



Australian
Competition &
Consumer
Commission

Assessment

Collective bargaining notifications

lodged by

PaintRight Ltd

Date: **16 September 2009**

Notification nos. **CB00081 -
CB00137**

Commissioners:

**Samuel
Kell
Schaper
Court
Dimasi
Willett**

Public Register no. **C2009/1525**

Summary

Based on the information currently before it, the ACCC does not object to the collective bargaining notifications lodged by PaintRight Ltd on behalf of 56 paint stores. PaintRight proposes to negotiate collectively the price and other terms on which paint, painting accessories and services such as banking and marketing will be acquired from 57 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 conduct by lodging a notification with the ACCC. Provided the ACCC does not object to the notified conduct, protection commences 14 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 conduct would not outweigh the public detriments (and substantially lessen competition for notifications that do not concern price fixing or other cartel provisions or exclusionary conduct).

The notification

On 21 August 2009, PaintRight Ltd lodged 57 collective bargaining notifications on behalf of 56 paint stores it proposed to represent (CB00081-CB00137). PaintRight proposes to represent these Participants in negotiations with 57 suppliers to negotiate the price and other terms on which paint, painting accessories and services such as banking and marketing will be acquired.

The collective bargaining notification process is transparent, involving interested party consultation and with relevant documents available from a public register. On this matter, the ACCC has received four submissions: from three nominated suppliers, which did not object to the proposed arrangements, and from another paint-sales chain, which did object.

ACCC's decision

The ACCC considers that the proposed collective bargaining arrangement may result in some public benefits by generating cost savings for participating stores and suppliers.

Given existing competition at the retail level, these cost savings are likely to be reflected in lower prices and/or improved quality of service for consumers.

The ACCC considers that the potential for anti-competitive impact is limited, in particular by the limited size of the bargaining group, by the alternatives to collective

bargaining available to the Participants and the suppliers, by the voluntary nature of the arrangement and because the arrangement does not involve potential boycotts.

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

Protection afforded by these notifications commenced on 3 September 2009 and will cease 3 years from the date of lodgement (21 August 2012). As with any notification, the ACCC may act to remove the immunity afforded by the notifications 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 14 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 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 interested party consultation and with relevant documents available from a public register. 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 14 day statutory period, legal protection from the notification does not commence.

2. Background

The proposed arrangement

- 2.1. On 21 August 2009 PaintRight Ltd lodged notifications CB00081 to CB00137 on behalf of 56 specified paint stores (the Participants). PaintRight Ltd represents independently owned and operated paint/painting-accessory retailers across Australia. These retailers provide to the broad public what is often termed architectural and decorative paints (in contrast with industrial coatings such as automotive paints) and related items and services.
- 2.2. The PaintRight group is a ‘banner group’ of independent businesses that engage PaintRight Ltd for common services such as marketing of the PaintRight brand and chain. PaintRight Ltd states that it operates under a co-operative business model.
- 2.3. PaintRight Ltd proposes to negotiate on behalf of the Participants, who are located in NSW, Queensland, Victoria, South Australia and Tasmania, with 57 suppliers, located across all of Australia’s states, in relation to the maximum price at which the Participants can acquire products and services from those suppliers. Other terms and conditions of supply, such as delivery terms and product-return procedures, will also be negotiated collectively as part of this arrangement.
- 2.4. Under the proposed arrangements, the Participants will continue themselves to contract directly with the suppliers for the supplies and PaintRight states that the retailers are free to seek to negotiate further individual deals.
- 2.5. Under the arrangements, PaintRight will not require Participants to purchase supplies from the nominated suppliers. PaintRight also states that there is no agreement between Participants in relation to retail prices.
- 2.6. PaintRight states that it will use rebates flowing from the agreements it negotiates with suppliers towards marketing the banner group.
- 2.7. The suppliers (the target businesses) include manufacturers and wholesalers of paint, paint tools, other coatings products, decorator products, adhesives, sealants and other decorative accessory products (and ancillary services such as product advice) and providers of services such as banking and marketing.
- 2.8. The target businesses are:
 - 3M
 - Australian Brushware Corporation
 - Bondall
 - Bostik
 - C & A Brushware
 - Campbells Wholesale
 - Colourtrend Paints

- CH Paint Rollers
- Commonwealth Bank of Australia
- Contract Blinds
- Melpaint Products (Dispose-a-tray)
- Dominion Plastics
- Dulux [Orica]
- E-Sime
- Express Rollers
- The Flood Company
- G James Glass & Aluminium
- GSB Chemical Co
- Handi Home Supplies
- Hartman Pacific (Gorilla Ladders)
- Haymes Paint
- HiChem
- Hills Industries
- Hiretech
- HSBC
- Hume Internationale
- Irwin Industrial Tools
- ITW Polymers & Fluids
- Ladder Solutions
- Macron Marketing
- Nilfisk
- Oldfields
- Orica Woodcare
- Pace Advertising
- Phillro
- PPG
- Quantum
- Recochem
- Red Devil
- Rokset Industries
- Saint-Gobain Abrasives
- Sceneys
- Selleys Chemicals [Orica]
- Sequence
- Simister
- Swepdri
- Tenaru (Sikkens)
- Thermoshield
- Timbercare
- Timbermate
- Uni-Pro
- Viponds
- Vision Wallcoverings
- Wagner Spraytech
- Watty
- Yakka
- Zinsser

- 2.9. PaintRight states that it expects no Participant spends more than \$500,000 in a year with any target business and in most cases they spend under \$100,000 per store per target business (some of the PaintRight group member companies have more than one store but none has more than five).

The paint industry

- 2.10. The paint industry involves the manufacture and sale of various paints, timber finishes and other surface coating products for the decoration and protection of surfaces against wear, weather and corrosion. Key products include paints, enamels, varnishes, lacquers and stains.
- 2.11. Paint production in Australia can broadly be divided into two main segments: architectural and decorative paints, such as those applied to houses, and industrial paints and coatings, such as those applied in manufacturing processes to cars. The current notifications relate to architectural and decorative paints and related items.
- 2.12. Some paint manufacturers are vertically integrated, selling some of their production to end users through retail outlets. Some paint is sold to trade painters and painting contractor companies via trade depots. Some paint is sold by manufacturers or wholesalers to retailers, ranging from large chain stores to local hardware stores, who on-sell to consumers undertaking do-it-yourself painting work on homes. The proposed members of the PaintRight bargaining group are retailers in this last group.
- 2.13. PaintRight states that its group comprises about two per cent of what it calls the paint reselling market in Australia.

Other relevant notifications

- 2.14. The ACCC has received a number of other notifications involving paint-industry participants. Two are of particular relevance to PaintRight's collective-bargaining notification.

Exclusive-dealing notification N40312

- 2.15. On 26 August 1998 PaintRight Ltd lodged a third-line forcing notification concerning a requirement for PaintRight group members to carry a core range of premium paints, private-label paint and accessories from nominated suppliers. On 25 November 1998 the ACCC advised that it did not intend to take any further action in respect of the notification at that time.
- 2.16. The conduct the subject of the 1998 notification differs from that proposed in the current collective-bargaining notifications in that the 1998 notification related to a condition placed on member stores, whereas the current notifications relate to the Participants' voluntary participation in proposed collective negotiations with suppliers.

Collective bargaining notifications CB0009-CB00056

- 2.17. On 7 October 2008 BFC Stores Pty Ltd lodged 48 collective bargaining notifications on behalf of paint stores it owned and franchised paint stores in its chain, proposing collective bargaining arrangements in relation to 48 suppliers of paint and related products. On 29 October 2008 the ACCC advised that, based on the information before it, it did not object to the notifications.
- 2.18. More information is available on these notifications from the ACCC's website, www.accc.gov.au, by following the links to the Exclusive Dealing Notifications and Collective Bargaining Notifications registers respectively.

ACCC consultation

- 2.19. The ACCC sought submissions from all the nominated target businesses and some other paint-store chains. Four submissions were received.
- 2.20. Coloutrend Paints, an architectural house paint maker, stated that it did not oppose the notification. It stated that it agreed that being able to negotiate core trading terms and other business arrangements with the PaintRight group office rather than each individual Participant provided cost savings that could be passed on to the bargaining group through improved trading terms.
- 2.21. Orica Consumer Products (OCP), a division of the Orica chemicals group, responded on behalf of three target businesses that are among its business units: Dulux, Orica Woodcare and Selleys. OCP stated that it did not object to the Participants operating in the manner outlined in the notification, provided Participants were not precluded from negotiating directly with Orica or purchasing goods directly from Orica.
- 2.22. Timbermate Group, a timber-coatings and preparations maker, stated that it had no objections to the proposed arrangements.
- 2.23. 3D Paint Stores (Holdings) Ltd (3D) is the member-owned franchisor company that operates the 130-member-store Inspirations – 3D Paint & Colour chain of franchised paint stores. 3D stated that it opposed the application, on behalf of its members. 3D submitted that PaintRight's proposed arrangements would provide Paint Right and the Participants with the benefits of a franchise operation without the costs and regulatory compliance of a franchise operation, such as those involved in complying with the Franchising Code of Conduct.
- 2.24. 3D raised concerns that this would result in 3D franchisees not being able to compete on a level playing field with PaintRight members.
- 2.25. In response, PaintRight submitted that there was no evidence to suggest that any relationships 3D had with any suppliers included in PaintRight's notifications would be adversely affected in any way. In addition, PaintRight

submitted that whether it was operating as a franchise system or otherwise was irrelevant to consideration of the notifications.

Important dates

DATE	ACTION
21 August 2009	Lodgement of collective bargaining notifications.
25 August 2009	Public consultation process commenced.
4 September 2009	Closing date for submissions from interested parties.
9 September 2009	Closing date for notifying party to respond to issues raised in public consultation process.
16 September 2009	ACCC assessment of notified arrangement issued.

Public benefit test

- 2.26. The ACCC may revoke a collective bargaining notification where the relevant test in section 93AC of the Act is satisfied.
- 2.27. 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 conduct within the meaning of section 44ZZRD (cartel provisions), 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.
- 2.28. For notifications that do not involve collective boycotts (or other exclusionary provisions), cartel 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:
- that in all the circumstances the conduct would, or would likely result in a substantial lessening of competition, and
 - that 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.

3. ACCC assessment

Affected markets

- 3.1. The first step in assessing the notified conduct is to consider the relevant market or markets affected by that conduct.
- 3.2. PaintRight submits that the markets affected by the proposed collective bargaining arrangements include paint resellers, paint suppliers, accessories suppliers and road transport services.
- 3.3. For the purpose of assessing this application, the ACCC considers the collective bargaining arrangements may have their strongest effects on the following areas of competition:
 - the wholesale supply of architectural and decorative paint and related accessories and services
 - the supply of other specific business inputs provided by certain of the target businesses, such as banking and marketing services.
- 3.4. The ACCC considers the notifications may also produce effects in the area of the retailing of architectural and decorative paint and related accessories and services, given that the products the subject of the proposed collective-bargaining arrangements are inputs to the retail supply of these goods and services.

The future with and 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. The ACCC considers that, in the absence of the legal protection afforded by the notifications, the most likely counterfactual to the proposed arrangements would be that individual proposed Participants would negotiate individually with suppliers.

Public benefits

- 3.7. PaintRight submits that the proposed collective bargaining arrangement will result in the following public benefits:
 - Increased competition – Participants will be better able to compete with larger retailers, thereby offering consumers greater choice.
 - Increased consumer awareness – The agreements are primarily set up for the collection of rebates that are used to market the group, with the marketing highlighting the benefits of shopping at paint specialists.

- Increased levels of service – Participants will have access to deals that they could not access individually. Specifically, by consolidating their purchasing power, Participants not only potentially achieve better pricing from suppliers but also gain countervailing power when discussing supply issues, product requests and additional support, which is also valuable in product development, leading to a better product for the public.
- 3.8. The ACCC considers that the proposed collective bargaining conduct is likely to result in public benefits through increased competition, consumer awareness and levels of service and transaction cost savings.

Increased competition, consumer awareness and levels of service

- 3.9. PaintRight submits, in effect, that the proposed arrangement will deliver better supplier terms and contribute to the costs of marketing, helping the Participants better compete and therefore increasing competition, to the benefit of consumers.
- 3.10. The ACCC considers that, by collectively negotiating price and other supply terms, the Participants are likely to have a greater ability to negotiate more favourable prices and other supply terms – through, for example, economies of scale for supplier and/or buyer – compared with a situation where the stores negotiate individually with the target businesses.
- 3.11. Further, irrespective of any cost savings which may be achievable through servicing a large number of customers through a single agreement, suppliers may be willing to charge less under the proposed arrangements in order to guarantee access to the volume of customers that the proposed arrangements provide.
- 3.12. Competitive pressures at the retail level are likely to force Participants to pass on some of the reduction in costs in the form of lower prices to consumers and/or improved levels of service or innovation.
- 3.13. In this instance, PaintRight states that additional rebates obtained through the proposed arrangements will be directed primarily to marketing the group. This in turn would further promote competition between PaintRight members and other retailers, which will be reflected in price and/or quality of service offered to customers.

Transaction cost savings

- 3.14. The ACCC considers that the proposed collective bargaining arrangement is likely to result in some transaction cost savings for both the target businesses and the Participants in the collective bargaining group, compared to a situation where there are a number of separate negotiations.
- 3.15. To the extent that such transaction cost savings do result, the ACCC considers this to be a public benefit. As noted above, the ACCC considers that competitive pressure at the retail level is likely to result in the benefits of any

cost savings flowing through to consumers in the form of lower prices and/or improved levels of service.

Public detriments

- 3.16. Under collective bargaining arrangements, competitors come together to negotiate terms and conditions, which can include price, with a supplier or customer.
- 3.17. Generally speaking, competition between individual businesses generates price signals that 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.
- 3.18. 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

- 3.19. Where the current level of individual bargaining between members of a proposed bargaining group and the target business is low, the difference between the level of competition between proposed participants with or without the collective arrangements may also be low.
- 3.20. The ACCC considers that, in this instance, there is some potential that collective negotiation may reduce competition between Participants in negotiating supply arrangements.
- 3.21. However, the ACCC considers that the potential scope of any reduction in competition through collective bargaining in this instance is limited, having regard to the factors discussed below. In particular, the composition of the bargaining group, the voluntary nature of the arrangements and the ability for participants, even where they do participate in the arrangements, to negotiate individual variations to any collectively agreed arrangements.

Coverage or composition of the group

- 3.22. 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 buyers and/or sellers outside the group.
- 3.23. PaintRight proposes to represent a bargaining group of 56 stores across five Australian states, which, it submits, represents about two per cent of the paint reseller market in Australia.
- 3.24. The majority of stores retailing paint and accessory products throughout Australia remain outside the group, including national hardware chains. In addition, in respect of other services about which the Participants propose to negotiate collectively, such as banking and marketing, the proportion of relevant trade for which the negotiating group accounts would be much smaller again.

Voluntary participation

- 3.25. Participation in the collective bargaining arrangement is voluntary. PaintRight advises that individual stores are free to negotiate individual supply arrangements, or variations on any collectively agreed arrangements, directly with the target businesses at any time.
- 3.26. Similarly, each proposed target business is free to decide whether to participate in the proposed arrangements or negotiate with each proposed Participant individually.

Boycott activity

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

Effect on parties outside the bargaining group

- 3.28. 3D submitted that PaintRight's proposed arrangements would provide Paint Right and the Participants with the benefits of a franchise operation without the costs and regulatory compliance of a franchise operation. 3D raised concerns that this would result in 3D franchisees not being able to compete on a level playing field with PaintRight members.
- 3.29. The arrangements notified by PaintRight are limited to negotiating supply terms collectively with suppliers and do not represent a de-facto franchise arrangement.

- 3.30. Establishing and maintaining a franchise system involves many costs, and benefits, in addition to those that may flow to PaintRight members as a result of the proposed arrangements. In this respect, the appropriate business model for any individual business is a matter for the business to determine, having regard to the costs and benefits of alternative business structures.
- 3.31. To the extent that the proposed arrangements result in cost savings to Participants in the arrangements, it is open to their competitors, subject to the relevant provisions of the Act being satisfied, to seek to engage in similar arrangements.
- 3.32. Further, as discussed above, the ACCC considers that the benefits resulting from the proposed arrangements are likely to have a pro-competitive effect on retail competition between paint suppliers.

4. Conclusion

- 4.1. The proposed collective bargaining arrangement is subject to the tests described in paragraphs 2.27 and 2.28.
- 4.2. The ACCC considers that the proposed collective bargaining arrangement may result in some public benefits by generating cost savings for participating stores and suppliers.
- 4.3. Given existing competition at the retail level, these cost savings are likely to be reflected in lower prices and/or improved quality of service for consumers.
- 4.4. The ACCC considers that the potential for anti-competitive impact is limited, in particular by the limited size of the bargaining group, by the alternatives to collective bargaining available to the Participants and the suppliers, by 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 CB00081 to CB00137. Protection from legal action provided by notifications CB00081 – CB00137 commenced on 3 September 2009 and will expire three years after the date of lodgement (21 August 2012).
- 4.6. As with any notification, the ACCC may review these notifications at a later stage should concerns arise.