



Australian
Competition &
Consumer
Commission

Assessment

Collective bargaining notifications

lodged by

BFC Stores Pty Ltd

Date: 29 October 2008

**Notification nos. CB00009 -
CB00056**

Public Register no. C2008/1648

**Commissioners: Samuel
Schaper
King
Martin
Willett**

Summary

Based on the information currently before it, the ACCC does not object to the collective bargaining notifications lodged by BFC Stores Pty Ltd (BFC) on behalf of its BFC owned stores and franchisee owned stores. BFC proposes to collectively negotiate the price at which paint and related accessory products will be acquired from 48 nominated suppliers.

The small business collective bargaining notification process

Collective bargaining refers to two or more competitors collectively negotiating terms and conditions with a supplier or customer. Without protection, it can raise concerns under the competition provisions of the *Trade Practices Act 1974* (the Act).

Small businesses can obtain protection from legal action under the Act for collective bargaining arrangements by lodging a notification with the ACCC. Provided the ACCC does not object to the notified arrangement, protection commences 28 days after lodgement.

The ACCC will only object to and remove the immunity provided by a collective bargaining notification when it is satisfied that any public benefits from the proposed collective bargaining arrangement would not outweigh the public detriments (and substantially lessen competition for notifications that do not concern price fixing or exclusionary conduct).

The notification

On 7 October 2008, 48 collective bargaining notifications were lodged by BFC Stores Pty on behalf of its BFC owned stores and franchisee owned stores (CB00009 - CB00056). BFC proposes to represent the group and negotiate with 48 suppliers to determine the price at which the stores can acquire paint and related accessory products.

The collective bargaining notification process is transparent and involves public registers and interested party consultation. The ACCC did not receive any submissions from interested parties.

ACCC's decision

The ACCC considers that the proposed collective bargaining arrangement may result in some public benefits in the form of:

- facilitation of market dynamics
- transaction cost savings
- potentially reduced prices for consumers.

The ACCC identified a number of features which mitigate the potential anti-competitive detriment of BFC's proposed arrangement. In particular, the ACCC notes

that BFC's proposed collective bargaining arrangement is voluntary and does not involve potential boycotts.

On the information available, the ACCC is satisfied that the benefits likely to arise from the notified arrangement would outweigh the identified detriments. Accordingly, it does not object to the notification.

Protection afforded by these notifications will commence on 4 November 2008 and will cease 3 years from the date of lodgement (7 October 2011). As with any notification, the ACCC may act to remove the immunity afforded by the notification at a later stage should concerns arise.

1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government 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. In the context of the Act, collective bargaining involves two or more competitors agreeing to collectively negotiate terms and conditions (which can include price) with a supplier or a customer (the target or counterparty).
- 1.3. Arrangements will amount to collective boycott where the collective bargaining group agrees not to acquire goods or services from, or not to supply goods or services to, the counterparty unless it accepts the terms and conditions offered by the group.
- 1.4. Collective bargaining and collective boycott arrangements can have a detrimental effect on competition and consumers and are likely to raise concerns under the competition provisions of the Act.
- 1.5. The Act, however, allows businesses to obtain protection from legal action in relation to collective bargaining and collective boycott arrangements in certain circumstances. One way in which small business bargaining groups may obtain protection is to lodge a collective bargaining notification with the ACCC.
- 1.6. Provided the ACCC does not object to the notified arrangement, protection commences 28 days after lodgement. The immunity from a collective bargaining notification expires three years from the date it was lodged.
- 1.7. The ACCC may object to a collective bargaining notification if it is satisfied that any an public benefits from the proposed collective bargaining arrangement would not outweigh the public detriments (and substantially lessen competition for notifications that do not concern price fixing or exclusionary conduct).
- 1.8. The collective bargaining notification process is transparent involving public registers and interested party consultation. Where the ACCC proposes to object, it must first issue a draft objection notice setting out its reasons and providing an opportunity for interested parties to request a conference. If the ACCC issues a draft objection notice before the expiration of the 28 day statutory period, legal protection from the notification does not commence.

2. Background

The proposed arrangement

- 2.1. Notifications CB00009 – CB00056 were lodged on 7 October 2008 by BFC Stores Pty Ltd (BFC) on behalf of its BFC owned stores and its franchisee owned stores (together referred to as the Participants). BFC operates a chain of retail stores across Australia that supply architectural and decorative paints, coatings products and related accessory products (the Products) to consumers.
- 2.2. BFC is in the process of establishing a franchise system which will retail the Products.
- 2.3. BFC proposes to negotiate on behalf of the collective bargaining group with 48 targets in relation to the price at which the group can acquire the Products for on-supply to Australian consumers. Other terms and conditions of supply, including payment terms, volume of purchases, delivery terms, faulty products and marketing materials will also be negotiated collectively as part of this arrangement.
- 2.4. The target businesses include manufacturers and wholesalers of paint, paint tools, coatings products, decorator products, adhesives, sealants and other decorative accessory products.
- 2.5. The targets are:
 - G.S.B Chemical Co Pty Ltd
 - The Bronson Group Pty Ltd
 - Bondall Pty Ltd
 - Bostik Australia Pty Ltd
 - C & A Brushware Pty Ltd
 - The Flood Company Australia Pty Ltd
 - Hichem Pty Ltd
 - GPI Automotive Products Pty Ltd
 - Hills Industries Ltd
 - K & H Surface Technologies Pty Ltd
 - Liquid Technologies Pty Ltd
 - Sequence Australia Unit Partnership
 - Ladder Solutions Pty Ltd
 - Lightning Products Pty Ltd
 - Hartman Pacific Pty Ltd t/as Gorilla Ladders
 - Lifestyle Australia Pty Ltd
 - Hume Internationale
 - Metro Agencies International
 - Nilfisk-Advance Pty Ltd
 - Paint Products Australia
 - Phillro Industries Pty Ltd
 - Quantum Timber Finishes Pty Ltd
 - Recochem Inc

- Red Devil (Australia) Pty Ltd
- Saint-Gobain Abrasives Pty Ltd
- Wagner Spraytech (Australia) Pty Ltd
- Selleys Pty Ltd
- Timbermate Products
- Aussie Optics Pty Ltd
- Yakka Pty Ltd
- Vidpond's Paints Pty Ltd
- Zinsser Asia Pacific Pty Ltd
- Vision Wallcoverings (Australia) Pty Ltd
- Uni-Pro Painting Equipment Pty Ltd
- Tenaru Timber & Finishes Pty Ltd
- Swepdri International Pty Ltd
- G James Glass and Aluminium Pty Ltd
- Express Rollers Australia Pty Ltd
- Dominion Plastic Industries Pty Ltd
- Melpaint Products Pty Ltd
- Campbells Wholesale Pty Ltd
- Oldfields Pty Ltd
- Rokset Industries Pty Ltd
- Australian Brushware Corporation Pty Ltd
- Orica Australia Pty Ltd
- Irwin Industrial Tool Company Pty Ltd
- 3M Australia Pty Ltd
- PPG Industries Australia Pty Ltd

The paint industry

- 2.6. The paint industry involves the manufacture of various paints, timber finishes and other surface coatings products for the decoration and protection of surfaces against wear, weather and corrosion. Key products include paints, enamels, varnishes, lacquers and stains.
- 2.7. Paint production in Australia can be broadly divided into two main segments: architectural and decorative paints and industrial paint and coatings. Paint supplied through manufacturers' company-owned stores and trade depots/dealerships to professional painters is architectural paint. Paint supplied to retailers for retail to DIY consumers is decorative paint. The industrial and heavy duty coatings are usually formulated and produced for specific needs.
- 2.8. Some manufacturers sell a proportion of their product to the end user through retail outlets. A greater proportion is sold to trade painters and painting contractor companies via trade depots. An even larger segment is sold to retailers, both large chain stores and local hardware stores.

ACCC consultation

- 2.9. The ACCC sought submissions from interested parties potentially affected by the notified arrangement including industry associations, retail hardware and

paint stores and paint manufacturers.

2.10. The ACCC did not receive any submissions.

Important dates

DATE	ACTION
7 October 2008	Lodgement of collective bargaining notification.
8 October 2008	Public consultation process commenced.
15 October 2008	Closing date for submissions from interested parties.
22 October 2008	Closing date for notifying party to respond to issues raised in public consultation process.
xx October 2008	ACCC assessment of notified arrangement issued.

Public benefit test

2.11. The ACCC may revoke a collective bargaining notification where the relevant test in section 93AC of the Act is satisfied.

2.12. For notifications that involve collective boycott, conduct within the meaning of s 45(2)(a)(i) or (b)(i) of the Act (exclusionary provisions), or a collective arrangement under which competitors will negotiate prices, the ACCC may object to a collective bargaining notification if it is satisfied:

- that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public.

2.13. For notifications that do not involve collective boycotts (or other exclusionary provisions) or price fixing but involve conduct that may otherwise substantially lessen competition within the meaning of s 45(2)(a)(ii) or (b)(ii) of the Act, the ACCC may object to a collective bargaining notification if it is satisfied:

- that in all the circumstances the conduct would, or would likely result in a substantial lessening of competition, and
- the conduct has not resulted or is not likely to result in a benefit to the public or the benefit to the public would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

2.14. The proposed collective bargaining arrangement involves an agreement on price and is therefore subject to the test described in paragraph 2.12.

3. ACCC assessment

Affected markets

- 3.1. In considering the benefits and detriments associated with collective bargaining arrangements, it often assists to identify the markets affected. Where a market starts and finishes will be influenced by the degree of substitutability of different products and across different geographic areas.
- 3.2. BFC submits that the relevant market for assessing the collective bargaining arrangement is the national market for the retailing of architectural and decorative paint and coatings products and related accessory products.
- 3.3. The ACCC considers that these markets may be more localised. However, given the nature of the notified conduct, the ACCC considers that it can assess the likely impact of the notified conduct without precisely defining the market.
- 3.4. Generally, the ACCC considers the collective bargaining notifications may have some effect on the national markets for:
 - the retail supply of architectural and decorative paint
 - the retail supply of coatings products
 - the retail supply of related accessory products.

The future with or without test

- 3.5. The ACCC uses the ‘future-with-and-without-test’ established by the Australian Competition Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the proposed arrangement.
- 3.6. BFC advises that obtaining the legal protection afforded by the notifications is a condition precedent to establishing its franchisee stores.
- 3.7. The ACCC considers that, in the absence of the legal protection afforded by the notifications, the most likely counterfactual would be a continuation of the present situation, where there are no franchisee stores and BFC continues to negotiate with the targets on behalf of its BFC owned stores.

Public detriments

- 3.8. Under collective bargaining arrangements, competitors come together to negotiate terms and conditions, which can include price, with a supplier or customer.
- 3.9. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to inefficiencies. The capacity of new entrants to

compete for the rights to undertake the business of existing market Participants subject to the collective bargaining agreement also has implications for how competition is affected. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

- 3.10. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies is likely to be more limited where:
- the current level of negotiations between individual members of the group and the proposed counterparties is low
 - participation in the collective bargaining arrangement is voluntary
 - there are restrictions on the coverage or composition of the group
 - there is no boycott activity.

Current level of negotiations

- 3.11. Where the current level of individual bargaining between members of a proposed bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.
- 3.12. The ACCC notes that the inclusion of BFC franchisee owned stores in the bargaining arrangement is unlikely to have a significant impact on the level of negotiations taking place.
- 3.13. The ACCC notes that the arrangement does not restrict the ability of the BFC owned stores and the franchisee owned stores to compete in other ways. BFC advises that each participant will independently determine how any discount or rebate will be included in the price to end customers.

Coverage or composition of the group

- 3.14. The ACCC considers that where the size of the bargaining group is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers outside the group.
- 3.15. The proposed collective bargaining group includes 31 prospective franchisees. These 31 franchisees are independently owned businesses and, when established, will have a presence nationwide. The Participants are located in NSW, Victoria, Queensland, Western Australia and the ACT.
- 3.16. The majority of stores retailing paint and accessory products throughout Australia remain outside the group, including national hardware stores such as Bunnings.

Voluntary participation

- 3.17. Participation in the collective bargaining arrangement is voluntary. BFC advises that individual stores are free to negotiate directly with the targets or other suppliers of products at any time.

Boycott activity

- 3.18. The notified conduct does not allow for the Participants to engage in collective boycott activity.

Public benefits

- 3.19. BFC submits that the proposed collective bargaining arrangement will result in a number of public benefits. Broadly, BFC submits that the arrangement will result in increased competition in the market. BFC also submits that the arrangement will result in lower retail prices.
- 3.20. The ACCC considers that the following public benefits may result from the collective bargaining arrangement.

Facilitation of market dynamics

- 3.21. BFC submits that there are a large number of suppliers of accessory products for architectural and decorative paint products in the market. BFC considers that the proposed arrangement will facilitate competition in the market and may encourage other competitors to offer similar discounts.
- 3.22. BFC submits that the collective bargaining arrangement is beneficial for individual stores because BFC is able to negotiate collectively on their behalf to achieve economies of scale not available to each specific entity.
- 3.23. The ACCC considers that by collectively negotiating price the Participants are likely to have a greater ability to negotiate more favourable prices compared with a situation where the stores negotiate individually with the targets.
- 3.24. To the extent that the more favourable prices enable Participants to compete more effectively with suppliers outside the group than is currently possible, the collective bargaining arrangement is likely to give rise to some public benefit.

Transaction cost savings

- 3.25. The ACCC considers that the proposed collective bargaining arrangement is likely to result in some transaction cost savings for both the targets and the Participants in the collective bargaining group, compared to a situation where there are a number of separate negotiations.

- 3.26. The ACCC accepts that the arrangement will result in transaction cost savings and to the extent that these savings are passed on to consumers will result in a public benefit.

Lower prices for consumers

- 3.27. BFC submits that negotiating collectively will allow the Participants to obtain more competitive prices than they could by negotiating on an individual basis. BFC submits that as a result, consumers will obtain lower retail prices for the Products.
- 3.28. The ACCC considers that to the extent any discounts or rebates are passed on to consumers, the arrangement will result in a public benefit.

4. Conclusion

- 4.1. The proposed collective bargaining arrangement involves an agreement on price and is therefore subject to the test described in paragraph 2.12.
- 4.2. Consistent with that test the ACCC will object to a notified arrangement where it is satisfied that the benefit to the public that would result, or is likely to result, from the proposed arrangements does not outweigh the detriment to the public.
- 4.3. The ACCC considers that the proposed collective bargaining arrangement may result in some public benefits in the form of:
- facilitation of market dynamics
 - transaction cost savings
 - potentially reduced prices for consumers
- 4.4. The ACCC considers that the potential for anti-competitive impact is limited, in particular by the highly competitive nature of the industry, the voluntary nature of the arrangement and because the arrangement does not involve potential boycotts.
- 4.5. Accordingly, the ACCC does not object to notifications CB00009 – CB00056. Protection from legal action provided by notifications CB00009 – CB00056 will commence on 4 November 2008 and will expire three years after the date of lodgement (7 October 2011).
- 4.6. As with any notification, the ACCC may review these notifications at a later stage should concerns arise.