
Adjudication

Authorisations

The Commission has the function, 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.

Determinations

Proprietary Medicines Association of Australia and the Nutritional Foods Association of Australia

In relation to the Therapeutic Goods Advertising Code (A90600)

- Interim authorisation granted 18 December 1996
- Draft determination issued 29 April 1997
- Determination issued 2 July 1997

On 11 December 1996 the Proprietary Medicines Association of Australia and the Nutritional Foods Association of Australia lodged an application for authorisation in relation to the adoption and administration of the Therapeutic Goods Advertising Code.

The proposed arrangements provided for:

- the establishment of a Therapeutic Goods Advertising Code Council;

- the adoption of the Therapeutic Goods Advertising Code as an industry standard; and
- the establishment of a complaints resolution panel and appeal mechanism to deal with disputes.

According to the applicants the arrangements are intended to ensure continuity of consumer protection following the abandonment of the self-regulation scheme previously administered by the Media Council of Australia.

On 18 December 1996 the Commission granted interim authorisation to the arrangements. On 29 April 1997 it issued a draft determination proposing to grant authorisation to the arrangements. It noted that the proposed arrangements might substantially lessen competition, because of:

- the extension of advertising restrictions beyond the provisions of the Therapeutic Goods Act; and
- provision for the imposition of sanctions where an advertisement is found to be in breach of the code.

However, it considered that the arrangements would benefit the public through:

- the continued application of a Therapeutic Goods Advertising Code, together with effective mechanisms to ensure compliance;
- the implementation of a flexible system capable of responding quickly to complaints and changes in community needs and attitudes;
- broad coverage (albeit incomplete for the time being) of the code across various media; and

- consistency in application of the code between over-the-counter medicines and health and nutrition products.

These benefits were expected to outweigh any anti-competitive detriment associated with the code.

Following a pre-decision conference, on 2 July 1997 the Commission granted authorisation to the proposed arrangements for four years, subject to any application to the Tribunal for review.

On 24 July 1997 the Australian Competition Tribunal received an application for review of the authorisation from Bionic Products.

AW Tyree Transformers Pty Limited and Wilson Transformer Company Pty Ltd

In relation to a joint marketing agreement for the supply of distribution transformers (A30178-9)

- Draft determination proposing to grant authorisation issued 11 February 1997
- Determination granting authorisation issued 9 July 1997

On 1 November 1996 AW Tyree Transformers Pty Limited and Wilson Transformer Company Pty Ltd lodged two applications for authorisation regarding a proposed joint marketing agreement to provide for the tender and supply of distribution transformers.

The applications contained provisions that may have constituted a breach of s. 45 of the Trade Practices Act.

According to the applicants, the joint marketing agreement is a competitive response by two long term participants to changes in the electricity supply industry, including changes to the purchasing preferences of electricity utilities, the main buyers of distribution transformers.

On 11 February 1997, the Commission issued a draft determination proposing to grant

authorisation in respect of the proposed joint marketing agreement. ABB Transmission and Distribution and Schneider Australia Limited requested a pre-decision conference, which was held on 20 March 1997 and reconvened on 13 May 1997.

Following the Commission's draft determination and discussions at the pre-decision conference, the applicants redrafted the proposed joint marketing agreement to clearly identify when joint bidding would occur and when Tyree and Wilson would continue to compete with each other.

The Commission was of the view that the relevant market for the purpose of assessing the applications was the national market for the supply of distribution transformers. It considered that although the proposed joint marketing agreement may reduce competition between the applicants in terms of the supply of range B transformers in particular, this was not likely to have a significant anti-competitive impact on the market in general, as there appeared to be a significant degree of competition.

The Commission accepted that there was public benefit in the joint marketing agreement through increased competition in tendering for distribution transformers where a utility requires or prefers the full tender requirements to be met by a single supplier.

The Commission was satisfied that there was sufficient public benefit associated with the joint marketing agreement.

On 9 July 1997 the Commission issued a determination granting authorisation for three years.

Draft determinations

National Electricity Code and National Electricity Market access code

(A40074-6)

- Draft determination proposing to grant conditional authorisation to the NEC and to

accept the NEM access code issued 29 August 1997

The National Electricity Market

Late last year and earlier this year, the National Electricity Code Administrator (NECA) and the National Electricity Market Management Company (NEMMCO), on behalf of the governments of the Australian Capital Territory, New South Wales, Queensland, South Australia and Victoria, lodged applications with the Commission:

- for authorisation under Part VII of the *Trade Practices Act 1974* of the proposed electricity wholesale market arrangements; and
- for acceptance under Part IIIA of the Act of an access code for the electricity transmission and distribution networks.

The applications relate to a single integrated document, the National Electricity Code (NEC). The NEC details market and institutional arrangements relating to market rules, system security, network connection, network pricing and metering. The NEC also contains the rights and obligations of the wholesale market participants.

On 29 August 1997, the Commission released its draft determinations to conditionally accept the two applications. This decision was made by the Commission's Energy Division which is comprised of three members of the Commission and Associate Commissioners from the independent regulators in New South Wales, Tasmania and Victoria.

Authorisation draft determination

The applications to authorise the NEC, and all related conduct, have been made in order to protect market participants from possible contraventions of ss 45 or 47 of the Act. For example:

- the NEC imposes strict prudential requirements on participants which could potentially be considered to be a barrier to entry;

- scheduled generators (greater than 30MW) bid into the market and are dispatched according to least cost merit order, a price determination process which could be construed to be a price fixing arrangement; and
- the wholesale market is a gross pool whereby all electricity is traded by auction at a common clearing price through the pool and where dispatch is centrally coordinated, and all trading is blind so buyers do not know the identity of the sellers. This arrangement may breach s. 47 (exclusive dealing) of the Act and is in contrast to the alternative of bilateral contract trading supplemented by a net spot market for trade in contract differences.

Despite the potential for anti-competitive detriment, the Commission's assessment indicates that the code may instigate significant public benefits (e.g. greater efficiencies, lower input costs for other industries, lower prices and better service delivery to end users). However, the assessment also highlights a large number of shortcomings which will influence the effectiveness of competition. In order to improve the balance between public benefit and anti-competitive detriment, the Commission is imposing conditions which must be met prior to market commencement, including:

- altering arrangements which have been justified on the basis of current market immaturity (e.g. the price floor, the price cap, short term forward market and market intervention);
- a requirement that the system operator (i.e. NEMMCO) monitor the market daily in order to ensure that all trading is in accordance with the code; and
- derogations that extend beyond the transition period will not be allowed.

One of the issues raised which goes beyond the subject matter of the code is the structure of the wholesale market. The Australian Bureau of Agriculture and Resource Economics' (ABARE) analysis of market structure indicates that the NEM is characterised by a significant degree of market concentration, particularly in South

Australia and New South Wales. ABARE concluded that this could result in some generators dominating particular segments of the market and that strategic behaviour by generators during periods of high demand could lead to significant increases in electricity spot prices. On the basis of this analysis, the Commission urged the NSW and South Australian governments to consider further structural reform.

Access code draft determination

The access code is a sub-set of the broader NEC. It focuses on network connection, investment and pricing and excludes those parts of the NEC relating to the operation of the wholesale market. In general, the access code allows generators and large electricity users (e.g. smelters) to participate in the wholesale market and to separately contract for its transport on the networks.

In terms of an access regime as envisaged in the competition policy reforms and Part IIIA, the access code will largely be irrelevant for most households. Most small and medium sized electricity users will continue to purchase their electricity through retailers which will bundle the wholesale commodity and transport costs. The code's impact on smaller users will largely be felt through the regulatory mechanisms which set the prices for the monopoly networks which will be passed through as part of the retail price.

The Commission concluded that, in general, the NEC provides an acceptable framework for parties to gain access to and use of the electricity transmission and distribution networks. However, the Commission has determined that certain features of the access code do not meet the criteria in Part IIIA of the Act and regulations for an acceptable access code. Before it is willing to accept the access code, the Commission will be seeking to resolve its major concerns relating to:

- establishing a better balance between regulatory flexibility and price certainty by requiring that jurisdictional regulators are independent of executive government;
- providing regulators with effective powers to:

- publicly release information gathered in the price setting reviews; and
- determine the accounting and functional ring-fencing guidelines for a network's monopoly and contestable activities;
- improving the efficiency and location signals of transmission network prices;
- improving the negotiation arrangements for network connection by:
 - allowing access seekers to construct and operate their own wires thereby providing them with the option to by-pass the incumbent networks; and
 - making it clear that access seekers can use the NEC's dispute resolution procedures thereby providing a short circuit to any unduly protracted negotiations;
- limiting the extent of non-uniform jurisdictional arrangements which persist beyond the year 2000, for example:
 - Victoria's arrangements to facilitate the privatisation of its transmission network operator (PowerNet Victoria); and
 - South Australia's attempt to use average, not cost reflective, prices for their transmission network.

The Commission's assessment has also highlighted a larger number of other shortcomings which impact on the balance of the interests of network owners, access seekers and the public interest. Some of these shortcomings involve complex issues and will take some time to resolve. Other shortcomings can easily be handled through the normal code change processes.

Next steps

Following the release of the two draft determinations, a pre-decision conference was requested by one of the interested parties. Subject to the outcome of the pre-decision conference, the Commission proposes to make

a final determination on authorisation and decision on the access code in mid-October 1997.

Copies of the draft determinations can be obtained from the Commission's Internet home page, from Commission offices, or by contacting Alison Milton on (02) 6243 1253.

Australian Payments Clearing Association

In relation to Consumer Electronic Clearing System regulation and procedures (A30176-7)

- Draft determination rejecting application issued 20 August 1997

On 6 September 1996 the Australian Payments Clearing Association (APCA) applied for authorisation of the proposed regulations and procedures for the Consumer Electronic Clearing System (CECS).

Background

Consumer electronic transactions currently include debit card transactions generated within the ATM and EFTPOS networks, plus Visa, Mastercard and Bankcard credit card arrangements. Stored value cards (smart cards), which are currently being trialed, will also fall into this category.

Current credit and debit card payment arrangements are not protected under the Trade Practices Act, so persons taking part in any such arrangements that may breach the Act would be open to court action by an aggrieved party or the Commission.

CECS arrangements

Under the umbrella of APCA, financial institutions are seeking authorisation of CECS arrangements, which include certain standards and procedures to facilitate interchange of debit card payment instructions generated within the ATM and EFTPOS networks.

In essence, CECS provides a forum for members to consider, agree and promulgate relevant interchange standards and procedures.

The advantage of CECS membership is that members can contribute to the setting of such standards and procedures.

The Commission considered that the proposed CECS rules were substantially incomplete.

In particular it considered that:

- APCA should develop mandatory interchange standards and procedures for participation in the ATM and EFTPOS networks as issuers or acquirers;
- APCA should administer compliance with such standards and procedures;
- interchange fees should be based on efficient pricing principles, and APCA should include a general requirement to this effect in its EFTPOS and ATM interchange standards and procedures;
- APCA should conduct independent audits of interchange fee arrangements to ensure that access to the EFTPOS and ATM networks is available to issuers and acquirers on fair and reasonable commercial terms;
- APCA should provide a forum through which EFTPOS participants that do not qualify for membership of CECS can consult with APCA and members of CECS;
- the CECS membership criteria should be amended to remove the requirement that all members be subject to prudential supervision and/or satisfy standards as to financial standing.

Conclusion

On 20 August 1997 the Commission issued a draft determination rejecting the application for authorisation in its current form. It proposes to delay issuing a final determination so that the CECS rules as further developed by APCA can be considered in its final determination.

CSR Ltd

In relation to the collective negotiation of owner/driver contracts

- Draft determination proposing to grant authorisation issued on 3 September 1997

On 1 August 1995 CSR Ltd sought authorisation to make and to give effect to contracts, arrangements or understandings with each of its carriers of pre-mixed concrete. The contracts, arrangements or understandings will establish the terms and conditions under which carriers will operate and will also establish a formula for cartage rates.

As the application raised a number of broader issues the Commission decided those issues would need some time to be fully considered, and it granted interim authorisation to the application. During the course of the interim authorisation CSR and its carriers negotiated and entered into contracts. The contracts provide for continuing discussions on rates and conditions.

The Commission and the Tribunal have previously considered a number of similar applications. However, the CSR application is distinguishable in two respects, namely:

- it is not an industry-wide application involving suppliers of concrete at the producer level — the proposal involves only CSR and its carriers; and
- entry of carriers to the market for supply of its services is controlled by CSR and not by its association or union (in this case the Transport Workers Union (TWU)).

In its evaluation the Commission noted the distinguishing features of the application but still considered the conduct anti-competitive because it discourages carriers from competing between themselves, even though the Commission acknowledged that competition between carriers would always be limited because of the nature of the work.

The Commission, however, considered that there were benefits to the public resulting from the contracts.

Carriers are 'locked into' CSR in the sense that CSR owns the agitators, it controls the number of trucks, the customers are the customers of CSR and not the carriers, and the trucks are painted in CSR's colours. There is also evidence that CSR would seem to have little difficulty in recruiting new carriers. On that basis the Commission concluded that there is potential for carriers to be exploited and there is public benefit in allowing the carriers to come together to improve the fairness in the negotiating process. The Commission is also satisfied that there is public benefit in the form of:

- continued industrial harmony;
- increased incentive for carriers to improve their productivity; and
- lower transaction costs.

These benefits will allow CSR to be more competitive, and the Commission expects that ultimately the community will benefit through lower construction costs.

Although carriers are independent businessmen they have chosen to engage the TWU to provide advice in negotiating with CSR. The Commission noted that the TWU sees its role as being limited to providing advice and secretarial services to the committee of carriers negotiating with CSR. In the context of this application the Commission considers that to be an appropriate role for the TWU. It added, in its decision, that it would be concerned if that position were to change and the union were to seek standard conditions industry-wide. That would be likely to increase the anti-competitive detriment of the contracts.

On balance the Commission concluded that the public benefit outweighed the anti-competitive detriment and proposed to grant conditional authorisation for four years. The condition is that the TWU continue to provide only advice and secretarial services to the carriers and that the carriers themselves undertake the continuing negotiations as part of the contracts.

Revocation of authorisation

Media Council of Australia

In relation to the administration of advertising standards (A30106, A30110, A30111, A90429)

On 10 January 1986 the Trade Practices Commission granted authorisation to a system of advertising standards to be administered by the Media Council of Australia. This system provided for:

- the pre-clearance of advertising by industry approval bodies;
- the operation of an Advertising Standards Council to hear complaints about specific advertisements; and
- amendment to the codes according to changes in community needs and attitudes.

The TPC's decision to grant authorisation was appealed by the Australian Consumers' Association to the Trade Practices Tribunal. After finding that benefit to the public did not outweigh the associated anti-competitive detriment, the Trade Practices Tribunal invited the Media Council of Australia to amend its application to address its concerns.

The amendments satisfied the Tribunal that the applications for authorisation were likely to result in a net benefit to the public. The Tribunal granted authorisation subject to conditions designed to ensure implementation of the amendments, and the revised codes came into effect on 1 June 1989.

On 19 August 1996 the Australian Competition and Consumer Commission announced a review of the authorisations. It believed that circumstances had changed since authorisation was granted, including that:

- the codes no longer reflected community needs;

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

On 31 December 1996 the Media Council of Australia and the Advertising Standards Council were disbanded. These developments were identified by the Commission as possible further material changes of circumstance surrounding the authorisations.

After considering the views of interested parties, the Commission decided that there had been a material change of circumstance which warranted revocation of the authorisations.

On 9 July 1997 the Commission revoked the authorisations.

Notifications

Notifications considered

The Domain Retirement Country Club (N50092) (Revoked)

On 4 March 1997 The Domain Retirement Country Club (DRCC) lodged a notification with the Commission in respect of conduct which may have constituted third line forcing. The conduct involved the inclusion of a clause in the Unit Owners' Agreement requiring the unit owner to engage a real estate agent (CRS

Management Pty Limited) nominated by the DRCC for the resale of the unit.

DRCC claimed that the conduct gave rise to public benefit in relation to potential purchasers of units in The Domain, vendors of those units, and to DRCC as the operator. It claimed that the conduct would ensure that potential purchasers would be fully informed and receive the necessary documentation, vendors would gain the service of an agent experienced in selling retirement village units, and DRCC would gain from being able to ensure that it satisfied its obligations under the *Retirement Villages Act 1988* (Qld).

However, in the Commission's view, the conduct gave rise to significant public detriment. It eliminated a unit owner's choice in selecting a real estate agent to sell their unit and forced them to accept CRS's conditions of service and commission rates. It also removed the normal options available to a vendor in a competitive real estate market.

The Commission considered that the reasons given by DRCC did not justify the use of such a restrictive agreement.

It was satisfied that the likely benefit to the public from the notified conduct would not outweigh the likely detriment to the public.

On 25 June 1997 the Commission gave notice to DRCC, revoking the notification.

**ANZ Banking Group Ltd (N90367)
(Allowed to stand)**

ANZ proposes offering a facility known as the 'Guaranteed Equities Loan' which can be used to finance the acquisition of certain shares. ANZ takes a mortgage over the shares as security. The borrower must use ANZ Securities Ltd to make the initial acquisition of the shares (third line forcing).

Optus Networks Pty Ltd, Optus Vision Pty Ltd (N90373-4) (Allowed to stand)

Proposed offer of discount, allowance, rebate or credit on telephony charges on condition that

customer subscribes to Optus Vision pay TV services. Proposed offer to subscribers to Optus Vision pay TV services of free or discounted installation of telephone capability on condition they purchase local telephony services from Optus Networks.

Commercial Union Assurance Company and Swann Insurance (Aust) Pty Ltd (N90386-7) (Allowed to stand)

Reduction in appliance insurance premiums if purchase of disablement and involuntary redundancy unemployment insurance, and vice versa.

National Australia Bank Limited and ors, National Australia Financial Management Ltd and ors, National Australia Fund Management Ltd and ors, National Australia Superannuation Pty Ltd and ors, National Australia Trustees Ltd and ors, National Australia Asset Management Ltd and ors, Australian Market Automated Quotation (AUSMAQ) System Ltd and ors (N90388-94) (Allowed to stand)

Offer of bank products, financial products, fund management products, superannuation products, trustee products, asset management products or AUSMAQ products at a particular price or a discount rebate or credit.

BHP Iron Ore and National Australia Bank (N90397-8) (Allowed to stand)

BHPIO will supply mining contract rights to nominated contractor on condition that contractor lease equipment from MEC; and NAB will supply equipment to MEC on condition that MEC sub-lease it to nominated contractor (third line forcing).

Advance Asset Management Ltd (N90741-2) (Allowed to stand)

Exclusive dealing providing credit to approved borrowers on security of shares or units in a managed fund (third line forcing).

**State Housing Commission
(Homesweet) and Sanwa Vines Pty
Ltd (N70066) (Allowed to stand)**

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

**Bank of Western Australia (N70065)
(Allowed to stand)**

Exclusive dealing notification for program conditions of 'Affinity Home Loans' (third line forcing).

**Integral Energy Australia (N30744)
(Allowed to stand)**

Section 47 exclusive dealing to allow or offer discount to customers referred to Bank West for electricity account (third line forcing).

**Cobblestone Paving (Aust) Pty Ltd
(N50093) (Allowed to stand)**

Distributors of designer-cote-polymix cement coating to supply only applicators who are certified by Cobblestone as having attended its training course.

**Lend Lease Property Investment
Services Pty Ltd (N30746) (Allowed
to stand)**

LLPIS will provide funding to Kidmania to establish child minding centres, on condition that Kidmania lease premises from specified retail centres (third line forcing).

APCO (N40209) (Allowed to stand)

Exclusive dealing notification for offering discounts on petroleum products to purchasers from Franklins and local retail traders (third line forcing).

**Optus Vision Pty Ltd (N90403)
(Allowed to stand)**

The offering of discounts for pay TV charges to customers who acquire telephone services from Optus Networks Pty Ltd (third line forcing).

**Optus Networks Pty Ltd (N90404)
(Allowed to stand)**

The offering of discounts for telephony charges to customers who acquire pay TV services from Optus Pty Ltd (third line forcing).