



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Vision Group Holdings Limited

in respect of

an agreement on the fees charged to patients for ophthalmology
services supplied at Vision Group clinics

Date: 9 June 2010

Authorisation no.: A91217 **Commissioners:** Samuel
Kell
Schaper
Court
Dimasi
Walker

Public Register no.: C2010/357

Summary

The ACCC proposes to grant authorisation to Vision Group for an agreement to discuss and agree the fees to be charged to patients for ophthalmology services supplied at Vision Group clinics. The ACCC proposes to grant authorisation for five years.

On 29 March 2010, Vision Group Holdings Limited (Vision Group) lodged application for authorisation A91217 with the Australian Competition and Consumer Commission (ACCC). Vision Group has sought authorisation to enable it, its employees and ophthalmologists engaged as contractors at Vision Group clinics to discuss and, if relevant, agree and implement fees to be charged to patients for ophthalmology services supplied at Vision Group clinics.

Vision Group operates under the brand names Vision Eye Institute, Vision Retinal Institute, Vision Laser and Vision Day Surgery and comprises a number of subsidiary companies, each of which is ultimately owned by Vision Group. They are therefore all related bodies corporate. Ophthalmologists operating as independent contractors engaged at Vision Group clinics are entities legally separate from Vision Group and are therefore regarded as competitors under the *Trade Practices Act 1974* (the Act). Therefore, the sharing of price information both within and between Vision Group clinics gives rise to a risk of breaching the Act.

The ACCC considers that the proposed conduct is likely to result in a benefit to the public from providing consistent and predictable pricing for patients at Vision Group clinics.

The ACCC considers that any detriment that may result from adopting uniform prices is likely to be limited. Vision Group operates under a shared business structure where the ophthalmologists work as a team, share patient records, have common facilities, policies and procedures and as such the current level of competition within and between Vision Group clinics is limited. Further, Vision Group clinics will continue to compete with ophthalmologists operating in other clinics and public hospitals and ophthalmologists and contractors engaged at Vision Group clinics are able to individually price and discount their services.

On balance, the ACCC considers that the likely benefits that will result from the arrangements will outweigh any public detriments and the ACCC proposes to grant authorisation for five years.

The ACCC is now seeking further submissions in relation to this draft determination prior to making its final decision. Vision Group and any interested parties may also request that a conference be held to make oral submissions on the draft determination.

Contents

- 1. THE APPLICATION FOR AUTHORISATION 1**
 - VISION GROUP HOLDINGS LIMITED 1
 - THE PROPOSED CONDUCT 2
- 2. BACKGROUND TO THE APPLICATION 3**
- 3. SUBMISSIONS RECEIVED BY THE ACCC..... 4**
- 4. ACCC EVALUATION 4**
 - THE MARKET 5
 - THE COUNTERFACTUAL 5
 - PUBLIC BENEFIT 6
 - PUBLIC DETRIMENT 7
 - BALANCE OF PUBLIC BENEFIT AND DETRIMENT 8
 - LENGTH OF AUTHORISATION 9
 - VARIATIONS TO THE PROPOSED CONDUCT 9
- 5. DRAFT DETERMINATION 9**
 - THE APPLICATION..... 9
 - THE NET PUBLIC BENEFIT TEST 9
 - CONDUCT FOR WHICH THE ACCC PROPOSES TO GRANT AUTHORISATION 9
 - CONDUCT NOT PROPOSED TO BE AUTHORISED..... 10
 - FURTHER SUBMISSIONS 10
 - ATTACHMENT A - THE AUTHORISATION PROCESS 11
 - ATTACHMENT B - CHRONOLOGY OF ACCC ASSESSMENT FOR APPLICATION A91217 12
 - ATTACHMENT C - THE TESTS FOR AUTHORISATION AND OTHER RELEVANT PROVISIONS OF THE ACT 13

1. The application for authorisation

- 1.1. On 29 March 2010, Vision Group Holdings Limited (Vision Group) lodged application for authorisation A91217 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of this application is contained in Attachment B.
- 1.4. Application A91217 was made under:
 - section 88(1) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
 - section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).

Vision Group Holdings Limited¹

- 1.5. Vision Group was formed in 2001 and supplies a range of eye health care services specialising in corneal, retinal, refractive and cataract procedures treating glaucoma and other debilitating eye conditions. Vision Group claims to be Australia's largest provider of ophthalmic care along the eastern seaboard, operating 23 ophthalmic consulting clinics, seven laser and refractive eye surgery centres and nine day surgeries.
- 1.6. While operating as one corporate entity, Vision Group clinics operate under the following brands:
 - Vision Eye Institute - which provides a range of eye care treatments
 - Vision Retinal Institute - which specialises in retinal conditions
 - Vision Laser - which provides laser eye surgery
 - Vision Day Surgery - which operates a day surgery for ophthalmic conditions
- 1.7. Vision Group's clinics are owned and operated by Vision Group. Generally a number of ophthalmologists (who are either employed or contracted by Vision Group) are co-located at each clinic. Vision Group advises that at Bundaberg, Maryborough and

¹ Vision Group's submission to the ACCC, March 2010

Gladstone in Queensland there is only one ophthalmologist located in each Vision Group clinic.

- 1.8. Vision Group advises that there are approximately 735 full-time equivalent ophthalmologists working in Australia of which Vision Group engages approximately 44 ophthalmology partners and 10 non-partners (associates). Vision Group's partner and associate ophthalmologists comprise both employees of Vision Group and independent contractors. Of the 44 partner ophthalmologists engaged by Vision Group, 29 are employees and 15 are independent contractors.
- 1.9. Vision Group ophthalmologists also provide ophthalmic services to private patients in non-Vision Group clinics, work in public hospitals and/or provide public eye screenings. The proposed conduct only relates to services that ophthalmologists provide in or for Vision Group clinics.

The proposed conduct

- 1.10. Vision Group advises that it operates its clinics using a team approach where they share patient records, have common facilities, trade under a common trading name and adopt common policies and procedures devised by Vision Group. As an extension of the team approach Vision Group advises it would like to discuss and, if relevant, agree and implement fees to be charged to patients for ophthalmic services supplied at Vision Group branded clinics irrespective of whether the ophthalmologists are engaged as employees or contractors.
- 1.11. In this regard, Vision Group proposes to facilitate the discussion, agreement and implementation of the fees charged to patients for ophthalmology services within and between Vision Group clinics. The agreement would be relevant to fees charged by both ophthalmologist employees and ophthalmologist contractors at Vision Group clinics and would relate to:
 - an intra and inter-practice agreement in respect of the fees to be charged to a particular patient or group of patients. For example, the agreement may be to charge lower fees to pensioners. Alternatively, there may be an agreement that one ophthalmologist will refer a particular patient to another ophthalmologist and the second ophthalmologist will see the patient for a lower fee than his or her usual fee.
 - intra and inter-practice agreements to apply consistent pricing either within a clinic or between clinics (the **proposed conduct**).
- 1.12. Ophthalmologists contracted by Vision Group will not be compelled to engage in the proposed conduct. The pricing arrangements will be voluntary. Ophthalmologists engaged as contractors may set their own fees, including being free to offer different fees or to offer discounts below Vision Group fees for their services on an individual basis.
- 1.13. Vision Group advises it has sought authorisation because of a risk that the exchange of pricing information could be perceived to be evidence of an understanding between Vision Group's clinics as to the prices they will charge.
- 1.14. Vision Group advises that the proposed conduct is not intended to operate so that discussions, agreements or implementation of fees will be consistent between all Vision

Group clinics nationally. Vision Group submits that its objective in seeking authorisation is to ensure that pricing information can be discussed by its ophthalmologists so as to improve the efficiency of ophthalmic care provided by Vision Group including by providing relevant benchmarks.

- 1.15. The proposed conduct relates only to services provided by ophthalmologists in or for Vision Group clinics.

Other parties

- 1.16. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.
- 1.17. Vision Group has sought authorisation for itself, all employees engaged by Vision Group who provide ophthalmology services at Vision Group branded clinics and contractors engaged by Vision Group who provide ophthalmology services at Vision Group branded clinics.

2. Background to the application

- 2.1. Ophthalmology is a specialist area of medicine focussing on eye related diseases, injuries and deficiencies. Eye health care encompasses medical and non-medical services provided by the following eye health care professionals:²
- **Ophthalmologists:** a specialist medical practitioner who provides total care of the eyes from comprehensive eye examinations to prescribing corrective lenses, diagnosing eye-related diseases and disorders, injuries and deficiencies and carrying out medical and surgical procedures.
 - **Ophthalmic nurses:** provide nursing care to patients being treated by an ophthalmologist. Ophthalmic nurses test vision and perform other eye tests under medical direction.
 - **Optometrists:** specialise in the management of disorders of the eyes and visual system, diagnose refractive disorders and eye disease, prescribe spectacles and contact lenses and carry out treatment for eye disorders. Optometrists can prescribe drugs for certain eye conditions and monitor long-term eye conditions.
 - **Orthoptists:** specialise in the diagnosis and management of disorders of eye movements and associated vision problems, perform investigative procedures appropriate to disorders of the eye and visual system and rehabilitation of patients with vision loss. Orthoptists also diagnose refractive disorders and prescribe glasses on referral from an ophthalmologists or optometrist.
 - **General practitioners:** perform eye examinations and vision tests to diagnose the presence of eye diseases or disorders
 - **Optical dispensers (also called opticians):** supply spectacles as prescribed by optometrists or ophthalmologists.

² Vision Group's submission to the ACCC, March 2010 & Australian Institute of Health & Welfare, *Eye health labour force in Australia*, August 2009.

3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.
- 3.2. Broadly, Vision Group submits that the public benefits of the proposed conduct substantially outweigh any detriment to the public that occurs as a result of the pricing agreement. The proposed conduct improves the quality, continuity, availability, certainty and predictability of ophthalmic care for patients. Vision Group also submits that the proposed conduct will result in efficiencies which could be passed on to patients via price reductions, increasing or improving the range of services available and enabling Vision Group to compete more effectively.
- 3.3. Vision Group considers that there will be minimal competitive detriment because the proposed conduct is voluntary and relates only to Vision Group clinics. Further, Vision Group considers that the proposed conduct is likely to have a minimal effect on either Vision Group's prices or market prices.
- 3.4. The ACCC sought submissions from a number of interested parties potentially affected by the application, including Commonwealth and State governments, industry bodies and providers of ophthalmology services and other eye health care providers.
- 3.5. The ACCC did not receive any submissions from interested parties.
- 3.6. Vision Group's application for authorisation and supporting submission may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) and by following the links to this matter.

4. ACCC evaluation

- 4.1. The ACCC's evaluation of the application for authorisation is in accordance with tests found in the following sections of the Act:
 - sections 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
 - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
 - sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
- that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

4.2. For more information about the tests for authorisation and relevant provisions of the Act, please see Attachment C.

The market

- 4.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.
- 4.4. Vision Group submits that while a number of market definitions may be possible, the relevant markets to assess the application are the regional markets for the supply of ophthalmic services to patients. As the Vision Group clinics only provide ophthalmology services, the ACCC proposes to adopt this definition for the purpose of assessing the application for authorisation.

The counterfactual

- 4.5. The ACCC applies the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.³
- 4.6. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.
- 4.7. Vision Group submits that in the absence of authorisation, the contracted ophthalmologists at each Vision Group clinic will continue to price their services individually, without the ability to agree on a common fee structure for the services they provide to patients. The ACCC adopts this as the counterfactual for the purpose of assessing this application.

³ *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

Public benefit

4.8. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁴

4.9. Broadly, Vision Group submits that the proposed conduct improves the quality, continuity, availability, certainty and predictability of ophthalmic care for patients. Further, Vision Group submits that the proposed conduct will result in efficiencies in administration which could be passed on to patients via price reductions, increasing or improving the range of services available and enabling Vision Group to compete more effectively.

4.10. The ACCC's assessment of the likely public benefits generated by the proposed conduct follows.

Consistency in patient care

4.11. Vision Group considers that differing fee structures may inconvenience and confuse patients, interrupt patient care and compromise equitable health outcomes among patients who are disadvantaged either socially, financially, linguistically or culturally. Vision Group claims that consistency in fees will improve the quality of patient care for example through:

- facilitating the team approach and a shared responsibility for patient outcomes
- facilitating cross referrals within or between Vision Group clinics
- increased availability of ophthalmologists.

4.12. The ACCC notes that whether ophthalmologists working at Vision Group clinics are employees or contractors, they work in a team environment where they share facilities. As noted by Vision Group, each of its clinics shares:

- a reception area
- fee collection and bank accounts
- a trading name
- medical records
- policies and procedures.

4.13. The ACCC has previously accepted⁵ that there is likely to be public benefit from consistent, predictable pricing among health practitioners operating in a shared practice where they work as a team, share patient records, common facilities, a common trading

⁴ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

⁵ See authorisation A91024 lodged by the Royal Australian College of General Practitioners and authorisations A91094-A91095 lodged by the Australian Dental Association Inc.

name and common policies and procedures. To consumers they appear to be one business with the ability to charge a common price.

- 4.14. The ACCC considers that the proposed conduct is likely to result in a benefit to the public from providing consistent and predictable pricing for patients at Vision Group clinics.

Efficiency in administration

- 4.15. Vision Group claims that the proposed conduct will benefit the public by improving the efficiency of Vision Group's administrative functions. Vision Group advises that administration staff frequently receive calls from potential patients with queries on price differences between ophthalmologists at the clinic. Some clinics engage up to eight ophthalmologists which results in a significant amount of staff time answering such queries. Vision Group submits that uniform pricing would eliminate this issue and would lead to significant reductions in overheads. Vision Group claims that it could pass some of the savings on to patients through price reductions or improving the range of services available.
- 4.16. The ACCC accepts that Vision Group may experience some minor administrative and overhead cost savings from adopting uniform prices.

Public detriment

- 4.17. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁶

- 4.18. The ACCC notes the proposed conduct involves inter and intra-practice price agreements. Generally, the exchange of pricing information between competitors may facilitate collusion or otherwise reduce competition, resulting in increased prices or reduced quality and availability of goods or services. Outcomes of this nature are associated with significant public detriment.
- 4.19. In this case however, the ACCC considers that the public detriments are likely to be limited by a number of factors. In particular, the sharing of price information applies to ophthalmologists engaged by Vision Group clinics which operate under a shared business structure where the ophthalmologists work as a team, share patient records, have common facilities, policies and procedures. The ACCC notes the extent of competition between ophthalmologists within and between Vision Group clinics absent authorisation is likely to be limited given this team approach.
- 4.20. Vision Group advises that the proposed conduct is not intended to operate so that discussions, agreements or implementation of fees will be consistent between all Vision Group clinics nationally. The pricing in other Vision Group clinics is one of a number of factors considered by ophthalmologists is setting their fees. Vision Group advises these factors often differ between clinics at any particular time and include operating

⁶ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

costs (rent and staff salaries), the reputation of the ophthalmologist and clinic and the competitive pressures which apply in the specific locality.

- 4.21. Therefore, while the proposed conduct provides the potential for uniform fees to be set across all Vision Group clinics, Vision Group clinics will continue to compete with ophthalmologists operating in other clinics and public hospitals. Vision Group claims that nationally Vision Group ophthalmologists comprise less than 6% of all ophthalmologists and that it is subject to strong competition from other ophthalmology providers who offer a similar range of services. Vision Group advises that in every state there are a number of large and small competitors. Similarly, in more local areas, with only one exception, there is no Vision Group clinic where there are not competitors within close vicinity.
- 4.22. While Vision Group is one of the largest providers of ophthalmic care in Victoria, New South Wales and Queensland, there are other clinics including Laser Sight, Vista Eye Clinic, Perfect Vision and number of small clinics operating in these areas. The competition provided by these clinics is likely to constrain the fees set by Vision Group and may reduce the potential detriment that results from the proposed conduct.

Balance of public benefit and detriment

- 4.23. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.24. In the context of applying the net public benefit test in section 90(8)⁷ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁸
- 4.25. As Vision Group clinics are operated under a common brand with common facilities, policies and procedures, the consistency of fees within and between Vision Group clinics can ensure the predictability of costs for treatment for patients.
- 4.26. The ACCC considers that while there is potential for anti-competitive detriment to result from the proposed conduct, the extent of competition between ophthalmologists within and between Vision Group clinics absent authorisation is likely to be limited given the team approach.
- 4.27. For the reasons outlined in this chapter, the ACCC considers the public benefit that is likely to result from the proposed conduct is likely to outweigh the public detriment, including the detriment from any lessening of competition that would result. The ACCC is therefore satisfied that the tests in sections 90(6)/90(7) and 90(5A)/90(5B) are met.

⁷ The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

⁸ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

Length of authorisation

- 4.28. The Act allows the ACCC to grant authorisation for a limited period of time.⁹ The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 4.29. In this instance, Vision Group seeks authorisation for five years. The ACCC proposes to grant authorisation to the proposed conduct for five years.

Variations to the proposed conduct

- 4.30. The ACCC notes that any amendments to the proposed conduct during the proposed term of this authorisation would not be covered by the proposed authorisation.

5. Draft determination

The application

- 5.1. On 29 March 2010, Vision Group Holdings Limited lodged application for authorisation A91217 with the ACCC.
- 5.2. Vision Group has sought authorisation to enable it, its employees and ophthalmologists engaged as consultants at Vision Group clinics to discuss and, if relevant, agree and implement fees to be charged to patients for ophthalmology services supplied at Vision Group clinics.
- 5.3. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

- 5.4. For the reasons outlined in Chapter 4 of this draft determination, the ACCC considers that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct. The ACCC is therefore satisfied that the tests in sections 90(6)/90(7) and 90(5A)/90(5B) are met.
- 5.5. The ACCC therefore **proposes to grant** authorisation to application A91217 for five years.

Conduct for which the ACCC proposes to grant authorisation

- 5.6. The ACCC proposes to grant authorisation under sections 88(1) and 88(1A) of the Act to enable Vision Group, its employees and ophthalmologists engaged as consultants at Vision Group clinics to discuss and, if relevant, agree and implement fees to be charged to patients for ophthalmology services supplied at Vision Group clinics.
- 5.7. This draft determination is made on 9 June 2010.
- 5.8. The attachments to this determination are part of the draft determination.

⁹ Section 91(1).

Conduct not proposed to be authorised

- 5.9. The proposed authorisation is limited to the setting of fees for ophthalmic services supplied within and between Vision Group clinics. The proposed conduct does not apply to any price agreements between Vision Group ophthalmologists when working for other providers of ophthalmic services or for ophthalmologists operating outside Vision Group clinics.

Further submissions

- 5.10. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Attachment A — the authorisation process

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 conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

Attachment B - chronology of ACCC assessment for application A91217

The following table provides a chronology of significant dates in the consideration of the application for authorisation lodged by Vision Group.

| DATE | ACTION |
|---------------|--|
| 29 March 2010 | Application for authorisation lodged with the ACCC |
| 30 April 2010 | Closing date for submissions from interested parties in relation to the substantive application for authorisation. |
| 3 May 2010 | The ACCC requests further information from Vision Group |
| 13 May 2010 | Vision Group provides requested information |
| 9 June 2010 | Draft determination issued |

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to

the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

- (a) make a determination granting:
 - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;

- (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.¹⁰

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.¹¹

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.¹²

Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future¹³

¹⁰ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

¹¹ *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

¹² Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁴

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation¹⁵. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.¹⁶ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.¹⁷

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.¹⁸ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.¹⁹

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.²⁰ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.²¹

¹³ Section 88(10)

¹⁴ Section 88(6)

¹⁵ Section 90(10A)

¹⁶ Subsection 91A(1)

¹⁷ Subsection 87ZD(1)

¹⁸ Subsection 91B(1)

¹⁹ Subsection 91B(3)

²⁰ Subsection 91C(1)

²¹ Subsection 91C(3)