
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 if the Commission is satisfied that the practice delivers offsetting public benefits.

Determinations

The full reports of the following determinations can be obtained from the ACCC website at:
<<http://www.accc.gov.au/electric/fs-elec.htm>>.

Premium Milk Supply Pty Ltd

In relation to collective negotiations with Pauls Limited (A90745)

- Draft determination issued 14 February 2001.
- Interim authorisation issued 14 February 2001.
- Final determination issued 12 December 2001.

Premium proposed to collectively bargain farm-gate prices and milk standards in negotiations with Pauls Limited in Queensland. The 580 Queensland producers that supplied milk to Pauls through six cooperatives were offered membership to Premium.

Press coverage before the Commission's final determination was released indicated that Premium had successfully negotiated supply contracts with Pauls under the protection of interim authorisation.

Under the proposal, a milk management committee of three Premium and three Pauls' representatives would facilitate collective negotiations. Neither Pauls nor member producers would be bound to buy or sell at any particular price established by the committee. Member producers could enter into individual supply arrangements with Pauls, or any other processor, by first giving Premium six months notice.

The Commission considered it likely that the nature of the proposed arrangements and various structural

features in the market would limit the anti-competitive effects.

In particular, Pauls is not bound by any exclusivity agreement with Premium and may purchase milk outside the collective arrangements. Similarly, producer members of Premium are able to opt out of the collective arrangements and negotiate their own supply arrangements with Pauls or another processor. To the extent that some producers may choose to negotiate individually, the scope for potential competition over rates of payment and other contract terms is increased.

In addition, competitive pressures at both the processing and retail sectors are likely to limit the likelihood that any higher prices negotiated by Premium will be passed on to consumers.

The Commission considered that there was a benefit to the public flowing from the proposed arrangements, particularly from the efficiency gains from transaction costs savings and smoothing the transition from a regulated to a deregulated market.

The Commission granted authorisation until 1 July 2005.

Franklins Limited

Agreements with Interfrank Holdings Pty Ltd, Action Supermarkets Pty Limited and acquirers of Franklins stores through the Joint Independent Divestiture Alliance (JIDA) process (A30206-8)

- Draft determination issued 29 August 2001.
- Final determination issued 13 December 2001.

On 20 June 2001 Franklins Limited lodged three applications for authorisation of agreements with each of Action Supermarkets Limited and Interfrank Holdings Pty Ltd (Pick 'n Pay). The agreements were to enable the joint promotion of products for sale in stores in New South Wales and Queensland that trade with the Franklins facia brands until the last Franklins store is sold or closed, or 1 April 2002, whichever occurs earlier. The applications arose from a managed sell down of the Franklins chain to numerous companies, including Pick 'n Pay and Action, by the current owner of the chain Dairy

Farm Management Services Limited. The applicant submits that the transfer of Franklins stores to such acquirers will take some time and that until the process is complete supermarkets operated under the Franklins banner will be owned by different parties.

The Commission considered that the nature of the proposed arrangements, as well as structural features of the supermarket industry are likely to limit any anti-competitive effects that might result from the proposals, and that the resulting anti-competitive detriment is therefore likely to be minimal.

In particular, the arrangements apply to promotional pricing only, specify minimum discounts only, do not inhibit the capacity of the parties to engage in other in-store promotional activity and will be in place until the last Franklins store is sold or closed, or 1 April 2002. The Commission also noted that each of the parties to the proposed arrangements will face strong competition from other participants in the supermarket industry, such as Woolworths and Coles.

The Commission's view was that there were significant public benefits from the conduct including:

- the implementation of stronger promotional programs in supermarkets operating under the Franklins Banner;
- the maintenance of individual Franklins stores as competitive food and grocery stores;
- the maintenance of the Franklins banner as a competitive force in the grocery industry; and
- the avoidance of confusion among customers of Franklins stores acquired through the JIDA process.

The Commission concluded that the public benefits were likely to outweigh any detriments flowing from the arrangements. It granted the authorisation until the date on which the last Franklins store is sold or closed or by 1 April 2002, whichever occurs sooner.

Sydney Futures Exchange Ltd

Arrangements and conduct relating to the operation and membership of the SFE Clearing Corporation Pty Ltd, and in respect of the clearing of futures traded on markets operated by the SFE Corporation Limited (A90756-7)

- Draft determination issued 3 August 2001.
- Final determination issued 14 November 2001.

On 7 November 2000 the SFE Corporation Limited and the SFE Clearing Corporation Pty Ltd (SFECC) applied for authorisation of arrangements and conduct relating to the clearing of futures contracts by the SFECC.

The applicants sought authorisation for the following.

- SFECC clearing by-laws which specify membership criteria that must be met by applicants seeking to become clearing participants. These include being of good character, high business integrity, financial probity and being in good standing.
- Disciplinary provisions set out in the SFECC clearing by-laws, that enable the SFECC board to fine or suspend or terminate clearing participants or terminate their membership.
- Various categories of financial requirements, set out in the SFECC clearing by-laws, that must be met by clearing participants. These include a net tangible asset requirement of \$5 million and a first level commitment to the SFECC of \$1 million.
- A third line forcing requirement set out in the general by-laws G.3.2 and G.5.17(d)(i) of the business rules of the SFE, under which participants of the SFE Corporation who are not clearing participants must clear all trades made on markets operated by the SFE Corporation by them or on their behalf, through a clearing participant of the SFECC. In addition, general by-laws G.3.2(c) and G.3.6 of the business rules of the SFE Corporation require that full participants of the SFE Corporation who are not clearing participants of the SFECC be guaranteed by a clearing participant of the SFECC.

On 3 August 2001 the Commission issued a draft determination proposing to grant authorisation to the SFECC membership provisions, financial requirements and disciplinary provisions for five years. The draft determination proposed to grant authorisation to the third line forcing of clearing services and the requirement that non-clearing participants be guaranteed by clearing participants for one year after the date of Royal Assent of the *Financial Services Reform Act 2001* (FSR Act) or, in the event that the *Financial Services Reform Bill 2001* was not promulgated, for no more than five years from the date the determination came into force. Royal Assent of the FSR Act took place on 27 September 2001.

While a pre-decision conference was not called in relation to this authorisation application, one was called for the application received from Australian Stock Exchange Limited (ASX) and the Options Clearing House Pty Ltd (OCH) in respect of third line forcing conduct relating to the clearing of options contracts traded on the ASX Derivatives Market (see A90758 determination below). Issues raised at the conference are relevant to this determination. Additionally, a regulators' roundtable was held on 20 September 2001 at which relevant issues were also discussed.

Membership criteria, financial requirements and disciplinary provisions

The SFECC membership provisions, financial requirements and disciplinary provisions could be anti-competitive, particularly by imposing barriers to SFECC's clearing facility for futures contracts, and enabling the board of the SFECC to fine participants and to suspend or terminate their participation.

However, the Commission also recognises that these restrictions benefit the public by promoting the efficient operation of the SFECC's clearing facility, and hence the efficiency of futures markets. The Commission also noted that the SFECC has an appeal mechanism which should operate as a check on the ability of the SFECC to anti-competitively restrict membership and discipline members. Given the financial structure of the SFECC and its mutual financial backing by the clearing participants, clearing participants must meet financial and probity criteria which would enable them to fulfil their responsibilities to the clearing house. This is needed for the SFECC to minimise its risk and to operate efficiently.

The Commission considered that the public benefits likely to arise from the requirements would outweigh any likely anti-competitive detriment.

Third line forcing of clearing services and requirement that non-clearing participants be guaranteed by clearing participants

The Commission noted that the requirement for futures contracts traded on markets operated by the SFE Corporation to be cleared by a clearing participant on the SFECC, and the requirement that non-clearing participants be guaranteed by clearing participants, potentially stifle the entry of new clearing and settling facilities by requiring that futures contracts traded on markets operated by the SFE Corporation be cleared by a clearing participant on the SFECC.

In this context the Commission noted the consensus between regulators at the roundtable meeting on 20 September 2001 at which the Commonwealth Department of the Treasury, the Reserve Bank of Australia and the Australian Securities and Investments Commission agreed that barriers to competition between clearing houses should be removed in line with the policy objectives of the FSR Act.

The Commission acknowledged that at present, before the full implementation of the FSR Act, there appeared to be benefits associated with clearing all futures contracts traded on markets operated by the SFE Corporation in a single clearing house.

However, the reforms contained in the FSR Act are intended to increase competition by lowering barriers to entry and encouraging new participants to operate competing markets and clearing and settlement facilities. In particular, these reforms will permit (but not require) more than one clearing and settlement facility to handle the clearing and settlement of transactions executed on the one financial product market. Therefore the Commission considered it would not be appropriate to grant authorisation to the conduct for an extended period given that the conduct would not appear to be consistent with the policy objectives of the FSR Act.

Determination

The Commission concluded that the arrangements and conduct yielded sufficient public benefit to outweigh any anti-competitive detriment and granted authorisation for five years.

It granted authorisation to the third line forcing conduct for one year to provide for a reasonable transition period to the new regulatory regime.

Australian Stock Exchange (ASX)

In relation to clearing of options traded on ASX's derivatives market (A90758)

- Draft determination issued 3 August 2001.
- Final determination issued 14 November 2001.

On 10 November 2000 the Australian Stock Exchange Limited (ASX) and ASX's wholly owned subsidiary, the Options Clearing House Pty Ltd (OCH), applied for authorisation of third line forcing conduct relating to the clearing of options contracts traded on the ASX derivatives market.

The applicants sought authorisation of the requirement that as a precondition to participation in the ASX derivatives market, trading participants

are to acquire clearing services either directly or indirectly from OCH. They also sought authorisation of the requirement that to obtain clearing services from OCH for transactions on the ASX derivatives market, organisations must be ASX clearing participants and such clearing services are provided on condition that clearing participants agree to abide by the ASX business rules and procedures in force from time to time.

The Commission authorised these requirements in 1995. It had previously authorised similar arrangements since 1976, in relation to the trading of options on the Sydney Stock Exchange Limited.

On 3 August 2001 the Commission issued a draft determination proposing to grant authorisation for the requirement that as a precondition to participation in the ASX derivatives market, trading participants must obtain clearing services from OCH, as embodied in ASX business rules 7.2.1.1–7.2.1.3 until one year after the date of Royal Assent of the *Financial Services Reform Act 2001* (FSR Act) or, in the event that the Financial Services Reform Bill 2001 was not promulgated, for no more than five years. Royal Assent of the FSR Act took place on 27 September 2001.

The Commission also proposed not to grant authorisation for the requirement that an organisation must be an ASX clearing participant to access OCH clearing services for options transactions on the ASX derivatives market, as embodied in ASX business rules 10.2.1.1 and 10.2.1.3(b). The Commission invited submissions on this issue before it issued a final determination.

After a pre-decision conference on 13 September 2001 and a regulators' roundtable on 20 September 2001, the Commission received further submissions from interested parties.



Third line forcing of clearing services

The Commission decided, as per the A90756–7 determination above, to grant authorisation for 12 months on the basis that this is a reasonable transition period.

Third line forcing of membership in ASX and compliance with ASX business rules

For the requirement that an organisation be a clearing participant to access OCH clearing services for options transactions on the ASX derivatives market, and agree to abide by the ASX business rules in place, the Commission considered that this conduct, which assures the enforceability of OCH's business rules until the FSR Act is fully implemented, is likely to result in such a benefit to the public that the conduct should be allowed to take place in the short term. The Commission decided to grant authorisation for 12 months to give a reasonable transition period.

Scope of authorisation

It is proposed that this authorisation be limited only to cover options traded on the ASX derivatives market.

Determination

The Commission concluded that the third line forcing of clearing services and the third line forcing of membership in ASX and compliance with ASX business rules were likely to result in such a benefit to the public that the conduct should be allowed to take place for a 12-month transition period.

National Electricity Code Administrator

In relation to derogations to facilitate Tasmania's entry to the national electricity market (A90759–61) and vesting contracts (A80010–11)

- Draft determination issued on 18 July 2001.
- Final determination issued on 14 November 2001.

On 22 November 2000 the Commission received applications for authorisation of derogations and a non-contestable vesting contract relating to Tasmania. These applications facilitate Tasmania's entry into the national electricity market (NEM) which is conditional upon Basslink, the proposed interconnector, being built between Tasmania and Victoria.

The derogations outlined in the applications concern (among other things):

- regulating transmission and distribution service pricing for the transitional period with a view to minimising the potential for discontinuity to network owners and customers in Tasmania, and the appointment of regulators to fulfil these roles;
- implementing a retail contestability timetable in Tasmania;
- adapting the existing projected assessment of system adequacy (PASA) provisions to reflect the impact of hydrological conditions on the capability of the hydro generating system as a whole in Tasmania;
- specifying an ongoing role for the reliability and network planning panel (RNPP) in recommending power and system security and reliability standards; and
- various technical issues arising in Tasmania relating to, among other things, frequency standards, fault clearance times, and power system operating procedures.

The Commission believes that the anti-competitive detriment associated with the energy reform framework is uncertain but is bounded by the Tasmanian Government's ability to alter the structural arrangements should problems arise in the future.

The Commission decided to grant authorisation subject to conditions that improve the balance of public benefits and anti-competitive detriments relating to the derogations. The Commission has limited the authorisation in respect of the derogations to 31 December 2010.

The vesting contract

On 22 November 2000 the Commission received related applications for authorisation (A80010–11) of the Tasmanian vesting contract concerning:

- a contract between Aurora and Hydro Tasmania for non-contestable load; and
- the arrangement between Hydro Tasmania and Aurora constituted by combining the non-contestable vesting contract and the major industry vesting contracts.

The purpose of this vesting contract is to provide a hedge against the exposure of Aurora to spot prices in the NEM. In effect, the vesting contract provides certainty as to the price and volumes at which electricity is supplied to meet the franchise demand in Tasmania and transfers any volume risk to Hydro Tasmania.

The Commission believes that the public benefits associated with the non-contestable vesting contract are significant, particularly the argument that the vesting contract provides a mechanism to manage the transition to a deregulated electricity market. It also concluded that the strike price is not unduly high and is largely consistent with the vesting contract prices in other jurisdictions.

However, it did not believe that these public benefits would continue beyond the transitional term. It authorised the vesting contracts, subject to conditions designed to address concerns about their duration and coverage, to 31 March 2007.

Real Estate Institute of Western Australia (Inc.)

In relation to its articles of association, members' codes of practice, multiple listing service by-laws and standard exclusive agency agreements

- Draft determination issued 17 July 2000.
- Final determination issued 21 December 2001.

REIWA is an industry association of real estate agents in Western Australia. Its articles address, among other things, matters relating to membership and disputes involving members and appeals. The codes of practice address various issues to do with relationships between agents and vendors/lessees, other agents and purchasers/lessees. The multiple listing by-laws address elements of conjunctive agreements and members' obligations in relation to multi-listing service (MLS) arrangements. REIWA also applied for authorisation of ten standard exclusive sales and managing agency agreements it has developed for use by its members.

On 16 June 1998 the Commission began legal proceedings against REIWA alleging breaches of s. 45 of the Trade Practices Act. These proceedings led to the Federal Court on 8 October 1999 issuing orders by consent requiring, among other things, REIWA to enter into a trade practices compliance program. The program included the option for REIWA to ensure its articles, codes, multi-listing service by-laws and standard agreements did not raise trade practices concerns by applying for authorisation.

REIWA applied for authorisation on 17 July 2000. The Commission released a draft determination on 20 July 2001 proposing to deny authorisation. However, it indicated that it would be prepared to grant authorisation if REIWA addressed several concerns.

After the draft determination was released, REIWA proposed several amendments to its articles, codes and standard agreements. These addressed most of the Commission's concerns. REIWA was largely able to address the remaining concerns by providing further information to the Commission.

The Commission accepted that the documents, which are in effect agreements between competitors, provide benefits to the public. However, as drafted it considered they were likely to give rise to detriments, including an adverse impact on competition. The Commission therefore required REIWA, before authorisation can begin, to make several amendments to the documents to ensure that, overall, the benefits outweigh the detriments.

The Commission considered that public benefits flowed from, among other things, requirements that members adhere to professional standards of behaviour and obtain professional indemnity insurance, from the operation of REIWA's dispute-resolution processes and multi-listing service and from its standard contract documentation. However, it found that some restrictions in the documents were excessive, including some standard contract terms. Further, REIWA's reporting arrangements were not sufficiently transparent and its appeals process not sufficiently independent. Amendments have been required to remedy these and other concerns.

In his judgment, French J said that:

... prior to the resolution of these proceedings, [there was] a strong, indeed it might be said righteous belief within REIWA of its entitlement to behave in the way in which it did, which was in blatant contravention of various provisions of Part IV. In light of that entrenched culture of non-compliance, no doubt based upon misunderstanding of the application of Part IV, there is a need for the development in REIWA of an institutional sensitivity to and understanding of the principal provisions of Part IV.

In response to Justice French's orders, REIWA reviewed its rules and applied for authorisation.

The ACCC welcomed REIWA's application, as it considered that undertaking the authorisation process would be likely to assist REIWA to further develop its understanding of trade practices issues.

The Commission granted the authorisation for five years.

Note: The full report on the determination with an extensive list of amendments is available from the Commission's website at <<http://www.accc.gov.au>>.

Notifications

Notifications finalised

The following notifications have been allowed to stand.

Qantas Airways Ltd (N9039) The Qantas frequent flyer program offers 1000 points on the condition that the applicant acquires a Diners Club rewards membership from Diners Club Pty Ltd.

ASX Operations Pty Ltd (N31088) ASX World Link Service package involving Bloomberg software and ASX Settlement and Transfer Corporation Pty Ltd (third line forcing).

Bloomberg Tradebook (N31090) Offering terminal discount services on condition that users acquire brokerage and clearing services from G-Trade Services.

Bloomberg Tradebook (N31091) Proposing to offer terminal discount services on condition users acquire brokerage services from Bloomberg Tradebook, B-Trade or G-Trade Services and clearing services from BNY ESI or G-Trade Services.

Bloomberg Tradebook (N31092) Offer of trade facility services on condition users acquire the Bloomberg professional or related Bloomberg services for trade facility services.

Bloomberg Tradebook (N31093) Proposing to offer terminal discount services on condition users acquire brokerage services from B-Trade or G-Trade Services and clearing services from BNY ESI or G-Trade Services.

The Essential Ingredient (N31122) Franchisee may only sell the franchisor's home-related and food products that appear on the franchisor's home-related and retail product lists.

Snap Franchising Limited (N40465) Offer to supply Snap Franchising service on condition the customer also acquires or has acquired National card product from NAB.

Australian Sugar Mill Council (N50126, N50130-8) Requirement that contractors obtain specified generic induction training from licensed training providers before performing duties for sugar mill operators.

Walker Stores Pty Ltd (N60031-2) Proposing to offer its inRent rental customers the opportunity to obtain discounts and special offers from various third parties by showing their inRent card loyalty program.

Val Morgan Cineticket Pty Ltd (N70211-7)

Supply goods/services on presentation of cinema ticket — notifying parties are Aroma Café, Whitford; Contacio, Scarborough; Leading Edge, Joondalup; McDonalds, Joondalup; Movies 4U, Joondalup; Booragoon Morley Video, Scarborough; Whitford City Video.

University of WA & Australian Finance Group

(N70218-9) Offer of goods or services at a discount on condition the person is a RAC member (third line forcing).

Peter Alexander Sleepwear Pty Ltd (N90940) A

\$5 discount voucher on all Peter Alexander sleepwear and homeware products.

RAC Retail Partners (RACWA) (WP Crowhurst Pty Ltd, CJ Gray & BJ Cusworth t/a AG Services, Deepwater Bay Investments Pty Ltd as trustee for the Van Barren Trust, KJ & AJ Krogoll as trustee for the Krogoll Discretionary Trust t/a AK Paint Supplies, Bonanza Paints Pty Ltd) (N70221-32)

Offer by RAC Group or Retail Partners of discounted goods and services on condition that the customer is a member of RACWA.

RAC Retail Partners (Edinwell Holdings t/a Carpet Paint & Tile Centre, Alan and Jenny Birrel t/a Country Paint Supplies, Denmark Co-Operative, Haerewa Nominees Pty Ltd, The GC Family Trust t/a Derby Building Supplies, Michelle Hyson t/a Geraldton Paint Centre, L & W Sales) (N70233-9).

Offer by RAC Group or Retail Partners of discounted goods and services on condition that the customer is a member of RACWA.

AGL Electricity Limited, AGL South Australia Pty Limited, AGL Retail Energy Limited & ActewAGL (N90843-6)

Offer of interest-free repayment options to customers who acquire appliances from nominated parties (third line forcing).

Bloomberg PowerMatch (N90885)

Proposing to pay subscription fees of subscribers to the Bloomberg professional service on condition they acquire trading facility services in excess of a certain value.

Fujitsu Australia Ltd (N90923)

Proposing to offer discounts to customers who acquire rental of a Fujitsu PABX from Comlease and telephony products from Optus Networks Pty Ltd.

Joint Vending Company (N90925)

Proposing to supply vending machines to subcontractors on condition that the subcontractors acquire and stock

Arnotts and Nestlé products in the vending machines.

St George Bank Ltd (N90929)

Proposing to offer low interest rates to borrowers who agree to accept the terms of the equity home loan component.

Hutchison Telecommunications Australia Ltd

(N90930, N90943) Intends to offer customers of Origin Energy Electricity Ltd the right to purchase Orange mobile telephone products at discount prices (third line forcing).

Village Roadshow Limited (N90931-2)

Discounts on cinema tickets and various goods and services appearing on the Vodafone super Tuesday coupon.

Vodafone Australia (N90933)

Discounts on cinema tickets and various goods and services appearing on the Vodafone super Tuesday coupon.

Ford Motor Company, Ford Credit, Volvo, Premier Automotive Group and Primus Automotive (N90934-8)

Proposal that Autogrid franchisors will require their dealers/suppliers to acquire a permanent connection from Optus for the Autogrid Network.

Twentieth Century Fox (N90941)

Offer of a discount on zoo admission with hire of Dr Dolittle 2 from Blockbuster Australia Pty Ltd (third line forcing).

Time Inc. Magazine Company Pty Ltd (N90942)

Offering supply of a discounted subscription to *Who Weekly* to customers on condition that they rent *Bridget Jones's Diary* (third line forcing).

Hume Building Society (N90953)

Hume Building Society proposes to offer some loan products on condition that customers also purchase home and contents insurance and/or loan protection insurance from Hume Building Society (which has agency arrangements with CGU Insurance and Swann Insurance).

Macquarie Investment Management Limited (as trustee of Macquarie Portfolio Super and Pension Manager) (N90955).

Notifier will refuse to purchase securities requested by a member whose financial adviser does not agree to place their orders for securities through Macquarie Equities Limited.