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.

Australian Competition Tribunal

Review of the Commission's revocation of authorisation of AGL Cooper Basin gas supply arrangements

Background

On 17 April 1996 the South Australian Cooper Basin Producers applied to the Tribunal to review the Commission's decision to revoke the authorisation of arrangements under which the Producers supplied gas to The Australian Gas Light Company (AGL).

The arrangements had been authorised by the Trade Practices Commission in 1986. In South Australia the agreements were already exempted from the application of Part IV of the Trade Practices Act through the operation of provisions in the *Cooper Basin (Ratification) Act 1975* (SA). The purpose of the authorisation was to enable the parties to conduct price reviews in Sydney where the Ratification Act exemption did not apply.

The Commission reviewed the arrangements in 1995–96 in response to the industry changes set in train by COAG's agreement on free and fair trade in gas, which provided for third party access to transmission and distribution pipelines. The Commission found that there had been a material change of circumstances since the authorisation was granted in 1986. Further, three provisions of the Letter of Agreement that tied AGL to supply by the Producers now appeared to the Commission to have anti-competitive effects in practice. These were:

- clause 18 — 'take-or-pay', which obliged AGL to purchase and pay for 80 per cent of annual contract quantities of sales gas from the Producers;
- clause 20 — 'exclusive dealing', which obliged AGL to purchase all gas within maximum contract quantities from the Producers; and
- clause 12 — 'first right of refusal', which obliged AGL to give the Producers the first right to refuse to supply AGL's requirements of gas over and above contract quantities, provided the Producers' price and terms of sale were no less favourable than those on which AGL could obtain gas elsewhere.

The Commission formed the view that the detriments arising from the anti-competitive effects of these clauses now outweighed the public benefits of the arrangements, which included the secure supply of gas to New South Wales. Accordingly, on 27 March 1996 the Commission revoked the authorisation and granted a new, limited authorisation to enable the parties only to conduct price reviews for a specified period of time.

(For further detail on the Commission's determination, see *ACCC Journal* 3, June 1996, pp. 55–8.)

Tribunal's determination

The Tribunal decided on 14 October 1997 to revoke the Commission's determination. This means that the TPC authorisation of 1986 will continue to have effect until the supply arrangements terminate in 2006.

While the Tribunal allowed the authorisation of the arrangements to stand, it found that the tying clauses were anti-competitive and that 'a less restrictive contract would have sufficed, and would suffice today, to yield the benefit to the public' that arose from the arrangements.

The Tribunal found that there were three product markets of relevance to this application: natural gas, and the services of transmission and reticulation. The Tribunal considered that the natural gas market extends at the margin to encompass, at times, alternative and complementary energy sources, principally electricity. The content and geographic scope of these markets are expanding over time, and market structures evolving from monopoly to at least 'contestability' in present-day markets and possibly to full workable or effective competition in the markets of the future.

The Tribunal concluded that there had been a material change of circumstances since 1986, stemming largely from COAG competition policy reforms.

It considered that substantial public benefits arose in this long term contract in sustaining substantial, long-lived, sunk investments, though that benefit had diminished to some extent because there was less need, with current and future developments in the gas and transmission markets, for contractual protection against opportunism and risk. Nevertheless, the Tribunal took the view that the benefit of the contract was to be assessed over its life, society placing a value on the preservation of contract commitments, and by considering the contract as a whole.

> It is the sum of its parts, some of which in their effect are anti-competitive; but others have positive benefit. [p. 114]

The Tribunal considered that significant public detriments also arose from the contract. For example, it considered clause 12 (first right of refusal) was quite independent of the other clauses and generated no benefit and carried with it significant detriment. It also considered that there were now more economically efficient ways than the interdependent clauses 18 (take-or-pay) and 20 (exclusive dealing) to cover the necessary future cash flows, in particular the use of a two-part tariff. It noted that a less restrictive contract would have sufficed, and would suffice today, to yield the benefit to the public, but there would be transaction costs in revoking the contract and negotiating a new one in the remaining time the contract had to run.

On balance, the Tribunal concluded that the future benefit to the public of not revoking the Letter of Agreement outweighed the future detriment.

Final determination

CSR Limited

In relation to collective negotiation of owner/drivers' contracts (A50016)

- Draft determination issued 3 September 1997
- Final determination issued 9 October 1997

On 1 August 1995 CSR Ltd lodged an application for authorisation to negotiate contracts with each of its carriers of pre-mixed concrete. The contracts set the terms and conditions under which its carriers will operate and also establish a formula for cartage rates.

In support of the application CSR and other interested parties submitted a number of public benefit arguments including prospects for industrial harmony, enhanced bargaining strength of carriers, facilitation of compliance with statutory requirements and increased competitiveness of the applicant.

The Commission noted that the anti-competitive effect of the proposal was reduced because the current contract was not industry-wide and did not involve the carriers (or their representatives) determining numbers of

carriers. Although the Commission considered that the contract discouraged carriers from competing between themselves, it acknowledged that competition between carriers would always be limited because of the nature of the work.

However, the Commission considered that, because the carriers were effectively 'locked into' CSR, there was a potential for them to be exploited. It concluded there was a public benefit in allowing the carriers to come together to improve the fairness of the negotiating process.

The Commission was also satisfied that there was public benefit in the form of:

- continued industrial harmony;
- increased incentive for carriers to improve their productivity — the contract includes incentives to carriers to increase the average volume of concrete carted per load; and
- lower transaction costs than if CSR were required to negotiate individually with each of its carriers.

The Commission's view was that these benefits would, in turn, allow CSR to be more competitive, which the Commission expects will flow through to the community generally by way of lower concrete costs and lower construction costs.

On 3 September 1997 the Commission issued a draft determination proposing to grant conditional authorisation for four years, on the condition that the TWU continue to provide advice and secretarial services only to the carriers and that the carriers themselves undertake the continuing negotiations as part of the contract. The Commission had concerns that if the union were to seek standard conditions industry-wide, this would increase the likely anti-competitive detriment of the contract.

On 9 October 1997 the Commission affirmed its draft determination and granted conditional authorisation for four years.

Draft determination

Australian Stock Exchange Limited and Options Clearing House Pty Ltd

In relation to ASX business rules for derivatives (A90599)

- Draft determination issued 24 September 1997

The Commission has considered an application for authorisation jointly lodged by Australian Stock Exchange Limited (ASX) and Options Clearing House Pty Ltd (OCH) in relation to changes to ASX business rules which provide for participation and trading in ASX's automated derivatives markets.

A derivative is a financial instrument that derives its value from the value of another more basic instrument, such as a security traded on the stock exchange. Types of derivatives markets conducted by ASX include options and share ratios.

The main issues considered by the Commission related to the regulation of participation and trading in ASX's derivatives markets.

In relation to the participation rules, the Commission considered that the public interest was served through maintaining investor confidence and protection by limiting access to the market to those participants who meet the capital adequacy requirements and the other admission criteria. Further, the Commission saw public benefit in rules which protect the integrity of the market though requiring clearing members to have adequate physical and staff resources and through the disciplining of participants for inappropriate conduct.

The Commission was concerned that some rules were subjective and undefined; although, it noted, in relation to options, that there were appropriate review and appeal mechanisms in place.

However, the Commission noted that these mechanisms did not apply to the whole share ratios market. In particular, they did not apply to the approval and withdrawal of approval of

SEATS (Stock Exchange Automated Trading System) ratio operators.

Further, the Commission was concerned that rule 9.7.3(f) provided the ASX Board with an absolute discretion in relation to the approval of ratio advisers and that there were no rights of appeal against a Board decision to reject or withdraw that approval.

In relation to trading, the Commission considered the move to an automated system was likely to result in significant improvements on the old trading floor regime.

The Commission accepted that there was public benefit in setting minimum rules and standards which applied to all transactions and participants in the derivatives market, provided that they did not unreasonably inhibit competition. Further, the Commission considered it important that ASX have powers to take immediate action to protect investors and the integrity of the market and was satisfied that adequate safeguards existed to prevent ASX and participants from engaging in conduct which was detrimental to competition in the market.

On 24 September 1997 the Commission issued a draft determination proposing to grant authorisation to ASX business rules contained in sections 7, 9, 10, 11 and 12 for five years, and to grant conditional authorisation to the rules contained in section 9. The conditions are that ASX further amend the ASX business rules to:

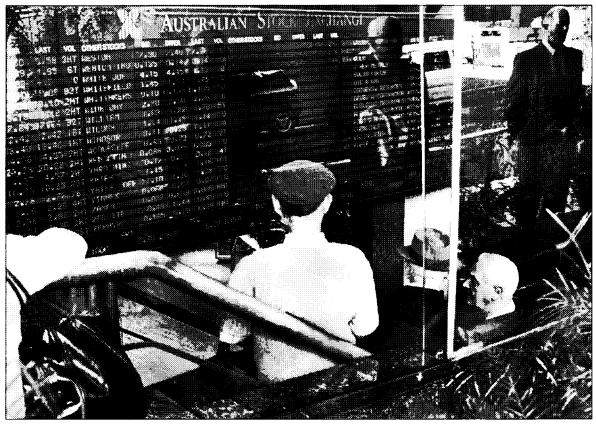
- delete rule 9.7.3(f);
- include provisions for appeal to the Appeal Tribunal in relation to decisions by the ASX Board to reject or withdraw an application for an authorised ratio adviser; and
- include provisions for appeal to the Appeal Tribunal in relation to decisions to reject or withdraw approval as a SEATS ratio operator.

A pre-decision conference was held on 3 November 1997. A range of issues were discussed at the conference, particularly in relation to the technical dealing rules relating to options.

Notification

The Commission also considered notification N30723 lodged by ASX in respect of third line forcing exclusive dealing conduct whereby Registered Independent Options Traders (RIOTs) are required to acquire services from clearing members. The conduct also involves ASX refusing to register, or continue to register, traders as RIOTs unless they have in place at all times appropriate arrangements with a clearing member for the acquisition of such services.

The Commission was satisfied that the public benefits arising from enhanced market liquidity through having RIOTs trade in the market, balanced with the maintenance of financial integrity, were likely to outweigh any public detriments which might result from the conduct. It decided to allow the immunity provided by the notification to stand.



Photography by Arthur Mostead

Interim authorisation

Queensland Electricity Transmission Corporation (Powerlink)

In relation to Queensland interim electricity arrangements (A90626–8)

On 17 September 1997 the Commission granted interim authorisation to arrangements for the transitional Queensland electricity market.

The interim authorisation allows the Queensland market to begin on 1 October 1997, as planned, and continue into 1998 until the national market arrangements commence.

At that time the Queensland market will adopt much of the National Electricity Code in line with other jurisdictions.

The arrangements will enable Queensland to introduce competitive trading arrangements based on a local spot market, increased customer choice and the entry of new retailers, all of which will ultimately converge with the national electricity market.

In its assessment of public benefits, the Commission noted that several important reforms had been introduced during 1997 such as:

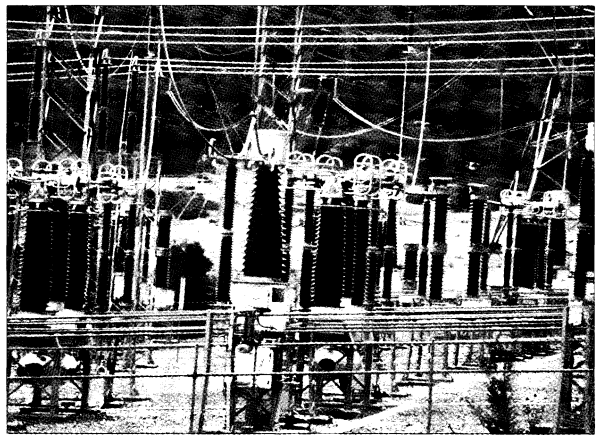
- the restructuring of the generation and retail sectors to enable competition;
- the entry of new generators over the 1998–2000 period;
- the creation of a 'ring-fenced' Queensland System Operator to manage the spot market;
- the gradual removal of customer franchise restrictions;
- the proposed mutual recognition of interstate retailers; and
- the role of the Queensland Competition Authority as an independent regulator.

At the same time, the Commission recorded its concerns about several features of the Queensland arrangements, in particular:

- long-term generator agreements which allow for variations from the market procedures and technical standards of the national code;
- the status of customer agreements and retail licensing which may impede the full delivery of customer contestability and entry by new retailers by January 1998;
- the basis for setting regions and network losses initially by a government body;
- the extent to which system interventions distort the market-based dispatch process, particularly in regard to the dispatch of ancillary services and the management of frequency bands;
- the duration and interstate effects of a number of the derogations from the national code; and
- vesting contracts and network pricing arrangements to be decided later this year.

The Commission also said the Queensland electricity arrangements should be amended, to the extent it is practicably possible during the interim period, to reflect the conditions on the Commission's authorisation decision for the National Electricity Code.

The Commission will continue its public consultations on the Queensland interim arrangements. In particular, it will re-examine the implementation of the new market in November when an application will be made to incorporate the Queensland arrangements, including network access and pricing, in the longer term national scheme.



Photography by Arthur Mostead

Notifications

Notifications considered

Toyota Motor Corporation Australia Limited (N90383) (Draft notice issued)

On 2 May 1997 Toyota Motor Corporation Australia Limited lodged a notification in relation to conduct that may constitute third line forcing exclusive dealing. The conduct involves the offer of an express warranty by Toyota subject to the new vehicle owner ensuring that periodic maintenance servicing is completed by an authorised Toyota dealer during the currency of the express warranty. Toyota advised the Commission that this requirement was in warranty documents provided with all new Toyota vehicles sold before 1 January 1997 and for selected new Toyota vehicles sold since 1 January 1997.

Toyota said that the purpose of the condition was to preclude warranty claims in relation to damage to motor vehicles caused by the lack of, or improper, servicing. The requirement that periodic maintenance servicing be carried out by authorised Toyota dealers was regarded as evidence to Toyota that proper servicing had been carried out.

Toyota submitted that the conduct provides a benefit to the public in that if it were unable to limit its liability in relation to defects arising as a result of improper servicing by third parties, it would be unlikely to offer a warranty as comprehensive and extensive as it does.

Although the warranty documents contain the third line forcing clause, Toyota said that in practice it does not insist that the vehicle be serviced by an authorised Toyota dealer. It said that maintenance servicing may be carried out by authorised Toyota dealers or other service providers. If an owner has not had periodic maintenance servicing provided by an authorised Toyota dealer, then Toyota evaluates the warranty claim on a case by case basis.

However, in the Commission's view the conduct gives rise to significant public detriment arising from a reduction in consumer choice and competition. This view was supported by a number of submissions received from independent servicing outlets. In particular, the conduct restricts a new Toyota vehicle owner's choice in selecting an outlet to provide periodic maintenance on their new vehicle and removes the normal options available to a car owner in a competitive market such as comparing price, service quality and location.

The conduct also excludes independent servicing outlets from competing for the servicing of new Toyota vehicles for the express warranty period. The Commission considers that restricting competition in this way can have an adverse effect on the price and service quality provided to new vehicle owners.

The Commission was not satisfied that the public benefits as claimed by Toyota were sufficient to outweigh the significant public detriments which the Commission considered likely to flow from the conduct.

On 22 October 1997, it issued a draft notice proposing to revoke the immunity provided by the notification.

LH Perry and Sons (N90409) (Allowed to stand)

Offering discounted fuel to customers of supermarkets (third line forcing).

Edgeworth Car Care Centre Pty Ltd (N90410) (Allowed to stand)

Offering discounted fuel for customers who produce a docket from Franklins (third line forcing).

K & S Minter Pty Ltd (N90406) (Allowed to stand)

Offering discounted fuel to customers of Lakes Foodorana (third line forcing).

BP Australia Ltd (N90402) (Allowed to stand)

Offering discounts in relation to the supply of petrol on condition the customer acquires goods of not less than a nominated value from participating stores (third line forcing).

ASX (N30723) (Allowed to stand)

Requiring Registered Independent Options Traders to acquire services from clearing members (third line forcing).

Woolmen Petroleum Pty Ltd (N90412) (Allowed to stand)

Offering discounted fuel to customers of Hoopers Ararat IGA supermarket (third line forcing).

Grants Chalambar Service Centre Pty Ltd (N90411) (Allowed to stand)

Offering discounted fuel to customers of Lakes Foodorana (third line forcing).

Merck Sharp & Dohme (N30745) (Allowed to stand)

Exclusive distribution agreement with Serve-Ag for one year.

GIO Insurance Ltd (N90405) (Allowed to stand)

Liquidators' costs and fees in pursuing litigation on certain legal services from Ebsworth & Ebsworth (third line forcing).

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

Arrangements for acquiring and granting rights for music.