
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.

National Electricity Market Code application

On 9 October 1996 the National Grid Management Council (NGMC) submitted to the Commission the final draft of the National Electricity Code for the proposed National Electricity Market (NEM). It covers all aspects of the NEM, including market operation rules, system security, network connection, network pricing, metering, dispute resolution, monitoring of compliance and reporting, and provides for transitional arrangements for participating jurisdictions to adjust to the requirements of the code.

On 15 November 1996 the Commission received applications for authorisation of the NEM Code of Conduct. The applications were lodged by the National Electricity Code Administrator Limited (NECA) and the National Electricity Market Management Company Limited. A draft application for acceptance of an access code for the proposed NEM was also lodged with the Commission by NECA.

Under the Commission's statutory obligations with respect to an authorisation the Commission will examine the proposed NEM Code to determine whether the public benefits of the proposed arrangements outweigh any anti-competitive detriment. The Commission

invited interested parties to comment and make submissions on the market arrangements contained in the NEM Code.

In addition the Commission has also invited comments on the impact of the draft access regime on the electricity supply industry, electricity users and the Australian community as a whole. However, as the legal process for assessment of the access code under Part IIIA of the Trade Practices Act is currently being refined, the Commission is accepting submissions on the access code on an informal basis only at this stage. Once NECA formally submits the access code, the Commission will call for interested parties to lodge formal submissions.

Copies of the NEM Code and the application may be obtained from Commission offices, or electronically from <http://electricity.net.au/> or <http://www.accc.gov.au>.

Draft determination

Australasian Performing Right Association Limited

In relation to its standard arrangements for the acquisition and licensing of the performing rights in its music repertoire, for distribution of funds to members, and with overseas collecting societies (A30166-73) (N30714)

Summary

- Draft determination issued 16 October 1996

The applications

On 17 November 1995 the Australasian Performing Right Association Limited (APRA) lodged eight applications for authorisation and

one notification in relation to its standard arrangements for the acquisition and licensing of the performing rights in its music repertoire.

The applications concern possible anti-competitive agreements and exclusionary provisions that may constitute a breach of s. 45 of the Trade Practices Act. The notification relates to a possible breach of s. 47 of the Act, the provision which prohibits exclusive dealing.

The applications were opposed by the Federation of Australian Commercial Television Stations (FACTS). Many other submissions, both in support of and opposing the applications, were received from other interested parties and industry participants.

Background

APRA is a collecting society which operates as a non-profit making association of composers, authors and publishers of musical and associated literary works. On behalf of its members, APRA licences various performing rights of the music and associated literary works of its members. It collects licence fees and distributes the revenue to its members. Licensees include television stations, radio stations, cinemas, retail outlets, night clubs and pubs, and concert promoters.

APRA owns the performing rights in the vast majority of musical works in which copyright exists in Australia (both Australian and overseas works). APRA's arrangements in respect of those works fall into four categories:

- input arrangements;
- output arrangements;
- distribution arrangements; and
- overseas arrangements.

Under the input arrangements, APRA members assign to APRA the performing rights of their (present and future) works, and must provide three years notice of resignation.

Under the output arrangements, APRA offers predominantly blanket licences to users. This means that users are entitled to use any or all of

APRA's music repertoire for the term of the licence, usually 12 months. Fees are calculated according to criteria not necessarily including the number of works used or amount of music played. For example, the fees for commercial television licences are calculated according to advertising revenue.

Under the distribution arrangements, APRA applies a set methodology to calculate the use of works and allocation of royalties to members. The distribution rules set out the allocation of shares in musical works, but guarantee that composers will never receive less than 50 per cent of the royalties for works used.

Under APRA's overseas arrangements, APRA has reciprocal, exclusive arrangements with overseas collecting societies where each grants to the others the right to licence the musical works in their repertoires.

Commission consideration

The Commission concluded that the public benefits of APRA's restrictive input and output arrangements for users with spontaneous and unpredictable use (most public performance rights users) outweighed the anti-competitive detriments. It could see no incentive for APRA members to supply performing rights to such users directly, and could see no demand from the relevant users for a licence other than a blanket licence. However, it took the view that the public benefits of those arrangements in relation to users with predictable or planned use (many live public performance and broadcast rights users) did not outweigh the detriment.

The Commission considered that APRA's distribution arrangements, when combined with the input arrangements, limited competition between members. It took the view that competition between members would be increased and the anti-competitive effects of the arrangements reduced if members had the option to 'opt out' of the APRA system for live public performance and broadcast rights.

The Commission recognised that, if an 'opt-out' option was created for APRA members, the members who choose to exercise their own rights may be at a disadvantage in their bargaining power vis-a-vis large users such as

television broadcasters. Therefore, it is prepared to consider alternative mechanisms intended to overcome this imbalance.

In relation to APRA's arrangements with overseas collecting agencies, the Commission could see little or no public benefit arising from the exclusivity of the arrangements, and any public benefit that did arise would not outweigh the negative effect of limiting the likelihood of entry to the market.

Commission conclusion

The Commission issued a draft determination on 16 October 1996 proposing to grant authorisation for four years for APRA's input and output arrangements for public performance rights (excluding live public performance rights) provided that APRA sets up an independent appeal mechanism for users.

It proposes to deny authorisation of APRA's input or output arrangements for live public performance rights and broadcast rights, and of APRA's distribution arrangements, unless the following issues can be resolved to its satisfaction.

- Members should not be required to assign to APRA live public performance rights and broadcast rights in all works (present and future) as a requirement of membership.
- Members should be entitled to 'opt out' of the APRA system for some or all live public performance rights and broadcast rights, for some or all works, whilst remaining an APRA member.
- Licence fees should take account of members' decisions to 'opt out' for some or all live public performance rights or broadcast rights in some oral works.
- Notice for withdrawal of membership for all members should be reduced from three years to six months.

The Commission proposes to deny authorisation of APRA's overseas arrangements.

It proposes, at this time, to allow the notification to stand.

A pre-decision conference has been called, to be held on 3 December 1996.

Inghams Enterprises Pty Ltd

In relation to a collective agreement with contract chicken growers (A90595)

- Interim determination granted 26 June 1996
- Draft determination proposing to grant authorisation issued on 20 November 1996

The application

On 31 May 1996, Inghams Enterprises Pty Ltd applied for authorisation for its proposal to collectively negotiate a standard five-year growing agreement with its South Australian contract chicken growers. The Commission granted Inghams interim authorisation on 26 June 1996.

The growing agreement provides for a standard fee payable to contract growers at the end of the growing cycle. This fee is based on the concept of a 'model farm', where the fee each contract grower receives depends on his or her efficiency compared with other contract growers. Efficiency is measured by the conversion of feed (the most expensive input in the growing process) to chicken meat. Inghams proposes to meet representatives of the contract growers every six months to review the standard fee. Contract growers will have the option of negotiating individually with Inghams if they do not wish to be part of the collective negotiation process.

A code of practice will be attached to the growing agreement. The code governs issues pertaining to negotiations between Inghams and its contract growers. It is part of the collective negotiation process for which authorisation is sought.

Background

Inghams' application was lodged in anticipation of deregulation of the South Australian chicken meat industry. Currently, under regulation, chicken grower contracts, terms and conditions (including fees) and matters arising therefrom are negotiated on an industry basis.

The chicken industry is highly vertically integrated, with two large processing companies controlling 86 per cent of the South Australian market. Chicken growers are required to make significant capital investment in sheds and equipment that have virtually no

alternative use and are non-portable. Thus, a reasonable degree of stability and predictability of growing arrangements is required to ensure future investment.

Commission conclusion

The Commission was satisfied that the anti-competitive effects of Inghams' proposed arrangements are likely to outweigh the public benefits, which include:

- assisting a smooth transition from regulation to deregulation, which will ensure lower adjustment costs for the South Australian chicken industry;
- providing chicken growers with countervailing market power; and
- reducing transaction costs, as a result of the collective negotiation process, which should result in lower retail prices.

On 20 November 1996, the Commission issued a draft determination proposing to grant authorisation to the proposed grower agreement and code of practice for four years, while the industry passes through transition to a deregulated market.

Australian Competition Tribunal

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

On 11 March 1996 the Commission filed an application in the Federal Court seeking an interlocutory order restraining the acquisition of Taubmans' Australian business by Wattyl (Australia) Pty Limited.

On 3 April 1996 Wattyl and Taubmans lodged an application for authorisation of the proposed acquisition. The Commission announced on 17 May 1996 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.

Wattyl and Taubmans have indicated their intention to seek leave to withdraw their applications before the Tribunal. It is likely that the s. 50 proceedings before the Federal Court will be also terminated by consent. (See also *ACCC Journal* 5, pp. 47-48.)

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

After reviewing the authorisation of supply arrangements between AGL and the South Australian Cooper Basin Producers of natural gas, the Commission was satisfied that material changes of circumstances had occurred since the authorisation was granted in 1986, and that the anti-competitive detriments of the authorised arrangements now outweighed their public benefits. On 27 March 1996 the Commission issued a determination revoking the existing authorisation and granting a substitute authorisation narrower in scope than the revoked 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 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. (See also *ACCC Journal* 5, p. 48.)

Authorisations under review

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

In 1980 the Commission authorised magazine and newspaper distribution arrangements in NSW/ACT. That decision formed the bases for authorisations in Queensland and Victoria.

The Commission is reviewing the authorisations in the light of apparent changes. It has received a large number of submissions and is currently considering them. The Commission is currently examining in detail a submission recently lodged by the Commonwealth Government. It expects to move to a decision in respect of the reviews once the Government submission is fully considered.

(See also *ACCC Journal* 5, pp. 52-3.)

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.

The Commission believes that circumstances have changed since authorisation was granted. These changes appear to have increased the anti-competitive effects associated with operation of the advertising 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 would be disbanded as from 31 December 1996. Industry participants are working with the Commission to develop a replacement system.

(See also *ACCC Journal* 5, pp. 51-2.)

Revocation of authorisations

Under s. 91(4) of the Trade Practices Act, where it is satisfied that there has been a material change of circumstance since an authorisation was granted, the Commission may revoke the authorisation, and if it considers it appropriate to do so, grant a substitute authorisation.

Electric Lamp Manufacturers (Australia) Pty Limited and others

In relation to the ELMA Operating Agreement and Third Party Lamp Sales Agreement (A90311-12)

On 20 April 1982 the Trade Practices Commission granted authorisation to the Electric Lamp Manufacturers (Australia) Pty Ltd (ELMA) Operating Agreement and Third Party Lamp Sales Agreement between the Australian subsidiaries of the ELMA shareholders.

In July 1996, ELMA advised the Commission that the Third Party Lamp Sales Agreement had been terminated in December 1990. ELMA also lodged new applications for authorisation of the ELMA Operating Agreement. On 2 October 1996 the Commission granted authorisation to the Operating Agreement.

The Commission was satisfied that a material change of circumstances had occurred since the 1982 authorisations were granted. A revocation was issued on 27 November 1996 to come into force on 19 December 1996.

Pre-1977 'deemed' authorisations

Before 1 July 1977, the Commission granted clearances to a number of companies under

s. 92(2) of the Trade Practices Act for various contracts, arrangements or understandings that may have been in restraint of trade.

On 1 July 1977 the Trade Practices Act was amended and s. 92 repealed. Under the amendments, any s. 92(2) notices that had been granted clearance before 1 July 1977 were deemed authorisations under ss 88(1) or (5) of the amended Act.

The Commission is reviewing all pre-1977 'deemed' authorisations in an effort to bring its register up to date.

Authorisations to the following companies for various agreements in this category have now been revoked since it appeared to the Commission that material changes in circumstances had occurred in that the agreements had expired or had been terminated.

- Southfield Pty Limited, Norco Co-operative Limited, Bayer Australia Limited, Australian Motor Industries Limited, Otvosi Investments Pty Limited, Lonsyd Pty Limited (various commercial agreements) — the revocation of 10 'deemed' authorisations was issued on 6 November 1996 to take effect on 28 November 1996.
- Clark Equipment Australia Limited, British Optical Co Pty Limited, WM Cooper (Hand Tools) Limited, Abbott Australasia Pty Limited, Roche Products Pty Limited, Binks-Bullows (Aust) Pty Limited, Ready Mixed Concrete (Canberra) Pty Limited, The Colonial Mutual Life Assurance Society Limited, Bunge (Australia) Pty Limited and Bunge (Industrial) Limited (various commercial agreements) — the revocation of 19 'deemed' authorisations was issued on 6 November 1996 to take effect on 28 November 1996.

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 31.3.97.

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.

11.9.96 Interim authorisation extended to 28 February 1997.

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

Arrangements for acquiring and granting rights for music.

16.10.96 Draft determination issued.

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.

18.9.96 Interim authorisation extended following changes to scheme rules.

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.

20.11.96 Draft determination issued.

ASX Settlement and Transfer Corporation Pty Ltd (A90596)

Amendments to CHES rules to accommodate international trading.

12.6.96 Interim authorisation granted until 20.7.97.

ASX and OCH (A90599)

Proposed rewritten business rules for derivatives.

23.10.96 Interim authorisation granted until 30.6.97.

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

Australian Independent Retailers Pty Ltd (N30735) (Allowed to stand)

On 18 October 1996 the Commission announced it would not revoke a third line forcing notification involving a proposal by Woolworths to offer discount petrol to customers buying at least \$30 of groceries at selected Woolworths' and Safeway supermarkets.

After reviewing the proposal, the Commission was satisfied that the public benefits (including lower petrol prices) outweigh any public detriment. It welcomed Woolworths' move as a proactive force in the restructuring of the petrol industry and as a way of increasing competition, particularly in country areas.

The Commission has told Woolworths that it must ensure that any conditions relating to the cheaper petrol offer, such as the \$30 minimum purchase, are clearly and openly displayed on the offer dockets and signs within Woolworths and Safeway stores and also where the fuel is purchased.

Re-iterating a comment in its recent petroleum report, the Commission said that it is crucial that local councils do not hinder such important developments by refusing planning approvals. It noted that, in the United Kingdom, supermarkets have led petrol prices down by significant amounts and major oil companies have been forced to respond, to the benefit of consumers.

Australian Performing Right Association (APRA) (N30714) (Allowed to stand)

Arrangements for acquiring and granting rights for music.

National Bank Australia Ltd (N40205) (Allowed to stand)

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.

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

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

BMW Australia Limited (N90349) (Allowed to stand)

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.

State Housing Commission (Homeswest) (N70064) (Allowed to stand)

Sale of house and land packages on condition that the buyers build using one of the nominated builders (third line forcing).

Notifications under consideration

Advertiser Newspapers Ltd (N60023-5)

Arrangements for supply of newspapers published by Advertiser.

Fred Hosking Pty Ltd (N30721)

Purchase of stationery for speedprint printing system.

ASX (N30723)

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

Dymocks Franchise Systems Pty Ltd (N90350)

Charging of reduced franchise fees on condition that franchisees buy stock from suppliers on an approved supplier list (third line forcing).

Oratel Pty Ltd (N90351)

Supply of cardswitches on condition that customer purchase airtime agreements with nominated service providers (third line forcing).

Optus Vision Pty Ltd (N90352)

Optus Vision offer of \$40 allowance to subscribers to its pay TV service who acquire membership of the Carlton Football Club, Melbourne Football Club or Australian Football League for 1997 (third line forcing).

**Commonwealth Bank of Australia
(N90353)**

Proposed lending by Commonwealth Bank to clients using shares as security on condition the clients enter into CHESS sponsorship agreements with a subsidiary of the bank (third line forcing).

ANZ Banking Group Ltd (N90355)

Proposed lending by ANZ to clients using shares as security on condition the clients enter into CHESS sponsorship agreements with a subsidiary of ANZ; or transfer the legal interest in shares and acquire administrative services in respect of (certified) shares (third line forcing).

Certification trade marks

**Danske Mejeriers Faellesorganisation
(CTM 597286, 597566-8)**

Relating to 'LUR' branch Danish dairy products.

2.5.96 Initial assessment proposing to approve the CTMs issued.

22.8.96 *Final assessment approving CTMs issued.*

**Consorzio Tutela Provolone (CTM
658374)**

Relating to an Italian brand of cheese.

23.10.96 *Initial assessment issued proposing to approve the CTM issued.*

Relais et Chateau (CTM 529087)

Relating to services provided in the accreditation of hotels and restaurants.

**International Standards Certifications
Pty Ltd (CTM 702128, 703098)**

Relating to the certification of Australian organisations to ISO 9000 (quality) and ISO 14000 (environmental) standards.

**Skin and Cancer Foundation of
Australia (CTM 656130)**

Relating to the licensing of clothing and headwear for sale in Australia.

**Aktion Zahnfreundlich (CTM
572400-2, 601904)**

Relating to Swiss-made food and beverage products.

**International Zinc Association (CTM
593514)**

Relating to zinc and zinc products.