
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.

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 (A30186-93) (N30751)

- Draft determination issued on 3 December 1997.
- Final determination and notice issued 14 January 1998.

The application

On 15 October 1997 the Australasian Performing Right Association Limited (APRA), a voluntary collecting society, 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 arrangements fall into four categories:

- Input arrangements — the assignment of performing rights by members to APRA and the terms upon which membership is granted;
- Output arrangements — the licensing arrangements between APRA and users of musical works;
- Distribution arrangements — the arrangements under which APRA distributes to members the fees it has collected from licences (with a rule that composers receive at least 50 per cent of the royalties collected for their work); and
- Overseas arrangements — the reciprocal, exclusive arrangements between APRA and overseas collecting societies under which each grants the other the right to licence works in their repertoires.

Background

The current applications and notification replace APRA's original applications and notification lodged on 17 November 1995. The Commission issued a draft determination on 16 October 1996 in respect of the original applications, proposing to deny authorisation to most of the arrangements. On 15 October 1997 APRA withdrew the original applications and lodged new applications for authorisation and notification.

The applications were opposed by the Federation of Australian Commercial Television Stations (FACTS).

Commission's assessment

APRA owns the performing rights in the vast majority of musical works in which copyright subsists in Australia (both Australian and overseas works), effectively giving it a monopoly position in respect of those rights in the market.

In the Commission's view the Copyright Tribunal did not appear to be a sufficiently practicable forum for many users of musical works and may not have the opportunity to consider competition issues in matters before it, the result being that it did not appear to effectively constrain APRA in the use of its market power.

The Commission concluded that the public benefits did not outweigh the anti-competitive detriments associated with the input, output and distribution arrangements. It considered that a number of amendments were required for authorisation to be granted.

- The collecting system should contain an 'opt out' option with the following key features:
 - composers are able to opt out on a work-by-work basis as well as by category of right or form of use;
 - 'opting out' may be by way of either assignment of commissioned works or through a licence back; and
 - blanket licence fees should be adjusted to reflect direct dealing.
- APRA should introduce an appropriate appeal mechanism and revoke the 50 per cent rule in circumstances where a member assigns all rights to a work to a third party.

The Commission concluded that the overseas arrangements were likely to give rise to a balance of public benefits and anti-competitive detriments such that authorisation could be granted, provided that the standard agreement was altered to entitle parties to terminate an agreement by giving the other six months' notice in writing. This change is to come into effect by 31 December 1998.

Notification

In relation to the notification of exclusive dealing conduct constituted by the proposed input arrangements, the Commission concluded that any benefit to the public would not outweigh the detriment constituted by the lessening of competition that was likely to result from the conduct.

Commission determination

On 14 January 1998 the Commission issued a determination denying authorisation in respect of APRA's proposed input, output and distribution arrangements, granting conditional authorisation in respect of APRA's proposed overseas arrangements until 31 December 2002, and revoking the notification relating to APRA's proposed input arrangements.

Review of determination

On 4 February 1998 APRA applied to the Australian Competition Tribunal for a review of the Commission's determination denying authorisation of the proposed input, output and distribution arrangements, and revoking the notification relating to the proposed input arrangements.

Draft determinations

Woodside Petroleum Development Pty Ltd

In relation to common terms and conditions of sale of gas produced under the North West Shelf Project (A90624)

- Draft determination proposing to grant conditional authorisation issued on 19 December 1997.

On 5 September 1997 the North West Shelf (NWS) Project participants lodged an application for authorisation of arrangements to agree on common prices, terms and conditions for the sale of natural gas to domestic customers in Western Australia, and to coordinate their method of marketing and selling gas.

The application concerns the marketing arrangements for gas to be produced from the proposed expansion of the natural gas producing facilities of the NWS Project under the Incremental Pipeline Gas Joint Venture (Incremental Venture) and other future expansion. The current proposed expansion will double the existing domestic production capacity of the NWS Project (produced under the Domgas Venture) from 550 Tj/day to 1100 Tj/day.

On the basis of the material before it, the Commission concluded that the public benefit of the proposed arrangements outweighed any anti-competitive detriment. Accordingly, on 19 December 1997 the Commission issued a draft determination proposing to grant authorisation to the applicants to coordinate the marketing and selling of gas produced by the Incremental Venture for seven years, so that the applicants, interested parties and the Commission could take account of the state of development of the market and the level of risk faced by the applicants in continuing with, or departing from, coordinated marketing at the end of that time.

The draft determination limits the authorisation to the Incremental Venture, on the basis that insufficient information was provided by the applicants to assess the balance of public benefit over detriment of other future ventures. The Commission proposes that any future expansion proposal be considered separately.

The parties had sought in their application to include an explicit provision to extend the authorisation to any new party to the NWS Project in the future. However, the Commission was concerned that the gas producers could potentially enjoy the benefit of an authorisation for conduct that could have a marketplace effect equivalent to a substantial merger of the interests in the Carnarvon Basin, yet not technically fall for consideration as a merger or acquisition. Therefore, the draft determination restricts the authorisation to the parties to the present application.

The draft determination also contains a further condition regarding minimum features for delivery points.

Port Waratah Coal Services Limited

Arrangements for implementing a capacity allocation system for the coal loaders at Newcastle (A90650-1)

- Interim authorisation denied 18 January 1998.
- Draft determination issued proposing to reject application 25 February 1998.

On 19 December 1997 Port Waratah Coal Services Limited (PWCS) lodged an application for authorisation of a capacity allocation system for coal loaders at the Port of Newcastle.

Port Waratah Coal Services Limited operates the Carrington and Kooragang coal loaders. Nearly all export coal from the Hunter Valley passes through these facilities.

During the second half of 1997 the facilities were unable to cope with demand and, as a result, a large queue of coal ships developed off the port. This queue cost the coal mining companies significant amounts in demurrage.

To alleviate the problem the coal industry decided that some form of capacity allocation system for the coal loaders would be beneficial. PWCS sought interim authorisation for the system to begin from 1 February 1998 but did not want the Commission to specify an end date and also wanted the capacity to opt in, opt out or change the system at its discretion.

Under the proposed system PWCS would allocate a share of its capacity to each coal mine, based on the mine's previous and forecast exports. The aim was to ensure that total export sales could not exceed the port's capacity, and hence reduce the ship queue off Newcastle.

While the capacity allocation system was supported by a majority of coal mining companies in the Hunter Valley, it was opposed by others such as Shell Coal and

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BHP. In the Commission's view the system created certain anti-competitive effects, such as restricting the ability of coal mines to compete with each other for sales, restricting the ability of coal traders to participate in the market and reducing the incentive for coal mines to improve their efficiency.

The Commission concluded that there was no public benefit from implementing the system. It considered that the proposed system would simply hide the port capacity limitation and queuing problems by passing them up the coal chain to the coal mining companies. It also had strong doubts about the necessity of the system given likely growth in the demand for Hunter Valley coal and existing port capacity.

On 25 February 1998 the Commission issued a draft determination proposing to deny the authorisation. A pre-decision conference was held on 13 March 1998 in Newcastle.

Interim authorisation

Queensland vesting contracts

On 15 January 1998 the Commission granted interim authorisation to the Queensland vesting contracts. The contracts are between the government owned generators (Stanwell Corporation, Tarong Energy and CS Energy) and retailers (Northern Electricity Retail Corporation, Central Electricity Retail Corporation and Southern Electricity Retail Corporation).

The decision allowed the introduction of the Queensland vesting contracts on 18 January 1998 as planned. The contracts are designed to put a restraint on the market power held by generators until the commissioning of the Queensland-New South Wales interconnector, expected in 2001.

The Commission is awaiting information necessary to finalise its analysis of the arrangements.

Notifications

Notifications considered

BMW Australia Limited (N90396)

Exclusive dealing notification requiring each dealer to purchase certain products in new sales facilities (third line forcing).

John and Mary Lea (N90435)

Sactotum Pty Ltd (N90434)

Astilbe Pty Ltd (N90433)

TJ & K Yeats Pty Ltd (N90432)

Hillmark Pty Ltd (N90431)

Charzula Pty Ltd (N90430)

Westoil Petroleum & ors (N90429)

Vellum Pty Ltd (N90427)

W&J Brown (N90426)

PA Job Pty Ltd (N90425)

Shaska Pty Ltd (N90424)

Mary Jane Investments (N90423) (Allowed to stand)

Exclusive dealing notification for offer of discounted petrol to customers with supermarket dockets — BP franchisees (third line forcing).

Woolman Petroleum Pty Ltd (N90436) (Allowed to stand)

Exclusive dealing notification for offering discounted fuel to customers with supermarket dockets (third line forcing).

Mutual Community General Insurance Pty Ltd (N90421) (Allowed to stand)

Discount on premiums charged by HBA general insurance to consumers who also purchase HBA general health insurance which is underwritten by National Mutual Insurance Pty Ltd (third line forcing).

**Optus Networks Pty Ltd (N90439)
(Allowed to stand)**

The offering of discounts for telephony services on condition the customer subscribes to Optus Vision pay TV services (third line forcing).

**Optus Vision Pty Ltd (N90440)
(Allowed to stand)**

The offering of discounts for pay TV charges on condition the customer acquires telephony services from Optus Networks Pty Ltd (third line forcing).

Toyota Motor Corporation Australia Ltd (N90383) (Revoked)

Exclusive dealing notification for service provided under new vehicle warranty (third line forcing).

Minister for State Development and Delfin (N90399) (Allowed to stand)

Minister for State Development and Delfin Property Group Limited (trading as Golden Grove Joint Venture) proposed s. 47 exclusive dealing in development and marketing of residential land at Golden Grove, South Australia (third line forcing).

Royal Automobile Club of WA (N70068) (Allowed to stand)

Offering of discount, rebate, credit to its customers on condition that they acquire services from RAQ (third line forcing).

Royal Automobile Club Insurance Pty Ltd (N70069) (Allowed to stand)

Offering of discount, rebate, credit to its customers on condition that they acquire services from RAC of WA Inc. (third line forcing).

HIH Casualty & General Insurance Ltd (N90419) (Allowed to stand)

HIH Winterthur proposes to supply travel insurance at a discount of particular price on condition that the customer acquires travel through a Qantas office (third line forcing).

Mercantile Mutual Insurance (Aust) Pty Ltd (N30752) (Allowed to stand)

Mercantile Mutual Life Insurance Pty Ltd (N30753)

ING Mercantile Mutual Bank Ltd (N30754)

Mercantile Mutual Investment Management Ltd (N30755)

Mercantile Mutual Funds Management Ltd (N30756)

Mercantile Mutual Funds Management Aust Ltd (N30757)

Mercantile Mutual Insurance (NSW Workers Compensation) Ltd (N30758)

Mercantile Mutual Insurance (Workers Compensation) Ltd (N30759)

Mercantile Mutual Worksure Ltd (N30760)

Mercantile Mutual (SA Workers Compensation) Ltd (N30761)

QBE/Mercantile Mutual Underwriting Agency Pty Ltd (N30762)

Mercantile Mutual Holdings Ltd (N30763) (Allowed to stand)

One Mercantile Mutual Group company will offer a discount on premiums, nil or reduced service fees, better policy terms, free products, free periods of cover or other benefits to persons who acquire one or more products from any other member of the Mercantile Mutual Group (third line forcing).

**Jamison Holdings Pty Ltd (N90441)
(Allowed to stand)**

Exclusive dealing notification for offering discounted petrol to customers with supermarket dockets (third line forcing).

Advance Petroleum Distributors Pty Ltd (N90445) (Allowed to stand)

Exclusive dealing notification for offering discounted petrol to customers with supermarket dockets (third line forcing).

**Eastern Energy Limited (N90438)
(Allowed to stand)**

Eastern Energy will provide a discount to its customers on their electricity account that have a standard State Bank 'Rate Saver' home loan or similar product (third line forcing).

GIO Finance Ltd (N30750) (Allowed to stand)

Applicants for home loans are offered building and contents insurance for \$50 for first year through GIO-RACQ Insurance Ltd.

**Australasian Performing Right Association Limited (N30751)
(Revoked)**

Arrangements for acquiring and granting rights for music.

Justco Pty Ltd, J&B Bentley Holdings Ltd (N90448-9) (Allowed to stand)

Proposed discount on petrol to customers who have spent \$30 or more at nominated independent supermarkets at Ballarat, Horsham and Stawell (third line forcing).

Fosters Petroleum Pty Ltd, Restbay Pty Ltd, Dan P Carroll, Westoil Petroleum Pty Ltd, Lonaport Pty Ltd (N90450-4) (Allowed to stand)

Proposed discount by relevant BP service stations in Dubbo and Orange to customers who have purchased groceries at a 'nominated

value' from participating Franklins Supermarket (third line forcing).

**R&P Matthews Pty Ltd (N90455)
(Allowed to stand)**

Proposed discount on petrol to customers who have spent \$30 or more at a Coles supermarket (third line forcing).

AMP General Insurance Limited, Priority One Financial Services Limited (N90446-7) (Allowed to stand)

Proposed rebate on first year's premium for home building insurance and home contents insurance on condition that the customer acquires a home loan product from Priority One (third line forcing).

Nerrin Pty Ltd (N90457), SR & SA McVea (N90458) (Allowed to stand)

Offering a discount on supply of petrol on condition that customers have bought goods of not less than a nominated value from participating Farmer Jack Supermarkets (third line forcing).