

---

# 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.*

## Final determinations

### Port Waratah Coal Service Limited

*In relation to a proposed capacity allocation system for the coal loaders at Newcastle (A90650-1)*

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

PWCS 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 could not 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 and damaged the reputation of the Port of Newcastle as a reliable source of coal.

The capacity allocation system was designed to alleviate this problem by allocating a share of the coal loaders' capacity to each coal mine.

In its draft determination issued on 25 February 1998 the Commission proposed to deny the authorisation as it had concerns that the system would create certain anti-competitive effects and did not provide any public benefits.

Following a pre-decision conference, on 25 March 1998 the Commission issued a final determination proposing to grant conditional authorisation to the arrangements.

The Commission considered that the system would have short term benefits, particularly in restoring the image of Newcastle in the eyes of coal buyers. However, it considered it might generate certain anti-competitive effects in the long term. For example, it would reduce the pressure on PWCS to improve its efficiency, restrict the ability of coal mines to compete with each other for sales, restrict the ability of coal traders to participate in the market, and reduce the incentive for coal mines to improve their efficiency. The Commission considered that a more effective and efficient long term solution was to improve the capacity of the Hunter Valley coal chain, which is currently under way.

The conditions of the authorisation are that:

- it is granted only until 30 September 1998 (by which time a new berth at Kooragang would be operational);
- the capacity allocation system can be implemented only if the vessel queue has been 25 vessels or more for seven

consecutive days, and it can be implemented only for two months at a time;

- PWCS must notify the Commission when it plans to implement the system; and
- PWCS must seek Commission approval for any proposed changes to the way the system works.

The Commission will monitor the way in which coal traders are treated under the system should it become operational.



Photography by Arthur Mostead

### **Newfurn Floor Coverings Limited**

*In relation to certain clauses of the Newfurn membership agreement (A90629)*

- Draft determination proposing to grant authorisation to the application and allowing the notification to stand issued 4 March 1998.
- Final determination granting authorisation and allowing notification to stand issued 1 April 1998.

On 10 October 1997 Newfurn Floor Coverings Limited lodged an application for authorisation of clauses 4.2(f), 4.2(g) and 4.5 in its membership agreement.

Newfurn is a cooperative buying group of floor covering retailers. It operates throughout Australia except for Queensland and the Northern Territory. Newfurn organises collective buying facilities on behalf of its members and grants licences to its members to

use Newfurn's trademarks — including Carpet Choice (a banner group of carpet retailers).

Clauses 4.2(f) and 4.2(g), referred to as a wholesaling restriction, prohibit Carpet Choice members from on-selling Carpet Choice exclusive lines of carpet. Clause 4.5 prohibits members from using the services, benefits or privileges provided by Newfurn under the agreement for a business other than that conducted at the Carpet Choice licensed outlet.

Newfurn claimed the clauses were necessary to give its members a competitive advantage through product distinction, which would thereby promote increased competition with the national chains and the large number of State-based groups.

#### *Notification*

Newfurn Floor Coverings Limited also lodged a notification relating to a 'supply proposal' contained in clauses 5.3 and 5.4 in the agreement which requires members to use 'reasonable endeavours to support' Newfurn-preferred suppliers and to purchase adequate quantities of carpet from them.

Newfurn argued that the supply proposal was necessary to secure better trading terms with its suppliers, including lower prices for its members. This would enable its members, who are predominantly small business operators, to compete more effectively on price and increase competition which would ultimately result in price savings to the consumer.

The Commission concluded that the conduct referred to in the three clauses and the supply proposal would result in a benefit to the public which would outweigh any likely detriment resulting from the conduct.

On 4 March 1998 the Commission issued a draft determination proposing to grant authorisation to the application and allowed the notification to stand. There was no call for a pre-decision conference. On 1 April 1998 the Commission affirmed its draft determination and granted authorisation to the application.

## **Australian Payments Clearing Association Limited**

*In relation to its proposed regulations and procedures for the High Value Clearing System (A90617–9)*

- Draft determination proposing to grant authorisation issued 4 March 1998.
- Final determination granting authorisation issued 1 April 1998.

On 29 April 1997 the Australian Payments Clearing Association Limited (APCA) lodged three applications for authorisation of its regulations and procedures for the High Value Clearing System (HVCS).

Under the HVCS arrangements, members electronically exchange high value payments with each other. It is expected that wholesale electronic payments currently exchanged between the four major banks (the ANZ, CBA, NBA, Westpac) and the Colonial State Bank through their Bank Interchange & Transfer System (BITS), and high value paper warrants and cheques currently exchanged through APCA's paper clearing system (APCS), will migrate to the HVCS.

The HVCS arrangements form one component of the Real Time Gross Settlement (RTGS) system which is being established in Australia.

Australia currently has a 'deferred settlement' payment system under which the settlement of clearing obligations between financial institutions occurs at 9.00 a.m. on the day after transfers of the payment messages underlying settlement have taken place. Under deferred settlement systems, should an institution be unable to meet its obligations, other institutions due to receive funds are exposed (settlement risk) and there is significant potential for other parties to fail (systemic risk).

Under the proposed RTGS system, settlement between institutions involved in a payment transaction occurs before the transfer of the payment message between the institutions. APCA advised that the introduction of the RTGS system would eliminate settlement and

systemic risk for high value payments which are settled in real time.

The Commission was satisfied that the HVCS arrangements would result in public benefit through increased cost efficiencies and reduced settlement and systemic risk in the payments system.

It was also satisfied that requirements relating to prudential supervision and membership were likely to result in public benefit sufficient to outweigh any anti-competitive detriment.

The Commission recognised that the setting of operational and technical requirements would be likely to result in benefits in terms of the efficiency, security and integrity of the clearing system.

On 4 March 1998 the Commission issued a draft determination proposing to grant authorisation to the HVCS arrangements for 10 years. No pre-decision conference was requested. On 1 April 1998 the Commission issued a final determination granting authorisation to the arrangements until 23 April 2008.

## **Australian Stock Exchange Limited**

*In relation to ASX business rules for SEATS (open interface) and the SEATS access agreement and derivatives access agreement (A90623)*

- Draft determination proposing to grant conditional authorisation issued 25 February 1998.
- Final determination granting conditional authorisation issued 1 April 1998.

On 29 July 1997 the Australian Stock Exchange Limited (ASX) lodged an application for authorisation of changes to section 2 of its business rules which govern the operation of the Stock Exchange Automated Trading System (SEATS) for the trading of securities in the stock market conducted by ASX.

In 1992 the Commission granted authorisation to a number of ASX business rules contained in

section 2 to provide for trading on SEATS in the automated market.

The current application proposes changes to the rules to provide for the introduction of SEATS 97 and the open interface environment.

The Commission considered that the changes would continue to provide the benefits identified by the Commission in the 1992 application. It also considered that the changes would increase efficiencies, particularly through allowing member organisations to choose and tailor their trading systems to suit their businesses (rather than being tied to standard ASX technology) and through the introduction of automated order processing.

The Commission accepted that there was public benefit in requiring member organisations to comply with certain rules and procedures, including rules which limit access to the market to suitably qualified and experienced personnel, provided there were adequate appeal mechanisms in place.

The Commission proposed to grant authorisation to the rules for five years on condition that ASX include provisions to appeal decisions made by the ASX Board to reject, suspend or withdraw an application for a designated trading representative.

#### *Notification*

The Commission also considered a notification lodged by Australian Stock Exchange Operations Pty Ltd (ASXO) in relation to certain clauses in the SEATS access agreement and the derivatives access agreement. The effect of these clauses is to place restrictions on the resupply of two types of information, namely:

- restricted information — which can be resupplied only to trading participants (member organisations) who have entered into a material agreement with ASXO's customer; and
- general information — which can be resupplied to any person who has entered into a material agreement with ASXO's customer.

The Commission was satisfied that the exclusive dealing conduct contained in the access agreements would not substantially lessen competition in the market for the supply of ASX trading information to end users.

#### **Job Futures Limited**

*In relation to tendering for provision of employment services (A90625)*

- Interim authorisation granted 24 September 1997.
- Draft determination proposing to grant conditional authorisation issued 24 February 1998.
- Final determination granting conditional authorisation issued 8 April 1998.

On 9 September 1997 Job Futures Limited lodged an application for authorisation in relation to arrangements for tendering with the Department of Employment, Education, Training and Youth Affairs (DEETYA) for the provision of employment services.

As part of the Commonwealth Government's reform of labour market assistance schemes, DEETYA was made responsible for processing, letting contracts and monitoring contractors' performance in providing employment placement services for eligible job seekers.

Job Futures proposed to tender to DEETYA for a contract to supply employment services in areas where its members were located and to sub-contract to members any work it was successful in bidding for. It also sought to allow new members to join Job Futures and be protected by any authorisation granted.

The members of Job Futures are not-for-profit organisations which provide assistance to the long term unemployed and other disadvantaged persons.

The Commission identified public benefit in improved efficiency arising from combining the resources of members. However, it considered that membership conditions relating to the setting of entrance fees, and the absence of any requirement to give reasons for refusing

membership, could potentially be anti-competitive.

The Commission concluded that the public benefits outweighed the anti-competitive detriment associated with the arrangements.

On 24 February 1998 the Commission issued a draft determination proposing to grant conditional authorisation.

There was no request for a pre-decision conference.

On 8 April 1998 the Commission issued a final determination granting authorisation on condition that arrangements were made for review of new membership provisions. The authorisation will expire at the end of DEETYA's second tender round, expected to be around 30 November 2002.

### **Australian Communications Access Forum Inc**

*In relation to constitution and rules of governance (A90613)*

- Interim authorisation granted 22 May 1997, extended on 17 December 1997.
- Draft determination proposing to grant authorisation issued 11 March 1998.
- Final determination granting authorisation issued 22 April 1998.

On 11 March 1997 the Australian Communications Access Forum Inc (ACAF) lodged an application for authorisation of its constitution and rules of governance.

The ACAF is a telecommunications industry association formed to perform the role of the Telecommunications Access Forum (TAF) in the telecommunications access regime set out in Part XIC of the Trade Practices Act. The primary roles of the TAF are to make recommendations on declared services and to submit a draft access code for Commission approval.

On 22 May 1997 the Commission granted interim authorisation to ACAF's constitution

until December 1997. The interim authorisation was extended on 17 December 1997 to give effect to the constitution and rules of governance (as further amended on 5 December 1997).

The Commission was satisfied that the operation of the constitution and rules of governance would result, or would be likely to result, in public benefits of:

- providing a framework for the industry to facilitate the efficient operation of the telecommunications access regime; and
- facilitating industry self regulation.

It considered these public benefits to be sufficient to outweigh any anti-competitive detriment associated with the conduct.

On 11 March 1998 the Commission issued a draft determination proposing to grant authorisation for five years.

There was no request for a pre-decision conference.

On 22 April 1998 the Commission issued a final determination granting authorisation for five years, conditional on the ACAF notifying the Commission of any amendments to the constitution and rules of governance within 30 days of them coming into effect.

### **Steggles Limited and others**

*In relation to the collective negotiation of chicken growers' contracts (A30183)*

- Interim authorisation issued 27 August 1997.
- Draft determination proposing to grant conditional authorisation issued 5 March 1998.
- Pre-decision conference held on 16 April 1998.
- Final determination granting authorisation issued 20 May 1998.

On 25 July 1997 Steggles Limited lodged an application for authorisation of arrangements to collectively negotiate rates and conditions for the raising of broiler chickens by chicken growers.

The Commission granted Steggles interim authorisation on 27 August 1997.

While the Commission considered that the proposed arrangements might have the potential to become agreements on prices and may limit the number of growers and processors in the relevant market, it concluded that public benefit would flow from the proposed arrangements by facilitating:

- a smooth transition to deregulation;
- a reduction in inequality of bargaining power between growers and the processor;
- a reduction in production and supply costs;
- the promotion of industrial harmony;
- a reduction in litigation; and
- contract stability, thereby enhancing grower investment.

The Commission concluded that the arrangements were likely to result in a public benefit which outweighed any anti-competitive detriment likely to result from the arrangements.

On 5 March 1998 it issued a draft determination proposing to grant authorisation to the application for three years, conditional on Steggles amending its draft broiler chicken growing agreement to provide, at provision 13(b), for appeal to independent arbitration in the event of a dispute between the parties.

Following a pre-decision conference the Commission issued a final determination on 20 May 1998 granting authorisation for four years. It was satisfied with Steggles' amended wording to provision 13(b) and accepted the arguments by interested parties for an extension of the authorisation period.

## Draft determination

### **Australian Medical Association Limited and South Australian Branch of the Australian Medical Association Limited**

*In relation to the fee for service agreement in rural SA public hospitals (A90622)*

- Draft determination proposing to grant conditional authorisation issued 3 April 1998.

On 21 July 1997 the South Australian and Federal Australian Medical Associations (jointly referred to here as the AMA) applied for authorisation for the AMA and its members to negotiate and give effect to a common service agreement for the remuneration of visiting medical officers practising in South Australian rural public hospitals. It is known as a fee for service agreement.

Changes in national competition policy in 1996 extended the reach of the Trade Practices Act to the professions, including the medical profession. As a result, some of the practices previously engaged in by the medical profession, such as collective negotiation by doctors and the AMA, are in breach of the Act unless authorised. It was with this in mind that the AMA lodged the present application.

The Commission considered that the fee for service agreement had anti-competitive effects because it acted as a price floor for all rural hospitals in South Australia. Hospitals in the regions closer to Adelaide have to pay the same rate for medical services as hospitals in remote and outlying regions. Also, sometimes negotiations result in doctors being provided with a remuneration package over and above that provided by the agreement, but never appear to result in a discount to the hospitals.

The Commission agreed that there were public benefits arising from the provision of medical services in rural South Australia, although it was not convinced of the nexus between the method of engaging doctors in South Australia and these public benefits.

However, the Commission recognised that the South Australian Health Commission and the AMA and its members have established collective negotiation techniques. It recognised that there was some public benefit in allowing the parties to adapt to a less regulated system in a phased manner.

On 3 April 1998 the Commission issued a draft determination proposing to grant authorisation to the arrangements until 30 June 1999, subject to the condition that all parties covered by the authorisation are not permitted to conduct boycott action. If granted, the authorisation will not extend to the making of new agreements.

A pre-decision conference will be held in two parts on 19 May and 11 June 1998.

## Notifications

### Notifications considered

#### **BMW Australia Limited**

*In relation to its sales cooperation strategy (N90395)*

On 18 June 1997 BMW Australia lodged a notification in relation to a sales cooperation strategy involving Rover dealerships.

BMW imports various models of BMW branded motor vehicles from its parent company in Germany and wholesales these vehicles to the network of BMW dealers throughout Australia.

BMW is a wholly owned subsidiary of BMW AG. Rover Australia (Rover) is a wholly owned subsidiary of Rover Group Holdings (Birmingham), the shares of which were acquired by BMW AG in March 1994.

The sales cooperation strategy requires that some prospective BMW dealers agree to also become Rover dealers.

BMW gained immunity from legal proceedings under the Act for the notified conduct on 2 July 1997. Under the protection of the notification, BMW could:

- supply BMW dealerships to prospective dealers in rural areas on condition they also acquired a Rover dealership from Rover; or
- refuse to supply BMW dealerships to prospective dealers in rural areas if they did not agree to also acquire a Rover dealership from Rover.

On 12 November 1997 the Commission issued a draft notice to BMW proposing to revoke the notification immunity. A pre-decision conference was held on 18 December 1997 at the request of BMW and two interested parties.

The Commission was not convinced that the economic viability of affected BMW dealers in rural areas would be significantly improved through synergies that might result from having both a BMW and a Rover dealership.

It considered that BMW's claim that the conduct would provide the BMW group with a strong competitive strategy that would allow it to more effectively place products in the market would not be a public benefit, but rather, a private commercial justification. It noted that the conduct might adversely affect competition as dual BMW/Rover dealers might not have the capacity to take on additional competing vehicle dealerships.

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

On 11 March 1998 it issued a final notice revoking the notification, to take effect on 15 April 1998.

#### **IMS Australia Pty Ltd (N90428) (Allowed to stand)**

IMS acquires wholesale sales data from Fauldings and API on an exclusive basis.

#### **Eastern Energy Limited (N90442) (Allowed to stand)**

Eastern Energy will provide a discount on electricity accounts for the period 8.12.97 to 30.3.98 to customers that purchase split system reverse cycle air conditioners (third line forcing).

**Western Power Corporation (N70070)  
(Allowed to stand)**

Proposed discount from Smart Power electricity connection charge, and discount from an off-peak electric hot water system, when both products are purchased together.

**Mobil Oil Ltd (N40207), Norvac Ltd (N40210), Westnell Ltd (N40211), G&V and G&J Herbert (N40212), S&C Buchwald (N40213), Starwilton No 90 Pty Ltd (N40214), 080961959 Pty Ltd (N40215), AH & MH & JM Oost (N40216), S&I Rush (N40217), Tony Cauchi (N40218), Crisan Pty Ltd (N40219), B&J Westcott (N40220), Traydon Pty Ltd (N40221), J & J Brown (N40222), C&B Lawrence (N40223), TRC Hotel Pty Ltd (N40224), Brent Willing (N40225), Peter Rimon (N40226), Arames Pty Ltd (N40227), Patrick Slaninka (N40228), Kevin Jordan (N40229), LH Bellchambers (N40230), Kevrob Pty Ltd (N40231), Ken Jupp (N40232) (Allowed to stand)**

Offering discount on petrol to customers who acquire goods from the participating stores (third line forcing).

**Strasburber Enterprises Properties (N40233-40), Fahic Pty Ltd (N40234), Stadky Pty Ltd (N40235), Sawyer Petroleum (N40236), Breslet Pty Ltd (N40237), Presnall Pty Ltd (N40238), Scotts Auto Spares Pty Ltd (N40238), Ferntin Pty Ltd (N40240) (Allowed to stand)**

Offering discount on petrol to customers who acquire goods from the participating stores (third line forcing).

**St George Bank Ltd (N90444)  
(Allowed to stand)**

Third party retailers and service providers will provide discounts or free products/services in respect of products or services provided by those third parties (third line forcing).

**JB Were Capital Markets Limited  
(N90443) (Allowed to stand)**

WCM requires investors wishing to acquire JB Were deposit notes to appoint JB Were and Son as their agent to receive and hold on their behalf each deposit note issued to them by WCM (third line forcing).

**NRMA Building Society Ltd (N30768), NRMA Insurance Ltd (N30769), NRMA Financial Ltd (N30770), NRMA Life Ltd (N30771), NRMA Financial Management Ltd (N30772), NRMA Financial Planning Ltd (N30773) (Allowed to stand)**

Offering discount to customers who acquire an NRMA product from the NRMA Group (third line forcing).

**Pilkington Australia Limited (N90459)  
(Allowed to stand)**

Agreement to distribute reflective glass manufactured by G James Australia Ltd and to supply raw float glass to G James Australia Ltd (exclusive dealing).

**ASX Operations Pty Ltd (N30749)  
(Allowed to stand)**

In relation to supply of information by ASXO to a person on condition that the customer will not resupply that information to persons other than particular persons.

**State Housing Commission  
(Homewest) and Sanwa Vines Pty Ltd  
(N70067) (Allowed to stand)**

Sale of land on condition that buyers construct residences using designated builders (third line forcing).

**David Jones Ltd (N90461), John  
Martin Retailer Ltd (N90460)  
(Allowed to stand)**

Instant rewards customer loyalty program (third line forcing).



**Newfurn Floor Covering Ltd (N90422)  
(Allowed to stand)**

Newfurn wishes to oblige its members to purchase an adequate quantity of carpet from preferred carpet suppliers (third line forcing).

**International Exchange Programs Pty Ltd (N90456) (Allowed to stand)**

Proposed provision of services by IEP (including the coordination of travel arrangements, assistance with respect to locating employment, orientations, visa applications) on condition participants acquire both an airline ticket and insurance policy from entities nominated by IEP (third line forcing).

**Royal & Sun Alliance Insurance Australia Ltd (N30766), Royal & Sun Alliance Life Assurance Australia Ltd (N30767) (Allowed to stand)**

Offering consumer credit insurance to repay personal or housing loan (third line forcing).

**Bendigo Bank Ltd (N30775) (Allowed to stand)**

Discounts for NZI customers (third line forcing).

**NZI Insurance Australia Ltd (N30774) (Allowed to stand)**

Discounts for Bendigo Bank customers.

**AAP Information Services Pty Limited (N30747) (Withdrawn)**

Exclusive licence between AAP and ASXO for the supply of 'Signal G'. AAP will assume ASXO's existing relationships with distributors of 'Signal G'.

**ASX Operations Pty Ltd (ASXO) (N30748) (Withdrawn)**

Exclusive licence between AAP and ASXO for the supply of 'Signal G'. AAP will assume ASXO's existing relationships with distributors of 'Signal G'.

**Dymocks Franchise Systems (NSW) Pty Ltd (N90437) (Allowed to stand)**

Granting of franchise rights on condition the franchisor purchases products or services only from an approved supplier (third line forcing).

**Lexmark International Aust. Pty Ltd (N90384) (Allowed to stand)**

Exclusive dealing proposing to sell 'Optra' printers and separately licence the recycle toner cartridges suitable only for Optra printers.

**Evans Petroleum (Gippsland) Pty Ltd (N40241) (Allowed to stand)**

Offering a discount on petrol to customers who purchase goods from participating stores (third line forcing).

**Mobil Oil Australia Limited (N40242) (Allowed to stand)**

Offering a discount on petrol to customers who purchase goods from participating stores (third line forcing).

**Barroraft Pty Ltd (N40244) (Allowed to stand)**

Offering a discount on petrol to customers who purchase goods from participating stores (third line forcing).

**ADCO Petroleum Pty Ltd (N40244) (Allowed to stand)**

Offering a discount on petrol to customers who purchase goods from participating stores (third line forcing).

**Melbourne Market Authority (N90401) (Withdrawn)**

Licence agreement for wholesalers/retailers to acquire the services of Melbourne Markets Credit Services Pty Ltd (MMCS) for an arranged fee.

**Grand United Credit Union Ltd  
(N30778) (Allowed to stand)**

Proposed offer of discount on home loan by credit union on condition customer remains a member of a Grand United health fund (third line forcing).

**RACQ-GIO Insurance Ltd (N90462)  
(Allowed to stand)**

Proposed offer of 5 per cent on standard no claim bonus on car, home, home contents and pleasurecraft insurance to RACQ members of 10 or more years of membership (third line forcing).

**One Tel, One Tel Digital, One Net,  
One Card (N30779-82) (Allowed to stand)**

Offer of product/service at a discount on condition that customer acquires product/service of another member of One Tel group (third line forcing).

**AMP General Insurance Pty Ltd  
(N30783) (Allowed to stand)**

Free fatal accident cover for certain AMP life insurance policy owners (third line forcing).

**Cocks Petroleum Pty Ltd (N40245),  
Mogo Village Centre Pty Ltd  
(N40246), Beach Road Service  
Station (N40247) (Allowed to stand)**

Offering a discount on petrol to customers who purchase goods from Coles Supermarkets Bega and Ulladulla — 'Shop & Win' (third line forcing).

**Rhone Merieux Australia Pty Ltd  
(N90385) (Allowed to stand)**

Exclusive dealing notification in relation to the veterinary frontline product and terms and conditions of sale.