



**Australian
Competition &
Consumer
Commission**

Decision

in respect of a notification lodged by

**the Confederation of Australian Motor
Sport Limited**

Date: 1 July 2004

Notification no. N40702

Commissioners:

**Sylvan
King
McNeill**

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1. Introduction

- 1.1 The Australian Competition and Consumer Commission (the Commission) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2 Section 47 of the Act prohibits conduct known as exclusive dealing where it has the purpose or effect of substantially lessening competition. Generally speaking, exclusive dealing involves one business trading with another, imposing restrictions on the other's freedom to choose with whom, or in what, it deals.
- 1.3 Sub-sections 47(6) and 47(7) of the Act specifically prohibit conduct known as 'third line forcing' which involves the supply of goods or services on condition that the customer also acquire goods or services from a third party. Third line forcing conduct is currently a per se provision, meaning that it amounts to a contravention of the Act regardless of its effect on competition.
- 1.4 Businesses may obtain immunity in relation to conduct that might be at risk of breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the Commission. Once lodged, immunity for the notified conduct commences automatically, or in the case of third-line forcing, after 14 days. The Commission may proceed to revoke a third-line forcing notification where it is satisfied that the likely benefit to the public from the proposed conduct will not outweigh the likely detriment to the public from the proposed conduct.
- 1.5 In effect, revoking a notification removes the immunity conferred by the lodging of the notification. The Commission conducts a comprehensive public consultation process before making a decision to revoke a notification.
- 1.6 Where the Commission forms the view that the conduct the subject of a third line forcing notification is likely to generate a detriment to the public which outweigh the benefits to the public, it may commence the revocation process. This involves the Commission issuing a Draft Notice advising the notifying party, and interested parties, that the Commission intends to revoke the notification.
- 1.7 Where the Commission decides to issue a Draft Notice, the Commission must provide a written statement of its reasons for giving notice. Upon issuing a Draft Notice the Commission must invite the notifying party and/or any other interested party to request a conference in relation to the Draft Notice. The conference, if requested, must be held within 30 days.
- 1.8 After the conference the Commission must decide whether to leave the notification undisturbed or issue a Final Notice revoking the notification. Similarly, if no conference is requested, the Commission must decide whether or not to issue a Final Notice.

- 1.9 A Final Notice has the effect of revoking any immunity from legal proceedings under the Act for the notified conduct and takes effect on the 31st day after the Commission gives the notice or on a later date specified in writing by the Commission.
- 1.10 Where the Commission allows a notification to stand, particularly if it has not issued a Draft Notice, it will generally not release written reasons for its decision. However, in some circumstances, particularly where the decision is likely to be of interest to, or likely to affect, the public or interested parties in the industry to which the notified conduct relates, the Commission will issue a written document outlining the reasons for its decision to allow the notification to stand. This document is a decision in relation to notification N40702 lodged by the Confederation of Australian Motor Sport Limited.
- 1.11 Where a notification in relation to third line forcing conduct is allowed to stand, the Commission may act to remove the immunity afforded by the notification at a later stage if it is satisfied that the likely benefit to the public from the conduct will not outweigh the likely detriment to the public from the conduct.

2. Conduct

- 2.1. Notification N40702 was lodged by the Confederation of Australian Motor Sport Limited (CAMS) on 2 April 2004 in relation to conduct that may be in breach of sections 47(6) and 47(7) of the Act.
- 2.2. The notification describes the conduct as CAMS proposing to require competitors registered to compete using turbo/super charged four wheel drive vehicles in Australian Rally Championship (ARC) events use Elf WRF fuel, if such competitors wish to accrue points which are used in the calculations of placings and awards in the ARC. Competitors who do not use this fuel will still be able to compete in the events in every other aspect save for the accrual of championship points.
- 2.3. In its supporting submission, CAMS states it does not accept that the proposed conduct would fall under the third line forcing provisions of the Act. However, in order to achieve commercial certainty and to achieve the benefits to competitors it submits flow from the proposed conduct, CAMS submits that the notification should be allowed to remain in force.
- 2.4. CAMS arguments in support of the notification are discussed below in section 4.

3. Statutory test

- 3.1 Section 93 of the Act provides that a corporation that engages or proposes to engaged in conduct of a kind referred to in subsection 47 (6) and (7) may give to the Commission notice, as prescribed, setting out particulars of the conduct or proposed conduct.
- 3.2 Under section 93 (3A), if a corporation has notified the Commission of conduct or proposed conduct of the type described in subsection 47(6) or 47(7) and the

Commission is satisfied that the likely benefit to the public from the conduct or proposed conduct will not outweigh the likely detriment to the public from the conduct or proposed conduct, the Commission may, through the process described above in paragraphs 1.5 to 1.11, give the corporation a written notice stating that the Commission is so satisfied. The effect of giving such a notice is to revoke the immunity from the Act afforded by the lodging of the notification.

4. Applicant's submission

Public benefit

- 4.1. CAMS provided a supporting submission with the notification, outlining the public benefits it believes flow from the notified conduct.
- 4.2. CAMS claims the following public benefits will flow from the conduct:
 - fairness and competitiveness of ARC events;
 - reduced costs of competing in events; and
 - improved quality and safety.

Fairness and competitiveness of ARC events

- 4.3. CAMS considers that the use of a specified fuel will promote fair competition between competitors in ARC events.
- 4.4. CAMS notes that motor sport is a very technical and complex sport, where advances in component design and materials used can produce significant performance gains. CAMS submits that where some competitors have greater financial resources, it may allow them to obtain an unfair advantage over other competitors, for example, by using a higher performance, and generally more expensive, fuel. CAMS believes that if every competitor is required to use the same fuel then each competitor has a better chance of competing on a level playing field.
- 4.5. CAMS considers that if some competitors are able to obtain an unfair advantage through having greater financial resources then participation rates are likely to drop as those with fewer resources may choose not to compete. CAMS notes that concerns were expressed to it by competitors in the 2003 ARC series in relation to the cost of the fuel being used to generate the levels of performance required to be competitive, with many professional competitors spending in excess of \$7 per Litre (\$7/L).
- 4.6. CAMS submits that in order to promote fairness, encourage competition and contain costs, Elf WRF fuel has been chosen by CAMS as a controlled/specified fuel. Elf WRF fuel sells at around \$5.50/L, which CAMS submits is the median price for this type of fuel. CAMS submits that the proposed stipulation of Elf WRF fuel as the control fuel will promote fairness in the competition, and will reduce costs, thereby encouraging persons to compete in the ARC.

Reduced costs of competing in events

- 4.7. CAMS submits that costs savings will not only arise directly in relation to the purchase of fuel, but also in relation to the costs participants are required to pay by way of entry fees.
- 4.8. Under the arrangement entered into by CAMS and the distributor of Elf WRF fuel for it to be used as the controlled fuel in ARC events, the distributor of Elf WRF fuel will contribute directly to the cost of the provision of medical services to competitors in all ARC events in the form of doctors, paramedics, fire fighters, rescue personnel and vehicles. Previously the cost of providing these services was a component of the registration fee for ARC events. CAMS claims that the proposed arrangement will lead to a reduction in the entry fee for each competitor of at least \$200 per event.
- 4.9. In addition, CAMS submits that competitors will benefit from the relative ease of vehicle scrutiny where a specified fuel is required. CAMS notes that if a specified fuel is not required, the methods of scrutiny would be more complex, which is likely to result in additional expense and testing time.

Improved quality and safety

- 4.10. CAMS submits that fuel that is of variable quality or composition is a significant cause of engine damage. CAMS contends that the stipulation of a specified fuel ensures a consistent quality of fuel is used by competitors.
- 4.11. CAMS submits that Elf WRF fuel has an established reputation for quality, reliability and safety and has been proven in racing competitions both in Australia and internationally. CAMS considers using this fuel as the specified fuel contributes to quality and safety in ARC events.

Public detriment

- 4.12. CAMS considers that there is no anti-competitive detriment flowing from the conduct for reasons including that the ARC is only a small sub-set of the motor racing events in Australia in which fuels in the same class as Elf WRF can be used, and that the conduct only affects those participants who wish to accrue championship points.

5. Interested party submissions

- 5.1. The Commission consulted with a wide variety of interested parties in relation to the notification, including:
- other fuel suppliers;
 - racing teams and drivers;
 - sponsors; and
 - other industry participants.

- 5.2. The Commission received a number of responses from interested parties, with most interested parties supporting the notification. Very few interested parties opposed the notification, and of those that did, most appeared to disagree with the brand of fuel to be used rather than the general concept of using a controlled fuel.
- 5.3. The comments made by interested parties in relation to each of CAMS claimed public benefits, and other comments made by interested parties in relation to the notification, are summarised below. Copies of all submissions received by the Commission are available on the public register.

Fairness and competitiveness of ARC events

- 5.4. Pedders Rally Team (**Pedders**) believes competition will be fairer with a controlled fuel. It submits that a competitor who wishes to accrue points must register, and those who register usually do so for the entire ARC series. Those who compete in only one or two ARC events do not register for the series and have the option of using a fuel other than the nominated controlled fuel. Pedders states that those competitors who enter only one or two events usually do so for the experience and benchmarking of their skills and speed against series competitors (the professional race teams).
- 5.5. Ordynski Motor Sports (**OMS**) notes that the benefits of competing in the ARC without the ability to accrue championship points depend entirely on the individual competitor. OMS considers that a competitor who will compete in the ARC series, rather than one or two races, would find it essential to score points, however, there are many competitors who compete for enjoyment only and would not place in the top twenty or thirty, therefore not accruing significant points.
- 5.6. OMS considers that serious teams contesting the ARC will exploit whatever performance advantage that can be gained, and special fuel is one of those areas. OMS submits that the desire for performance has to be balanced with reliability and a high quality, that consistent grade performance is difficult to find, but that Elf WRF is such a fuel. OMS believes that if Elf WRF was not the agreed fuel for the ARC series then competitors would be continually on a search for more performance and that experimentation would lead to a degree of engine failure. OMS submits that it seems fair to have a well-regarded, high performance control fuel and not have safety issues with engines blowing up.
- 5.7. VP Racing Fuels (**VP Racing**) submits the professional teams look at the cost of fuel as a consumable that makes up part of the overall cost of their participation in events. VP Racing considers that there will always be people who are prepared to invest whatever it takes to be able to compete at the highest level and improve their chance of winning.
- 5.8. VP Racing submits different fuels will have an effect on the competitiveness of different entrants, however, all instances where there is a choice regarding equipment used (for example, tyres) will have the same potential to affect results.

- 5.9. VP Racing believes that it is unrealistic to single out one item in the cost of any highly competitive sport that encourages ingenuity and extreme commitment. VP Racing states that the well funded teams will always find the edge over the basic teams regardless of the controls put in place by any sanctioning body.

Reduced costs of competing in events

- 5.10. Pedders submits that higher octane fuels, such as Elf Turbo Max, were used in the 2003 ARC series but were very expensive fuels to run, costing somewhere in the order of \$6.50 to \$7.20/L. Pedders states that the reason for using this type of fuel is strictly performance based, as the fuel creates an opportunity to have more engine power and output. Pedders submits that by using a control fuel, costs can be contained and Pedders notes there has been a reduction in its costs since a controlled fuel was introduced.
- 5.11. In addition to savings in respect of fuel costs, Pedders submits that it saved around \$400 on the costs of entry fees at this year's Respect Yourself rally because it was not required to pay the compulsory medical levy (as the distributor of Elf WRF fuel was offsetting this cost).
- 5.12. Neal Bates Motorsport and Toyota Racing Team (**NB Motorsport**) submits that there is a reduction in costs for all competitors by using a control fuel. It states that tuning an engine is a very expensive exercise and by using a control fuel it only has to tune to suit one type of fuel. NB Motorsport considers that the cost of the Elf WRF fuel is fair and that in using this fuel, NB Motorsport has made a significant saving on its fuel bill compared to the fuel it was previously using (which was an additional \$2.00/L).
- 5.13. In addition, NB Motorsport states that while the saving claimed by CAMS on entry fees is not a significant amount of NB Motorsport's budget, it is happy to receive the saving, and views the medical teams as a vital safety aspect of the ARC.
- 5.14. OMS agrees that the cost of Elf WRF is the median price for the type of fuel. OMS also notes that cheaper brands of fuel do not meet the requirements of OMS' engines when tuned for maximum performance.
- 5.15. OMS considers that there is the opportunity for huge savings by having one designated fuel as fuel testing and mapping of engine management systems is a very expensive process. OMS states that running Elf WRF fuel means that it can run its rally cars for international events, which also use Elf WRF as their control fuel, without having to embark on an expensive and intensive engine tuning program.
- 5.16. Team Mitsubishi Ralliart (**Ralliart**) submits that the requirement for all serious competitors to use the same fuel will substantially reduce the cost to competitors. It submits that suppliers can estimate the volume required and reduce their costs because they can order and ship quantities more economically.
- 5.17. Ralliart notes that the use of Elf WRF fuel aligns Australia with the rest of the world and gives Ralliart the ability to use developed parts and information from other parts

of the world. It also gives Ralliart and other Mitsubishi competitors a large reduction in operating costs. Ralliart states that the use of control fuel allows local competitors to compete in the Australia round of the World Rally Championship (WRC) held in Perth in November without having to change and develop their cars to suit the WRC regulations.

- 5.18. Subaru Rally Team (**Subaru**) submits it was concerned about the cost of using other products in the 2003 series but needed to use the more expensive products to be competitive. Subaru states that all leading teams used the same fuel as it did in 2003 (the more expensive Elf Turbo Max). Subaru notes that a few teams used alternative fuels, but would not have been considered championship contenders. Subaru supports CAMS decision to use the less expensive Elf WRF fuel in 2004.
- 5.19. Subaru also notes that Elf is contributing towards the cost of providing safety, rescue and medical services during the ARC and that the provision of such services is vital to the sport.
- 5.20. In response to CAMS' claims that the use of Elf WRF fuel will reduce entry fees as the distributor will cover the cost of medical and rescue services, VP Racing states that in any commercial situation, nothing is free. It submits that if a commercial entity is providing a service in an attempt to obtain a monopoly then ultimately the end user will suffer.

Improved quality and safety

- 5.21. Pedders states that it is yet to be proven to it that the other fuel providers can offer the same level of quality and safety as Elf WRF.
- 5.22. NB Motorsport submits that Elf WRF has been the control fuel for the World Rally Championship for several years and its producers have a very good understanding of the sport and its requirements. NB Motorsport note that the engines typically used in this competition are worth up to \$50,000 each and that competitors are reliant upon the quality and consistency of the fuels used. NB Motorsport express concerns that other fuel companies involved may not be able to work at this level or be able to produce fuels to a consistent level.
- 5.23. OMS states that Elf WRF is consistently of a high quality and has been used for many years all over the world as a high performance fuel that offers outstanding engine protection. OMS believes that other fuel brands may be compliant with CAMS and FIA specifications but they do not have the proven performance that Elf WRF does.
- 5.24. Ralliart submits the Elf fuel does contribute to quality competition as all teams that use it produce about the same performance level from their engines. It considers that other fuels could be used, however not without major cost to the teams. It notes that if there is engine failure due to incorrect tuning, which can happen when teams are forced to use variation of fuel brands, then there is the potential to have the environment, the car, and the occupants damaged or injured.

- 5.25. VP Racing submits that the quality of rallying is not improved by forcing competitors to use any inferior parts or fuel to try to satisfy all concerned. VP Racing considers that as all fuels are subject to the same handling and storage conditions, safety should be a common feature regardless of the brand used.

Other general comments from interested parties

- 5.26. Dimension 1 Pty Ltd (**Dimension**) is a sponsor of a private entry in the ARC. Dimension submits that it is aware of at least two other fuels (other than Elf WRF) that may be available, but do not consider those fuels to be a viable alternative at this stage.
- 5.27. Dimension considers that other fuel companies have been unable to prove to Dimension or its engine builders that those companies can produce an equivalent fuel to Elf to meet the requirements of its rally cars.
- 5.28. Dimension also considers that the notification lodged by CAMS has not resulted in any anti-competitive detriment.
- 5.29. GSA Wholesale Suspension Pty Ltd (**GSA**) submits that use of the controlled fuel will not produce any public benefits. GSA considers that there are a number of different fuels which fall within the FIA and CAMS specifications with little, if any, performance difference. GSA believes that Elf is not of a higher quality standard than other fuel types.
- 5.30. A number of individuals, including competitors and industry participants, contacted the Commission to express their views in relation to the notification. Many of the parties did not want their identity disclosed but considered it important that their views still be provided. The following are comments provided by such parties.
- Some competitors have no objection to the use of a controlled fuel, but do not want to use Elf. Some competitors want the control fuel to be a fuel that is available at the bowser (for example Shell Optimax fuel which retails for around \$1 to \$1.20/L) while others thought that there needed to be a more rigorous tender process for the selection of the controlled fuel.
 - Some competitors are concerned that half of the entrants in a rally are paying a fuel subsidy in order to provide the medical and rescue services for the whole event.
 - Many competitors said that even if they were not forced to use the Elf WRF fuel they would still choose to use it as it has a proven quality and safety record and has been consistently reliable.
 - Some industry participants stated that the use of a control fuel will enhance the sport and make the competition fairer as no individual can use a higher performance fuel to gain an advantage over other competitors.

- Some industry participants believe that using a fuel of a lower quality has risked injury to other drivers on the rally course as the lower quality fuels have resulted in engines blowing up.
- Some competitors believe that there should be a choice between three types of fuel, so that the control fuel should be a specification rather than a brand.
- Some competitors contend that the only people truly affected by the notification is those teams which have previously run higher performance fuels at a higher cost, and that those teams are now benefiting through lower cost.

Concerns expressed by ET Racing Fuels

- 5.31. ET Racing Fuels and Lubricants Pty Limited (**ET Racing**) states that all competitors in the ARC want the opportunity to accrue championship points. It further states that the requirement that competitors must use Elf WRF fuel if they wish to accrue championship points will cause significant loss and damage to ET Racing as it is likely that most, if not all, competitors will purchase the fuel which allows them the opportunity of accruing championship points.
- 5.32. ET Racing considers that CAMS should specify that all turbocharged and supercharged 4WD vehicles only use FIA fuels, rather than a particular brand of fuel. ET Racing submits that this would set the parameters for the fuel to be used and provide a level playing field without causing a corresponding anti-competitive detriment.
- 5.33. While CAMS claims the cost of the Elf WRF fuel is the median price for the type of fuel, ET Racing considers the requirement that competitors must purchase Elf WRF fuel may increase the potential costs of participating in the ARC and discourage such participation for reasons including that ET Racing fuel is cheaper than Elf WRF. ET Racing submits that competitors would save around \$200 on fuel per event if they chose ET 102 fuel over Elf WRF.
- 5.34. ET Racing submits there is no substance to the claim that the overall costs to competitors will be less as a result of the distributor of Elf WRF covering the provision of medical and rescue services. It is ET Racing's view that CAMS appears to be suggesting that the distributor of Elf WRF would not provide these services unless the accrual of competition points is linked with the purchase of Elf WRF fuel.

6. Commission Assessment

- 6.1. In examining the benefits and detriments flowing from the notified conduct, the Commission has considered all of the information provided by both the Applicant and interested parties.

- 6.2. Some interested parties raised issues regarding conduct falling outside the scope of the notification. For example, a number of parties raised concerns regarding the way in which the tender process for awarding the control fuel was conducted and sporting politics issues. Those comments made in relation to the public benefit and detriment of conduct which is not the subject of the notification have not been considered by the Commission in deciding whether to allow the notification to stand.

The relevant market

- 6.3. Defining the markets affected by the arrangements which have been notified assists in assessing public benefits and detriment flowing from the arrangements. However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of this definition.
- 6.4. In respect of the arrangements the subject of this notification, it is the Commission's view that its assessment will not be overly affected by the possible variations in precise market definition.
- 6.5. In considering the notification, the Commission has identified two relevant areas of competition, being those associated with the:
- supply of motor racing fuel to competitors competing in ARC races; and
 - supply of motor racing fuel to competitors in motor racing events more generally.
- 6.6. It is arguable that the areas of competition could also extend to the provision of high performance fuel to the public more generally. However, the type of fuel (or the specified class) to which the notification relates is not generally available at retail petrol sites and is of little use to the public more generally other than in high performance vehicles competing in motor racing events.

Public detriment

- 6.7. The Applicant submits that there is likely to be limited public detriment generated by the conduct. In particular, CAMS submits that the proposed conduct will not have any significant effect on the level of competition in the market for the supply of motor fuels. CAMS submits that the detriment generated by the notified conduct is limited as the ARC is only a small sub-set of the motor racing events in Australia in which fuels in the same class as Elf WRF can be used.
- 6.8. It is important to note that a detriment, which affects one business more than others, does not necessarily result in a detriment to the public. Rather, it is necessary to consider and weigh the effect that the conduct has on competition in the market more generally rather than the effect the conduct has on a particular competitor.

Increased costs in competing in ARC events

- 6.9. The notified conduct provides that competitors wishing to accrue championship points in ARC events must use Elf WRF fuel. This will increase the fuel costs of those competitors currently using a cheaper fuel if they wish to continue to be eligible to accrue ARC championship points.
- 6.10. The Commission understands that approximately 1300 rally crews competed in rally events in Australia during the 2003 rally season. The Commission notes that of the 65 registered competitors in the ARC 2003 series, 50 competitors used turbo or supercharged cars. Only the 50 registered competitors using turbo or supercharged cars are likely to be affected by the notified conduct. Many of these 50 competitors would not place or accrue significant points to qualify as the Australian Rally Champion.
- 6.11. It is therefore likely that the impact of the notified conduct only extends to the 20 to 30 competitors in serious contention for ARC championship points. It has been put to the Commission by a number of registered competitors in the ARC 2004 series that even if the notified arrangements were not in place, they would use Elf WRF, or would even use Elf Turbo Max fuel (at a higher cost) rather than using another suppliers fuel. It therefore appears that the majority of competitors in serious contention for the ARC are not concerned about the effects of the notified conduct.
- 6.12. However, some competitors who do wish to remain in contention to accrue championship points and currently use a cheaper fuel than Elf WRF, will incur higher fuel costs as a result of the notified conduct. These increased costs could be anywhere up to \$3 and \$4 per litre of fuel, based on a price of \$5.50 per litre for Elf WRF versus \$1.20 per litre for the cheapest *alternative* class of fuel. As competitors typically use 200-400 litres per rally event, this could increase the cost to some competitors by up to \$1500 per event. Although the Commission understands, based on the submission received by ET Racing, that the additional cost incurred by competitors having to use Elf WRF instead of some of the cheaper fuels in the *same* class, is more likely to be in the range of \$200.
- 6.13. The Commission understands that the average cost of competing in an ARC event, including transport costs, fuel, engines and preparation is approximately \$20,000 to \$30,000. The Commission notes that while the total budget of some private operators may well be significantly less than this, these competitors are unlikely to be in serious contention for ARC championship points and are therefore unlikely to be affected by the conduct. However, a small number of competitors may face increased fuel costs as a result of the notified conduct. Alternatively, these competitors may choose to forgo eligibility to accrue championship points. In either case, the Commission considers that this would generate some, limited, public detriment.
- 6.14. More generally, as noted above, most competitors in serious contention for the ARC championship already use either Elf WRF fuel, other similarly priced fuels or more expensive alternatives. However, the notified conduct may still result in an increase

in the cost of competing to those competitors already using Elf WRF fuel or a similarly priced alternative if it results in an increase in the cost of Elf WRF fuel.

- 6.15. The notified conduct in effect grants Elf a monopoly over the supply of fuel to competitors wishing to accrue ARC championship points. Generally, in such circumstances, unconstrained by the competitive pressures brought to bear by competition from other suppliers, a monopolist would be expected to charge a higher price for the supply of fuel than would otherwise be the case. The result would be an increase in the cost of competing in ARC events for some competitors. However, in this instance the Commission does not consider that the notified conduct will result in a significant increase in the cost of Elf WRF fuel to competitors.
- 6.16. The Commission notes that the decision to use Elf WRF as the control fuel was made based on a number of criteria, including price. While the notified conduct provides Elf with a monopoly over the supply of fuel to competitors wishing to accrue championship points, it is only a temporary monopoly. The presence of other suppliers also able to supply this class of fuel is likely to constrain the ability of Elf to significantly increase prices above the market price. That is to say, the ability of other suppliers to compete to supply this class of fuel to competitors at the end of the existing agreement between CAMS and Elf, either directly if a control fuel is no longer used, or by tendering for the exclusive rights to supply to control fuel, will act as a competitive constraint on Elf's capacity to increase prices to competitors during the life of the agreement.
- 6.17. In addition, the Commission notes that while competitors wishing to accrue championship points are restricted from using other brands of fuel, there is no restriction on where or how they purchase Elf WRF. Given that Elf WRF is used in many motor racing events other than the ARC, and that it is only one of numerous fuels available to competitors in those events, the market price of Elf fuel is unlikely to be significantly affected by it having exclusive rights to supply 30 or so competitors in the ARC.

Restrictions on competitors choice of fuel

- 6.18. The proposed arrangements restrict some competitors ability to choose for themselves which brand and/or class of fuel to purchase when competing in ARC events. Generally, the Commission would consider any such restriction on consumer choice would be likely to produce some public detriment.
- 6.19. However, in this instance the Commission notes that very few people, approximately 30 competitors, are affected by the proposed arrangements. In addition, the Commission notes that while competitors choice of fuel is restricted, submission received from competitors and other industry participants indicate that the Elf WRF fuel is of a suitably high standard. Therefore, being required to use this fuel is unlikely to adversely impact, except for the price effect noted above, on those competitors currently using lower cost fuels.
- 6.20. However, the proposed arrangements may adversely impact on those competitors who currently use higher performance fuels than Elf WRF. In this respect, the

Commission notes that numerous competitors have submitted that they are quite happy to use Elf WRF and currently use more costly/higher performance fuels, such as Elf Turbo Max, only because they are compelled to do so in order to remain competitive in ARC events. Restricting the choice of fuels available to these competitors to Elf WRF is unlikely to generate any public detriment.

- 6.21. On the other hand, some competitors would presumably prefer to use higher performance fuels than Elf WRF irrespective of whether it was necessary for them to do so in order to remain competitive in ARC events. While these competitors are likely to be limited in number, they would only be a (presumably small based on submissions received by the Commission) percentage of the 30 or competitors affected by the conduct, the Commission considers that restricting these competitors choice in relation to the fuel used in ARC events would generate some, albeit very limited, public detriment.

Effect on competition in the markets for the supply of high performance fuels

- 6.22. As noted above, the notified conduct applies only to a small number of competitors in one particular class of motor racing. However, if the notified conduct was to have the effect of reducing competition in the market for the supply of high performance fuels more generally, broader public detriment could be generated. In this respect, ET racing has submitted that the notified conduct will cause it significant loss or damage.
- 6.23. The Commission accepts that the notified conduct is likely to adversely impact on other suppliers of fuels suitable for use in motor racing, including ET Racing. Specifically, the notified arrangements will preclude these suppliers from supplying the 30 or so competitors affected when they compete in ARC events. More generally, as those competitors cars are likely to be tuned specifically to use Elf WRF fuel, the cost of reconfiguring to enable them to use other brands of fuels in events other than the ARC is likely to be prohibitive.
- 6.24. However, as noted above, in considering the public detriment (and benefit) generated by notified conduct the Commission must consider and weigh the effect that the conduct has on competition in the market generally. The effect of the conduct on a particular competitor is still relevant, to the extent that it impacts on competition in the market more generally.
- 6.25. With respect to the notified conduct, the Commission notes that only a very small proportion of the overall market for high performance/motor racing fuels is affected. Other suppliers are not in any way restricted from supply the remaining segments of this market, or indeed from competing to supply ARC drivers at the end of the existing agreement between CAMS and Elf, either directly if a control fuel is no longer used, or by tendering for the exclusive rights to supply the control fuel.
- 6.26. Consequently, the Commission does not consider that the notified conduct is likely to adversely affect competition in the market for the supply of these types of fuel.

Public benefit

- 6.27. The public benefits claimed by the Applicant and interested parties is discussed above in sections 5 and 6.

Lower fuel costs

- 6.28. As noted above, the Commission understands that of the 60 or more competitors currently competing in ARC events, approximately 20 to 30 are likely to be affected by the notified conduct. The Commission understands that most of the affected competitors currently use the more expensive Elf Turbo Max fuel. For these competitors, switching to Elf WRF is likely to save them in the vicinity of \$1.50/L or \$300 to \$600 per event.
- 6.29. Generally, the Commission would consider such cost savings to constitute a public benefit. However the Commission notes that in this instance some competitors have chosen to use the more expensive Elf Turbo Max and incur the additional expense involved in doing so. Generally, the Commission would not consider any cost savings accruing to consumers as a result of compelling them to use a cheaper product against their wishes to constitute a public benefit.
- 6.30. However, many competitors have submitted that they only use the more expensive Elf Turbo Max because they are compelled to do so in order to remain competitive in ARC events. These competitors have submitted that they would quite happily use the cheaper Elf WRF fuel provided that it did not put them at a competitive disadvantage. In this respect, the Commission notes the submission of CAMS that concerns were expressed by competitors in the 2003 ARC series in relation to the cost of fuels being used to generate the level of performance required to remain competitive in events. These concerns have also been reflected in submissions received by the Commission in respect of the notified conduct.
- 6.31. In these circumstances, the Commission considers that the cost savings accruing to those competitors who do not wish to use more expensive brands of fuel, but would, absent of the notified conduct, be compelled to in order remain competitive, constitutes a public benefit.
- 6.32. However, given that the cost of competing in an ARC event for those competitors most likely to be affected by the conduct, the professional teams, is in the vicinity of \$20,000 to \$30,000 and the small number of competitors affected by the proposed arrangements, the Commission does not consider that these cost savings constitute a significant public benefit.

Other cost savings to competitors

- 6.33. CAMS submitted that the notified conduct will also result in lower entry fees and other cost savings for competitors. In particular CAMS submitted that the notified conduct would:

- reduce competitors entry fees as the distributor of Elf will contribute directly to the cost of the provision of medical services at ARC events;
 - reduce competitors entry fees as use of a control fuel will reduce costs involved in vehicle scrutiny;
- 6.34. In addition, some competitors submitted that the use of a control fuel also reduced costs such as engine tuning as engines would not have to be retuned, for example to compete in overseas events such as the world Rally Championships, as these events also use Elf WRF as their control fuel.
- 6.35. The Commission understands that competitors in this year's Respect Yourself ARC event were not required to pay the compulsory medical levy usually levied on such events as the distributor of Elf fuel offset this cost. This represented a cost saving of around \$400 per competitor. If this cost saving is indicative of that likely to be provided for remaining ARC events as a result of the distributor of Elf fuels covering the cost of the provision of medical services at events, such savings are likely to be significant.
- 6.36. However, the Commission notes that the distributor of Elf fuels will incur additional expenses, roughly equivalent to the cost saving to competitors, in providing these services. If these additional expenses were reflected in higher prices being charged for Elf fuel, in effect, the cost saving would be balanced out by an increase in the price of fuel. It would be expected that any such increase in the price of Elf WRF would be a small across the board increase to all consumers, rather than a larger increase in the price paid by ARC competitors.
- 6.37. The Commission has not been provided with information to allow it to adequately assess whether costs incurred by the distributor of Elf WRF in providing medical services at ARC events will be absorbed by the distributor or passed on to consumers in the form of higher prices. However, to the extent that retail competition for the sale of this class of fuel does exist it can be expected that at least some of the additional costs incurred by the distributor will be absorbed rather than passed on to consumers.
- 6.38. However, the net result may still be a reduction in costs paid by ARC competitors, financed, at least in part, by an increase in the cost of Elf WRF to all consumers. Given that the reduction in cost to competitors may well come, at least in part, at the expense of other consumers of Elf fuel, the Commission does not accept that this cost saving necessarily generates a public benefit.
- 6.39. However, the Commission does accept that scrutinising vehicles is likely to be less complex, quicker, and involve less expense for CAMS, the greater the number of cars using a common fuel. While the Commission has not been provided with any estimates as to the magnitude of any such cost saving it does accept that such cost savings are likely to arise and that these will be reflected in lower entry fees to competitors which the Commission considers to be a public benefit.

- 6.40. In addition, the Commission accepts that competitors costs in competing in other, particularly overseas rallies, are likely to be reduced as engines will only need to be tuned to suit a single type of fuel, which the Commission also considers to be a public benefit.

Fairness and competitiveness of ARC events

- 6.41. CAMS, and many competitors, argued that the introduction of a control fuel would promote fair competition between competitors in ARC events.
- 6.42. The Commission notes that choice of fuel can have a significant effect on the performance, and thereby competitiveness, of a rally car. However, the Commission notes that most competitors affected by the notified conduct, those in serious contention for championship points, already use a common, albeit more expensive, class of fuel. While the use of a cheaper control fuel is likely to generate cost savings as discussed above, it will not, other than providing teams with limited resources additional funds to dedicate to other areas of improving vehicle performance, provide for a fairer and more competitive competition between these drivers.
- 6.43. The notified conduct will however allow those competitors who would, for cost or other reasons, use Elf WRF even absent of the notified arrangements, to compete more equally with those who would, absent of the proposed arrangements, use a more expensive/higher performance fuel. However, the Commission understands that the number of such competitors to be limited.
- 6.44. More generally, the Commission notes that type of fuel is but one of the numerous inputs or pieces of equipment which affect a rally cars performance. In this respect, placing controls on a single input or piece of equipment is unlikely to prevent well funded teams from obtaining a competitive advantage.

Increased safety and quality

- 6.45. Both CAMS and some competitors consider that the notified conduct generates benefits to the public by way of increased safety and quality in ARC races. Many of the competitors believe that the fuel Elf produces is of a superior quality to that currently used by many competitors, resulting in safer rallying by, for example, ensuring engine reliability and safety. Some competitors contended that cars using inferior fuel have resulted in accidents, putting at risk the safety of the driver and the viewing public.
- 6.46. The Commission accepts that there exists a benefit in having safer rally events. However, the Commission does not accept in this instance that the notified conduct generates such a benefit to the public.
- 6.47. As noted above, those competitors likely to be affected by the notified conduct are those in serious contention for the accrual of championship points. As also noted above, these competitors by and large already use high quality, high performance fuels. The Commission does not consider that those competitors who fit into this

category not currently using Elf WRF fuel, switching from other high quality fuels to it, will in itself result in increased quality and safety of ARC events.

Conclusion on public benefits and detriments

- 6.48. The Commission considers the anti-competitive detriment generated by the arrangements to be limited. In particular, the Commission considers that the notified conduct generates some limited detriment in the form of increasing the cost of fuel for a small number of competitors. In addition, the Commission considers that the notified conduct will affect a small number of competitors freedom to choose which fuel they use.
- 6.49. However, more generally, the Commission considers that the notified conduct will reduce the cost of fuel to the majority of competitors affected by the conduct which constitutes a public benefit. In addition, the Commission considers that the notified conduct will result in some, limited, reduction in entry fees for all competitors and a reduction in the cost of competing in other, non ARC events, to competitors affected by the notified conduct.
- 6.50. On balance, the Commission is not satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public.
- 6.51. The Commission notes the argument of some interested parties that if CAMS wishes to introduce a control fuel for fairness and safety reasons that it should restrict competitors wishing to accrue championship points to using a particular class of fuel rather than a particular brand of fuel.
- 6.52. The Commission notes that restricting competitors to using a particular class, rather than a particular brand of fuel, may lessen the public detriment generated by the arrangements. Conversely, it may be that such a requirement may also lessen the public benefits generate by the arrangements.
- 6.53. However, irrespective of whether or not this is the case, the Commission's role through the notification process is limited to considering the public benefits and detriments of the specific conduct the subject of the notification. As noted above, in this instance the Commission is satisfied that the detriments to the public flowing from the conduct do not outweigh the benefits to the public.

7. Decision

- 7.1 Having regard to the claims by the applicant and the issues raised by interested parties, the Commission is satisfied that the likely benefits to the public from the conduct or proposed conduct will outweigh the likely detriment to the public from the conduct or proposed conduct.
- 7.2 Accordingly, the Commission does not intend to take any further action in this matter at this time.

- 7.3 As with any notification, the Commission may act to remove the immunity afforded by this notification at a later stage if it is satisfied that the likely benefit to the public from the conduct will not outweigh the likely detriment to the public from the conduct.