Freehills

28 June 2006

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Mr Scott Gregson and Mr David Hatfield
Australian Competition and Consumer Commission
470 Northbourne Ave Dickson ACT 2602

Attention: Mr David Hatfield

By facsimile
Fax number 02 6243 1199

Dear Sir

ENI - Power and Water Gas Sales Agreement (GSA)

Thank you for your letter of 23 June 2006.

We agree that the GSA does not contain any express condition that PWC will not acquire gas from any other party. Nor is there any express condition that Eni will not supply gas to any other party. However, there is in our opinion a strong argument that a contract for supply of (what may be) all of a purchaser's requirements contains an implied negative condition that the purchaser not purchase any of its requirements from a competitor of the supplier. The same argument applies in respect of a contract for purchase of (what may be) all of a supplier's output, namely, that there is an implied negative condition that the supplier will not sell any of its output to a competitor of the purchaser.

The "implied negative condition" argument has been noted by several commentators, including Corones in "*Competition Law in Australia*" 3rd Ed. at p458. Support for the argument is drawn from the extended definition of "condition" in section 47(13)(a) of the TPA, which makes it clear that conditionality is a question of substance rather than mere form.

We are aware that the Federal Court in *Monroe Topple & Associates v Institute of Chartered Accountants* ((2002) 122 FCR 110 pointed out that it was important not to confuse issues of purpose and effect with that of "condition", and the mere fact that the practical effect of a purchase requirement was that the purchaser could not also deal with another supplier did not involve any relevant "condition." However, we are of the view that the case turns on its own facts, and that each case must be considered to see whether a negative condition should be inferred or implied from the particular conduct and circumstances.

The "implied negative condition" argument can also be criticised because it appears to mean that even a single acquisition or supply can be "exclusive dealing." However, section 47 only makes exclusive dealing unlawful when the conduct has either the purpose or effect of substantially lessening competition, and short term or "one off" conduct is inherently unlikely to involve such purpose or effect.

In the circumstances, our view is that, whilst the law in relation to section 47 is not entirely clear and awaits clarification by the High Court, there is, as matters stand, a strong basis for arguing that the first and second elements of the notified conduct (as well as the third element) would be held to amount to exclusive dealing. Even though our client strongly believes (for the reasons set out in the submissions accompanying the notification) that none of the exclusive dealing conduct contravenes the TPA because it is not likely to have any negative impact on competition in any relevant market (and is in fact pro-competitive), it takes the view that the prudent course, in the circumstances, is to seek the protection afforded by notification.

We hope the above satisfactorily answers your question, but would be pleased to provide further comments if required.

Yours faithfully
Freehills
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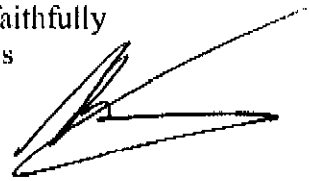

Steve Standing
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