that a regulated price policy be adhered to in the interest of all parties involved.'

(c) '… we have therefore established the following as the costing structure to be applied in <u>all</u> markets

PROFIT STRUCTURE TRIMit™		
Area Manager Cost	$19.50	
Profit	$10.00	51%
Retailer Cost	$29.50	
Retailer Profit	$20.45	70%
Recommended Retail	$49.95	

(d) '15. Who determines the price at which I sell my stock?

The company will set the recommended retail price and wholesale price that must be adhered to by all area managers. There must be no discounting or price cutting without the written permission of the company. This ensures everyone is protected from unnecessary price wars.'

(e) 'Cost to You…

What will TRIMit cost you?

Retailer Cost	$32.45
Recommeded Retail	$54.95
Retailer Profit	$22.50
PROFIT	**70%**'

being statements of prices that were likely to be understood by area managers as the prices below which the goods were not to be sold, has been directly knowingly concerned in Chaste engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

I order that:

26. The fourth respondent pay to the Commonwealth of Australia, within 45 days of the date of this order, a penalty of $150,000 in respect of his being knowingly concerned in the conduct of a corporation engaging in the practice of resale price maintenance in contravention of section 48 of the *Trade Practices Act 1974* (Cth), as alleged in paragraphs 106 and 113(c) of the statement of claim.

27. The fourth respondent be restrained, for five years from the date of this order, from being directly or indirectly knowingly concerned in the promotion or conduct by a

corporation of any business relating to weight loss, cosmetic or health industry products or services of any kind.

28. The fourth respondent be restrained, for five years from the date of this order from being directly or indirectly knowingly concerned in or party to, or aiding, abetting, counselling or procuring, a corporation, which supplies to another person products said to have health, weight loss or cosmetic benefits:

    28.1 inducing or attempting to induce that other person not to sell those products at a price less than the price specified by that corporation; or

    28.2 using in relation to those products a statement of price likely to be understood by that other person as a price below which the products are not to be sold.

29. The fourth respondent be restrained for a period of five years from the date of this order from in any manner being knowingly concerned in any corporation in trade or commerce, making, or permitting to be made, any representation as to the nature, quality, fitness for any purpose, testing, history, composition, standard, approval by any person, performance characteristics, uses or benefits of any good or service unless, prior to making the representation:

    29.1 he believes the representation to be true and accurate;

    29.2 the corporation informs the representee in writing of all information of which he is aware that refutes, qualifies or contradicts any part of the representation; and

    29.3 the corporation provides the representee with a copy of these orders or informs the representee of the existence of these orders and gives the representee the address of the Federal Court website, namely www.fedcourt.gov.au, from which a copy of these orders can be obtained.

30. The fourth respondent be restrained for five years from the date of this order from being knowingly concerned in any corporation in trade or commerce making any representation as to the future payment by it of any sum to any person or the future by giving by it of any benefit to any person unless:

    30.1 he has made all necessary enquiries to satisfy himself that the corporation intends to make the payment or give the benefit and has reasonable grounds to believe it can make the payment or give the benefit; and

30.2 he has fully recorded in writing the details of all matters he has relied upon in so satisfying himself (including the source of the information and the time it was obtained) and has retained copies of all documents relied upon.

31. The fourth respondent shall retain the records and copies of documents prepared by or relied on by him pursuant to order 30 above for at least six years from the date of this order and shall produce a complete and true copy of such material to the applicant upon request within seven days of receiving such a request.

32. The fourth respondent pay the applicant's costs of and incidental to these proceedings as against him, such costs to be taxed if not agreed within 28 days of the date of this order.

In relation to the sixth respondent, Mr Cousins:

I declare that:

33. The sixth respondent, having been engaged by and acted:

(a) from approximately March 2000 to April 2000 as a retained legal adviser to;

(b) from May 2000 to November 2000 as the manager and Chief Executive Officer of; and

(c) from November 2000 to November 2001 as legal advisor to:

a corporation engaged in the supply or possible supply in trade or commerce, through distributors (area managers) of a purported weight loss aid named TRIMit and having held himself out, and having permitted the corporation to hold him out as having these positions, by making on behalf of the corporation, or causing or permitting to be made on behalf of the corporation:

33.1 a representation in documents provided to area managers and potential area managers that the corporation would promote TRIMit by an extensive national television, radio and magazine campaign with a forecast expenditure of over $1.5 million in the first year of sales and would further provide a national team of marketing, management and advertising experts to assist area managers when in fact and to his knowledge the corporation had no such plans or arrangements in place, had no apparent means of executing them, had not engaged the represented marketing, management and advertising experts, and the sixth respondent deliberately refrained from making the necessary enquiries to ascertain whether the corporation had the financial means to fund the represented expenditure;

33.2 representations to area managers that delays in commencement of the said campaign were due to the actions of persons other than the corporation and its officers when in fact and to his knowledge the campaign had not proceeded because it had not been arranged or agreed to by the corporation and the corporation continually refused to pay deposits or other payments required for aspects of the campaign to proceed;

33.3 a representation to area managers and potential area managers that if they wished to discontinue their distribution arrangement with the corporation, the corporation would, upon ninety days notice, repurchase all unsold stock and point of sale material supplied to the area manager and arrange a new area manager for the distribution area when in fact and to his knowledge during the period when the corporation was making the representation, the corporation and the sixth respondent wrote correspondents to area managers who sought to terminate their agreements, requiring them to continue to perform their obligations under the agreements, or refusing to refund their deposits in full, until such time as their areas were re-sold.

33.4 representations that:

33.4.1 TRIMit was a thoroughly researched and scientifically tested product;

33.4.2 TRIMit's efficacy as a weight loss product was without question;

33.4.3 TRIMit (or an equivalent product) had been successfully launched in the United States and has been scientifically tested at eleven universities;

when in fact and to the knowledge of the sixth respondent TRIMit was a new and unique formulation and none of these matters were true;

33.5 representations that:

33.5.1 clinical studies had shown the combination of ingredients in TRIMit were 700% more effective than hydroxycitric acid alone;

33.5.2 the corporation had the results of independent research into, scientific testing of, or independent clinical trials of TRIMit (or an equivalent product) which proved it was a quality product, safe to use and effective as a weight loss aid;

when in fact and to the knowledge of the sixth respondent, the corporation did not have such results, and such clinical trials as were conducted for the

corporation were conducted without scientifically controlled conditions, and largely involved subjects who had an interest in the business of the corporation;

33.6 representations that claims made by the corporation as to TRIMit's potency, use and effectiveness had a scientific basis and *Therapeutic Goods Act* approval, when in fact and to the knowledge of the sixth respondent, the claims did not have a scientific basis, and such approval as was obtained under the *Therapeutic Goods Act* did not provide verification of the product's efficacy;

33.7 a representation to area managers and to the public that the corporation was a genuine business conducted on an ordinary commercial basis and that the opportunity offered by it to area managers was a genuine business opportunity when:

33.7.1 it was the fact and he knew, but did not inform the pubic and area managers, that the fourth respondent had extensive involvement in the management and marketing of the said corporation;

33.7.2 it was the fact and he was aware that the fourth respondent had convictions in relation to the unlawful sale and promotion of weight loss products;

33.7.3 he was aware that the fourth respondent had a reputation as the instigator of dubious and failed schemes for profit for the conduct of businesses promoting and selling or purporting to sell purported slimming or weight loss products;

33.7.4 he believed that if the public and potential area managers of the corporation knew of the involvement of the fourth respondent in the said corporation that they would be unlikely to buy its weight loss products or become its distributors;

33.7.5 it was the fact and he knew that while allowing himself to be held out as chief executive officer of the corporation he was not authorised or empowered to make routine or day to day decisions in relation to the running of the company or to incur expenses or authorise payments without the express instruction of the second and fourth respondents;

33.7.6 it was the fact and he knew that instructions given to him by the second and fourth respondents with which he complied, including as to correspondence to be sent to potential area managers, area managers and advertising agencies with whom the corporation was dealing, were contrary to what he believed to be proper business standards contrary to his own business ethics;

33.7.7 it was the fact and he knew that communications to area managers which described him as being the chief executive officer and having the full authority of the role were untrue;

33.7.8 it was the fact and he knew that invoices sent to the corporation by external persons who had carried out services for it were routinely not paid, or were partially paid or were queried or contested on grounds that he believed to be unreasonable and not genuine;

33.7.9 it was the fact and he knew, but did not inform area managers or the public, that gross income from sale of distributorships and goods by the corporation had been distributed to, or at the direction of the second and fourth respondents but refrained from making any enquiry, as he should have in all the circumstances, as to whether there were any, or any adequate, funds to make good on representations on future expenditure by the corporation;

33.8 representations to potential area managers that the corporation was a good business opportunity, while deliberately not revealing the involvement of the fourth respondent to area managers and potential area managers, and thereby misrepresenting the risks associated with the corporation's business opportunity

has, in respect of each representation, been directly knowingly concerned in a corporation engaging in conduct that was misleading or deceptive in contravention of s 52 of the *Trade Practices Act 1974* (Cth).

34. The sixth respondent by, between at least May 2000 and November 2001, knowingly permitting, assisting and authorising a corporation in trade or commerce to enter into agreements for the supply of goods, namely weight loss tablets, together with point of sale material and other related products, under an agreement, one of the terms of which was that area managers to whom the goods were supplied would not sell the

said goods at a price less than the price specified from time to time by the corporation, has been directly knowingly concerned in the corporation engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

35. The sixth respondent by, between at least May 2000 and November 2001, knowingly permitting, assisting and authorising a corporation to use in trade or commerce in relation to goods supplied by that corporation to area managers for resale, the statements:

(a) '… the company will be solely responsible for fixing, from time to time, the recommended retail price and the price at which the area manager purchases stock';

(b) '… it is most important that a regulated price policy be adhered to in the interest of all parties involved.'

(c) '… we have therefore established the following as the costing structure to be applied in all markets

PROFIT STRUCTURE TRIMit™		
Area Manager Cost	$19.50	
Profit	$10.00	51%
Retailer Cost	$29.50	
Retailer Profit	$20.45	70%
Recommended Retail	$49.95	

(d) '15. Who determines the price at which I sell my stock?

The company will set the recommended retail price and wholesale price that must be adhered to by all area managers. There must be no discounting or price cutting without the written permission of the company. This ensures everyone is protected from unnecessary price wars.'

(e) 'Cost to You…

What will TRIMit cost you?

Retailer Cost $32.45

Recommeded Retail	$54.95
Retailer Profit	$22.50
PROFIT	**70%**’

being statements of prices that were likely to be understood by area managers as the prices below which the goods were not to be sold, has been directly knowingly concerned in Chaste engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

I order that:

36. The sixth respondent pay the Commonwealth of Australia a penalty of $100,000 in respect of his being knowingly concerned in the conduct of a corporation engaging in resale price maintenance in contravention of s 48 of the *Trade Practices Act 1948* (Cth), as alleged in paragraphs 106 and 116(c) of the statement of claim. The $100,000 penalty to be payable over two years by four instalments of $25,000, the first to be made sixth months from 16 December 2005, and each of the further three instalments every six months thereafter. In default of any instalment, the full balance will be immediately due.

37. The sixth respondent be restrained, for five years from the date of this order, from being directly or indirectly knowingly concerned in or party to, or aiding, abetting, counselling or procuring, a corporation, which supplies to another person products said to have health, weight loss or cosmetic benefits:

    37.1 inducing or attempting to induce that other person not to sell those products at a price less than a price specified by that corporation; or

    37.2 using in relation to those products a statement of price likely to be understood by that other person as a price below which the products are not to be sold.

38. The sixth respondent be restrained, for five years from the date of this order, from promoting or taking part in any business in relation to weight loss or health industry products or services with which he knows or believes the fourth respondent to be directly or indirectly involved, unless he discloses to any prospective customer or franchisee of the business with whom he deals in the course of or in promotion of the business, his knowledge or belief as to the fact of, and the nature of, the involvement of the fourth respondent.

39. The sixth respondent be restrained for a period of five years from the date of this order from in any manner being knowingly concerned in any corporation (other than an

incorporated legal practice) in trade or commerce, making or permitting to be made, any representation as to the nature, quality, fitness for any purpose, testing, history, composition, standard, approval by any person, performance characteristics, uses or benefits of any good or service unless, prior to making the representation, he:

39.1 believes the representation to be true and accurate;

39.2 informs the representee of his qualifications and expertise relevant to the subject matter of the representation;

39.3 informs the representee of all information of which he is aware that refutes or contradicts any part of the representation; and

39.4 provides the representee with a copy of these orders or informs the representee of the existence of these orders and gives the representee the address of the Federal Court website, namely www.fedcourt.gov.au, from which a copy of these orders can be obtained.

40. The sixth respondent be restrained for five years from the date of this order from being knowingly concerned in any corporation in trade or commerce making any representation as to the future payment by it of any sum to any person or the future giving by it of any benefit to any person unless:

40.1 he has made all necessary enquiries to satisfy himself that the corporation intends to make the payment or give the benefit and has reasonable grounds to believe it can make the payment or give the benefit; and

40.2 he has fully recorded in writing the details of all matters he has relied upon in so satisfying himself (including the source of the information and the time it was obtained) and has retained copies of all documents relied upon.

41. The sixth respondent shall retain the records and copies of documents prepared by or relied on by him pursuant to order 40 above for at least six years from the date of this order and shall produce a complete and true copy of such material to the applicant upon request within seven days of receiving any such request.

42. The sixth respondent pay the applicant's costs of and incidental to these proceedings as against him in the agreed amount of $25,000, which amount is from the date of these orders a debt due and payable to the applicant on 2 September 2005.

In relation to the eighth respondent, Mr McMullan:

I order that:

43. The eighth respondent pay to the Commonwealth of Australia, a penalty of $30,000 in respect of his ancillary involvement in a corporation engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth), as alleged in paragraphs 106 and 117(c) of the statement of claim, such penalty to be paid as follows:

    43.1 the amount of $15,000 on or before 14 June 2008;

    43.2 the further amount of $15,000 on or before 14 June 2010;

    save that should the first instalment not be paid on or before the due date, the full amount of $30,000 becomes due and payable immediately.

44. The eighth respondent be restrained, for a period of three years, from being directly or indirectly knowingly concerned in or party to, or aiding, abetting, counselling or procuring, a corporation, which supplies to another person products said to have health, weight loss or cosmetic benefits:

    44.1 inducing or attempting to induce the other person not to sell those products at a price less than a price than a price specified by that corporation; or

    44.2 using in relation to those products a statement of price likely to be understood by that other person as a price below which the products are not to be sold.

45. The eighth respondent be restrained, for a period of three years, from promoting or taking part in any business in relation to weight loss or health industry products or services with which he knows or believes the fourth respondent to be directly or indirectly involved, unless he discloses to any prospective customer or franchisee of the business with whom he deals in the course of or in promotion of the business, his knowledge or belief as to the fact of, and the nature of, the involvement of the fourth respondent.

46. The eighth respondent pay the applicant's costs of an incidental to these proceedings in the agreed amount of $20,000, to be paid as follows:

    46.1 the amount of $10,000 on or before 14 June 2008;

    46.2 the further amount of $10,000 on or before 14 June 2010;

    save that should the first instalment not be paid on or before the due date, the full amount of $20,000 becomes due and payable immediately.

In relation to the ninth respondent, Mr Cooper:

I order that:

47. The ninth respondent be restrained, for a period of three years, from promoting or taking part in any business in relation to weight loss or health industry products or services with which he knows or believes the fourth respondent to be directly or indirectly involved, unless he discloses to any prospective customer or franchisee of the business with whom he deals in the course of or in promotion of the business, his knowledge or belief as to the fact of, and the nature of, the involvement of the fourth respondent.

48. The ninth respondent pay the applicant's costs of and incidental to these proceedings in the agreed amount of $3,000, such amount to be paid in equal monthly instalments of $50 on or before the 15 day of each month, commencing on 15 September 2005 and concluding 15 August 2010, save that if any instalment is not paid on or before the due date the entire amount of the $3,000 then unpaid becomes immediately due and payable.

In relation to the tenth respondent, Dr D'Alton:

I declare that:

49. The tenth respondent, having been between December 1999 and November 2001 engaged by a corporation as a consultant to assist with the supply or possible supply in trade or commerce of a purported weight loss aid called TRIMit and at all material times permitting that corporation to hold him out, and holding himself out, to the public and to area managers of that corporation as its Research Director and as Chairman of its Market Research and Development Committee; and

    49.1 assisting that corporation in the drafting of, and authorising and consenting to the publication and making by that corporation the following representations, namely:

        49.1.1 that the corporation was marketing a new product, TRIMit, which had been successfully launched in the United States, when in fact and to his knowledge the TRIMit tablet had not been launched in the United States successfully or at all;

        49.1.2 that TRIMit had been scientifically tested at 11 Universities and was found to be safe and effective, when in fact and to his knowledge the TRIMit tablet, or a product with the specifications of the TRIMit tablet, had not been scientifically tested at 11 universities or at all;

49.1.3 that the efficacy of TRIMit as a diet pill was beyond question, that TRIMit was an effective weight loss aid, and that TRIMit was a quality product thoroughly researched and scientifically proven as a weight loss aid, when in fact and to his knowledge the corporation had not conducted and was not in receipt of results of independent research into specific testing or independent clinical trails of the TRIMit tablet or a product with the specifications of the TRIMit tablet proving that the TRIMit weight loss tablet was a quality product, safe to use and effective as a weight loss aid;

49.1.4 that the unique combination of ingredients in TRIMit ensured that the pill was 700% more effective than if it contained HCA only, when in fact and to his knowledge the corporation was not in receipt of results of independent research to this effect, but he complied a report summarising the findings of some overseas research reports on products none of which had the specifications or comparable specifications of TRIMit;

49.1.5 that comprehensive clinical trials had been conducted by the tenth respondent on patients in Australia with respect to the use of the product TRIMit, and the clinical trials scientifically proved that the product TRIMit is an effective diet pill or weight loss aid, when in fact and to his knowledge the corporation had not conducted independent clinical trials of TRIMit; and the human trials conducted by him were in fact and to his knowledge conducted without scientifically controlled conditions and largely amongst persons who had an interest in the success of the corporation business or their associates;

49.1.6 that Australian scientists analysed the research, conducted over three decades, into the three active ingredients in TRIMit, when in fact and to his knowledge he compiled a report summarising the findings of some overseas research reports on products none of which had the specifications or comparable specifications of TRIMit;

49.1.7 that he was the leader of a scientific research team which:

(a) for three years, investigated the formulation of TRIMit;

(b) devised an effective blend of compounds used in the formulation of TRIMit;

(c) devised a manufacturing process that resulted in the most effective diet tablet in the world;

when in fact and to his knowledge he did not lead any scientific research team which accomplished these tasks or any other tasks and he had no scientific qualification to undertake such research.

49.1.8 That:

(a) the use of the product TRIMit generates rapid weight loss, and inhibits the production of fat in the body;

(b) TRIMit had been thoroughly researched, and tested worldwide; and

(c) TRIMit was a potent pill with no side effects;

when in fact and to his knowledge the corporation and not conducted and was not in receipt of results of the independent research into or scientific testing or independent clinical trials of the TRIMit tablet or a product with the specifications of the TRIMit tablet proving that the TRIMit weight loss tablet was effective as a weight loss aid;

49.1.9 That he had conducted controlled clinical trials of TRIMit, using 24 persons randomly selected, when the human trials were in fact and to his knowledge conducted without scientifically controlled conditions and largely amongst persons who had an interest in the success of the corporation business or their associates;

49.1.10 That the methodology of the trial followed established protocols that are accepted by the Therapeutic Goods Administration and the Australian Bureau of Statistics, when in fact and to his knowledge the corporation had not conducted independent clinical trials in accordance with protocols established under the *Therapeutic Goods Act 1989* (Cth) or used by the Australian Bureau of Statistics.

49.1.11 That:

(a) scientific evidence supported the finding that taking the recommended dosage of TRIMit without a specific dietary regime or exercise plan would result in weight loss;

(b) that the product had been scientifically tested; and

(c) that the product had been scientifically and statistically proven to be effective as a diet pill or a weight loss aid;

when in fact and to his knowledge the corporation had not conducted and was not in receipt of results of independent research into or scientific testing or independent clinical trials of the TRIMit tablet or a product with the specifications of the TRIMit tablet proving that the TRIMit weight loss tablet was effective as a weight loss aid;

49.1.12 that the research results of eight trials reported on by him were analogous to the use of TRIMit and supported the use of TRIMit as a weight loss aid, when in fact and to his knowledge:

(a) he compiled a report summarising the findings of some overseas research reports on products none of which had the specifications of TRIMit;

(b) he did not include or mention in his report, published reports by the American Medical Association and the Australian Medical Association which contradicted the reports he summarised;

(c) he did not mention in his report that the research reports suggesting efficacy of ingredients that were components of TRIMit to which he referred, had been prepared by employees of the manufacturers of those ingredients;

(d) he knew that, even if the purportedly active ingredient HCA had a weight loss effect, TRIMit contained half or less than half of the amount of HCA than tablets used in research overseas;

49.2 assisting the corporation in drafting the test of, and making as spokesperson for the corporation the following representations, namely:

49.2.1 that clinical trials under scientifically controlled conditions were currently being conducted to test the effectiveness of TRIMit as a weight loss aid, when in fact and to his knowledge the human trials were conducted without scientifically controlled conditions and largely amongst persons who had an interest in the success of the coporation business or their associates;

49.2.2 that taking TRIMit promoted the burning of fact, and inhibited the production of fat through inhibiting the enzyme citrate lyase, when in fact and to his knowledge the corporation had not conducted and was not in receipt of results of independent research into or scientific testing or independent clinical trials of the TRIMit tablet or a product with the specifications of the TRIMit tablet proving that the TRIMit weight loss tablet was effective as a weight loss aid;

49.2.3 that TRIMit and the claims made of its use and effectiveness were approved under the *Therapeutic Goods Act 1989* (Cth) when in fact and to his knowledge the claims did not have that approval;

49.2.4 that TRIMit had been developed and perfected in Australia over three years of tedious trial and error, when in fact this was not true and the tenth respondent had no knowledge of any basis for this assertion;

49.2.5 that TRIMit was the most effective diet pill possible with the science then available, when in fact and to his knowledge the corporation had not conducted and was not in receipt of results of independent research into or scientific testing or independent clinical trials of the TRIMit tablet or a product with the specifications of the TRIMit tablet proving that the TRIMit weight loss tablet was effective as a weight loss aid;

49.2.6 that controlled clinical trials had been conducted in Australia, and the clinical trials followed the protocols accepted by the Therapeutic Goods Administration and the Australian Bureau of Statistics, when in fact and to his knowledge the corporation had not conducted research or scientific testing or independent clinical trials in accordance with protocols established under the *Therapeutic Goods Act 1989* (Cth) or used by the Australian Bureau of Statistics or at all;

has:

49.3 in respect of each representation, been knowingly concerned in the corporation, in trade or commerce, engaging in conduct that is misleading or deceptive or likely to mislead or deceive in contravention of s 52 of the *Trade Practices Act 1974* (Cth);

49.4 in respect of representations 49.1.1, 49.1.3, 49.1.4, 49.1.7, 49.1.10, 49.2.2, 49.2.4 and 49.2.5, been knowingly concerned in the corporation in trade or

commerce, in connection with the supply or possible supply of goods made false representations as to the quality and composition of those goods in contravention of s 53(a) of the *Trade Practices Act 1974* (Cth);

49.5 in respect of representations 49.1.1 to 49.1.4, 49.1.7, 49.1.10, 49.2.2, 49.2.4 and 49.2.5, been knowingly concerned in the corporation, in trade or commerce, represented that goods have approval, performance characteristics, uses and benefits they do not have in contravention of s 53(c) of the *Trade Practices Act 1974* (Cth).

50. The tenth respondent, by representing and permitting and assisting others to represent, on behalf of a corporation, in trade or commerce, to the public and to area managers of the corporation that the corporation was a genuine business conducted on an ordinary commercial basis and that the opportunity offered by it to area managers was a genuine business opportunity when:

50.1 the circumstances set out in the preceding declaration, to his knowledge, obtained;

50.2 it was the fact and he knew, but did not inform the public and area managers, that the fourth respondent had extensive involvement in the management and marketing of the said corporation;

50.3 he believed that if the public and area managers of the corporation knew of the involvement of the fourth respondent in the said corporation they would be unlikely to buy its weight loss products or remain its distributors;

has been directly knowingly concerned in a corporation engaging in conduct that was misleading and deceptive in contravention of s 52 of the *Trade Practices Act 1974* (Cth).

I order that:

51. The tenth respondent be restrained for 5 years from the date of this order from in any manner being knowingly concerned in any corporation in trade or commerce, making, or permitting to be made, any representation as to the nature, quality, fitness for any purpose, testing, history, composition, standard, approval by any person, performance characteristics, uses or benefits of any good or service unless, prior to making the representation, he:

51.1 believes the representation to be true and accurate;

51.2 informs the representee of his qualifications and expertise relevant to the subject matter of the representation;

51.3 informs the representee of all information of which he is aware that refutes or contradicts any part of the representation; and

51.4 provides the representee with a copy of these orders or informs the representee of the existence of the orders and gives the representee the address of the Federal Court website, namely www.fedcourt.gov.au, from which a copy of these orders can be obtained.

52. The tenth respondent pay the applicant's costs of and incidental to these proceedings as against him agreed in the sum of $20,000 to be paid in the following instalments:

52.1 $5,000 on or before 14 September 2005;

52.2 $5,000 on or before 14 October 2005;

52.3 $5,000 on or before 14 November 2005;

52.4 $5,000 on or before 14 December 2005,

save that if any instalment is not paid on or by the due date the whole amount outstanding is immediately due and payable.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **QUD 252 OF 2001**

BETWEEN:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** **APPLICANT**
AND:	**CHASTE CORPORATION PTY LTD (IN LIQUIDATION) (ACN 089 837 329)** **FIRST RESPONDENT**
	BRADDON RALPH WEBB **SECOND RESPONDENT**
	ORLAWOOD PTY LTD (ACN 059 294 334) **THIRD RESPONDENT**
	PETER CLARENCE FOSTER **FOURTH RESPONDENT**
	SEAN PETRIE ALLEN COUSINS **SIXTH RESPONDENT**
	KEVIN ANTHONY MCMULLAN **EIGHTH RESPONDENT**
	ALAN KENNETH COOPER **NINTH RESPONDENT**
	STEPHEN D'ALTON **TENTH RESPONDENT**
JUDGE:	**LANDER J**
DATE:	**2 SEPTEMBER 2005**
PLACE:	**ADELAIDE (HEARD IN BRISBANE)**

REASONS FOR JUDGMENT

THE HISTORY OF THE PROCEEDINGS

1 This case concerns an application for injunctions, declarations and pecuniary penalties in relation to contraventions of the *Trade Practices Act 1974* (Cth) (the Act) that arose in

relation to the supply of, and services in connection with, a weight loss product called TRIMit and associated goods.

2 On 16 September 2002 the applicant filed an amended application in these proceedings in which it sought:

> *'... injunctions, declarations, pecuniary penalties and other orders pursuant to ss 76 and 80 of the* Trade Practices Act 1974 *("the Act") and s 21 of the* Federal Court of Australia Act 1976 *against the first respondent in respect of conduct in connection with the supply of weight loss products, in contravention of ss 48, 51AA or 51AC, 51AD, 52, 53(a), 53(aa), 53(c), 53(g) and 59(2) of the Act, and the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents being involved in that conduct for the purposes of ss 76 and 80 of the Act.'*

3 When this matter came before me on 14 June 2005, the applicant indicated that it did not wish to proceed with claims in respect of contraventions of ss 51AA or 51AC of the Act.

4 There are two quite separate aspects to the applicant's case. The first is that some, but not all, of the respondents contravened Part IV of the Act and, in particular, s 48 of the Act by engaging in the practice of resale price maintenance with the first respondent's area managers. None of the respondents are former area managers. A contravention of Part IV of the Act makes the contravener liable to a civil penalty. The applicant seeks a civil penalty against those respondents who the applicant claims breached Part IV of the Act. The second aspect of the applicant's claim concerns alleged contraventions of Part V of the Act and, in particular s 52 of the Act. It is alleged that some of the respondents breached Part V of the Act in making or been knowingly concerned in making misleading and deceptive statements to those persons who became area managers. In this aspect of the applicant's case, the area managers are treated as the victims. The applicant does not seek damages in regard to these contraventions but declarations and injunctions.

5 At the trial, the applicant indicated that it had reached agreement as to appropriate terms of the resolution of the proceedings with almost all of the respondents.

6 In relation to the first respondent, the applicant did not press for injunctive relief nor for declaratory or other relief in relation to claims pertaining to the alleged contraventions by the first respondent of Part V of the Act. Rather, the applicant limited its claim to a pecuniary penalty and declarations in relation to the s 48 (resale price maintenance) contraventions.

7 By letter dated 31 July 2003 the liquidator of the first respondent advised the applicant that it did not have the funds to appear, defend or contest this matter at trial. By facsimile dated 16 June 2005 the liquidator further advised that he had no objection to the applicant's submissions and proposed orders being put before the Court by way of resolution of the proceedings against the first respondent. There was no appearance by the first respondent.

8 The second and third respondents filed defences in the proceedings but neither filed any affidavit material to support the defences. Neither appeared at the hearing to make submissions or contest the applicant's case. The applicant sought declaratory and injunctive relief against both the second and third respondents and a pecuniary penalty against the second respondent only.

9 Both claims remained against the fourth respondent, Mr Foster. However, at trial the fourth respondent conceded that he had contravened s 48 of the Act. The only issue in relation to the resale price maintenance claim was thus the quantum of the pecuniary penalty. In relation to the s 52 claim, the applicant sought declaratory and injunctive orders. The fourth respondent objected to the making of the declaratory orders. However, he indicated that he agreed to the terms of the injunctive orders sought.

10 On 14 November 2003, pursuant to orders made by Spender J, the proceedings were discontinued against the fifth respondent.

11 At the trial, the applicant and the sixth respondent presented joint submissions in relation to the injunctions and declarations sought in respect of the s 48 and the s 52 contraventions. The sixth respondent agreed that he had contravened s 48 of the Act and that a penalty of $100,000 should be imposed. The only issue that remained was the sixth respondent's capacity to pay the agreed penalty. On the third day of trial, joint submissions were presented in relation to the quantum of the penalty and the time frame within which it was agreed to be paid. In light of this, it was put to me that it was unnecessary to make findings in relation to the sixth respondent's conduct.

12 At the commencement of the trial, the applicant advised that the action against the seventh respondent had been disposed of.

13 The eighth respondent did not enter an appearance in the proceedings. On 1 August 2003, pursuant to an order made by Spender J, the applicant was given liberty to apply in three working days' notice for summary judgment against the eighth respondent. At the commencement of trial, the applicant indicated that it intended to proceed and prove the case against the eighth respondent. The eighth respondent filed a defence to the action four days prior to the commencement of the trial. On the first day of the trial, he indicated that he did not have the funds to defend the action. I adjourned the trial to give the applicant and the eighth respondent an opportunity to resolve the matter between themselves. On the resumption of the hearing, the applicant indicated that agreement had been reached with the eighth respondent in relation to the applicant's claim that the eighth respondent had contravened s 48 of the Act. The applicant and the eighth respondent presented the Court with a statement of agreed facts and joint submissions in relation to penalty and consent orders for injunctions.

14 The ninth respondent did not appear at the trial. In an affidavit sworn on 12 June 2005 the ninth respondent deposed that he did not have the funds to travel from New Zealand to appear at the hearing. Arrangements were put in place for him to appear via video-link. However, the video-link became unnecessary when the ninth respondent indicated that he would consent to orders in the terms that were presented on the third day of the trial. The applicant did not allege that the ninth respondent had contravened Part IV of the Act and, accordingly, no penalty was sought.

15 The tenth respondent appeared at the first day of trial and indicated that he had reached substantial agreement as to terms of settlement with the applicant and that he would like to resolve the matter as quickly as possible. The claim against the tenth respondent was limited to Part V contraventions. On the second day of hearing, the applicant presented me with declarations and orders to which the tenth respondent consented.

16 In light of the above, it is only necessary for me to make findings in relation to the first, second, third and fourth respondents.

BACKGROUND FACTS

17 From 5 October 1999 until 3 December 2001 the first respondent, Chaste Corporation Pty Ltd (in liquidation) ('Chaste') carried on a business as the manufacturer of a weight loss tablet

called TRIMit and associated goods and services in accordance with a scheme devised by the fourth respondent, Mr Peter Foster and the second respondent, Mr Braddon Webb.

18 Mr Webb was the sole registered director and secretary of Chaste. The third respondent, Orlawood Pty Ltd ('Orlawood') was the company's sole registered shareholder. Orlawood was also the trustee for the Webb Family Discretionary Trust ('WFDT'). WFDT was the registered beneficial owner of the sole share in Chaste. Orlawood was a family company of Mr Webb.

19 On 6 October 1999 a number of agreements were entered into between Chaste, WFDT and an entity known as the World Maps Marketing Trust ('WMMT'). Pursuant to one of the agreements, WMMT purportedly licensed to Chaste the intellectual property in the product TRIMit within Australia and New Zealand. The licence was said to be '*irrevocable*' and included the right to sub-license the intellectual property to market, inter alia, TRIMit within Australia and New Zealand. Mr Webb signed the agreement as director of Chaste. The fifth respondent, Jill Foster, the sister of the fourth respondent, signed on behalf of WMMT. The fourth respondent has admitted that he controlled WMMT.

20 The sole shareholder of Chaste was Orlawood. The disclosed beneficial owner was WFDT. However, on 6 October 1999, WMMT and WFDT entered into an agreement whereby they would hold the issued capital of Chaste beneficially in the ratio 75:25. The agreement provided that WMMT would provide 'marketing, promotional and selling expertise'. WFDT was to provide $96,000 together with 'marketing, promotional and selling expertise'. WFDT would act as managing director, secretary and public officer of the company. On the same day, Chaste entered into an agreement with WMMT whereby WMMT was to become Chaste's consultant in return for 75 per cent of Chaste's 'operating profits' and reimbursement of all expenses.

21 Yet another agreement was entered into, again on the same day, in which Chaste employed WFDT as a consultant on similar terms to those in the agreement between Chaste and WMMT in return in this case for WFDT receiving 25 per cent of the company's operating profits and reimbursement of all expenses.

22 Thus it was that Chaste was entirely controlled by the fourth respondent, Mr Foster and the second respondent, Mr Webb, and those two gentlemen, through the entities which they controlled, namely, WMMT and WFDT, would receive respectively 75 per cent and 25 per cent of the profits.

23 The initial capital was provided by WFDT (Mr Webb) in the sum of $96,000.

24 As far as a bystander was concerned, Chaste was entirely controlled by Mr Webb. No bystander could have known that there were agreements in place between the second and third respondents and the fourth respondent, and an entity controlled by the fourth respondent which gave control of Chaste to Mr Foster.

25 The purpose of the incorporation of Chaste and the agreements entered into on 6 October 1999 were to facilitate the business of a manufacturer of TRIMit and the distributor of that product through a network of area managers.

26 Orlawood, as trustee of WFDT, was assured of commissions on sales of areas regardless of whether such commissions were from the operating profits of the company or from gross income. In effect, as the trustee of WFDT, Orlawood was the party remunerated by Chaste for consultancy services. To the extent that any such consultancy services were provided, Orlawood was knowingly concerned in devising and implementing the Chaste business operation.

27 When persons engaged by Chaste, area managers, or members of the public queried who owned or controlled the operations of Chaste, persons involved in the operations of Chaste concealed the involvement of Mr Foster and maintained a false claim that the company was owned and operated solely by Mr Webb.

28 In the course of its operations between December 1999 and November 2001 Chaste entered into agreements with area managers (Area Mangement Agreements) for the supply of the product TRIMit to area managers, for resale by them to retailers. On the signing of Area Manager Agreements, the area managers paid an initial product payment and received distribution rights to sell TRIMit in a defined area, stock to service 50 retail outlets, point of

sale material, ongoing training and support from Chaste and a national marketing and advertising program by Chaste. The point of sale material was produced by Chaste.

29 Between December 1999 and September 2000 Chaste promoted the sale of exclusive distributorships for TRIMit. It subsequently distributed the product via 54 area managers throughout Australia who collectively represented some 79 areas. In promoting the sale of distributorships to potential area managers, Chaste made representations as to the nature of the arrangement area managers would enter into with Chaste, the pricing policy to be applied to TRIMit, the potential revenue to be earned by area managers, the business opportunity afforded, the marketing and advertising support which would be provided to area managers by Chaste, the identity of the persons controlling Chaste operations and the origins and efficacy of TRIMit.

30 Chaste, on the directions of Mr Foster and Mr Webb, paid out much of the gross income of the company immediately on its receipt by the company to Mr Foster, through WMMT, to Mr Webb, through Orlawood and to a lesser extent to the sixth respondent, Mr Cousins.

31 Mr Cousins (the sixth respondent) is a barrister. Between March and April 2000, Mr Cousins was held out as a legal advisor of Chaste and provided occasional legal services to Chaste under a retainer, for which he received payments. In March 2000 Mr Cousins also provided a written reference for Mr Webb, which was used in promoting the Chaste business to potential area managers. From March 2000 Mr Cousins was aware of the operations of Chaste, and from at least May 2000 he was aware of material being used by Chaste's sales representatives to recruit potential area managers.

32 On 9 May 2000, in correspondence drafted by him, Mr Cousins was introduced to area managers as having been retained by Chaste to advise on and oversee, all areas of the company in the lead up to the product launch', with 'full authority to make decisions and act on the company's behalf in the lead up to the launch'.

33 From May 2000 until about November 2000 Mr Cousins was the manager and Chief Executive Officer of Chaste, and received regular remuneration for his role. During this period Mr Cousins participated in the planning, promotion, supervision and management of the Chaste business; oversaw aspects of Chaste's operations; sent correspondence to

prospective area managers or gave directions to the general manager, Mr Xenodakis (the seventh respondent) as to communications that were to be made to area managers; dealt directly with Stephen D'Alton (the tenth respondent) in relation to clinical trials of TRIMit and the publication of material in relation to those trials; wrote newsletters to area managers; negotiated with various agencies in relation to the provision of advertising for Chaste; and carried out instructions he received from Mr Foster and Mr Webb. At the relevant times, Mr Foster was in custody in Australia, and subsequently in the United Kingdom, and then based in Fiji and Vanuatu. Mr Cousins travelled to Fiji and Vanuatu, at the expense of Chaste, where he obtained instructions from Mr Foster.

34 From November 2000 until the company was placed under administration in November 2001, Mr Cousins provided consultancy services to Chaste, for which he was paid.

35 From about February 2000 Mr Xenodakis (the seventh respondent) was engaged by Chaste as a sales representative and from about September 2000, he was engaged as a general manager of Chaste. In or around January 2001 Mr Xenodakis was engaged by Chaste as its 'International Sales Director'. From February 2000 Mr Xenodakis was directly involved in planning, promotion and supervision of the Chaste business.

36 The eighth respondent, Mr McMullan, was engaged by Chaste from February 2000 until August 2000 as a Director of Sales. Between February and August 2000 he oversaw a team of sales representatives who, acting on behalf of Chaste, recruited area managers to enter into exclusive distribution agreements with Chaste for the sale to retailers of TRIMit. Mr McMullan provided sales representatives with the documents to be used in interviews, and instructions as to their use. In accordance with Mr McMullan's instructions to sales representatives, area managers who were interviewed were shown a video and documents prepared by Chaste. The documents were entitled 'Area Management Agreement', 'Area Management Proposal' and 'We Answer Your Questions'. The interview followed a script which was prepared by Chaste. The video, documents and script contained representations which persuaded interviewees to enter into Area Management Agreements with Chaste. As the Director of Sales, Mr McMullan dealt directly with area manager inquiries as to the contents of the above documents.

37 Mr McMullan had knowledge of the contents of the documents, video and script and believed them to be true. Despite this, he was aware that this material did not disclose that Mr Foster was involved with the company and he admitted to deliberately concealing the fact of Mr Foster's involvement from area managers. He believed that potential area managers would be less likely to buy a distributorship if they knew of Mr Foster's involvement.

38 Between February and August 2000 Mr McMullan received approximately $54,000 in commission for introducing persons who entered into Area Management Agreements with Chaste.

39 From about May 2001 to about October 2001 the ninth respondent, Mr Cooper, was engaged as the general manager of Chaste. He was directly involved in the promotion and management of the Chaste business and liased with area managers on the day to day operations of the business.

40 The tenth respondent, Dr D'Alton was engaged by Chaste as a medical consultant. He was represented by Chaste to area managers and the public as the Research Director and Chairman of the Market Resource and Development Committee of Chaste.

THE CONTRAVENING CONDUCT

Resale Price Maintenance

41 In the course of its operations between December 1999 and November 2001 Chaste entered into Area Management Agreements for the supply of TRIMit to area managers, for resale by them to retailers.

42 The terms of the Area Management Agreements were set out in the documents entitled 'Area Management Agreement', 'Area Management Proposal', and 'We Answer Your Questions' ('the Chaste contractual documents').

43 A term of the Area Management Agreement was that Chaste would be responsible for fixing the price at which area managers sold TRIMit to retailers, and there would be no discounting or price cutting without the written permission of Chaste.

44 The contract contained the following terms:

'1. The Company hereby appoints the Manager as Area Manager for the distribution territory described in Item 2 of the Schedule of Particulars for the term specified in Item 3 of the Schedule of Particulars.

2. The company will not appoint during the term of this Agreement another Area Manager in respect of the distribution territory unless the Manager fails to perform his responsibilities as outlined in this Agreement and the Area Management Proposal.

3. This Agreement may be terminated by mutual consent upon such terms as the parties may agree PROVIDING that the Manager may not apply for a consentual [sic] termination within the first ninety (90) days after the date of delivery of stock to the Manager.

4. The company will deliver to the Area Manager the stock and point of sale material as described in the Area Management Proposal for the Initial Product Payment as described in Item 4 of the Schedule of Particulars.

5. The company will continue to provide TRIMit during the term of the Agreement PROVIDING that the Manager acknowledges that the company will be solely responsible for fixing from time to time the recommended retail price and the price at which the Manager purchases stock.

6. The statements made in the document titled "We Answer Your Questions" and the Area Management Proposal shall apply as if same were incorporated in this Agreement.

7. The Manager shall not during this Agreement establish or associate with directly or indirectly, a business in Australia that competes with the business of the company.

8. The Manager may assign the rights of this Agreement subject to the company being offered first right of refusal as explained in the Area Management Proposal. The consent of the company must be obtained to any such assignment PROVIDING that such consent shall not be unreasonably withheld.'

45 In entering into the Area Management Agreements, each of the area managers and Chaste agreed that the respective area manager would not sell stock to retailers at less than the price specified by Chaste.

46 The Area Management Proposal contained statements of price that were likely to be understood by area managers as the prices below which the stock was not to be sold by the retailers, namely:

*'It is most important that a **regulated price policy** be adhered to in the interest of all parties involved.*

We have therefore established the following as the costing structure to be applied in all markets.

PROFIT STRUCTURE TRIMit™		
Area Manager Cost	$19.50	
Profit	$10.00	51%
Retailer Cost	$29.50	
Retailer Profit	$20.45	70%
Recommended Retail	$49.95'	

47 The pricing policy set out by Chaste was used as a means of promoting the business opportunity offered by Chaste to prospective area managers. The document titled 'We Answer Your Questions' that was provided to area managers and prospective area managers by Chaste contained the following question and answers:

'15. Who determines the price at which I sell my stock?

The company will set the recommended retail price and wholesale price that must be adhered to by all Area Managers. There must be no discounting or price cutting without the written permission of the company. This ensures everyone is protected from unnecessary price wars.'

...

'Cost to You...

What will TRIMit cost you?

Retailer Cost $32.45;
Recommended Retail $54.95;
Retailer Profit $22.50

PROFIT 70%'

48 The Area Management Agreement is a clear example of the practice of resale price maintenance. By entering into that agreement Chaste agreed with each of the area managers that they would not sell goods at a price less than the price specified.

49 The pricing policy and the document entitled 'We Answer Your Questions' would have led the area managers to understand that they could not sell below the price contained in those documents. Those documents are also examples of the practice of resale price maintenance.

50 Those three documents establish, in my opinion, that Chaste contravened s 48 of the Act in that Chaste engaged in the practice of resale price maintenance as it is defined in s 96(3)(c) and (f).

51 Some of the respondents, for reasons which I will give, aided and abetted Chaste in the practice of resale price maintenance. They were also knowingly concerned in, or a party to, the contravention by Chaste of s 48. In doing so, of course, they also made themselves liable to a penalty pursuant to s 76 of the Act.

52 It is necessary to consider one further aspect of Chaste's business to determine whether it amounted to a franchise. Chaste manufactured the product TRIMit. Between December 1999 and September 2000 it promoted the sale of distributorships for the product and subsequently entered into Area Management Agreements with 54 area managers throughout Australia who, as I have already mentioned, collectively represented some 79 areas. For the reasons I have already mentioned, it controlled the price of the product.

53 The Chaste contractual documents expressly refer to the issue of whether Chaste is a franchise but go to some lengths to deny that it is. The initial advertisements for the sale of areas to prospective area managers, which were written by Mr Foster and published nationally in newspapers during December 1999/January 2000 at the request of Mr Webb, represented that Chaste was not a franchisor.

54 A number of area managers understood the representation that Chaste was not a franchisor as a benefit of the scheme. It meant that they were not franchisees and would not be required to make payments based on sales. They were assured of a set profit margin. They made an investment in a business which was backed by a buy back guarantee.

55 Clause 4 of the *Franchising Code of Conduct* sets out the meaning of a 'franchise agreement'. It relevantly provides:

> *'4 (1) A franchise agreement is an agreement:*

(a) that takes the form, in whole or in part, of any of the following:
(i) a written agreement;
(ii) an oral agreement;
(iii) an implied agreement; and
(b) in which a person (the franchisor) grants to another person (the franchisee) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system of marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor; and
(c) under which the operation of the business will be substantially or materially associated with a trade mark, advertising or commercial symbol;
(i) owned, used or licensed by the franchisor or an associate of the franchisor; or
(ii) specified by the franchisor or an associate of the franchisor; and
(d) under which, before starting business or continuing the business, the franchisee must pay or agree to pay to the franchisor or an associate of the franchisor an amount, including, for example:
(i) an initial capital investment fee; or
(ii) a payment for goods or services; or
(iii) a fee based on a percentage of gross or net income whether or not called a royalty or franchise service fee; or
(iv) a training fee or training school fee;
…'

56 The area managers paid the sum of $39,900 for the guaranteed rights of sole distribution for a period of 15 years in which to sell TRIMit to retail outlets in their defined area, and for stock to service 50 retail outlets and some point of sale material. The payment also was in return for ongoing training and support from Chaste and for a national marketing and advertising program by Chaste.

57 The initial product payment was not represented by the cost of stock and point of sale material but included a very significant premium for the payment of advertising, training and national marketing services. Further, for the specified sum, Chaste granted area managers the right to carry on business in a specified geographical territory under a marketing plan that was substantially controlled and determined by Chaste. The operation of the business system was associated with the trade mark or symbol known as 'TRIMit', which was owned, used or licensed by Chaste.

58 The business of Chaste was a franchise within the meaning of cl 3 of the Franchising Code of Conduct.

59 The Area Management Agreement, the Area Management Proposal and the document entitled 'We Answer Your Questions' all served to establish that the business components amounted to a franchise within the meaning of cl 4(1) of the Franchising Code of Conduct.

60 In my opinion, the manner in which Chaste constructed its business, and the agreements into which it entered with the area managers, established a franchise which was regulated by the Franchising Code of Conduct.

61 Because the representations which are relied upon by the applicant in support of its case of contraventions of Part V of the Act were made to the area managers, it is necessary to say something about the way in which the area managers were recruited.

62 In late 1999 and early 2000, Chaste placed newspaper advertisements for the purpose of recruiting people to attend interviews with Mr Webb or other sales representatives of Chaste.

63 In fact, those newspaper advertisements had been written by Mr Foster and were placed on the instructions of Mr Foster and Mr Webb.

64 The newspaper advertisements referred to business opportunities, potential earnings, weekly earning capacity of $2,500 per week, the level of support and training that area managers would receive from Chaste, the opportunity to operate in an exclusive territory, the area manager position was not a franchise, and that the opportunity existed to buy a small business.

65 Chaste employed several sale representatives to interview people who responded to the newspaper advertisements.

66 Sales representatives were provided with a sales kit which included copies of the Chaste contractual documents, references written by Mr Cousins for Chaste and a document entitled 'Obesity Report' which had been apparently prepared by Dr D'Alton.

67 On 9 May 2000 Chaste, in a letter which was signed by Mr Webb, represented that an annual budget was proposed of in the order of $1.3 million as a print budget, in addition to a further budget for electronic and trade advertising.

68 Mr McMullan was the Director of Sales and he coordinated the activities of the sales representatives on the instructions of Mr Foster and Mr Webb. He supervised Mr Xenodakis who interviewed 200 people between February and August 2000 for the position of area manager. Mr Xenodakis sold 25 areas. Mr McMullan dealt directly with area managers and answered questions from area managers. He received a $1,000 commission for each area that was sold.

69 As I have already indicated, all of the respondents who are alleged to have contravened Part V of the Act, except the first, second and third respondents, have consented to orders in the nature of injunctions in relation to those contraventions. All of those other parties, except the fourth respondent, have also consented to declarations.

70 It is only necessary to discuss the facts which constitute the contravening conduct for the purpose of making findings in relation to the first, second, third and fourth respondents. In the case of the fourth respondent, it is only necessary to make those findings for the purpose of considering whether it would be appropriate to make the declarations sought against the fourth respondent. As I have already indicated, the fourth respondent consents to injunctions against him in relation to his contraventions of Part V of the Act but has argued that no declarations should be made.

71 A series of representations were relied upon by the applicant in its case against the respondent for the contraventions of Part V of the Act. These representations were made to the area managers who had entered into the Area Management Agreements both before and after entering into those agreements.

72 I now turn to the conduct which is said to constitute the breaches of Part V of the Act.

Representations as to advertising campaign

73 In its advertisements directed to area managers, through the sales script and videos used in the recruitment campaign, statements by the Director of Sales and Chief Executive Officer to area managers, and the promotional use of the Chaste contractual documents Chaste made representations to the effect that each of the area managers would be supported by a national team of marketing, management and advertising experts who would coordinate the best strategies for the area managers' success and that Chaste would provide, at no cost to the area

managers, a bold publicity and advertising campaign featuring television, newspaper and national magazine advertisements.

74 It was represented to the area managers that this campaign would begin by the time of the launch and would ensure that potential retailers had knowledge of the product prior to the area manager approaching that retailer.

75 The contractual documents set out in detail the items of the advertising campaign and included budget estimates for each of those items. The Area Management Proposal included a representation; 'a forecast of advertising expenditure for the first twelve months of operation is in excess of $1.5 million with a further $2 million to be invested in year 2, constituting 15% projected income'.

76 To the knowledge of Messrs Webb, Foster and Cousins the advertising and publicity did not proceed due to changes in instructions provided by Mr Foster or Mr Webb via Mr Cousins, and the deliberate failure of Chaste to pay deposits for the filming of advertisements when they fell due.

77 Chaste sought to qualify the representations in the contractual documents by tying the budget estimates to anticipated sales which were to be calculated by reference to the number of area managers in operation at the time of the launch, the number of retail outlets stocked at the time of the launch, the number of outlets serviced by each area manager and the number of units sold by each area manager. However, Chaste, by its own conduct, ensured that these criteria were impossible to satisfy.

78 Following the launch of TRIMit in August 2000, Chaste did not provide the public relations campaign and advertising support which had been promised to area managers. The advertising that was provided by Chaste was minor in scale, ad hoc and of no or little support to many of the area managers. It bore no resemblance to the scope of work represented by Chaste. A number of excuses were given for the delays to the promised advertising. In particular, it was said that the delays were due to the actions of persons other than Chaste and its officers.

79 Notwithstanding the excuses for the delays, Chaste continued to represent that it would honour its commitment to providing a free advertising and national marketing campaign. In November 2000 in a trade video commissioned by Chaste it represented that it had already booked $1.5 million worth of prime television and magazine advertising to coincide with a spring launch of TRIMit.

80 The delays were caused by Chaste which delayed advertising and promotion by failing to pay the money required for advertising to proceed. In fact, Chaste had no intention of honouring the representations made to the area managers. Mr Foster and Mr Webb, by taking substantial payments from gross revenue, ensured that Chaste never had the financial capacity to honour its agreements with and representations to the area managers. In many circumstances, at the time of making the representations, no plans had been put in place for the realisation of the representations.

81 In fact, the evidence shows that a number of advertising and marketing campaigns did not proceed because, at the direction of Mr Foster and Mr Webb, Chaste continually refused to pay deposits or make other payments required for the campaign to proceed.

82 Mr Foster and Mr Webb were directly involved in the making of representations of this kind which were misleading and deceptive. To the extent that Mr Webb's role with respect to the provision of advertising services was in the provision of consultancy services by Orlawood, Orlawood was knowingly concerned through the making of the representations, in conduct which was misleading or deceptive.

Representations as to the 'buy-back' guarantee

83 Chaste represented to prospective area managers that the initial purchase price of $39,900 was secured by stock and point of sale material and supported by a buy back guarantee. The buy back guarantee was a promise fundamental to Chaste's claim that it was not a franchise. Area managers understood that the initial product purchase price was backed by the cost of the stock and point of sale material.

84 Clause 23 of the Area Management Proposal provided that the agreements could be terminated by the mutual consent of the parties after 90 days notice from the time of the

initial product payment and Chaste would arrange for another area manager to take over the area and buy back all the stock and point of sale material.

85 Chaste received numerous requests to honour the buy back guarantee. It failed to do so. Mr Cousins, writing on his letterhead as a barrister, informed Mr Webb on 1 November 2000 that cl 23 was '… not quite what I thought it said'. His understanding of the clause differed from 30 October to 1 November 2000. It appears that Chaste sought to rely on the uncertain meaning of the Area Management Proposal buy back guarantee clause for its own purposes.

86 In some cases area managers signed the agreements, paid a deposit of approximately $19,900 and, for various reasons, including Chaste's failure to honour its representation, sought to have Chaste honour the buy back guarantee. Chaste, in letters created by Mr Cousins, stated that the agreement provided that they must proceed to pay the full price and only after 90 days seek Chaste's assistance in selling to another manager. Refunds granted were done so purportedly on an ex gratia basis notwithstanding the prospective area manager's entitlement to a refund of 50% of the purchase price.

87 There are a number of instances where Chaste refused to honour the representation as to the buy back guarantee. Ms Young paid the $19,900 'deposit' in March 2000 understanding that TRIMit would be launched with advertising well before July 2000 when she had a holiday booked. In July 2000 she was notified by Mr Cousins that the final payment of $20,000 had to be paid before the product could be released for someone else to work her area. On her return from overseas in September she found that no advertising had occurred and sought to get a refund of her deposit. Chaste claimed it was not obliged to refund the deposit and, notwithstanding that Mrs Xenodakis admitted to Ms Young that she was working the area, Chaste consistently refused to refund the deposit. Following the institution of legal proceedings to recover the deposit monies Mr Cousins, CEO, replied on his letterhead as a barrister, 'I cannot see how your clients can possibly sue for the moneys. They are in breach of the contract. If anything it should be Chaste who is suing your clients seeking specific performance of the contract and damages for lost sales in the Birkdale area'. Ms Young never received a refund of any of the deposit monies.

88 Mr Bailey of the Northern Territory paid the 'deposit' at the time of the launch but because of Chaste's failure to provide any advertising as promised sought to terminate and obtain a

refund in October 2000. Chaste consistently refused to refund any of the deposit, to provide a tax invoice for the deposit, to advertise in the Northern Territory or to buy back any of Mr Bailey's stock.

89 In December 2000 Mr Clough and two other area managers made a joint bid for the Caboolture area which was sold to another person. No refund of the full purchase price was made to the unsuccessful group. In a response to a claim, Mr Webb wrote that the 'money you paid is worth 680 units. I am prepared to give you an extra 12,000 worth of stock free of charge … so you will receive the 680 units you have paid for, plus an additional 200 units each for a total of 880 units'.

90 Ms Webb, a co purchaser of the Caboolture area, told Chaste and Mr Webb that they 'were up the creek without a paddle' and she too was forced to accept reimbursement by stock rather than cash for a deal which did not go through.

91 Mr Parker indicated that he paid a 'deposit' for the Cronulla area in December 2000 but within a week asked for a refund as he did not believe that the promised advertising would occur. It did not occur but Chaste threatened to forfeit the deposit and assign the area to another. On 11 February 2001, following Mr Webb's 'memorandum of denouncement' (to which I will later refer), Mr Parker paid the balance in the hope to save the deposit. Mr Parker did so on the assurance of Mr Xenodakis that the purchase price of $33,000 was guaranteed by the price of the stock and point of sale. Mr Parker did not engage in the façade of negotiating with Adamsons on the July 2001 buy back offer as no price for the stock was ever stipulated.

92 Mr David also gave evidence of how from February 2001 through June 2001 he sought to sell unused stock back to Chaste to no avail.

93 The evidence satisfies me that the initial purchase price was never secured by the price of stock and point of sale materials. Nor were area managers guaranteed a refund of the purchase price on the giving of 90 days notice. In fact, by the lapse of 90 days from payment, Chaste had paid out commissions to the sales representative, the Director of Sales, Mr Cousins, Mr Webb/Orlawood and Mr Foster/WMMT in amounts in excess of $16,000 per area.

94 On or about June 2001 Chaste again represented to area managers that it was prepared to buy back unused stock. Mr Webb instructed Adamsons solicitors to make the offer pursuant to a draft letter prepared by Mr Cousins. The offer referred only to 'the price of unused stock to be agreed'; the terms of agreement were to remain confidential. Mr Dielos gave evidence that at this time Chaste was considering a restructure of the business and providing for the further sale of distributorships through state controller format.

95 Perhaps accustomed to the uncertainties of dealing with Chaste, some area managers challenged the scope of the Adamson's offer. Mr Wang purported to accept the offer and was informed that the price at which stock would be bought back was the price at which it was sold. When he accepted the offer he did not know that Chaste had withdrawn their instructions from Adamsons to finalise the deal.

96 In fact, Chaste refused to pay for any unused stock according to the Adamson's offer.

97 Mr Foster, Mr Webb and/ or Orlawood were knowingly concerned in the making of the buy back guarantee representations throughout the operations of Chaste. The representations were misleading and deceptive.

98 Mr McMullan was knowingly concerned in the making of the representations up until August 2000. He had knowledge of the representations and the fact that it was never possible for the purchase price to be secured by the cots of stock and point of sale material

Representations as to the efficacy of TRIMit

99 Chaste contracted with Dr Das trading as Millennium Nutriceuticals and Health Care for the manufacture of TRIMit. According to the contract, TRIMit was to consist of a bottle of 112 tablets, each tablet containing 'not less than 75 milligrams of HCA as the main active ingredient'. The cost of manufacture was $3.50 per bottle.

100 In May 2000 TRIMit was listed with the Therapeutic Goods Administration ('TGA') with Dr Das nominated as sponsor.

101 Chaste made various representations to potential area managers, area managers and the public, in relation to the efficacy of the TRIMit product, including a representation that TRIMit was approved by the TGA.

102 TRIMit was included in the Australian Register of Therapeutic Goods ('ARTG') as a 'Listed Medicine'. As such it was not subject to testing by the TGA but was listed following self certification by the sponsor of the goods and compliance checks by the TGA. TRIMit's listing stated the standard indications of the product to be 'may aid or assist weight loss by suppression of appetite in conjunction with (or as part of) a kilojoule/calorie controlled eating plan'.

103 The mere fact of listing a product under s 26A of the *Therapeutic Goods Act 1989* (Cth) does not mean that the TGA accepts or approves in any way the efficacy of the product in relation to any claims made about its therapeutic use. Self certification of a listed medicine by a sponsor requires the sponsor to hold information or evidence to support the indications made for the product. However, Chaste held no such information.

104 Thus, Chaste's representation that TRIMit was approved by the TGA was untrue and therefore misleading and deceptive.

105 Chaste's representation that TRIMit was a scientifically proven weight loss aid was a cornerstone of the marketing of TRIMit to the area managers and to the public. The representations as to the efficacy of the product were made in newspaper advertisements for the sale of areas to area managers, in the sales manual and in the Chaste contractual documents. They were made at a time before TRIMit was formulated and its ingredients determined. TRIMit was not listed with the TGA at the time the initial representations were first made. The initial representations that Chaste was marketing a new product, which had been successfully launched in the United States, scientifically tested at eleven Universities and efficacious as a diet pill were false.

106 Chaste claimed that TRIMit was a thoroughly researched and scientifically tested product and that its efficacy as a weight loss product was unquestionable. It represented that use of the product TRIMit would generate rapid weight loss and inhibit the production of fat in the body; that it had been thoroughly researched and tested worldwide; and that it had no side

effects. Chaste also claimed that scientific evidence supported the finding that taking the recommended dosage of TRIMit without a specific dietary regime or exercise plan would result in weight loss. These representations were untrue.

107 Chaste purported to justify those representations and provide a basis for further representations as to efficacy by employing the services of Dr D'Alton as head of Chaste's research division. Chaste presented Dr D'Alton to prospective area managers as 'our research director and chairman of the market research and development committee'.

108 Dr D'Alton wrote a column in a monthly newsletter distributed to area managers, prepared written advices and made representations on behalf of Chaste to third parties about the efficacy of the TRIMit product. Dr D'Alton also provided analysis of clinical data and written advices for sales and marketing purposes.

109 Dr D'Alton made expansive claims about the content of his research and his expertise as a researcher at the national launch by telling those present that he had 'done a lot of studies on obesity in his role as a social scientist and studies on medical practice'. He 'was not a chemist but he has looked through all the research that has been done, all the human trials that have been done, the animal trials that have been done on various parts and how those have developed into human trials and how human trials were developed further before the product was released in the United States'.

110 In its prospectus Chaste claimed that:

> *'TRIMit. It is a combination of three of the most thoroughly researched ingredients in recent decades. The main active ingredient is hydroxy citric acid which scientists have said may revolutionise the dieting industry. Known as HCA this natural ingredient is derived from a rare Asian fruit (garcinia cambogia), and has been proven safe and effective at no less than 11 universities. Further tests, however, have proven that this remarkable may be up to 700% more effective when combined with two other active ingredients.*
>
> *Manufactured to the highest standards using only the purest materials, TRIMit not only is super strength to provide maximum benefits, but is packaged to ensure a high perceived value. TRIMit is a complete diet and healthy nutrition and lifestyle program …'*

111 Dr D'Alton prepared an 'Obesity Report' that claimed to be a report of various clinical trials of the use of HCA. The Obesity Report was provided to area managers and sales

representatives. The report represented to those persons that Chaste had a scientific basis for its claims about the efficacy of TRIMit as a weight loss aid. However, the Obesity Report was not an objective analysis of various clinical trials on the use of HCA but rather, a summary of claims prepared for the purposes of marketing a proposed but unformulated product. While Dr D'Alton noted that the concentration and source of HCA were key variables in the effect of products containing HCA as an active ingredient, the concentration and source of HCA for TRIMit were both unknown and untested. In the report, Dr D'Alton referred to a number of 'clinical trials' in support of the use of TRIMit as a weight loss product. However, none of the trials to which he referred concerned products with the same specifications of TRIMit. Dr D'Alton failed to include or mention published reports by the American Medical Association and the Australian Medical Association which contradicted the reports which he summarised. Dr D'Alton also failed to mention in his report that the research reports suggesting efficacy of ingredients that were components of TRIMit, to which he referred, had been prepared by employees of the manufacturers of those ingredients. Dr D'Alton knew that even if the purportedly active ingredient HCA had a weight loss effect, TRIMit contained half or less than half of the amount of HCA compared with tablets used in research overseas.

112 Dr D'Alton, in close consultation with Mr Cousins, promoted and organised 'clinical trials' of TRIMit for the purpose of adding legitimacy to Chaste's efficacy claims. The trials provided no reasonable basis for justifying the claims made as to the efficacy of TRIMit. Dr D'Alton's report referred to 'controlled clinical trials' completed in Sydney and Brisbane with 24 randomly selected participants. However, Dr D'Alton and Mr Cousins knew that there were no trials held in Brisbane. A trial was held in Sydney. However, the participants were not randomly selected. The participants were selected from persons who had an interest in the success of Chaste, including some area managers. Further, the trials were not 'controlled trials' in any sense. Dr D'Alton and Mr Cousins, both of whom had an interest in the outcome of the trials, ran the trials and distributed the active and placebo pills. Mr Cousins and Dr D'Alton knew that the trial was conducted in a manner that did not follow established protocols which are accepted by the TGA or the Australian Bureau of Statistics.

113 Dr D'Alton was well paid for his contributions. He was paid $7,500 for his one-day appearance at the national seminar at which he spoke. He was paid $2,000 for each

newsletter to which he contributed. He was paid $300 per hour to prepare written advice, evaluate clinical data, prepare marketing reports and coordinate studies or trials.

114 He was also paid $7,500 for each television interview, $4,000 for each and every published interview or article in a national newspaper, $2,000 for each and every published interview or article in a State or capital city newspaper and $1,000 for each and every radio interview.

115 Dr D'Alton knew of Mr Foster's involvement with Chaste. Indeed, he travelled to Fiji to discuss matters with Mr Foster and later travelled with Mr Cousins to Vanuatu to meet with Mr Foster.

116 He was aware of the instruction that Mr Foster's involvement in Chaste should not be disclosed to area managers and the public, and complied with that request.

117 The evidence discloses that as early as May 2000 Dr D'Alton was aware of the falsity of Chaste's claims in relation to TRIMit.

118 Indeed, on 30 May 2000 he wrote to Chaste in the following terms:

> *'As a responsible professional consultant to Chaste it would be failing in my duty if I did not point out that there are serious shortcomings in the marketing and formulation of TRIMit. These are as follows:*
>
> *The tablet contains a very low content of HCA (74 milligrams) and this is derived from Garcinia Quaesita (Brindleberry) not Garcinia Campogia (Malabar Tamarind).'*

119 Mr Foster played an active part in the misrepresentations which were made as to the efficacy of TRIMit. He scripted media and newspaper releases and provided instructions in relation to media campaigns. He provided instructions to Dr D'Alton and met with him in Fiji and Vanuatu. Mr Foster and Mr Cousins consulted on the wording of the Clinical trial brochure while in Fiji and resolved to use its publication as an antidote to an article which contained very clear criticism of any efficacy representations for HCA and Chromium as weight loss aids.

120 Mr Webb regularly repeated in newsletters the content of the efficacy representations to area managers. He sought to allay concerns amongst area managers by asserting that Dr D'Alton was an independent researcher when he clearly knew that he was not. He avoided

investigation of the later complaints by alleging that Chaste was involved in litigation in relation to the complaints.

121 Further, to the extent that Mr Webb's role with respect to the making of the efficacy representations was in the provision of consultancy services by Orlawood, Orlawood was knowingly concerned through the making of those representations, in conduct which was misleading or deceptive.

Representations as to genuine business and the concealment of Mr Foster's involvement

122 Through Mr Webb, Chaste represented to area managers and to the public that Chaste was a genuine business conducted on ordinary commercial lines. It was represented to area managers that the business opportunity had an earning capacity of $2,500 per week.

123 The manager in which area managers were recruited led support to the proposition that Chaste was run on ordinary commercial lines. Area managers were required to apply for the position providing details of the employment history and financial affairs. Those who did not have sales experience were advised that they would be properly trained. Prospective area managers were assured by Chaste's accountants that the necessary regulatory procedures of TGA listing had been complied with. They were also advised that Chaste had a good working relationship with its bankers.

124 Prospective area managers were assured they would be selling a quality product which had been scientifically tested in 11 universities. They were told that TRIMit had been successfully sold in the United States of America.

125 Dr D'Alton was held out to them as providing an objective endorsement of the efficacy of the product.

126 Chaste acknowledged that it was necessary to embark on an extensive advertising and national marketing scheme and advised prospective area managers that it had committed to that course.

127 It represented that it had celebrity endorsement from Ms Kennerley who would be part of the national marketing of the product.

128 It is clear that the business opportunity presented by Chaste was not genuine. Chaste was established for the purpose of inducing persons to pay approximately $40,000 in two instalments to become area managers. Chaste distributed the area managers' capital contributions to Mr Foster and Mr Webb and entities associated with them for their use. Those findings can be drawn from the following facts and circumstances including:

- The corporate structures established by Mr Foster and Mr Webb and associated entities prior to the commencement of the Chaste business.
- The holding out of Mr Webb as the sole owner of the business and the concealment of Mr Foster's involvement in that business.
- The employment of persons such as a barrister, Mr Cousins as CEO and a medical practitioner, Dr D'Alton as purported head of a research team. Those persons' credentials were used to add credibility to the business. Those persons made false statements to area managers about their authority and expertise.
- The failure to provide the advertising or other services which had been promised to area managers.
- The deliberate failure to pay creditors.
- The siphoning off of gross income of Chaste to Mr Webb, Orlawood, Mr Foster, WMMT and Mr Cousins immediately on receipt of area managers' contributions and before any services could be provided to area managers or before creditors could be paid.
- The fact that all key personnel involved in the Chaste business knew that it was being operated according to the detailed directions and for the purposes of Mr Foster. Mr Webb, Mr McMullan, Mr Cousins, Mr Cooper and Dr D'Alton each had reason to believe that Mr Foster's purposes were not in accordance with the ordinary commercial expectations of the area managers and concealed his involvement from them.

129 Mr Foster had convictions in relation to the unlawful sale and promotion of weight loss products, and a reputation as the instigator of dubious and failed schemes for profit for the conduct of businesses promoting and selling weight loss products.

130 When area managers and creditors enquired as to the personnel involved in Chaste, Messrs Webb, Cousins, McMullan and office personnel, instructed by Mr Webb and Mr Foster,

answered in a manner which was clearly calculated to conceal the presence of Mr Foster as the key controller of the Chaste system.

131 Mr Xenodakis said that he clearly understood from discussions with Mr Webb and Mr Foster that he was not to mention Peter Foster's involvement in Chaste. He thought potential purchasers of TRIMit distribution areas would be less likely to buy an area if they knew Peter Foster was involved.

132 Mr Webb also maintained the lie. As late as 23 November 2001 Mr Webb personally signed a statement to area managers informing them that 'the allegation that Peter Foster owns or manages Chaste is clearly illogical on the facts'. Notwithstanding the volume of complaints Chaste had received about the product, he asserted 'it has not attracted a single negative comment in the media, but only attracted tens of thousands of satisfied users'.

133 I find that from its inception Chaste's business was conducted by Mr Foster and Mr Webb for the purpose of extracting the maximum possible revenue from unsuspecting area managers who had hoped to participate in a genuine business opportunity in selling a researched and effective weight loss aid to retailers. I find that Chaste never retained adequate funds to enable it to provide future expenditure for the benefit of the business or area managers as it represented it would. Regard was never had for the long term viability of Chaste.

134 I find that Mr Foster, Mr Webb and/or Orlawood were knowingly concerned in representing to area managers that participation in a Chaste distributorship was a genuine business opportunity when in fact, and to their knowledge, it was a high risk activity which was geared to distribute the gross income to Mr Foster, Mr Webb and associated entities whilst retaining the minimum amount of funds for conducting a short term business.

135 Mr McMullan, as Director of Sales, knew of and was complicit in making representations to prospective area managers that Chaste was a genuine business opportunity which he knew to be false. He knew that Chaste was under the control of Mr Foster and other key personnel in Chaste deliberately but failed to reveal the involvement of Mr Foster. In doing so, he put the area managers' investment in Chaste at risk.

Representations as to franchise

136 As I have mentioned previously, Mr Foster and Mr Webb (and/or Orlawood) played an integral role in establishing the corporate structure and associated agreements including the licensing agreement for the intellectual property of TRIMit and devising the essential components of the TRIMit scheme.

137 In addition, Mr Webb, as director of Chaste, informed the applicant that:

> *'Let me assure you that lawyers acting for this company investigated this issue in 1999 and confirmed that we did not fall within the boundaries of a franchise. As such, there is no necessity to produce a disclosure document.*
>
> *I can further advise that the CEO of this company during our wholesaling phase was and remains, a Barrister-at-Law, and he also ensured that we did not fall within the definition or conduct of a franchise.'*

138 These representations were clearly misleading and deceptive.

Breach of the Franchising Code of Conduct and the 'Memorandum of Denouncement'

139 On 3 February 2001 Mr Parker, an area manager, invited other area managers in New South Wales to a meeting to be held on 9 February 2001. The purpose of this meeting was to discuss issues of concern to area managers in their dealings with Chaste. He also invited Mr Webb to the meeting.

140 On 6 February 2001 Mr Parker received a document from Mr Webb entitled 'Memorandum of Denouncement', in which Mr Webb threatened to suspend all advertising of TRIMit in New South Wales unless Mr Parker's proposed meeting was cancelled. The document also contained a threat to terminate the Area Management Agreements of any area managers in New South Wales who attended any meeting which had not been sanctioned by Chaste.

141 Clause 15 of the Franchising Code of Conduct provides that:

> *'A franchisor must not induce a franchisee not to form an association or not to associate with other franchisees for a lawful purpose.'*

142 I find that Chaste, through the action of Mr Webb in issuing the Memorandum of Denouncement, breached Clause 15 of the Franchising Code of Conduct by inducing a franchisee not to form an association or associate with other franchisees.

THE SECOND AND THIRD RESPONDENTS

143 For the reasons which I have given, in my opinion, the applicant has established that the second and third respondents breached Part IV of the Act. It follows, in my opinion, that declarations ought to be made reflecting those breaches.

144 The second and third respondents also, in my opinion, breached s 76 of the Act in that they were knowingly concerned in Chaste's contravention of s 48.

145 Declarations ought to be made accordingly and it will be necessary to impose a penalty on the second respondent. The applicant did not seek a penalty against the third respondent.

THE FOURTH RESPONDENT

146 The fourth respondent agreed that he had been knowingly involved in the resale price maintenance contravention. He also agreed that he had breached Part IV of the Act. However, he opposed declarations being made in the terms sought. The fourth respondent argued that declarations were unnecessary in circumstances where they would be declaring facts rather than parties' rights. I do not accept this argument. It is appropriate to make declarations in circumstances to vindicate a party's claim, and or to serve the public interest in clearly spelling out the contravening conduct.

147 In *ACCC v Goldy Motors Pty Ltd* (2001) ATPR 41-801, Carr J made a declaration that the respondent contravened s 53(g) of the Act, notwithstanding the respondent's contention that no significant practical consequence would be served by making the declarations. In making those declarations, Carr J said, at 42:

> *'1. The declarations sought are directed to the determination of a legal controversy and not to answering abstract or hypothetical questions. In its statement of claim the applicant identified conduct in which the respondent has now admitted it engaged, and asserted that by such conduct the respondent had twice contravened (among other provisions) s 53(g) of the Act. The respondent denied these claimed contraventions. I think the applicant is entitled to have the Court resolve the issue. In some cases it might be appropriate simply to make findings of fact including findings that a respondent has contravened a provision of, relevantly, Part V of the Act. Such findings might be of evidentiary value in subsequent proceedings – see s 83. But in this case, subject to the other discretionary matters referred to below, I think that the applicant, having proved its case against the respondent, should be granted a declaration vindicating its claim.*

> *2. The applicant, as the public body charged with enforcing the Act, has a "real interest" in seeking the relief;*
>
> *3. The relief sought is not "purely hypothetical";*
>
> *4. The respondent is "a proper contradictor".'*

148 In *ACCC v Chen* (2003) 201 ALR 40, Sackville J considered the Court's power to order declaratory relief in circumstances where injunctive relief was not sought. He said, at 47-48:

> *'Section 21 (1) of the* Federal Court of Australia Act 1976 *(Cth) ... confers power on the court in any matter in which it has original jurisdiction to make binding declarations of right, whether or not consequential relief is claimed. In* Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2) *(1993) 41 FCR 89; 113 ALR 257* [Tobacco Institute v AFCO], *the Full Court held that the court has a power under s 21 of the Federal Court Act to make a declaration of right in proceedings for injunctive relief bought under s 80 of the* [*Trade Practices*] *Act, regardless of whether injunctive relief is granted. The declaration, if made, is a declaration of right because the right declared is a public right, namely the right of the public not to be misled or deceived by misrepresentations: at FCR 98; ALR 266 per Sheppard J, at 110; ALR 278 per Hill J. Sheppard J specifically recognised (at FCR 100; ALR 268) that the policy of the* [*Trade Practices*] *Act, concerned as it is with the public interest, warrants the court, in an appropriate case, exercising its power to grant declaratory relief to mark its disapproval of particular conduct contravening the* [*Trade Practices*] *Act.'*

149 Later he said, at 321:

> *'The Full Court recognised in* Tobacco Institute v AFCO, *the public interest in protecting Australian consumers from misleading conduct often warrants the making of a declaration. A declaration also marks the court's disapproval of the respondent's conduct and, if appropriate, can be used to inform consumers of the dangers posed by the respondent's* [*conduct*]. *I think that these considerations justify making a declaration in the present case in the terms to which I have referred.'*

150 In considering the grant of declaratory relief in similar circumstances, Gray J in *ACCC v Francis* [2004] FCA 487 indicated that he had difficulty with declarations being made to mark the Court's disapproval of the conduct concerned: at [109]. With respect, I do not agree with his Honour's view. When regard is had to the underlying policy of the Act which is concerned with the public interest, it is appropriate for the Court to exercise its power to grant declaratory relief to mark its disapproval of the contravening conduct. Furthermore, in the circumstances of this case, where the declarations sought are directed to the determination of a legal controversy and not to answering abstract or hypothetical questions, the applicant, as

the public body charged with enforcing the Act, has a 'real interest' in seeking the relief, and the relief sought is not 'purely hypothetical', I consider that it is appropriate to make the declarations sought.

151 I consider that it appropriate to make the declarations sought against the fourth respondent. I consider that there is utility in making the proposed declarations, as they will serve the public interest by making the public aware of Mr Foster's conduct. Furthermore, I consider that the declarations sought are appropriate to mark the Court's disapproval of Mr Foster's conduct. The declarations are set out below.

152 For those reasons, I am of the opinion that it would be appropriate to make declarations with respect to the first, second, third, sixth and tenth respondents.

PENALTIES

153 The applicant sought penalties against some of the respondents in respect of their contraventions of Part IV of the Act. The applicant did not assert that the fifth, ninth or tenth respondents had contravened s 48 of the Act. The proceedings had been discontinued against the fifth respondent prior to trial.

154 The applicant asked the Court to impose a penalty of $600,000 on the first respondent. As previously mentioned, the first respondent did not oppose the penalty sought against it.

155 A penalty of $150,000 was sought against the second respondent. Although the second respondent opposed the penalty sought to be imposed on him, he did not appear or present any evidence in his defence.

156 No penalty was sought against the third respondent no doubt because the third respondent was merely the vehicle through which profits were distributed to the second respondent.

157 A penalty of $150,000 was sought against the fourth respondent. The fourth respondent argued that the penalty sought was too high.

158 The sixth respondent agreed that a penalty of $100,000 would be an appropriate penalty to be imposed upon him in respect of his involvement in the resale price maintenance contravention.

159 The proceedings were discontinued against the seventh respondent prior to the matter coming to trial. On 6 April 2004, a penalty of $25,000 was imposed upon the seventh respondent, Mr Xenodakis by Spender J.

160 The eighth respondent agreed to the imposition of a penalty of $30,000 in respect of his involvement in Chaste's resale price maintenance contravention.

161 Of course, the question of penalty is a matter for the Court, even if a party consents to or does not object to a particular penalty.

The first respondent - Chaste

162 As I have previously mentioned, the applicant's claim against the first respondent was in relation to its conduct in respect of its participation in resale price maintenance.

163 Section 48 of the Act provides:

> *'A corporation or other person shall not engage in the practice of resale price maintenance.'*

164 The 'practice of resale price maintenance' is defined in s 4 of the Act to mean the practice of resale price maintenance in Part VIII of the Act. The Australian Competition and Consumer Commission is empowered to authorise a person to engage in the practice of resale price maintenance (s 88(8A)) but no such authority was given in this case.

165 Section 96 details what acts constitute 'the practice of resale price maintenance'. It relevantly provides:

> *'(1) Subject to this Part, a corporation (in this section called the supplier) engages in the practice of resale price maintenance if that corporation does an act referred to in any of the paragraphs of subsection (3).*
>
> *...*
>
> *(3) The acts referred to in subsections (1) and (2) are the following:*

...

(c) the supplier entering into an agreement, or offering to enter into an agreement, for the supply of goods to a second person, being an agreement one of the terms of which is, or would be, that the second person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier;

...

(f) the supplier using, in relation to any goods supplied, or that may be supplied, by the supplier to a second person, a statement of a price that is likely to be understood by that person as the price below which the goods must not be sold.'

166 In its written submissions, the applicant contended:

'11. Chaste:

11.1 by distributing and signing the Area Management [A]greements, entered into agreements, or offered to enter into agreements, for the supply of TRIMit to Area Managers, being an agreement one of the terms of which was that the area manager would not sell TRIMit at a price less than the price specified by Chaste, being an act which constitutes the practice of resale price maintenance pursuant to s 96(3)(c) of the Act;

11.2 by distributing the Area Management [A]greements, including the agreements, the area manager proposal, and the We Answer Your Questions booklet, used in relation to TRIMit, to area managers, a statement of price likely to be understood by the area managers as the price below which TRIMit was not to be sold, being an act which constitutes the practice of resale price maintenance pursuant to s 96(3)(f) of the Act;

11.3 by distributing, from August 2000, presentation folders to area managers which set out the prices at which the area managers were to sell to retailers, used in relation to TRIMit a statement of price likely to be understood by the area managers as the price below which TRIMit was not to be sold to those retailers, being an act which constitutes the practice of resale price maintenance pursuant to s 96(3)(f) of the Act.

167 As mentioned previously, the first respondent did not contest these proceedings.

168 In my opinion, the applicant has established the facts underlying those submissions. The Area Management Agreements contained terms, one of which was that the area manager would not sell TRIMit at a price less than specified by Chaste. In entering into such agreements, Chaste contravened s 48 of the Act. It engaged in the practice of resale price

maintenance: s 96(3)(c). It also contravened s 48 by distributing the area management proposal and 'We Answer Your Questions' booklet, and presentation folders to area managers which contained a statement of price which area managers would understand as the price below which TRIMit was not to be sold: s 96(3)(f). I find that the first respondent engaged in resale price maintenance by engaging in practice in the terms contended for by the applicant.

169 The first respondent is in liquidation. Prior to the trial, the liquidator of Chaste was advised that a penalty of $600,000 would be sought against the first respondent. The liquidator did not object to the penalty. No doubt, the liquidator formed the view that any penalty imposed upon the first respondent would not form part of the company's liabilities for the purposes of the administration because the penalty was not admissible to proof against an insolvent company: s 553B of the *Corporations Act 2001* (Cth); *Mathers & Anor v Commonwealth of Australia* (2004) 134 FCR 135.

170 In those circumstances, the penalty will not be recoverable by the applicant because there are no assets available to be applied against the penalty.

171 Nonetheless, having regard to the company's conduct, it would be appropriate to impose a penalty: *ACCC v SIP Australia Pty Ltd* (2003) ATPR 41-937 at 47,078; *ACCC v Fila Sport Oceania Pty Ltd* (2004) ATPR 41-983; *ACCC v The Vales Wine Company Pty Ltd* (1996) ATPR 41-528 at 42,776; *ACCC v GIA Pty Ltd* (2002) ATPR 41-902 at 45,419.

172 Section 76 of the Act provides for pecuniary penalties for a contravention of Part IV of the Act. In the case of a breach of s 48 the penalty that may be imposed must not exceed $10,000,000: s 76(1A). A penalty for a person other than a body corporate must not exceed $500,000: s 76(1B). Penalties imposed under this section are not criminal penalties.

173 Section 76(1) extends liability to persons other than the direct contraveners and directs the Court's attention to matters which must be considered in determining the appropriate penalty. It provides:

> *'(1) If the Court is satisfied that a person:*
> *(a) has contravened any of the following provisions:*
> *(i) a provision of Part IV;*
> *(ii) section 75AU or 75AYA,*

> *(b) has attempted to contravene such a provision;*
> *(c) has aided, abetted, counselled or procured a person to contravene such a provision;*
> *(d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene a provision;*
> *(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or*
> *(f) has conspired with others to contravene such a provision;*
>
> *the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all the relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct.'*

174 In this case, the applicant asserted that Chaste contravened s 48. It asserted that the other respondents against whom it sought penalties aided and abetted Chaste or were directly or indirectly, knowing concerned in, or party to, Chaste's contravention.

175 A penalty is imposed as a deterrent to both the party upon whom the penalty is imposed and others who might similarly contravene the Act: *TPC v Stihl Chainsaws (Aust) Pty Limited* (1978) ATPR 40-091 at 17,896 per Smithers J. In *TPC v CSR Ltd* (1991) ATPR 41-076 at 52,152 ('*CSR*') French J stated:

> *'The principal, and I think probably the only, object of the penalties imposed by s. 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act.'*

176 In *ACCC v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301, Goldberg J concluded at [39] that:

> *'The penalty imposed must be substantial enough that the party realises the seriousness of its conduct and is not inclined to repeat such conduct. Obviously the sum required to achieve this object will be larger where the Court is setting a penalty for a company with vast resources. However, as specific deterrence must also be achieved, consideration of the party's capacity to pay must be weighed against the need to impose a sum which members of the public will recognise as significant and proportionate to the seriousness of the contravention.'*

177 In *ACCC v Midland Brick Co Pty Ltd* (2004) 207 ALR 329 at [22] Lee J said:

> *'The object of orders made under s 76, or s 80, of the Act is to protect the integrity of markets and to prevent the subversion and distortion thereof by conduct that has the purpose or effect of adversely affecting competition. The Act sets out the norms to be met by corporations engaged in trade or commerce and in the main seeks to obtain adherence to those standards by providing for penalties to be imposed, and injunctions to be granted, that will be sufficient to deter corporations from risking, whether deliberately or negligently, the consequence of contravening the Act.'*

178 In *TPC v TNT Australia Pty Ltd* (1995) ATPR 41-375 at 40,169, Burchett J stated that the total penalty for related offences ought not to exceed what is proper for the entire contravening conduct (the 'totality principle' as it is known in the criminal law). A similar observation was made by Goldberg J in *ACCC v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 52.

179 Notwithstanding that Chaste is in liquidation, it is appropriate to order that Chaste pay a penalty for its contravention of the Act as a measure of the Court's disapproval of the contravention and as a measure of the seriousness with which the Court regards that contravention. Goldberg J said in *ACCC v SIP Australia Pty Ltd* (2003) ATPR 41-937 (at 47,078):

> *'If general deterrence is to gave any meaning, a company in liquidation which has contravened the Act must be ordered to pay an appropriate pecuniary penalty as a deterrent to others who might be tempted to engage in similar conduct.'*

180 If deterrence is the main reason for the imposition of a pecuniary penalty for a contravention of the Act and if deterrence as a concept is directed to both the party upon which the penalty is imposed (personal deterrence) and the wider community (general deterrence), there would seem to be no point in including any sum for personal deterrence when the company is in liquidation.

181 In *CSR* at 52,152-52,153, French J considered the following factors as relevant to the assessment of a pecuniary penalty:

(a) the nature and extent of the contravening conduct;

(b) the amount of loss or damage caused;

(c) the circumstances in which the conduct took place;

(d) the size of the contravening company;

(e) the degree of power it has, as evidenced by its market share and ease of entry into the market;

(f) the deliberateness of the contravention and the period over which it extended;

(g) whether the contravention arose out of the conduct of senior management or at a lower level;

(h) whether the company has a corporate culture conducive to compliance to compliance with the Act as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and

(i) whether the company has shown disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention.

182 These considerations were approved and expanded upon by the Full Court of this Court in *J McPhee & Son (Aust) Pty Ltd v ACCC* (2000) 172 ALR 532 as follows:

(a) similar conduct in the past;

(b) effect on the functioning of the market and other economic effects on the conduct; and

(c) whether the conduct was systematic, deliberate or covert.

183 I now turn to consider the above principles in light of the facts of this case.

The nature and extent of the contravening conduct

184 The contravening conduct involved resale price maintenance in the market for the supply of weight loss products (TRIMit) to on-sellers throughout Australia from December 1999 to November 2001.

185 Chaste entered into written agreements with approximately 74 area managers, pursuant to which each area manager was appointed as the exclusive distributor of TRIMit in a specified geographical territory. The agreements required the area managers to establish a minimum of 50 retail outlets selling TRIMit in each specified territory prior to the launch of TRIMit, increasing at the rate of 5 new retail outlets per month thereafter.

186 Chaste set the recommended retail price and the price that was to be adhered to by all area managers in selling stock to retailers. There was to be no discounting or price cutting without

the written permission of Chaste. Area managers were not to sell stock to retailers at a price less than a price specified by Chaste.

187 Prospective area managers were issued by Chaste with presentation folders containing statements of prices at which the area manager was to sell the stock to retailers and of a recommended retail price. These folders contained statements which were to be used by area managers when presenting to potential retail outlets. In supplying stock to area managers, Chaste used statements in regard to price that were likely to be understood by area managers as the prices below which the stock was not to be sold.

The amount of loss or damage caused, effect on the functioning of the market and other economic effects of the conduct.

188 The resale price maintenance conduct caused loss or damage to area managers, stockists and ultimate consumers of the TRIMit product. Area managers and stockists were bound not to lower prices and very largely complied with that proscription. Those area managers who were unsuccessful in having Chaste buy back their stock and distribution rights in accordance with the 'buy back' guarantee were prevented by the pricing terms of their agreement with Chaste from selling off their stock at lower prices. The harm to consumers was that they paid $49.95 for a bottle of pills that cost the distributor $19.95.

189 In marketing the TRIMit scheme to potential area managers, the pricing policy, which constituted resale price maintenance conduct, artificially inflated the projected profitability of the TRIMit product. This profitability was a key selling point of the scheme to area managers.

190 Further, the promoted profitability of the TRIMit product for retailers was based upon the premise that the resale price maintenance conduct would continue.

191 For end consumers, the harm of the resale price maintenance conduct was that retail prices were artificially inflated for the product. Moreover, of course, there was no competition amongst area managers which may have kept prices lower.

The circumstances in which the conduct took place

192 Chaste engaged in the conduct to induce persons to become area managers and purchase TRIMit. Its purpose was to extract the maximum possible revenue from area managers without regard for their reasonable commercial expectations or for the interests or long term viability of Chaste. Its ultimate purpose was to distribute to Mr Foster and Mr Webb and entities and persons associated with them the maximum possible gross income of Chaste whilst retaining the minimum funds in Chaste necessary for Chaste to maintain the appearance in the short term of a genuine business.

The size of the contravening company, and degree of market power

193 Chaste derived revenue from area managers of approximately $3.9 million between December 1999 and November 2001. Chaste's only business was the operation of the TRIMit scheme. Accordingly, the proposed penalty represents approximately 15% of Chaste's turnover during this period.

Whether the person has previously been found by the Court to have engaged in any similar conduct

194 Chaste has not previously been found by the Court to have engaged in any similar conduct. It was established to carry out the TRIMit scheme.

The deliberateness of the contravention and the period over which it extended

195 The conduct was deliberate and persisted for two years through a network of sales representatives and area managers.

196 The conduct ended in November 2001 with the failure of Chaste. Up until that time, Chaste continued to sell stock to its area managers under the unlawful terms and conditions.

Whether the contraventions arose out of the conduct of senior management or at a lower level, and whether the company has a corporate culture conducive to compliance with the Act

197 I find that the conduct was devised, established, implemented and controlled by Chaste's director, Mr Webb and its consultant, Mr Foster, for their own personal benefit, and without regard to the company, area managers, retailers or customers.

The financial position of the contravening company

198 As I mentioned above, it is appropriate to impose a penalty on a company in liquidation to mark the Court's disapproval of the contravention, and to deter others.

199 Taking into account all of the circumstances identified above, I consider that a pecuniary penalty in the amount of $600,000 would be appropriate to be imposed upon the first respondent.

The second respondent – Mr Webb

200 In relation to the second respondent, the applicant has sought a pecuniary penalty under s 76 of the Act against the second respondent in respect of being knowingly concerned in or party to, and aiding and abetting, conduct by Chaste which constituted engaging in the practice of resale price maintenance in contravention of s 48.

201 The third respondent is a family company of the second respondent and controlled by him. The applicant did not distinguish between the second and third respondents for the purpose of imposing a pecuniary penalty in relation to the resale price maintenance conduct. A single penalty of $150,000 was only sought against the second respondent.

202 The applicant alleged, inter alia, ancillary involvement by the second respondent in conduct by Chaste which contravened:

> *'4.1 section 48 of the Act; and*
> *4.2 sections 51AD, 52, 53(a), 53(aa), 53(c), 53(g) and 59(2) of the Act* ["the Part V contraventions"]*;*
>
> *within the terms of sections 75B and 76 of the Act.'*

203 Whilst declarations and injunctions were sought in respect of involvement in the Part V contraventions, a pecuniary penalty was only sought in relation to the involvement in the resale price maintenance contravention.

204 The fact that Chaste is now in liquidation does not preclude the Court from making findings and orders against persons who bear accessorial liability under s 75B: *Richardson & Wrench (Holdings) Pty Ltd v Ligon No 174 Pty Ltd* (1994) 123 ALR 681; *ACCC v Black on White Pty Ltd* (2001) 110 FCR 1.

205 Furthermore, the fact that the applicant did not press the Part V contraventions against Chaste does not preclude a finding of accessorial liability being made against the second and third respondents: *Matheson Engineers Pty Ltd v El Raghy* (1992) ATPR 41-192; *Richardson & Wrench (Holdings) Pty Ltd v Ligon No 174 Pty Ltd* (1994) 123 ALR 681.

206 In *Richardson & Wrench (Holdings) Pty Ltd v Ligon No 174 Pty Ltd* (1994) 123 ALR 681 the corporate respondent had been dissolved by the time of the hearing and the case proceeded against the individual respondents (its directors) alone. Burchett J concluded that an action may be maintained against individuals alleged to have been involved in a contravention of s 52, within the meaning of s 75B, although proceedings were not pursued against the corporation which was the principal party to the contravention.

207 In *Matheson Engineers Pty Ltd v El Raghy* (1992) ATPR 41-192 at 40,611 French J rejected the argument that it was not open to the applicant in proceedings for a contravention of s 52 of the Act to sue only the parties said to be involved in the contravention without joining the primary corporate contravenor. His Honour considered that the words of s 82 – 'by action against that other person or against any person involved in the contravention' – were clear, and did not impose as a condition of accessorial liability that the primary contravenor be a party to the action.' He said, at 40,611:

> *'It may be that in many cases a primary corporate contravenor should be joined as a respondent so that the entire dispute may be determined. In other cases the primary contravenor may be a company in liquidation or just insolvent. There may be no point to the joinder of that company in those circumstances which may require leave of the Court under the Corporations Law in any event.'*

208 There is no reason not to apply French J's reasoning in relation to s 82 to s 80. I consider that the words 'aiding, abetting, counselling or procuring', 'inducing, attempting to induce', 'being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention' and 'conspiring' contemplate the kind of 'involvement' referred to in s 82 which led French J to conclude that there could be a finding made against a person involved in a contravention without the primary contravenor being a party to the action. For those reasons, it is open for me to impose injunctions on the second and third respondents pursuant to s 80 notwithstanding that there will be an absence of any finding as to whether Chaste contravened any provision contained in Part V of the Act.

209 The ancillary involvement alleged to arise in relation to the Part V contraventions is said to arise out of the consultancy services provided by Mr Webb to Chaste pursuant to an agreement between an entity associated with the second and third respondents, being the WFDT and an entity associated with the fourth respondent, being WMMT. These arrangements are described above.

210 I have previously described Chaste's conduct which contributed to resale price maintenance. I find that as the sole director of Chaste, Mr Webb directed all aspects of the company's operations and was responsible for the contravening elements of Chaste's conduct including directing the use of the documents containing the resale price maintenance contraventions. He therefore aided and abetted Chaste to engage in the conduct and was directly knowingly concerned in, and party to the conduct.

211 The second respondent's conduct was actuated by personal gain. As a result of that conduct he received more than $360,000.

212 The applicant submitted that a pecuniary penalty of $150,000 be imposed upon the second respondent under s 76 of the Act in respect of his being knowingly concerned in or party to and aiding or abetting, conduct by the first respondent which constituted engaging in the practice of resale price maintenance in contravention of s 48 of the Act.

213 I now turn to consider the appropriateness of a $150,000 penalty, having regard to the circumstances of the second respondent and the legal principles identified above.

The nature and extent of the contravening conduct

214 Mr Webb was Chaste's sole director. As such, he had the obligation and responsibility to ensure that Chaste complied with all provisions of the Act which operated on its business. He therefore had the responsibility to ensure that Chaste's employees and agents, including its consultants, did not cause Chaste to contravene the Act. Instead, he allowed Chaste to act as the front for Mr Foster. He also actively participated in disguising Mr Foster's involvement. Mr Webb allowed the company to operate under the control of Mr Foster and together with Mr Foster, was responsible for Chaste's contravening conduct.

215 The details of the nature of the contravening conduct have already been described in relation to Chaste.

216 Mr Webb's contravening conduct did not occur in the course of operation of a genuine business, but as an integral part of a scheme to attract area managers to pay money to Chaste. Chaste was created for the purpose of maximising revenue for Mr Webb and Mr Foster. I consider that the fact that the contravention arose pursuant to such a scheme rather than in the course of a genuine business arrangement is an aggravating factor that should be taken into account in the penalty to be imposed upon Mr Webb.

217 The fact that the second respondent derived a substantial quantity of money from the scheme is also an aggravating factor.

The amount of loss or damage caused, effect on the functioning of the market and other economic effects of the conduct

218 I find that the loss or damage caused by the resale price maintenance conduct affected area managers, stockists and ultimate consumers of the TRIMit product. I have set out how the scheme effected the functioning of the market and other economic effects in relation to Chaste above. I repeat the findings made there and simply add that as Chaste's most senior officer and formal director, Mr Webb was largely responsible for Chaste's conduct.

The circumstances in which the conduct took place

219 Again, I repeat the findings made in relation to the circumstances in which Chaste's conduct took place and add that I find Mr Webb was largely responsible for this conduct. It is evident that Mr Webb, while concealing Mr Foster's involvement, in fact controlled and directed Chaste's business operations with Mr Foster.

Whether the person has previously been found by the Court to have engaged in any similar conduct

220 The applicant conceded that Mr Webb has not previously been found by the Court to have contravened the resale price maintenance provisions of the Act.

The deliberateness of the contravention and the period over which it extended

221 The conduct was deliberate and persisted for two years through a network of sales representatives and area managers. Mr Webb, as sole director of Chaste, worked in conjunction with Mr Foster to direct and control every aspect of Chaste's operations, from its establishment until its failure.

222 The conduct ended with the failure of Chaste in November 2001. Up until that time, Chaste continued to sell stock on the contravening conditions.

Whether the contraventions arose out of the conduct of senior management or at a lower level, and whether the company has a corporate culture conducive to compliance with the Act

223 The conduct was devised, established, implemented, promoted and controlled by Chaste's director, Mr Webb and its consultant, Mr Foster, for their own benefit, and without regard to the company, area managers, retailers or customers.

224 Mr Webb was the sole director of Chaste and thus in a position to ensure that the contravening conduct did not occur.

225 Mr Webb received over $360,000 in revenue from Chaste between December 1999 and November 2001.

Whether the contravenor has shown disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention

226 Mr Webb has not cooperated in any way with the applicant. He has continued to deny that Chaste contravened Part IV of the Act. Unlike other parties to this litigation, including Mr Foster, he has made no effort to assist to bring those proceedings to a conclusion. He has shown no contrition or remorse.

Parity with other respondents

227 The applicant contended that the proposed penalty would ensure parity with each of the following penalties:

> *'44.1 a penalty of $25, 000 which was imposed on Mr Xenodakis, the 7th respondent, on 6 April 2004. This penalty was reduced by 50% from*

$50,000 for the extensive and early cooperation provided by Mr Xenodakis, unlike the second respondent. Mr Xenodakis did not direct the company as the second respondent did. The second respondent derived more than double the revenue from Chaste's operations than that received by Mr Xenodakis. Mr Xenodakis did not remain engaged by the company until its demise, but ceased to have a role in about mid 2001.

44.2 a penalty of $30,000 which is recommended for Mr McMullan, the 8th respondent. Mr McMullan did not direct the company as the second respondent did, but held a management position and answered to the second and fourth respondents. In addition, Mr McMullan was involved in the contravening conduct for a significantly shorter period of time than the second respondent (some 7 months).

44.3 a penalty of $100,000 which is recommended for Mr Cousins, the 6th respondent. Mr Cousins, although a barrister, was not a director of Chaste as the second respondent was, and was not involved in the company's operations for the same duration as the second respondent. Mr Cousins received a discount for early cooperation with the applicant, and for substantive admissions made, which does not apply to the second respondent's position.'

228 I think the penalty is appropriate. I think that the penalty can be compared with that suggested for Mr Cousins. Mr Cousins' involvement was less than Mr Webb's. Mr Cousins has, albeit very lately, exhibited some evidence of contrition and remorse.

229 I will order that a pecuniary penalty of $150,000 be imposed on the second respondent for his ancillary involvement in the resale price maintenance contraventions of the first respondent.

230 There is no reason why the second and third respondents should not pay the applicant's costs of and incidental to these proceedings.

The fourth respondent – Mr Foster

231 The applicant submitted that a pecuniary penalty of $150,000 was appropriate to be imposed on the fourth respondent under s 76 of the Act, in respect of his being knowingly concerned in or party to, and aiding or abetting, conduct by the first respondent which constituted engaging in the practice of resale price maintenance in contravention of s 48 of the Act.

232 I will consider the appropriateness of a $150,000 penalty, having regard to the factors identified above.

Appropriateness of penalty

233 A penalty of $150,000 is at the high end of the scale of penalties imposed for contraventions of Part IV of the Act. Nevertheless, I consider the factors which support a penalty of this kind:

(1) the level of Mr Foster's involvement as the controller of the company, with primary responsibility for the offending acts in the company's contravention, as the designer of Chaste's business which was based upon the resale price maintenance conduct;

(2) the deliberateness with which the fourth respondent engaged in the contravening conduct;

(3) the unusual circumstances in which the conduct occurred, being not in the course of operation of a genuine business, but as an integral part of a scheme to attract persons as area managers for the purposes of paying money to the first respondent for the use of the second and fourth respondents;

(4) the importance of general deterrence in conduct of this nature;

(5) the importance of specific deterrence in respect of the fourth respondent;

(5) the absence of any acknowledgment by the fourth respondent of his contravention, or a willingness to cooperate with the applicant in its investigation; and

(6) the amount of money derived by the fourth respondent from the scheme he devised, based upon the resale price maintenance contraventions, of which the proposed penalty of $150,000 is a small proportion.

The nature and extent of the contravening conduct

234 The nature of the contravening conduct is set out above in relation to the first respondent.

235 The fourth respondent designed and controlled all aspects of the company's operations, and was responsible for the contravening elements of the Chaste operations, including drafting the documents containing the resale price maintenance contraventions and directing their use. He thereby aided and abetted Chaste to engage in the conduct and was directly knowingly concerned in, and party to the conduct. He profited to the extent that he extracted more than $1 million from the company's revenue to his own ends.

The amount of loss or damage caused, effect on the functioning of the market and other economic effects of the conduct

236 The loss and damage caused and the effect of the conduct on the functioning of the market are discussed above in relation to the first respondent. The thrust of the scheme was that artificially inflated profit margins were used to sell the scheme to area managers. The promoted profitability of the TRIMit product for retailers was based upon the premise that the resale price maintenance conduct would continue. For end consumers, the harm of the resale price maintenance conduct was that retail prices were artificially inflated for the product. This harm was additional to that caused by the marketing of TRIMit on the false basis that it was efficacious. I find that each of the elements of the TRIMit scheme was deliberately designed by the fourth respondent.

The circumstances in which the conduct took place

237 The circumstances in which the conduct took place is described above, in relation to the first respondent.

238 I find that Mr Foster, while concealing his own involvement, together with Mr Webb, controlled and directed the company's operations.

Whether the person has previously been found by the Court to have engaged in any similar conduct

239 Mr Foster has not previously been found by the Court to have contravened the resale price maintenance provisions of the Act.

The deliberateness of the contravention and the period over which it extended

240 The conduct was deliberate and persisted for two years through a network of sales representatives and area managers. Mr Foster, together with Mr Webb, controlled every aspect of Chaste's operations from its establishment up until its failure.

241 The conduct ended with the failure of Chaste in November 2001. Up until that time, Chaste continued to sell stock on the contravening conditions.

Whether the contraventions arose out of the conduct of senior management or at a lower level, and whether the company has a corporate culture conducive to compliance with the Act

242 The conduct was devised, established, implemented, promoted and controlled by Chaste's director, Mr Webb and its consultant, Mr Foster, for their own benefit, and without regard to the company, area managers, retailers or customers. Mr Foster was in effect a shadow director of the first respondent. Mr Foster received over $1 million in revenue from Chaste between December 1999 and November 2001.

Whether the contravenor has shown disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention

243 Mr Foster has shown no disposition to cooperate with the applicant, or to admit his conduct.

Parity with other respondents

244 In my opinion, the proposed penalty preserves parity with each of the following penalties to be imposed on the other respondents in these proceedings.

245 A penalty of $25,000 was imposed on the seventh respondent on 6 April 2004. This penalty was reduced by 50 per cent from $50,000 for the extensive and early cooperation provided by Mr Xenodakis. Mr Foster has not provided any cooperation of that kind and therefore is not entitled to any reduction on account of his contrition and remorse. Unlike the fourth respondent, Mr Xenodakis did not design the scheme nor did he control the company. The fourth respondent derived more than eight times the revenue from Chaste's operations than that received by Mr Xenodakis. Mr Xenodakis did not remain engaged by the company until its demise, but ceased to have a role in about mid 2001.

246 The applicant recommended a penalty of $30,000 in respect of the conduct of the eighth respondent, Mr McMullan. Mr McMullan did not design the scheme or control the company as the fourth respondent did. Although he held a management position he answered to the second and fourth respondents. In addition, Mr McMullan was involved in the contravening conduct for a significantly shorter period of time than the fourth respondent (some 7 months).

247 The applicant recommended a penalty of $100,00 in respect of the sixth respondent. Mr Cousins is a barrister and must have been aware of the unlawfulness of Chaste's conduct.

However, I have no reason to think that Mr Foster was unaware that Chaste's conduct was unlawful. Mr Cousins was not involved in the design of the scheme like the fourth respondent. Mr Cousins did not control the company like the fourth respondent. He was not involved in the company's operations for the same period of time as the fourth respondent. Mr Cousins has cooperated with the applicant and has made substantial admissions. The fourth respondent has not behaved similarly.

248 I consider that the penalty sought by the applicant would be appropriate to be imposed on the fourth respondent. Furthermore, there is no reason why the fourth respondent should not pay the applicant's costs.

The sixth and eighth respondents – Mr Cousins and Mr McMullan

249 I have already indicated that, by the time the matter came to trial, the applicant had reached an agreement with the sixth and eighth respondents as to the appropriate level of pecuniary penalty to be imposed upon them.

250 The applicant and the sixth respondent agreed on a penalty of $100,000 for the sixth respondent in respect of his involvement in Chaste's contravention of s 48 of the Act. The applicant and the eighth respondent agreed that $30,000 was an appropriate penalty for the eighth respondent.

251 The parties' agreement does not bind the Court. It is necessary for me to determine the quantum of any pecuniary penalties that should be ordered in accordance with s 76 of the Act.

252 In *TPC v Allied Mills Industries Pty Ltd (No 4)* (1981) 37 ALR 256 at 259, Sheppard J considered whether a court should accept a penalty that has been agreed between the ACCC and a respondent:

> *'It is, of course, true that the penalty has been suggested to me by the agreement of the parties. Uninformed of their agreement, I may have selected a different figure, but I am satisfied that it would not have been very different from theirs. There is from time to time, amongst members of the profession and amongst the public, discussion concerning plea bargaining. Sometimes it is suggested that it involves disreputable conduct. It is my opinion that that is so if it at all implicates the court in private discussions as to what the court's*

> *attitude will or would likely to be if a particular course is taken. In this case nothing of that kind has occurred. The parties have made their own agreement and put it to the court for approval, not knowing what its attitude was likely to be…. This, of course, is not a criminal case; the liability is civil only. But, even in the most serious criminal cases, it is not unusual for the prosecution to accept a plea to a lesser charge, subject always to approval of the court. I have said what I have only to explain that the course which the parties have adopted is both proper and not uncommon, even though perhaps novel in the comparatively new field of trade practices.*

253 That approach was considered and approved by the Full Federal Court in *NW Frozen Foods Pty Ltd v ACCC* (1996) 141 ALR 640. In that case, Burchett and Kiefel JJ held (at 644):

> *'There is an important public policy involved. When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers of the Australian Competition and Consumer Commission to turn to other areas of the economy that await their attention. At the same time, a negotiated resolution of the instant case may be expected to include measures designed to promote, for the future, vigorous competition in the particular market concerned. These beneficial consequences would be jeopardised if corporations were to conclude that proper settlements were clouded by unpredictable risks. A proper figure is one within the permissible range in all the circumstances. The Court will not depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case.'*

254 Their Honours also noted that generally the most significant and relevant matters that the Court needs to consider about penalty are effects upon the functioning of the market and other economic effects. Although the Court is responsible for determining the appropriate penalty, the Full Court considered that it would be informed by the views of the ACCC about those effects.

255 The decision of the Full Court in *NW Frozen Foods v ACCC* was recently considered by the Full Court in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41-993. The Full Court held that the decision in *NW Frozen Foods v ACCC* disclosed no error of principle. At 48,626, the Full Court said:

> *'... the views of the regulator on matters within its expertise (such as the ACCC's views as to the deterrent effect of a proposed penalty in a given market) will usually be given greater weight than its views on more "subjective" matters.'*

256 It follows that although the applicant and the sixth and eighth respondents have reached agreements as to penalties to be imposed, it is necessary for me to make an assessment of the

appropriateness of the agreed penalties. I will do so having regard to the submissions of both the ACCC and the respondents but, in the end, it is my judgment that must prevail. I will not, however, refuse to impose the agreed penalties upon the respondents merely because I would have imposed a different penalty. If the proposed penalties are within the appropriate range it would be appropriate to accept and impose them. In considering the appropriate range in this case, regard must be had to the penalties I have imposed which were not agreed. It is necessary that each of the penalties imposed in this case recognise the separate responsibilities of the respondents in the contravention by Chaste of s 48.

257 I will first consider whether a penalty of $100,000 is an appropriate penalty to be imposed upon the sixth respondent.

The nature and extent of the contravening conduct

258 The details of the Chaste business and thus the nature of the contravening conduct are described above in relation to Chaste.

259 Mr Cousins is a barrister. From March 2000 he was retained as a legal advisor to Chaste for which he was remunerated. From March 2000 he was retained as a legal advisor to Chaste for which he was remunerated. From at least May 2000 to November 2000 he was engaged as, and represented himself to be, Chief Executive Officer of Chaste, and received consultancy fees which were linked to the sale by Chaste of exclusive territories to area managers. From at least May 2000, he knew the agreements offered by Chaste contained the offending provisions, and as Chief Executive Officer assisted Chaste to promote and offer the agreements containing those provisions. From November 2000 until November 2001 he continued to act as legal advisor to Chaste and to Mr Foster, and continued to promote the activities of Chaste and the TRIMit product, including in Australia and overseas, for which he was remunerated by Chaste. He aided and abetted Chaste to engage in the conduct and was directly knowingly concerned in, and party to the conduct. Indeed, the eight respondent admitted that he breached both Parts IV and V of the Act. In a statement of agreed facts, Mr McMullan agreed that he was knowingly concerned in or party to, and aided or abetted, breaches by Chaste of:

> *'11.1 section 52 of the Act by, while representing to potential area managers that Chaste was a good business opportunity, deliberately concealing the involvement of Peter Foster from area managers and potential area*

managers, and thereby misrepresenting the risks associated with the Chaste business opportunity.

11.2 the resale price maintenance provisions in sections 48 and 96 of the Act, by his role in supervising and participating in the recruitment by sales representatives of area managers to enter into Area Manager [sic] *Agreements with Chaste between February 2000 and August 2000.'*

The amount of loss or damage caused, effect on the functioning of the market and other economic effects of the conduct

260 The loss or damage caused and the economic effects of the Chaste business have been described above in relation to Chaste. It is not necessary to repeat those matters here.

The circumstances in which the conduct took place

261 As I have previously mentioned, Chaste engaged in the conduct for the purpose of inducing persons to pay money to become area managers. The conduct was engaged in to maximise the financial return to Mr Foster and Mr Webb and persons and entities associated with them.

262 Mr Cousins knew that if Mr Foster's involvement in Chaste was known to potential area managers, they would be unlikely to purchase distributorships. He therefore allowed himself to be held out as a credible figurehead in the Chaste operations. He became aware of matters which caused him to have doubts of Mr Webb's and Mr Foster's bona fides and the Chaste operations, but he continued in his role and continued to accept payments from Chaste without making any proper inquiry into the company's operations.

263 Mr Cousins acted in consultation with Mr Foster in relation to the operation of the Chaste business. Mr Cousins took and relayed instructions from Mr Foster while Mr Foster was in custody. He thus enabled Mr Foster to direct the Chaste operations.

264 From at least May 2000 Mr Cousins was aware that the agreements included provisions which constituted resale price maintenance. He was also aware that resale price maintenance was unlawful.

265 On 22 June 2000, in response to a query from a prospective area manager's legal representative as to the potential for Chaste's pricing policy to contravene the resale price maintenance provisions, Mr Cousins sent correspondence on behalf of Chaste which stated:

> *'No one has ever raised any concerns about implications of the Trade Practices Act nor do I think there are any. Of course you must rely on your own advice.'*

266 He must have known that statement was at the very least misleading. He knew the conduct was unlawful.

Whether the person has previously been found by the Court to have engaged in any similar conduct

267 Mr Cousins has not previously been found by the Court to have engaged in any similar conduct.

The deliberateness of the contravention and the period over which it extended

268 The conduct was deliberate and sophisticated and persisted for two years through a network of sales representatives and area managers. Mr Cousins was closely involved in Chaste's operations from at least May 2000 to November 2000, and retained a role as a legal advisor to the company or its principals until at least December 2001.

269 Mr Cousins was aware of the seriousness of the resale price maintenance contraventions by Chaste, and raised them with Mr Webb and Mr Foster. When they refused to take any steps to alter the company's conduct, he nevertheless continued to act for Chaste.

270 The conduct ended with the failure of Chaste in November 2001. Up until that time, Chaste continued to sell stock subject to conditions which contravened Part IV of the Act.

Whether the contraventions arose out of the conduct of senior management or at a lower level, and whether the company has a corporate culture conducive to compliance with the Act

271 The conduct was devised, established, implemented, promoted and controlled by Chaste's director, Mr Webb and its consultant, Mr Foster, for their own benefit, and without regard to the company, area managers, retailers or customers.

272 Mr Cousins was legal advisor to Chaste from about March 2000 throughout its operations, and held the title of Chief Executive Officer and manager from approximately May to November 2000. Mr Cousins had a lower level of involvement in Chaste's operations from in or about November 2000. In the period he was Chief Executive Officer, at least 50 area

managers signed the contravening agreements; the TRIMit product was launched with the contravening price policy in place; and 74 area managers paid the balance of their purchase price for entering into the agreements.

273 From at least May 2000, Mr Cousins was aware that the Area Management Agreements and pricing policy of Chaste contravened the resale price maintenance provisions of the Act but nevertheless assisted Chaste to promote and offer the agreements containing those provisions.

274 Mr Cousins received over $70,000 from Chaste as fees, consultancy payments and commissions. While he was Chief Executive Officer and manager, Mr Cousins received $500 for each area sold to an area manager, and a further $250 in respect of each such area when area managers paid the balance of the purchase price, at the time of the launch of TRIMit in August 2000. In addition to those payments, Mr Cousins received a further sum of more than $26,000 from Chaste by way of reimbursements, expenses and other payments. These payments were made between March 2000 and November 2001.

Whether the contravenor has shown disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention

275 After proceedings were instituted against him, Mr Cousins attended lengthy interviews with the ACCC on a voluntary basis, and answered questions about his role in the Chaste operations. Although the ACCC was not prepared to accept that Mr Cousins' disclosure was full and frank in all respects, it acknowledged that substantial admissions were made in the course of the interviews. Those admissions were not only used in the case against Mr Cousins, but helped inform the ACCC about the roles played by the other respondents. By the time the matter came to trial, Mr Cousins had fully cooperated with the ACCC in admitting the case against him and in making joint submissions to the Court.

276 The ACCC and Mr Cousins put it to me that the figure of $100,000 represented a reduction of $50,000 to take into account Mr Cousins' cooperation.

Parity with other respondents

277 On 6 April 2004, a pecuniary penalty of $25,000 was imposed on the seventh respondent in these proceedings. The imposed penalty reflected the amount jointly recommended to the Court as the appropriate penalty by the applicant and seventh respondent. Those parties

informed the Court that the agreed penalty represented a 50 per cent reduction which otherwise would have been recommended by the applicant in respect of the seventh respondent. The applicant informed the Court that the 50 per cent reduction was a greater reduction than the applicant would recommend to the Court in relation to any respondents who subsequently sought to resolve the proceedings by way of admissions and cooperation. Thus, the reduction of 30 per cent in respect of Mr Cousins is consistent with the reduction allowed in relation to the seventh respondent.

278 There are other factors which distinguish Mr Cousins' conduct from that of the seventh respondent's position. Mr Cousins had the more senior role. He enjoyed greater authority within the company. Mr Cousins was a barrister with knowledge of the Act and who knew, unlike the seventh respondent, that the conduct constituted resale price maintenance. While Mr Cousins has cooperated to the extent mentioned, in March 2004 the seventh respondent filed a lengthy affidavit detailing his own and others' involvement in the conduct alleged.

279 The applicant and the sixth respondent have agreed that the sixth respondent should pay the further sum of $25,000 to the applicant in respect of its costs. I will make an order to that effect.

280 In light of the above, I consider that a penalty of $100,000 in respect of Mr Cousins' involvement in Chaste's conduct in relation to resale price maintenance would be appropriate.

281 I now turn to consider whether a penalty of $30,000 would be an appropriate penalty to impose upon the eighth respondent.

The nature and extent of the contravening conduct

282 From February 2000 to August 2000, Mr McMullan was engaged as Director of Sales, and supervised and instructed sales representatives who in turn conducted interviews with prospective area managers using a script and video prepared by Chaste. Mr McMullan was aware of the contents of the documents used by sales representatives. Those documents contained the resale price maintenance terms. He directed the sales representatives to use that material.

283 Chaste paid Mr McMullan approximately $54, 000 in total for commissions on areas sold while he was a Director of Sales.

284 Mr McMullan aided and abetted Chaste to engage in conduct in contravention of s 48 of the Act and was directly knowingly concerned in and party to the conduct.

The amount of loss or damage caused, effect on the functioning of the market and other economic effects of the conduct

285 There is no need to report the circumstances outlined above in relation to the first respondent which also apply to the eighth respondent.

The circumstances in which the conduct took place

286 Chaste engaged in the conduct to induce persons to become area managers and purchase TRIMit in order that Chaste would receive money from those persons. It did so for the purpose of extracting the maximum amount from area managers without regard for the reasonable commercial expectations of the area managers or for the interests of long term viability of Chaste. It did so for the purpose of distributing to Mr Foster and Mr Webb, and persons and entities associated with them, the maximum possible amount whilst retaining the minimum funds in Chaste necessary for Chaste to maintain the appearance in the short term of conducting a genuine business.

287 Whilst I am not satisfied that at any time prior to resigning from Chaste Mr Mr McMullan had knowledge of Chaste's collateral purposes, I am satisfied that Mr McMullan was aware of Mr Foster's reputation as the instigator of schemes of this kind in promoting and selling purported slimming or weight loss products. I find that Mr McMullan knew of Mr Foster's involvement in the Chaste business and acted under the direction of, and/or in consultation with, Mr Foster in relation to the operation of the Chaste business. Mr McMullan actively promoted the resale price maintenance scheme and sold distributorships to area managers, receiving $1,000 in respect of each sale. Although Mr McMullan was aware that the agreements contained the provisions which constitute resale price maintenance, I accept that he was not aware that resale price maintenance was unlawful.

288 Mr McMullan did not disclose the involvement of Peter Foster to area managers or potential area mangers.

Whether the person has previously been found by the Court to have engaged in similar conduct

289 Mr McMullan has not previously been found by the court to have engaged in any similar conduct.

The deliberateness of the contravention and the period over which it extended

290 The conduct was deliberate and sophisticated and persisted for two years through a network of sales representatives and area managers. Mr McMullan was closely involved in Chaste's operations only from February 2000 to August 2000.

Whether the contravention arose out of the conduct of senior management at a lower level, and whether the company has a corporate culture conducive to compliance with the Act

291 Although Mr McMullan was Director of Sales for Chaste, it appears that he did not enjoy the authority or autonomy that one would normally associate with such a position. He was unaware of the financial position of Chaste. He did however intentionally act over approximately six months to induce area managers to enter into the agreements which contained terms which contravened the Act. Mr McMullan received approximately $54,000 in total for commissions on areas sold whilst he was Director of Sales.

Whether the contravenor has shown disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention

292 Mr McMullan did not cooperate with the ACCC prior to the hearing, or the filing of the applicant's case against him. He did not appear in the proceedings, or file a defence up until the eve of the hearing. At the trial, he cooperated by making admissions as to his involvement. The proposed penalty is said to reflect a reduction of approximately 10% to take into account that cooperation.

Parity with other respondents

293 The penalty recommended in respect of the McMullan is substantially below that which was recommended by the applicant in respect of more senior persons involved in the Chaste operations. Mr McMullan was involved in the contravening conduct for a shorter period of time than the other respondents. However, he was involved during the period when Chaste

enter into the agreements with area managers. Mr McMullan did not offer the same level of cooperation as Mr Xenodakis or Mr Cousins.

294 In light of the above, I consider that a penalty of $30,000 would be an appropriate penalty to be imposed on the eight respondent.

The other respondents

295 No penalties were sought against the tenth respondent. The sixth, eighth, ninth and tenth respondents consented to declarations and orders being made against them in relation to the contraventions of Part IV and Part V of the Act. Because the declarations and orders are made with the consent of those parties, I need say no more about them.

296 The declarations and orders made in respect to the first, second, third and fourth respondents reflect these reasons.

ORDERS

297 In relation to the first respondent, Chaste:

1. I declare that:
   1.1 The first respondent, between December 1999 and November 2001, by in trade or commerce offering and entering into agreements for the supply of goods, namely weight loss tablets, together with point of sale material and other related products, under an agreement, one of the terms of which was that area managers to whom the goods were supplied would not sell the said goods at a price less than the price specified from time to time by Chaste, has engaged in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).
   1.2 The first respondent by, between December 1999 and November 2001, using in trade or commerce in relation to goods supplied by Chaste to area managers for resale, the statements:
      (a) '… the company will be solely responsible for fixing, from time to time, the recommended retail price and the price at which the Area Manager purchases stock';

(b) '… it is most important that a regulated price policy be adhered to in the interest of all parties involved.';

(c) '… we have therefore established the following as the costing structure to be applied in all markets:

PROFIT STRUCTURE TRIMit™		
Area Manager Cost	$19.50	
Profit	$10.00	51%
Retailer Cost	$29.50	
Retailer Profit	$20.45	70%
Recommended Retail	$49.95	

(d) '15. Who determines the price at which I sell my stock?
The company will set the recommended retail price and wholesale price that must be adhered to by all Area Managers. There must be no discounting or price cutting without the written permission of the company. This ensures that everyone is protected from unnecessary price wars.'

(e) 'Cost to you…

What will TRIMit cost you?

Retailer Cost $32.45

Recommended Retail $54.95

Retailer profit $22.50

PROFIT **70%**'

being statements of prices that were likely to be understood by area managers as the prices below which the goods were not to be sold, has

engaged in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

I order that:

2. The first respondent pay to the Commonwealth of Australia a penalty of $600,000 in respect of its conduct which constituted engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

298 In relation to the second respondent, Mr Webb:

I declare that:

3. The second respondent, having directed the operations of the first respondent, being a corporation engaged in the supply or possible supply in trade or commerce, through distributors (area managers) of a purported weight loss aid named TRIMit, by making on behalf of Chaste, or causing or permitting to be made on behalf of Chaste:

3.1 a representation in documents provided to area managers and potential area managers that Chaste would promote TRIMit by an extensive national television, radio and magazine campaign with a forecast expenditure of over $1.5 million in the first year of sales and would further provide a national team of marketing, management and advertising experts to assist area managers when in fact and to his knowledge Chaste had no such plans or arrangements in place, had no apparent means of executing them, had not engaged in the represented marketing, management and advertising experts, and to the second respondent's knowledge had no financial means to fund the represented expenditure;

3.2 representations to area managers that delays in commencement of the said campaign were due to the actions of persons other than Chaste and its officers when in fact and to his knowledge the campaign had not proceeded because it had not been arranged or agreed to by Chaste and Chaste at his direction continually refused to pay deposits or other payments required for aspects of the campaign to proceed;

3.3 a representation to area managers and potential area managers that if they wished to discontinue their distribution arrangement with Chaste,

Chaste would upon ninety days notice, repurchase all unsold stock and point of sale material supplied to the area manager and arrange a new area manager for the distribution area when in fact and to his knowledge during the period when Chaste was making the representation, Chaste and the second respondent had no intention of making good the representation but wrote correspondence to area managers who sought to terminate their agreements, requiring them to continue to perform their obligations under the agreements, or refusing to refund their deposits in full, until such time as their areas were re-sold;

3.4 Representations that:

3.4.1 TRIMit was a thoroughly researched and scientifically tested product;

3.4.2 TRIMit's efficacy as a weight loss product was without question;

3.4.3 TRIMit (or an equivalent product) had been successfully launched in the United States and had been scientifically tested at eleven universities;

when in fact and to the knowledge of the second respondent TRIMit was a new and unique formulation and none of these matters was true;

3.5 Representations that:

3.5.1 clinical studies had shown the combination of ingredients in TRIMit were 700% more effective than hydroxycytric acid alone;

3.5.2 Chaste had the results of independent clinical trial of TRIMit (or an equivalent product) which proved it was a quality product, safe to use and effective as a weight loss aid;

when in fact and to the knowledge of the second respondent, Chaste did not have such results, and such clinical trials as were conducted for Chaste were conducted without scientifically acceptable protocols or design, without scientifically controlled conditions, and largely involved subjects who had an interest in the business of Chaste;

3.6 Representations that claims made by Chaste as to TRIMit's potency, use and effectiveness had a scientific basis and *Therapeutic Goods Act*

approval, when in fact and to the knowledge of the second respondent, the claims did not have a scientific basis, and such approval as was obtained under the *Therapeutic Goods Act* did not provide verification of the product's efficacy;

3.7 A representation to area managers and to the public that Chaste was a genuine business conducted on an ordinary commercial basis and that the opportunity offered by it to area managers was a genuine business opportunity when:

3.7.1 It was the fact that the fourth respondent had extensive involvement in the management and marketing of Chaste which involvement was, at the direction of the second respondent, deliberately concealed from the public and area managers;

3.7.2 It was the fact that the fourth respondent had convictions in relation to the unlawful sale and promotion of weight loss products, and a reputation as the instigator of dubious and failed schemes for profit for the conduct of businesses promoting and selling or purporting to sell purported slimming or weight loss products, and that Chaste and the second respondent were deliberately concealing the involvement of the fourth respondent in Chaste because the public and potential area managers of Chaste would be unlikely to buy its weight loss products or become its distributors if they knew of the involvement of the fourth respondent in Chaste;

3.7.3 It was the fact and he knew, but did not inform area managers or the public that it was his intention and the intention of the fourth respondent as the controllers of Chaste that gross income from sale of distributorships and goods by Chaste would be distributed to, or at the direction of the second and fourth respondents, and Chaste would not retain adequate funds to make good on representations of future expenditure by Chaste;

3.7.4 It was the fact and he knew, but did not inform area managers or the public, that gross income from sale of distributorships and goods by chaste had been distributed to, or at the direction of the second and fourth respondents, and Chaste did not retain

adequate funds to make good on representations of future expenditure by Chaste;

3.7.5 It was fact, and the second respondent knew, that Chaste was operated by him and others for the purpose of:

3.7.5.1 Extracting the maximum revenue from area managers without regard for the long term viability of Chaste;

3.7.5.2 Inducing persons to become area managers and purchase TRIMit only so that Chaste would receive money from those persons;

3.7.5.3 Distributing to the second respondent and others the maximum possible gross income of Chaste whilst retaining the minimum funds in Chaste necessary for Chaste to maintain the appearance in the short term of conducting a genuine business;

3.8 Representations to potential area managers that Chaste was a good business opportunity; while deliberately not revealing the involvement of the fourth respondent to area managers and potential area managers, and thereby misrepresenting the risks associated with Chaste's business opportunity;

has, in respect of each representation, been directly knowingly concerned in Chaste engaging in conduct that was misleading and deceptive in contravention of section 52 of the *Trade Practices Act 1974* (Cth).

4. The second respondent, by representing to area managers and potential area managers of Chaste that the area management agreements offered by Chaste were not franchise agreements when in fact and to his knowledge under those agreements:

4.1 Chaste granted to the area manager, the right to carry on the business of offering, supplying or distributing TRIMit in a specified geographical territory in Australia under a system or marketing plan which was substantially determined, controlled or suggested by Chaste;

4.2 The operation of the above business was substantially or materially associated with the trade mark, advertising or commercial symbol,

known as TRIMit, which is or was owned, used or licensed by Chaste; and

4.3 Before starting the business, the area manager was required to pay Chaste an amount including a payment for TRIMit and associated franchise services;

and the agreements were thereby franchise agreements within the meaning of subcl 4(1) of the Franchising Code of Conduct, has, in respect of each representation, been directly knowingly concerned in Chaste engaging in conduct that was misleading and deceptive in contravention of s 52 of the *Trade Practices Act 1974* (Cth).

5. The second respondent, by on behalf of Chaste, on 6 February 2001:

5.1 threatening to suspend advertising by Chaste in New South Wales unless area managers cancelled a proposed meeting between them;

5.2 threatening to terminate without further notice the area management agreements of area managers who attended any gathering of area managers to discuss Chaste's business unless such gathering had been sanctioned by Chaste;

5.3 thereby directing area managers not to associate with one another for a lawful purpose;

was knowingly concerned in and aided, abetted, counselled or procured Chaste, in trade or commerce, to contravene cl 15 of the Franchising Code of Conduct, and thereby to contravene an applicable industry code in contravention of s 51AD of the *Trade Practices Act 1974* (Cth).

6. The second respondent, between December 1999 and November 2001, knowingly permitting, assisting and authorising Chaste in trade or commerce to enter into agreements for the supply of goods, namely, weight loss tablets, together with point of sale material and other related products, under an agreement, one of the terms of which was that area managers to whom the goods were supplied would not sell the said goods at a price less than the price specified from time to time by Chaste, which term was known to the second respondent, has been directly knowingly concerned in Chaste engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

7. The second respondent by, between December 1999 and November 2001, knowingly permitting, assisting and authorising Chaste to use in trade or commerce in relation to goods supplied by Chaste to area managers for resale, the statements:

(a) '… the company will be solely responsible for fixing, from time to time, the recommended retail price and the price at which the area manager purchases stock';

(b) '… it is most important that a regulated price policy be adhered to in the interest of all parties involved.'

(c) '… we have therefore established the following as the costing structure to be applied in all markets

PROFIT STRUCTURE TRIMit™		
Area Manager Cost	$19.50	
Profit	$10.00	51%
Retailer Cost	$29.50	
Retailer Profit	$20.45	70%
Recommended Retail	$49.95	

(d) '15. Who determines the price at which I sell my stock?

The company will set the recommended retail price and wholesale price that must be adhered to by all area managers. There must be no discounting or price cutting without the written permission of the company. This ensures everyone is protected from unnecessary price wars.'

(e) 'Cost to You…

What will TRIMit cost you?

Retailer Cost	$32.45
Recommeded Retail	$54.95
Retailer Profit	$22.50
PROFIT	70%'

being statements of prices that were likely to be understood by area managers as the prices below which the goods were not to be sold, has been directly knowingly concerned in Chaste engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

299 I order that:

8. The second respondent pay to the Commonwealth of Australia, within 45 days of the date of this order, a penalty of $150,000 in respect of being knowingly concerned in the conduct of a corporation engaging in the practice of resale price maintenance in contravention of section 48 of the *Trade Practices Act 1974* (Cth), as alleged in paragraphs 106 and 112(c) of the statement of claim.
9. The second respondent be restrained, for five years from the date of this order, from being directly or indirectly knowingly concerned in the promotion or conduct by a corporation of any business relating to weight loss, cosmetic or health industry products or services of any kind.
10. The second respondent be restrained, for five years from the date of this order, from promoting or taking part in any business in relation to weight loss or health industry products or services with which the second respondent knows or believes the fourth respondent to be directly or indirectly involved, unless he discloses to any prospective customer or franchisee of the business with whom he deals in the course of or in the promotion of the business, his knowledge or belief as to the fact of, and the nature of, the involvement of the fourth respondent.
11. The second respondent be restrained, for five years from the date of this order, from being directly or indirectly knowingly concerned in or party to, or aiding, abetting, counselling or procuring, a corporation, which supplies to another person products said to have health, weight loss or cosmetic benefits:
    11.1 inducing or attempting to induce that other person not to sell those products at a price less than a price specified by that corporation; or
    11.2 using in relation to those products a statement of price likely to be understood by that other person as a price below which the products are not to be sold.
12. The second respondent be restrained for five years from the date of this order from in any manner being knowingly concerned in any corporation in trade or

commerce, making, or permitting to be made, any representation as to the nature, quality, fitness for any purpose, testing, history, composition, standard, approval by any person, performance characteristics, uses or benefits of any goods or services unless, prior to making the representation:

12.1 the respondent believes the representation to be true and accurate;

12.2 the respondent informs the representee in writing of all information of which he is aware that refutes, qualifies or contradicts any part of the representation; and

12.3 the respondent provides the representee with a copy of these orders or informs the representee of the existence of these orders and gives the representee the address of the Federal Court website, namely www.fedcourt.gov.au, from which a copy of these orders can be obtained.

13. The second respondent be restrained for five years from the date of this order from in any manner being knowingly concerned in any corporation in trade or commerce making any representation as to the future payment by it of any sum to any person or the future giving by it of any benefit to any person unless:

13.1 the second respondent has made all necessary enquiries to satisfy himself that the corporation intends to make the payment or give the benefit and has reasonable grounds to believe it can make the payment or give the benefit; and

13.2 the second respondent has fully recorded in writing the details of all matters he has relied upon in so satisfying himself (including the source of the information and the time it was obtained) and has retained copies of all documents relied upon.

14. The second respondent shall retain the records and copies of documents prepared by or relied on by him pursuant to order 13 or above for at least six years from the date of this order and shall produce a complete and true copy of such material to the applicant upon request within 7 days of receiving any such request.

15. The seal of the Court be affixed to the reasons for judgment for the purposes of s 83 of the Act.

16. The second respondent pay the applicant's costs of and incidental to these proceedings, such costs to be taxed if not agreed within 28 days of the date of this order.

300 In relation to the third respondent Orlawood:

I declare that:

17. The third respondent, between December 1999 and November 2001, to the extent that the conduct of the second respondent in respect to the declarations in paragraph 3 hereof constituted consultancy services provided by the second respondent, via the third respondent, to the first respondent, for which payments were made to the third respondent by the first respondent, pursuant to arrangements between them dated 6 October 1999, has, in respect of each representation, been directly knowingly concerned in Chaste engaging in conduct that was misleading and deceptive in contravention of s 52 of the *Trade Practices Act 1974* (Cth).

301 I order that:

18. The third respondent be restrained, for five years from the date of this order, from being directly or indirectly knowingly concerned in the promotion or conduct by a corporation of any business relating to weight loss, cosmetic of health industry products or services of any kind.

19. The third respondent be restrained, for five years from the date of this order, from in any manner being knowingly concerned in any corporation in trade or commerce, making, or permitting to be made, any representation as to the nature, quality, fitness for any purpose, testing, history, composition, standard, approval by any person, performance characteristics, uses or benefits of any goods or services unless, prior to making the representation:

    19.1 the respondent believes the representation to be true and accurate;

    19.2 the respondent informs the representee in writing of all information of which he is aware that refutes, qualifies or contradicts any part of the representation; and

    19.3 the respondent provides the representee with a copy of these orders or informs the representee of the existence of these orders and gives the representee the address of the Federal Court website, namely

www.fedcourt.gov.au, from which a copy of these orders can be obtained.

20. The third respondent be restrained, for five years from the date of this order, from in any manner being knowingly concerned in any corporation in trade or commerce making any representation as to the future payment by it of any sum to any person or the future giving by it of any benefit to any person unless:

    20.1 the second respondent has made all necessary enquiries to satisfy himself that the corporation intends to make the payment or give the benefit and has reasonable grounds to believe it can make the payment or give the benefit;

    20.2 the second respondent has fully recorded in writing the details of all matters he has relied upon in so satisfying himself (including the source of the information and the time it was obtained) and has retained copies of all documents relied upon.

21. The seal of the Court be affixed to the reasons for judgment for the purposes of s 83 of the Act.

22. The third respondent pay the applicant's costs of and incidental to these proceedings, such costs to be taxed if not agreed within 28 days of the date of this order.

302 In relation to the fourth respondent, Mr Foster:

I declare that:

23. The fourth respondent, having controlled and directed the operations of the first respondent (Chaste), being a corporation engaged in the supply or possible supply in trade or commerce, through distributors (area managers) of a purported weight loss aid named TRIMit, by making on behalf of Chaste, or causing or permitting to be made on behalf of Chaste:

    23.1 a representation in documents provided to area managers and potential area managers that Chaste would promote TRIMit by extensive national television, radio and magazine campaign with a forecast expenditure of over $1.5 million in the first year of sales and would further provide a national team of marketing, management and advertising experts to assist area managers when in fact and to his

knowledge Chaste had no such plans or arrangements in place, had no apparent means of executing them, had not engaged the represented marketing, management and advertising experts, and to the fourth respondent's knowledge had no financial means to fund the represented expenditure;

23.2 representations to area managers that delays in commencement of the said campaign were due to the actions of persons other than Chaste and its officers when in fact and to his knowledge that campaign had not proceeded because it had not been arranged or agreed to by Chaste and Chaste at his direction continually refused to pay deposits or other payments required for aspects of the campaign to proceed;

23.3 a representation to area managers and potential area managers that if they wished to discontinue their distribution arrangement with Chaste, Chaste would, upon ninety days notice, repurchase all unsold stock and point of sale material supplied to the area manager and arrange a new area manager for the distribution area when in fact and to his knowledge during the period when Chaste was making the representation, Chaste and the fourth respondent had no intention of making good the representation but wrote correspondence to area managers who sought to terminate their agreements, requiring them to continue to perform their obligations under the agreements, or refusing to refund their deposits in full, until such time as their agreements were re-sold;

23.4 representations that:

23.4.1 TRIMit was a thoroughly researched and scientifically tested product;

23.4.2 TRIMit's efficacy as a weight loss product was without question;

23.4.3 TRIMit (or an equivalent product) had been successfully launched in the United States and had been scientifically tested at eleven universities;

when in fact and to the knowledge of the fourth respondent TRIMit was a new and unique formulation and none of those matters were true;

23.5 representations that:

23.5.1 clinical studies had shown the combination of ingredients in TRIMit were 700% more effective than hydroxycitric acid alone;

23.5.2 Chaste had the results of independent research into, scientific testing of, or independent clinical trials of TRIMit (or an equivalent product) which proved it was a quality product, safe to use and effective as a weight loss aid;

when in fact and to the knowledge of the fourth respondent, Chaste did not have such results, and such clinical trials as were conducted for Chaste were conducted without scientifically accepted protocols or design, without scientifically controlled conditions, and largely involved subjects who had an interest in the business of Chaste;

23.6 representations that claims made by Chaste as to TRIMit's potency, use and effectiveness had a scientific basis and *Therapeutic Goods Act* approval, when in fact and to the knowledge of the fourth respondent, the claims did not have a scientific basis, and such approval as was obtained under the *Therapeutic Goods Act* did not provide verification of the product's efficacy;

23.7 a representation to area managers and the public that Chaste was a genuine business conducted on an ordinary commercial basis and that the opportunity offered by it to area managers was a genuine business opportunity when:

23.7.1 it was the fact that the fourth respondent had extensive involvement in the management and marketing of Chaste which involvement was, at the direction of the fourth respondent, deliberately concealed from the public and area managers;

23.7.2 it was the fact that the fourth respondent had convictions in relation to the unlawful sale and promotion of weight loss products, and a reputation as the instigator of dubious and failed schemes for profit for the conduct of businesses promoting and selling or purporting to sell purported slimming or weight loss products, and that Chaste and the fourth respondent were deliberately concealing the involvement of the fourth respondent in Chaste because the public and potential

area managers of Chaste would be unlikely to buy its weight loss products or become its distributors if they knew of the involvement of the fourth respondent in Chaste;

23.7.3 it was the fact and he knew, but did not inform area managers or the public that it was his intention and the intention of the second respondent as the controllers of Chaste that gross income from sale of distributorships and goods by Chaste would be distributed to, or at the direction of the second and fourth respondents, and Chaste would not retain adequate funds to make good on the representations of future expenditure by Chaste;

23.7.4 it was the fact and he knew, but did not inform area managers or the public that gross income from sale of distributorships and goods by Chaste had been distributed to, or at the direction of the second and fourth respondents, and Chaste did not retain adequate funds to make good on representations of future expenditure by Chaste;

23.7.5 it was the fact, and the fourth respondent knew, that Chaste was operated by him and others for the purpose of:

23.7.5.1 extracting the maximum revenue from area managers and purchase TRIMit only so that Chaste would receive money from those persons;

23.7.5.2 inducing persons to become area managers and purchase TRIMit so that Chaste would receive money from those persons;

23.7.5.3 distributing the fourth respondent and others the maximum possible gross income of Chaste necessary for Chaste to maintain the appearance in the short term of conducting a genuine business;

23.8 representations to potential area managers that Chaste was a good business opportunity, while deliberately not revealing the involvement of the fourth respondent to area managers and potential area managers,

and thereby misrepresenting the risks associated with Chaste's business opportunity'

has, in respect of each representation, been directly knowingly concerned in a corporation engaging in conduct that was misleading and deceptive in contravention of section 52 of the *Trade Practices Act 1974* (Cth).

24. The fourth respondent by, between December 1999 and November 2001, knowingly permitting, assisting and authorising a corporation in trade or commerce to enter into agreements for the supply of goods, namely weight loss tablets, together with point of sale material and other related products, under an agreement, one of the terms of which was that area managers to whom the goods were supplied would not sell the said goods at a price less than the price specified from time to time by Chaste, which term was drafted by the fourth respondent, has been directly knowingly concerned in Chaste engaging in the practice of resale price maintenance in contravention of s 48 of the Act.

25. The fourth respondent by, between December 1999 and November 2001, knowingly permitting, assisting and authorising a corporation to use in trade or commerce in relation to goods supplied by that corporation to area managers for resale, the statements:

(a) '… the company will be solely responsible for fixing, from time to time, the recommended retail price and the price at which the area manager purchases stock';

(b) '… it is most important that a regulated price policy be adhered to in the interest of all parties involved.'

(c) '… we have therefore established the following as the costing structure to be applied in <u>all</u> markets

PROFIT STRUCTURE TRIMit™		
Area Manager Cost	$19.50	
Profit	<u>$10.00</u>	51%
Retailer Cost	$29.50	
Retailer Profit	<u>$20.45</u>	70%

Recommended Retail	$49.95

(d) '15. Who determines the price at which I sell my stock?

The company will set the recommended retail price and wholesale price that must be adhered to by all area managers. There must be no discounting or price cutting without the written permission of the company. This ensures everyone is protected from unnecessary price wars.'

(e) 'Cost to You…

What will TRIMit cost you?

Retailer Cost	$32.45
Recommeded Retail	$54.95
Retailer Profit	$22.50
PROFIT	**70%**'

being statements of prices that were likely to be understood by area managers as the prices below which the goods were not to be sold, has been directly knowingly concerned in Chaste engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

303 I order that:

26. The fourth respondent pay to the Commonwealth of Australia, within 45 days of the date of this order, a penalty of $150,000 in respect of his being knowingly concerned in the conduct of a corporation engaging in the practice of resale price maintenance in contravention of section 48 of the *Trade Practices Act 1974* (Cth), as alleged in paragraphs 106 and 113(c) of the statement of claim.

27. The fourth respondent be restrained, for five years from the date of this order, from being directly or indirectly knowingly concerned in the promotion or conduct by a corporation of any business relating to weight loss, cosmetic or health industry products or services of any kind.

28. The fourth respondent be restrained, for five years from the date of this order from being directly or indirectly knowingly concerned in or party to, or aiding,

abetting, counselling or procuring, a corporation, which supplies to another person products said to have health, weight loss or cosmetic benefits:

28.1 inducing or attempting to induce that other person not to sell those products at a price less than the price specified by that corporation; or

28.2 using in relation to those products a statement of price likely to be understood by that other person as a price below which the products are not to be sold.

29. The fourth respondent be restrained for a period of five years from the date of this order from in any manner being knowingly concerned in any corporation in trade or commerce, making, or permitting to be made, any representation as to the nature, quality, fitness for any purpose, testing, history, composition, standard, approval by any person, performance characteristics, uses or benefits of any good or service unless, prior to making the representation:

29.1 he believes the representation to be true and accurate;

29.2 the corporation informs the representee in writing of all information of which he is aware that refutes, qualifies or contradicts any part of the representation; and

29.3 the corporation provides the representee with a copy of these orders or informs the representee of the existence of these orders and gives the representee the address of the Federal Court website, namely www.fedcourt.gov.au, from which a copy of these orders can be obtained.

30. The fourth respondent be restrained for five years from the date of this order from being knowingly concerned in any corporation in trade or commerce making any representation as to the future payment by it of any sum to any person or the future by giving by it of any benefit to any person unless:

30.1 he has made all necessary enquiries to satisfy himself that the corporation intends to make the payment or give the benefit and has reasonable grounds to believe it can make the payment or give the benefit; and

30.2 he has fully recorded in writing the details of all matters he has relied upon in so satisfying himself (including the source of the information and the time it was obtained) and has retained copies of all documents relied upon.

31. The fourth respondent shall retain the records and copies of documents prepared by or relied on by him pursuant to order 30 above for at least six years from the date of this order and shall produce a complete and true copy of such material to the applicant upon request within seven days of receiving such a request.

32. The fourth respondent pay the applicant's costs of and incidental to these proceedings as against him, such costs to be taxed if not agreed within 28 days of the date of this order.

304 In relation to the sixth respondent, Mr Cousins:

I declare that:

33. The sixth respondent, having been engaged by and acted:

(a) from approximately March 2000 to April 2000 as a retained legal adviser to;

(b) from May 2000 to November 2000 as the manager and Chief Executive Officer of; and

(c) from November 2000 to November 2001 as legal advisor to:

a corporation engaged in the supply or possible supply in trade or commerce, through distributors (area managers) of a purported weight loss aid named TRIMit and having held himself out, and having permitted the corporation to hold him out as having these positions, by making on behalf of the corporation, or causing or permitting to be made on behalf of the corporation:

33.1 a representation in documents provided to area managers and potential area managers that the corporation would promote TRIMit by an extensive national television, radio and magazine campaign with a forecast expenditure of over $1.5 million in the first year of sales and would further provide a national team of marketing, management and advertising experts to assist area managers when in fact and to his knowledge the corporation had no such plans or arrangements in place, had no apparent means of executing them, had not engaged the represented marketing, management and advertising experts, and the sixth respondent deliberately refrained from making the necessary enquiries to ascertain whether the corporation had the financial means to fund the represented expenditure;

33.2 representations to area managers that delays in commencement of the said campaign were due to the actions of persons other than the corporation and its officers when in fact and to his knowledge the campaign had not proceeded because it had not been arranged or agreed to by the corporation and the corporation continually refused to pay deposits or other payments required for aspects of the campaign to proceed;

33.3 a representation to area managers and potential area managers that if they wished to discontinue their distribution arrangement with the corporation, the corporation would, upon ninety days notice, repurchase all unsold stock and point of sale material supplied to the area manager and arrange a new area manager for the distribution area when in fact and to his knowledge during the period when the corporation was making the representation, the corporation and the sixth respondent wrote correspondents to area managers who sought to terminate their agreements, requiring them to continue to perform their obligations under the agreements, or refusing to refund their deposits in full, until such time as their areas were re-sold.

33.4 representations that:

33.4.1 TRIMit was a thoroughly researched and scientifically tested product;

33.4.2 TRIMit's efficacy as a weight loss product was without question;

33.4.3 TRIMit (or an equivalent product) had been successfully launched in the United States and has been scientifically tested at eleven universities;

when in fact and to the knowledge of the sixth respondent TRIMit was a new and unique formulation and none of these matters were true;

33.5 representations that:

33.5.1 clinical studies had shown the combination of ingredients in TRIMit were 700% more effective than hydroxycitric acid alone;

33.5.2 the corporation had the results of independent research into, scientific testing of, or independent clinical trials of TRIMit (or

an equivalent product) which proved it was a quality product, safe to use and effective as a weight loss aid;

when in fact and to the knowledge of the sixth respondent, the corporation did not have such results, and such clinical trials as were conducted for the corporation were conducted without scientifically controlled conditions, and largely involved subjects who had an interest in the business of the corporation;

33.6 representations that claims made by the corporation as to TRIMit's potency, use and effectiveness had a scientific basis and *Therapeutic Goods Act* approval, when in fact and to the knowledge of the sixth respondent, the claims did not have a scientific basis, and such approval as was obtained under the *Therapeutic Goods Act* did not provide verification of the product's efficacy;

33.7 a representation to area managers and to the public that the corporation was a genuine business conducted on an ordinary commercial basis and that the opportunity offered by it to area managers was a genuine business opportunity when:

33.7.1 it was the fact and he knew, but did not inform the pubic and area managers, that the fourth respondent had extensive involvement in the management and marketing of the said corporation;

33.7.2 it was the fact and he was aware that the fourth respondent had convictions in relation to the unlawful sale and promotion of weight loss products;

33.7.3 he was aware that the fourth respondent had a reputation as the instigator of dubious and failed schemes for profit for the conduct of businesses promoting and selling or purporting to sell purported slimming or weight loss products;

33.7.4 he believed that if the public and potential area managers of the corporation knew of the involvement of the fourth respondent in the said corporation that they would be unlikely to buy its weight loss products or become its distributors;

33.7.5 it was the fact and he knew that while allowing himself to be held out as chief executive officer of the corporation he was not

authorised or empowered to make routine or day to day decisions in relation to the running of the company or to incur expenses or authorise payments without the express instruction of the second and fourth respondents;

33.7.6 it was the fact and he knew that instructions given to him by the second and fourth respondents with which he complied, including as to correspondence to be sent to potential area managers, area managers and advertising agencies with whom the corporation was dealing, were contrary to what he believed to be proper business standards contrary to his own business ethics;

33.7.7 it was the fact and he knew that communications to area managers which described him as being the chief executive officer and having the full authority of the role were untrue;

33.7.8 it was the fact and he knew that invoices sent to the corporation by external persons who had carried out services for it were routinely not paid, or were partially paid or were queried or contested on grounds that he believed to be unreasonable and not genuine;

33.7.9 it was the fact and he knew, but did not inform area managers or the public, that gross income from sale of distributorships and goods by the corporation had been distributed to, or at the direction of the second and fourth respondents but refrained from making any enquiry, as he should have in all the circumstances, as to whether there were any, or any adequate, funds to make good on representations on future expenditure by the corporation;

33.8 representations to potential area managers that the corporation was a good business opportunity, while deliberately not revealing the involvement of the fourth respondent to area managers and potential area managers, and thereby misrepresenting the risks associated with the corporation's business opportunity

has, in respect of each representation, been directly knowingly concerned in a corporation engaging in conduct that was misleading or deceptive in contravention of s 52 of the *Trade Practices Act 1974* (Cth).

34. The sixth respondent by, between at least May 2000 and November 2001, knowingly permitting, assisting and authorising a corporation in trade or commerce to enter into agreements for the supply of goods, namely weight loss tablets, together with point of sale material and other related products, under an agreement, one of the terms of which was that area managers to whom the goods were supplied would not sell the said goods at a price less than the price specified from time to time by the corporation, has been directly knowingly concerned in the corporation engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

35. The sixth respondent by, between at least May 2000 and November 2001, knowingly permitting, assisting and authorising a corporation to use in trade or commerce in relation to goods supplied by that corporation to area managers for resale, the statements:

(a) '… the company will be solely responsible for fixing, from time to time, the recommended retail price and the price at which the area manager purchases stock';

(b) '… it is most important that a regulated price policy be adhered to in the interest of all parties involved.'

(c) '… we have therefore established the following as the costing structure to be applied in <u>all</u> markets

PROFIT STRUCTURE TRIMit™		
Area Manager Cost	$19.50	
Profit	<u>$10.00</u>	51%
Retailer Cost	$29.50	
Retailer Profit	<u>$20.45</u>	70%
Recommended Retail	$49.95	

(d) '15. Who determines the price at which I sell my stock?

The company will set the recommended retail price and wholesale price that must be adhered to by all area managers. There must be no discounting or price cutting without the written permission of the company. This ensures everyone is protected from unnecessary price wars.'

(e) 'Cost to You…

What will TRIMit cost you?

Retailer Cost	$32.45
Recommeded Retail	$54.95
Retailer Profit	$22.50
PROFIT	**70%**'

being statements of prices that were likely to be understood by area managers as the prices below which the goods were not to be sold, has been directly knowingly concerned in Chaste engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth).

305 I order that:

36. The sixth respondent pay the Commonwealth of Australia a penalty of $100,000 in respect of his being knowingly concerned in the conduct of a corporation engaging in resale price maintenance in contravention of s 48 of the *Trade Practices Act 1948* (Cth), as alleged in paragraphs 106 and 116(c) of the statement of claim. The $100,000 penalty to be payable over two years by four instalments of $25,000, the first to be made sixth months from 16 December 2005, and each of the further three instalments every six months thereafter. In default of any instalment, the full balance will be immediately due.

37. The sixth respondent be restrained, for five years from the date of this order, from being directly or indirectly knowingly concerned in or party to, or aiding, abetting, counselling or procuring, a corporation, which supplies to another person products said to have health, weight loss or cosmetic benefits:

37.1 inducing or attempting to induce that other person not to sell those products at a price less than a price specified by that corporation; or

37.2 using in relation to those products a statement of price likely to be understood by that other person as a price below which the products are not to be sold.

38. The sixth respondent be restrained, for five years from the date of this order, from promoting or taking part in any business in relation to weight loss or health industry products or services with which he knows or believes the fourth respondent to be directly or indirectly involved, unless he discloses to any prospective customer or franchisee of the business with whom he deals in the course of or in promotion of the business, his knowledge or belief as to the fact of, and the nature of, the involvement of the fourth respondent.

39. The sixth respondent be restrained for a period of five years from the date of this order from in any manner being knowingly concerned in any corporation (other than an incorporated legal practice) in trade or commerce, making or permitting to be made, any representation as to the nature, quality, fitness for any purpose, testing, history, composition, standard, approval by any person, performance characteristics, uses or benefits of any good or service unless, prior to making the representation, he:

39.1 believes the representation to be true and accurate;

39.2 informs the representee of his qualifications and expertise relevant to the subject matter of the representation;

39.3 informs the representee of all information of which he is aware that refutes or contradicts any part of the representation; and

39.4 provides the representee with a copy of these orders or informs the representee of the existence of these orders and gives the representee the address of the Federal Court website, namely www.fedcourt.gov.au, from which a copy of these orders can be obtained.

40. The sixth respondent be restrained for five years from the date of this order from being knowingly concerned in any corporation in trade or commerce making any representation as to the future payment by it of any sum to any person or the future giving by it of any benefit to any person unless:

40.1 he has made all necessary enquiries to satisfy himself that the corporation intends to make the payment or give the benefit and has

reasonable grounds to believe it can make the payment or give the benefit; and

40.2 he has fully recorded in writing the details of all matters he has relied upon in so satisfying himself (including the source of the information and the time it was obtained) and has retained copies of all documents relied upon.

41. The sixth respondent shall retain the records and copies of documents prepared by or relied on by him pursuant to order 40 above for at least six years from the date of this order and shall produce a complete and true copy of such material to the applicant upon request within seven days of receiving any such request.

42. The sixth respondent pay the applicant's costs of and incidental to these proceedings as against him in the agreed amount of $25,000, which amount is from the date of these orders a debt due and payable to the applicant on 2 September 2005.

306 In relation to the eighth respondent, Mr McMullan:

I order that:

43. The eighth respondent pay to the Commonwealth of Australia, a penalty of $30,000 in respect of his ancillary involvement in a corporation engaging in the practice of resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974* (Cth), as alleged in paragraphs 106 and 117(c) of the statement of claim, such penalty to be paid as follows:

43.1 the amount of $15,000 on or before 14 June 2008;

43.2 the further amount of $15,000 on or before 14 June 2010;

save that should the first instalment not be paid on or before the due date, the full amount of $30,000 becomes due and payable immediately.

44. The eighth respondent be restrained, for a period of three years, from being directly or indirectly knowingly concerned in or party to, or aiding, abetting, counselling or procuring, a corporation, which supplies to another person products said to have health, weight loss or cosmetic benefits:

44.1 inducing or attempting to induce the other person not to sell those products at a price less than a price than a price specified by that corporation; or

44.2 using in relation to those products a statement of price likely to be understood by that other person as a price below which the products are not to be sold.

45. The eighth respondent be restrained, for a period of three years, from promoting or taking part in any business in relation to weight loss or health industry products or services with which he knows or believes the fourth respondent to be directly or indirectly involved, unless he discloses to any prospective customer or franchisee of the business with whom he deals in the course of or in promotion of the business, his knowledge or belief as to the fact of, and the nature of, the involvement of the fourth respondent.

46. The eighth respondent pay the applicant's costs of an incidental to these proceedings in the agreed amount of $20,000, to be paid as follows:

46.1 the amount of $10,000 on or before 14 June 2008;

46.2 the further amount of $10,000 on or before 14 June 2010;

save that should the first instalment not be paid on or before the due date, the full amount of $20,000 becomes due and payable immediately.

307 In relation to the ninth respondent, Mr Cooper:

I order that:

47. The ninth respondent be restrained, for a period of three years, from promoting or taking part in any business in relation to weight loss or health industry products or services with which he knows or believes the fourth respondent to be directly or indirectly involved, unless he discloses to any prospective customer or franchisee of the business with whom he deals in the course of or in promotion of the business, his knowledge or belief as to the fact of, and the nature of, the involvement of the fourth respondent.

48. The ninth respondent pay the applicant's costs of and incidental to these proceedings in the agreed amount of $3,000, such amount to be paid in equal monthly instalments of $50 on or before the 15 day of each month, commencing on 15 September 2005 and concluding 15 August 2010, save that if any instalment is not paid on or before the due date the entire amount of the $3,000 then unpaid becomes immediately due and payable.

308 In relation to the tenth respondent, Dr D'Alton:

I declare that:

49. The tenth respondent, having been between December 1999 and November 2001 engaged by a corporation as a consultant to assist with the supply or possible supply in trade or commerce of a purported weight loss aid called TRIMit and at all material times permitting that corporation to hold him out, and holding himself out, to the public and to area managers of that corporation as its Research Director and as Chairman of its Market Research and Development Committee; and

49.1 assisting that corporation in the drafting of, and authorising and consenting to the publication and making by that corporation the following representations, namely:

49.1.1 that the corporation was marketing a new product, TRIMit, which had been successfully launched in the United States, when in fact and to his knowledge the TRIMit tablet had not been launched in the United States successfully or at all;

49.1.2 that TRIMit had been scientifically tested at 11 Universities and was found to be safe and effective, when in fact and to his knowledge the TRIMit tablet, or a product with the specifications of the TRIMit tablet, had not been scientifically tested at 11 universities or at all;

49.1.3 that the efficacy of TRIMit as a diet pill was beyond question, that TRIMit was an effective weight loss aid, and that TRIMit was a quality product thoroughly researched and scientifically proven as a weight loss aid, when in fact and to his knowledge the corporation had not conducted and was not in receipt of results of independent research into specific testing or independent clinical trails of the TRIMit tablet or a product with the specifications of the TRIMit tablet proving that the TRIMit weight loss tablet was a quality product, safe to use and effective as a weight loss aid;

49.1.4 that the unique combination of ingredients in TRIMit ensured that the pill was 700% more effective than if it contained HCA only, when in fact and to his knowledge the corporation was not in receipt of results of independent research to this effect,

but he complied a report summarising the findings of some overseas research reports on products none of which had the specifications or comparable specifications of TRIMit;

49.1.5 that comprehensive clinical trials had been conducted by the tenth respondent on patients in Australia with respect to the use of the product TRIMit, and the clinical trials scientifically proved that the product TRIMit is an effective diet pill or weight loss aid, when in fact and to his knowledge the corporation had not conducted independent clinical trials of TRIMit; and the human trials conducted by him were in fact and to his knowledge conducted without scientifically controlled conditions and largely amongst persons who had an interest in the success of the corporation business or their associates;

49.1.6 that Australian scientists analysed the research, conducted over three decades, into the three active ingredients in TRIMit, when in fact and to his knowledge he compiled a report summarising the findings of some overseas research reports on products none of which had the specifications or comparable specifications of TRIMit;

49.1.7 that he was the leader of a scientific research team which:

(a) for three years, investigated the formulation of TRIMit;

(b) devised an effective blend of compounds used in the formulation of TRIMit;

(c) devised a manufacturing process that resulted in the most effective diet tablet in the world;

when in fact and to his knowledge he did not lead any scientific research team which accomplished these tasks or any other tasks and he had no scientific qualification to undertake such research.

49.1.8 That:

(a) the use of the product TRIMit generates rapid weight loss, and inhibits the production of fat in the body;

(b) TRIMit had been thoroughly researched, and tested worldwide; and

(c) TRIMit was a potent pill with no side effects;

when in fact and to his knowledge the corporation and not conducted and was not in receipt of results of the independent research into or scientific testing or independent clinical trials of the TRIMit tablet or a product with the specifications of the TRIMit tablet proving that the TRIMit weight loss tablet was effective as a weight loss aid;

49.1.9 That he had conducted controlled clinical trials of TRIMit, using 24 persons randomly selected, when the human trials were in fact and to his knowledge conducted without scientifically controlled conditions and largely amongst persons who had an interest in the success of the corporation business or their associates;

49.1.10 That the methodology of the trial followed established protocols that are accepted by the Therapeutic Goods Administration and the Australian Bureau of Statistics, when in fact and to his knowledge the corporation had not conducted independent clinical trials in accordance with protocols established under the *Therapeutic Goods Act 1989* (Cth) or used by the Australian Bureau of Statistics.

49.1.11 That:

(a) scientific evidence supported the finding that taking the recommended dosage of TRIMit without a specific dietary regime or exercise plan would result in weight loss;

(b) that the product had been scientifically tested; and

(c) that the product had been scientifically and statistically proven to be effective as a diet pill or a weight loss aid;

when in fact and to his knowledge the corporation had not conducted and was not in receipt of results of independent research into or scientific testing or independent clinical trials of

the TRIMit tablet or a product with the specifications of the TRIMit tablet proving that the TRIMit weight loss tablet was effective as a weight loss aid;

49.1.12 that the research results of eight trials reported on by him were analogous to the use of TRIMit and supported the use of TRIMit as a weight loss aid, when in fact and to his knowledge:

(a) he compiled a report summarising the findings of some overseas research reports on products none of which had the specifications of TRIMit;

(b) he did not include or mention in his report, published reports by the American Medical Association and the Australian Medical Association which contradicted the reports he summarised;

(c) he did not mention in his report that the research reports suggesting efficacy of ingredients that were components of TRIMit to which he referred, had been prepared by employees of the manufacturers of those ingredients;

(d) he knew that, even if the purportedly active ingredient HCA had a weight loss effect, TRIMit contained half or less than half of the amount of HCA than tablets used in research overseas;

49.2 assisting the corporation in drafting the test of, and making as spokesperson for the corporation the following representations, namely:

49.2.1 that clinical trials under scientifically controlled conditions were currently being conducted to test the effectiveness of TRIMit as a weight loss aid, when in fact and to his knowledge the human trials were conducted without scientifically controlled conditions and largely amongst persons who had an interest in the success of the coporation business or their associates;

49.2.2 that taking TRIMit promoted the burning of fact, and inhibited the production of fat through inhibiting the enzyme citrate lyase, when in fact and to his knowledge the corporation had

not conducted and was not in receipt of results of independent research into or scientific testing or independent clinical trials of the TRIMit tablet or a product with the specifications of the TRIMit tablet proving that the TRIMit weight loss tablet was effective as a weight loss aid;

49.2.3 that TRIMit and the claims made of its use and effectiveness were approved under the *Therapeutic Goods Act 1989* (Cth) when in fact and to his knowledge the claims did not have that approval;

49.2.4 that TRIMit had been developed and perfected in Australia over three years of tedious trial and error, when in fact this was not true and the tenth respondent had no knowledge of any basis for this assertion;

49.2.5 that TRIMit was the most effective diet pill possible with the science then available, when in fact and to his knowledge the corporation had not conducted and was not in receipt of results of independent research into or scientific testing or independent clinical trials of the TRIMit tablet or a product with the specifications of the TRIMit tablet proving that the TRIMit weight loss tablet was effective as a weight loss aid;

49.2.6 that controlled clinical trials had been conducted in Australia, and the clinical trials followed the protocols accepted by the Therapeutic Goods Administration and the Australian Bureau of Statistics, when in fact and to his knowledge the corporation had not conducted research or scientific testing or independent clinical trials in accordance with protocols established under the *Therapeutic Goods Act 1989* (Cth) or used by the Australian Bureau of Statistics or at all;

has:

49.3 in respect of each representation, been knowingly concerned in the corporation, in trade or commerce, engaging in conduct that is misleading or deceptive or likely to mislead or deceive in contravention of s 52 of the *Trade Practices Act 1974* (Cth);

49.4 in respect of representations 49.1.1, 49.1.3, 49.1.4, 49.1.7, 49.1.10, 49.2.2, 49.2.4 and 49.2.5, been knowingly concerned in the corporation in trade or commerce, in connection with the supply or possible supply of goods made false representations as to the quality and composition of those goods in contravention of s 53(a) of the *Trade Practices Act 1974* (Cth);

49.5 in respect of representations 49.1.1 to 49.1.4, 49.1.7, 49.1.10, 49.2.2, 49.2.4 and 49.2.5, been knowingly concerned in the corporation, in trade or commerce, represented that goods have approval, performance characteristics, uses and benefits they do not have in contravention of s 53(c) of the *Trade Practices Act 1974* (Cth).

50. The tenth respondent, by representing and permitting and assisting others to represent, on behalf of a corporation, in trade or commerce, to the public and to area managers of the corporation that the corporation was a genuine business conducted on an ordinary commercial basis and that the opportunity offered by it to area managers was a genuine business opportunity when:

50.1 the circumstances set out in the preceding declaration, to his knowledge, obtained;

50.2 it was the fact and he knew, but did not inform the public and area managers, that the fourth respondent had extensive involvement in the management and marketing of the said corporation;

50.3 he believed that if the public and area managers of the corporation knew of the involvement of the fourth respondent in the said corporation they would be unlikely to buy its weight loss products or remain its distributors;

has been directly knowingly concerned in a corporation engaging in conduct that was misleading and deceptive in contravention of s 52 of the *Trade Practices Act 1974* (Cth).

309 I order that:

51. The tenth respondent be restrained for 5 years from the date of this order from in any manner being knowingly concerned in any corporation in trade or commerce, making, or permitting to be made, any representation as to the nature, quality, fitness for any purpose, testing, history, composition, standard,

approval by any person, performance characteristics, uses or benefits of any good or service unless, prior to making the representation, he:

51.1 believes the representation to be true and accurate;

51.2 informs the representee of his qualifications and expertise relevant to the subject matter of the representation;

51.3 informs the representee of all information of which he is aware that refutes or contradicts any part of the representation; and

51.4 provides the representee with a copy of these orders or informs the representee of the existence of the orders and gives the representee the address of the Federal Court website, namely www.fedcourt.gov.au, from which a copy of these orders can be obtained.

52. The tenth respondent pay the applicant's costs of and incidental to these proceedings as against him agreed in the sum of $20,000 to be paid in the following instalments:

52.1 $5,000 on or before 14 September 2005;

52.2 $5,000 on or before 14 October 2005;

52.3 $5,000 on or before 14 November 2005;

52.4 $5,000 on or before 14 December 2005,

save that if any instalment is not paid on or by the due date the whole amount outstanding is immediately due and payable.

I certify that the preceding three hundred and nine (309) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lander.

Associate:

Dated: 2 September 2005

Counsel for the Applicant: Mr S Couper QC with Ms M Brennan

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the First, Second, The First, Second, Third and Ninth Respondents did not

Third and Ninth Respondents:	appear
Counsel for the Fourth Respondent:	Mr D Savage QC with Mr M Taylor
Solicitor for the Fourth Respondent:	Patrick Murphy
Counsel for the Sixth Respondent:	Mr S Cousins appeared in person
Counsel for the Eighth Respondent:	Mr K McMullan appeared in person
Counsel for the Tenth Respondent:	Dr S D'Alton appeared in person
Date of Hearing:	14, 15, 16 and 17 June 2005
Date of Judgment:	2 September 2005