
Adjudication

Authorisations

The Commission has the role, through the authorisation process, of adjudicating on proposed mergers and certain anti-competitive practices that would otherwise breach the Trade Practices Act.

Authorisation provides immunity from court action, and is granted where the Commission is satisfied that the practice delivers offsetting public benefits.

Australian Competition Tribunal

Review of the Commission's decision to deny authorisation of Wattyl's acquisition of Taubmans

On 27 July 1995 Wattyl (Australia) Pty Limited advised the Commission of its interest in acquiring the Australian assets of Taubmans offered for sale. The proposed acquisition was not made public until 23 October 1995. In December 1995 the Commission informed the parties that, in its view, the proposed acquisition would be likely to breach s. 50 of the Act.

Wattyl and Taubmans signed a contract for the purchase and sale of the Taubmans' Australian business on 16 December 1995. Following discussions with the Commission, the parties agreed not to complete the sale until 14 March 1996. The parties refused to extend these undertakings and the Commission filed an application in the Federal Court on 11 March 1996 seeking an interlocutory order restraining the acquisition. Wattyl and Taubmans decided not to contest the interlocutory hearing and

provided undertakings not to complete the transaction until the conclusion of the trial.

On 3 April 1996 Wattyl and Taubmans lodged an application for authorisation of the proposed acquisition. After detailed consideration of the arguments put forward by the parties, the Commission concluded that the public benefit associated with the acquisition would not outweigh the public detriment, particularly the detriment arising from the possible anti-competitive effects of the proposal. On 17 May 1996 the Commission announced that it proposed to deny the authorisation. (See also *ACCC Journal 3*, pp. 22-23, 46-47).

On 7 June 1996 Wattyl lodged an application with the Australian Competition Tribunal for review of the decision.

On 14 June 1996 the s. 50 proceedings were stayed pending the outcome of the Tribunal's review of the decision.

On 20 August 1996 Courtaulds (Australia) Pty Limited, the owner of Taubmans Industries Ltd, announced that it had sold the Taubmans' architectural and decorative paint business to Plascon Taubmans Pty Limited, a subsidiary of Barlow Limited, a South African industrial company.



Photography by Arthur Mostead

On 22 August 1996 the Tribunal adjourned the hearing until 8 November 1996. It is expected that, subject to completion of the sale contract between Plascon and Courtaulds, the application for review before the Tribunal will be withdrawn at this date.

The s. 50 proceedings are also expected to be terminated on 8 November 1996.

Review of the Commission's determination to revoke authorisation of the gas agreements between AGL and the Cooper Basin Producers

On 21 September 1994 the Commission initiated a review of the authorisation of supply arrangements between AGL and the South Australian Cooper Basin Producers of natural gas, in the light of what appeared to it to be material changes of circumstances since the authorisation was granted in 1986.

The agreements set out the terms and conditions under which AGL agreed to buy, and the Producers agreed to sell, natural gas for use in NSW. This included provision for price reviews through negotiation, and for arbitration when necessary.

After completion of the review the Commission was satisfied that three material changes of circumstances had occurred. On 27 March 1996 the Commission issued a determination revoking the existing authorisation and granting a substitute authorisation (see also *ACCC Journal* 3, pp. 55–58).

On 17 April 1996 the Producers filed an application with the Australian Competition Tribunal for a review of the Commission's decision. The parties to the application for review are Alliance Petroleum Australia Pty Ltd, Basin Oil NL, Boral Energy Resources Limited, Bridge Oil Developments Pty Ltd, Crusader Resources NL, Delhi Petroleum Pty Ltd, Reef Oil Pty Ltd, Santos Limited, Santos (BOL) Pty Ltd, Santos Petroleum Pty Ltd and Vamgas Pty Ltd.

The Tribunal held an initial directions hearing on 22 May 1996 and a further directions hearing on 26 July 1996, at which a timetable was established. The hearing of the matter has

been set for 17 March 1997. The Tribunal has indicated that at a further directions hearing on 19 December 1996 it will give its views on the issues for hearing.

Final determinations

Electric Lamp Manufacturers (Australia) Pty Limited and others

In relation to the ELMA operating agreement providing for the joint production of electric lamps (A90597–8)

- Draft determination proposing to grant authorisation issued 5 September 1996
- Notification allowed to stand

The Commission has considered two applications for authorisation lodged by Electric Lamp Manufacturers (Australia) Pty Ltd (ELMA) and its shareholders Philips Electronics N.V., GEC Australia Limited, Crompton Lighting Investments Limited and TLG Plc in relation to the ELMA operating agreement generally, and specifically to clause 11 of the operating agreement. The Commission has also considered an exclusive dealing notification lodged by ELMA and Philips in respect of clause 5 of the operating agreement.

Background

The ELMA operating agreement, made on 31 January 1980 between ELMA and its shareholders, regulates the joint manufacture of incandescent and fluorescent lamps at the ELMA plant in Newcastle. Clause 11 provides that the shareholders must obtain all their requirements for lamps that ELMA manufactures, from ELMA; and that ELMA must sell the lamps it produces only to its shareholders, unless the shareholders agree by a two-thirds majority to sell such products to third parties. Clause 5 requires ELMA to purchase all lamp making machines, machine parts and equipment exclusively from Philips.

The operating agreement (excluding clause 5) was authorised in 1982 by the Trade Practices Commission. The TPC also allowed

notifications, lodged in respect of clauses 5 and 11 of the operating agreement, to stand.

The applicants advised that it was likely that material changes had occurred since 1982 in the industry sufficient to warrant new applications for authorisation and a new notification to be lodged with the Commission in respect of the ELMA arrangements.

Commission consideration

The Commission concluded that the potential anti-competitive effects of the operating agreement (apart from clause 5) centre on clause 11. However, while this clause prevents ELMA's shareholders from producing or importing lamps of the type produced by ELMA, third parties can and do import such lamps. The tariff rate on lamps has decreased significantly since the early 1980s, and is currently 5 per cent. Imports by third parties thus provide an even more effective alternative source of supply of lamps now than at the time of the TPC's assessment of the ELMA arrangements in 1982. The Commission was also satisfied that ELMA's shareholders compete both with each other and with importers for the sale of lamps to customers.

The Commission considered that the operating agreement results in production efficiencies and cost savings due to the economies of scale achieved through the joint production of lamps. These cost efficiencies have enabled ELMA to meet increased import competition as well as increase its exports.

In respect of the notification lodged by ELMA and Philips, the Commission considered that the requirement that the only customer in Australia (ELMA) for specialised lamp making machines, machine parts and equipment purchase such products from one supplier (Philips) might substantially lessen competition in the market for such products. However, because ELMA needs to maintain production efficiencies so that its lamps are competitive with imports, the Commission was of the view that the public would not be adversely affected by the ELMA tie to Philips. Indeed, having access to the manufacturing expertise and resources of a large overseas producer of lamps

would appear likely to benefit ELMA's production efficiency.

Commission conclusion

The Commission concluded that the effect on competition of the operating agreement as a whole, and clause 11 specifically, is not substantial and is outweighed by the public benefits resulting from the arrangements and conduct.

On 5 September 1996 the Commission issued a draft determination proposing to grant authorisation in respect of the operating agreement (excluding clause 5), and to allow the notification relating to clause 5 of the operating agreement to stand.

No requests were made to hold a pre-decision conference and a final determination confirming the draft determination was made on 2 October 1996.

Franchising Code Council Limited

In relation to its Franchising Code of Practice (A30164)

- Interim authorisation granted 24 January 1996 until final determination
- Draft determination proposing to grant authorisation for five years issued 1 May 1996
- Final determination issued 25 September 1996

The application

On 27 January 1995 the Franchising Code Administration Council Limited (FCAC) (now the Franchising Code Council Limited (FCC)) lodged an application with the Trade Practices Commission for its Franchising Code of Practice. The code had previously been authorised in August 1993 but was due to expire on 1 February 1995.

Since the 1993 authorisation, FCAC had implemented a number of amendments to the code, including some of the recommendations of the 1994 review commissioned by the then

Minister for Small Business, Customs and Construction. However, the amended code was largely the same as that previously authorised. On 24 January 1996 the Commission granted interim authorisation of the amended code until the date of the final determination.

On 1 May 1996 the Commission issued a draft determination proposing to grant authorisation of the code for five years (see *ACCC Journal* 3, pp. 50–51). A pre-decision conference was requested by the Australia and New Zealand Banking Group Limited (ANZ), and written submissions were also received from a number of interested parties. The conference was held on 7 June 1996, and the Commission subsequently received further written submissions from ANZ and FCC.

The only provision of the code to attract adverse comment from interested parties was clause 16.1, which requires financial institutions registered under the code to provide customised finance packages only for franchise systems of franchisors registered under the code. In particular, ANZ expressed support for the code, except for clause 16.1.

Commission consideration

The Commission considered that public benefit was likely to result from the disclosure, certification and cooling-off provisions of the code, which should help prospective franchisees to make better informed decisions on whether to purchase franchise businesses. The Commission considered that public benefit would also result from the code's standard of conduct and dispute resolution provisions. It considered that little if any anti-competitive detriment was likely to result from these provisions.

The Commission concluded that clause 16.1 was likely to restrict competition between financial institutions registered under the code because such institutions are unable to provide customised finance packages for franchise systems of unregistered franchisors. However, it appeared to the Commission that, while the clause deprived financial institutions that register under the code of one marketing tool to attract business from unregistered franchise groups, the lessening of competition that

resulted did not give rise to significant public detriment. It appeared that all franchisee applications were assessed on their merits and that financial institutions were willing to compete for business from unregistered franchisees.

The FCC claimed that there were public benefits associated with the clause 16.1 restriction. In the Commission's view, however, clause 16.1 was not effective in alerting prospective franchisees to the code registration status of the vast majority of franchisors. For example, it noted that only a minority of registered franchisor's systems had been provided with customised financial packages by financial institutions registered under the code. It appeared to the Commission that customised finance packages did not provide any significant marketing advantage to franchisors and that clause 16.1 did not provide any real incentive for franchisors to register.

Commission conclusion

The Commission concluded that little if any public benefit was likely to result from clause 16.1, and that any benefit that did result would not be sufficient to outweigh the (also small) public detriment constituted by the lessening of competition that was likely to result from the clause.

On 25 September 1996 the Commission issued a final determination granting authorisation to FCC to give effect to the provisions, apart from clause 16.1, of the Franchising Code of Practice for three years.

Draft determination

United Energy Limited

In relation to a Value of Lost Load Contract Repackaging Scheme (A90593–4)

- Draft determination proposing to grant authorisation issued 17 July 1996
- Interim authorisation also granted, effective from date of draft determination until final determination

On 22 May 1996 United Energy Limited lodged two applications for authorisation in relation to a proposed scheme for the provision of hedging cover to the electricity industry in Victoria, known as the Value of Lost Load Contract Repackaging (VCR) Scheme. It was proposed that the scheme could replace the compulsory Generator Co-Insurance Scheme, scheduled to terminate on 30 September 1996.

The applications

According to the applications, the VCR Scheme is intended to:

- provide relatively 'firm' hedging cover to, initially, Victorian electricity retailers and generators during periods in which the spot price for electricity is very high; and
- facilitate the provision of firm retail prices to end-use customers even in periods of high spot prices.

One application related to provisions of the VCR Scheme which would have the purpose, or would or might have the effect, of substantially lessening competition. This application was concerned with proposed rules of the scheme that would constitute a contract between the administrator of the scheme and each member of the scheme, and between members of the scheme.

The other application related to provisions that may constitute exclusive dealing:

- the requirement that sellers of generation capacity in the scheme, for a contract period of one or more years in advance, commit to the amount of their generation capacity to be excluded from the scheme for the contract period;
- the secondary trading arrangements under the scheme; and
- the basis for calculating the seller's commission under the scheme.

Commission consideration

The Commission came to the view that the VCR Scheme might substantially lessen competition, primarily due to the control of

secondary trading through the scheme and the tying up of generation capacity.

However, the Commission was also satisfied that the VCR Scheme would benefit the public by:

- enhancing market responsiveness in the pricing of electricity; and
- facilitating the transition of the industry from a regulated environment.

It believes that limited public benefit might also result from the encouragement the scheme provides for generators to make capacity available to the market.

Commission conclusion

The Commission considered these public benefits to be sufficiently important to outweigh anti-competitive detriment associated with the scheme and on 17 July 1996 issued a draft determination proposing to grant authorisation to the applications.

The Commission also granted an interim authorisation on condition that, should it choose to deny final authorisation, any pooling created under the scheme would be unwound and converted to bilateral contracts.

The interim authorisation is effective from the date of the draft determination and lapses on the date of final determination.

Authorisations under review

Advertising standards

On 19 August 1996 the Commission announced a review of authorisations concerned with advertising standards in Australia. The authorisations were granted to the Media Council of Australia by the Trade Practices Tribunal in 1988. They provided for implementation of the Advertising Code of Ethics, and specific codes relating to the advertising of cigarettes, alcohol, therapeutic goods and slimming products.

Once an advertisement is created it must be accepted by the relevant industry-approval body as consistent with the codes before it is published or broadcast. If consumers believe advertisements do not meet the codes, they can appeal to the Advertising Standards Council, which was created under the Trade Practices Tribunal's authorisation. The Council will review the advertisement and advise the Media Council of Australia of its decision for any enforcement action.

The Commission believes that circumstances have changed since authorisation was granted. In particular, it considers that:

- the codes no longer reflect community needs;
- the mechanisms for enforcement of the codes are no longer adequate to ensure compliance with the codes, causing diminished confidence in the integrity of the codes system;
- diminished confidence in the integrity of the codes system has led some parties to attempt to circumvent/amend the codes;
- public representation on the Advertising Standards Council is no longer adequate to reflect prevailing community views; and
- amendments to the funding arrangements for the Advertising Standards Council have eroded the commitment of the founding organisations and thus support for the advertising codes.

These changes appear to have increased the anti-competitive effects associated with the operation of the code system and diminished the benefit to the public that it offers.

The need for the review was also foreshadowed by the Australian Competition Tribunal in its recent upholding of the Commission's decision to revoke the authorisation of the accreditation system for advertising agencies (see *ACCC Journal 4*, p. 43).

On 27 September 1996 the Media Council of Australia announced that the current system of advertising codes and review mechanisms would

be disbanded as from 31 December 1996. The industry is examining the possibility of a new system of advertising standards.

Newspaper and magazine distribution in NSW/ACT, Victoria and Queensland

In 1980 the Commission authorised magazine and newspaper distribution arrangements in NSW/ACT which provided the model for the subsequent Victorian and Queensland authorisations granted in the 1980s. The arrangements generally provided for:

- horizontal agreements between publishers;
- combined delivery, supply to sub-agents and retail functions; and
- close control of newsagency businesses by newsagency councils.

In 1995 the Commission decided to review the authorised arrangements in the mainland eastern States and Territories. This decision followed the Trade Practices Tribunal's decision in November 1994 to set aside a July 1993 authorisation of a revised distribution system in Victoria.

It appears to the Commission that a number of changed circumstances have materially affected the original authorisations and that the public benefits said to flow from the authorised arrangements may no longer outweigh the anti-competitive detriment. Small business may now be substantially constrained by the current arrangements.



Photography by Arthur Mostead

The Commission is reviewing the authorisations in the light of these apparent changes. It has received a large number of submissions and is currently considering them. No decision has yet been made. The Commission is awaiting a submission from the Commonwealth Government. Once the submission is received, the Commission expects to move quickly to a decision in respect of the reviews.

(See also former Trade Practices Commission *Bulletin* 82, August 1995.)

Authorisation applications under consideration

Delhi Petroleum (A90547)

Joint venture operations for SA gas supply.

Existing interim authorisation extended until final determination is made.

Further consideration deferred pending review of AGL authorisation A90424.

Santos Limited (A90559)

Agreement relating to the sale and marketing of liquid hydrocarbons from natural gas in south-west Queensland.

Further consideration deferred pending review of AGL authorisation A90424 and consideration of new application A90568 to address Commission concerns.

Santos Limited (A90560)

SA Cooper Basin — joint venture — natural gas.

Further consideration deferred pending review of AGL authorisation A90424.

To be considered with Delhi Petroleum application.

Advertiser Newspapers Limited & ors (A60020-1)

Contracts and rules for the operation of SA newsagency system.

Interim authorisation granted until 1.12.96.

Franchising Code Administration Council Ltd (A30164)

Voluntary code of practice for the franchising sector.

24.1.96 Interim authorisation granted until final determination issued.

1.5.96 Draft determination issued proposing to grant authorisation for five years.

25.9.96 *Final determination issued granting authorisation for three years.*

Santos Ltd (A90568)

Sale of commingled liquid hydrocarbons from Cooper Basin in SA and Qld.

8.2.95 *Interim authorisation granted.*

CSR Ltd (A50016)

Application for authorisation for negotiation and agreements on cartage rates with independent contractor concrete carriers.

20.3.96 Interim authorisation granted for six months.

Interim authorisation extended to end February 1997.

Australian Performing Rights Association (APRA) (A30166-73)

Arrangements for acquiring and granting rights for music.

Advertiser Newspapers & ors (A60022)

Agreement regarding newsagency territories and termination of agreement to adopt newsagency administration rules.

NSW Minister for Energy (A90588-90)

Wholesale electricity marketing arrangements.

26.4.96 Interim authorisation granted.

17.7.96 *Interim authorisation granted for Code as amended.*

United Energy (A90593-4)

Agreements concerning electricity supply contract repackaging to cover value of lost load.

17.7.96 Draft determination and interim authorisation issued.

Inghams Enterprises Pty Ltd (A90595)

Joint negotiations with contracted chicken growers for common terms and conditions in growing agreements.

26.6.96 Interim authorisation granted.

ASX Settlement and Transfer Corporation Pty Ltd (A90596)

Amendments to CHES rules to accommodate international trading.

12.6.96 Interim authorisation granted until 20.7.96.

Electric Lamp Manufacturers (Australia) Pty Ltd (A90597-8, N90347)

Agreements relating to joint manufacture of incandescent and fluorescent lamps.

5.9.96 Draft determination issued. (Notification allowed to stand.)

2.10.96 Final determination issued granting authorisation.

ASX and OCH (A90599)

Proposed rewritten business rules for derivatives.

APCA (A30176-7)

Consumer electronic clearing system regulation and procedures.

Notifications

Under the Act, immunity from legal proceedings is available for exclusive dealing conduct, including third line forcing, when notification is given to the Commission. Exclusive dealing conduct, except third line forcing, gains immediate and automatic immunity when notified to the Commission. In the case of third line forcing, immunity comes into force at the end of the prescribed period from the time the Commission receives the notice. Immunity remains unless revoked by the Commission.

Notifications considered

**Optus Vision Pty Ltd (N90341),
Optus Networks Pty Ltd (N90343),
Optus Mobile Pty Ltd (N90342)
(Allowed to stand)**

On 2 September 1996 the Commission announced that it would not revoke two third line forcing exclusive dealing arrangements notified by the Optus group of companies.

The first notification deals with Optus Vision's 'bundling' of pay television and local telephony services. Optus Vision plans to provide free installation for pay TV services (currently equivalent to the value of \$29.95) on condition that consumers acquire local telephony services from Optus Networks. The offer is limited to 1 July 2000.

The second proposal, lodged by Optus Mobile and Optus Networks, related to mobile/long distance telephony services bundling. It would allow Optus Mobile to offer free trials or discounts on analog and digital mobile phone services or mobile value added services (for example, secure fax and sure page) on condition that consumers also acquire long distance or long distance value added services (for example, calling cards and dedicated international fax line services) from Optus Networks (and vice versa). The free trials will be available for up to two months, while the

discounts will be available in contracts for up to 12 months.

The proposal also involves discounts by Optus Mobile on analog or digital mobile phone handsets on condition that consumers also acquire long distance or long distance value added services from Optus Networks (and vice versa). Discounts on mobile handsets are available in contracts for up to 18 months. Again the offer is limited to 1 July 2000.

The Commission considered that the conduct would not disadvantage consumers in terms of information about the individual products, or consumer choice. Consumers can buy the products separately and will be free to buy the services from either Optus or its competitors. Those consumers who want to take 'bundled' services from Optus will benefit as they will get the services at a lower cost than if they were to get the services separately.

In relation to the first notification, since Optus does not have a substantial market share in the relevant markets and the discount is limited to free installation for pay TV services (and also limited to those areas serviced by Optus Vision's cable network), the Commission considered that the conduct would not be detrimental to competition.

In the case of the second proposal, again the Commission considered that Optus does not have substantial market shares in the relevant markets, and any advantage it might gain as a result of the conduct would not prevent a competitive response from other providers of these services.

The Commission will monitor the practical effects of the conduct in both arrangements. It can move to remove the immunity enjoyed as a result of the notification at any time if it is satisfied the likely benefit to the public does not outweigh the likely detriment.

Merck Sharp & Dome (Australia) Pty Ltd (N30720) (Allowed to stand)

MSDA appoints IAMA Ltd sole distributor in Australia for the relevant product for one year.

NRMA Insurance Limited (N90346) (Allowed to stand)

Proposed reduced premium be charged in respect of Holden VN Commodore and comparable motor vehicles if an anti-theft device specifically approved by NRMA for VN Commodores and comparable motor vehicles is fitted.

AAPC Limited (N30719) (Allowed to stand)

Proposal to offer discount tariffs and other special offers in respect of its accommodation and restaurants to members of MBF health fund.

WA Tourism Commission (Eventscorp) (N70061) (Allowed to stand)

Eventscorp requiring suppliers to annual car rally to use sponsors' products, and requiring sponsors and other suppliers to use designated event contractors.

American Express International Inc. (N30722) (Allowed to stand)

The third line forcing conduct involves the provision of a health plan through HCG to AMEX employees.

Battery Assist Pty Ltd (N40206) (Allowed to stand)

Tying arrangements with RAC of WA for supply of battery services to its members and others.

The Royal Automobile Club of WA Inc. (N70063) (Allowed to stand)

Tying arrangements with Battery Assist for supply of battery services to RAC members and others.

Queensland Milk Pty Ltd (N50089) (Allowed to stand)

Supply of milk and dairy products on a wholesale basis.

Government Employees Health Fund Ltd, Australian Health Management Pty Ltd (N90345) (Allowed to stand)

Members receive enhanced financial and care outcomes on condition they acquire private hospital services from a class of nominated suppliers.

Golden 44 (trading as Handy Utes & Cars) (N90348) (Allowed to stand)

The third line forcing conduct involves franchises being required to purchase their rental vehicles from a designated supplier.

Electric Lamp Manufacturers Australia Pty Ltd & ors (N90347) (Allowed to stand)

Requirement that ELMA purchase machines, equipment, parts and materials from Philips.

Notifications under consideration

Australian Performing Rights Association (APRA) (N30714)

Arrangements for acquiring and granting rights for music.

Advertiser Newspapers Ltd (N60023-5)

Arrangements for supply of newspapers published by Advertiser.

National Bank Australia Ltd (N40205)

Proposed lending by NAB to clients using shares as security on condition the clients enter into a CHESS sponsorship agreement with a subsidiary of NAB.

Fred Hosking Pty Ltd (N30721)

Purchase of stationery for speedprint printing system.

BMW Australia Limited (N90349)

BMW proposes to grant to its dealers a bonus of 1 per cent on list price of new vehicles if they do not retail, or are not associated with the manufacturer of, specified brands of motor vehicles.

ASX (N30723)

Requiring registered independent options traders to acquire services from clearing members.

State Bank NSW/Colonial Mutual Group (N30724-34)

Supply of products at a discount conditional on acquiring other products from members of group.

Australian Independent Retailers Pty Ltd (N30735)

Supply of discount petrol on condition that at least \$30 worth of grocery products purchased from Woolworths/Safeway.