



Australian
Competition &
Consumer
Commission

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: 8 September 2010

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

Public Register no.: C2010/357

Summary

The ACCC grants 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 grants authorisation until 30 September 2015.

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 the proposed conduct is likely to be limited given that Vision Group operates under a shared business structure where the ophthalmologists work as a team, share patient records, have common facilities, policies and procedures. As such the current level of competition among Vision Group ophthalmologists is likely to be 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 remain 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 grants authorisation for five years until 30 September 2015.

Contents

1. THE APPLICATION FOR AUTHORISATION.....	1
VISION GROUP HOLDINGS LIMITED	1
THE PROPOSED CONDUCT	2
OTHER PARTIES	3
DRAFT DETERMINATION	3
2. BACKGROUND TO THE APPLICATION	3
3. SUBMISSIONS RECEIVED BY THE ACCC	4
4. ACCC EVALUATION	6
THE RELEVANT AREAS OF COMPETITION	7
THE COUNTERFACTUAL	7
PUBLIC BENEFIT	8
PUBLIC DETRIMENT	9
BALANCE OF PUBLIC BENEFIT AND DETRIMENT	10
LENGTH OF AUTHORISATION	11
VARIATIONS TO THE PROPOSED CONDUCT	12
5. DETERMINATION	12
THE APPLICATION	12
THE NET PUBLIC BENEFIT TEST	12
CONDUCT FOR WHICH THE ACCC GRANTS AUTHORISATION	12
CONDUCT NOT AUTHORISED	13
DATE AUTHORISATION COMES INTO EFFECT	13
ATTACHMENT A — THE AUTHORISATION PROCESS	14
ATTACHMENT B - CHRONOLOGY OF ACCC ASSESSMENT FOR APPLICATION A91217	15
ATTACHMENT C — THE TESTS FOR AUTHORISATION AND OTHER RELEVANT PROVISIONS OF THE ACT	16

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 advises it is Australia's largest provider of ophthalmic care along the eastern seaboard, operating 18 ophthalmic consulting clinics, seven laser and refractive eye surgery centres and nine day surgeries². Vision Group clinics are located in and around Sydney, Melbourne and Brisbane as well as Townsville and Mackay in regional Queensland.
- 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 Vision Group clinic.

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

² Vision Group website, http://www.vgaustralia.com/IRM/content/investor_businessoverview.html Accessed 1 September 2010

- 1.8. Vision Group advises that there are approximately 735 full-time equivalent ophthalmologists working in Australia of which Vision Group engages approximately 40 ophthalmology partners and 11 non-partners (associates). Vision Group's partner and associate ophthalmologists comprise both employees of Vision Group and independent contractors. Of the 40 partner ophthalmologists engaged by Vision Group, 21 are employees and 19 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.

Draft determination

- 1.18. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.19. On 9 June 2010, the ACCC issued a draft determination proposing to grant authorisation to the proposed conduct for five years.
- 1.20. A pre-decision conference was requested in response to the draft determination (see paragraph 3.7).

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:³
- **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

³ Vision Group's submission to the ACCC, March 2010 & Australian Institute of Health & Welfare, *Eye health labour force in Australia*, August 2009.

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.

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.

Prior to draft determination

- 3.2. Broadly, Vision Group submitted 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 submitted 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 considered that there will be minimal competitive detriment because the proposed conduct is voluntary and relates only to Vision Group clinics. Further, Vision Group considered 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, providers of ophthalmology services and other eye health care providers.
- 3.5. The ACCC did not receive any submissions from interested parties prior to the draft determination.

Following the draft determination

- 3.6. On 9 June 2010, the ACCC issued a draft determination in relation to the application for authorisation. The draft determination proposed to grant authorisation to the proposed conduct for five years.
- 3.7. Following the release of the draft determination a pre-decision conference was held on 22 July 2010. The pre-decision conference was attended by representatives of the Gordon Eye Surgery, the ASO, the Royal Australian and New Zealand College of Ophthalmologists, the Commonwealth Department of Health and Ageing and Vision Group.
- 3.8. A summary of the main points raised in written submissions and/or at the pre-decision conference follows.
- **The Gordon Eye Surgery** submits that:

- It does not object to the authorisation, but if the ACCC authorises Vision Group to discuss prices and set a common fee, then other providers of ophthalmic services with a similar practice structure, such as the Gordon Eye Surgery, should also be given authorisation for similar conduct. It may also open the door for other medical specialities to seek authorisation for similar arrangements.
- It agrees with the efficiency arguments put forward by Vision Group. The efficiency savings should be passed on to patients.
- The Gordon Eye Surgery did acknowledge that there was a risk that ophthalmologists could raise fees to match the highest charging ophthalmologist within the Vision Group clinic.
- **The Australian Society of Ophthalmologists (ASO)** submits that:
 - The proposed five year term for authorisation is too long. Similar arrangements considered by the ACCC have been granted authorisation for four years.
 - The authorisation should extend to all ophthalmologists who operate under a similar structure to Vision Group.
 - The proposed conduct is unlikely to have a significant impact on the provision of ophthalmology services in Sydney, Melbourne or Brisbane, however in small regional markets there is potential for anti-competitive detriment. For example, Vision Group may be able to subsidise its regional operations from the city clinics which may be able to charge higher fees.
 - The arrangements may result in efficiency savings and consistencies in patient care. These savings should be passed on to patients.
- **The Australian and New Zealand College of Ophthalmologists (RANZCO)** submits that it is concerned about the effect the authorisation may have in rural areas where there is a shortage of ophthalmologists. The health of the patient should come first.
- **The Department of Health and Human Services Tasmania (Tasmania DHHS)** does not object to the authorisation and considers it is in the best interests of consumers. The Tasmania DHHS notes that Vision Group is not currently active in Tasmania and if it were to become active in Tasmania in the near future there would be sufficient competition available in Tasmania.
- **The NSW Department of Health (NSW Health):** submits that there may be limited advantage to patients knowing that all ophthalmologists within a practice charge the same fees. NSW Health notes that there is no requirement for any savings to be passed on to patients/clients. Further, Vision Group may increase fees which may be contrary to the public interest.
- **Vision Group** submits that:
 - Vision Group ophthalmologists are still able to individually charge what they like for their ophthalmic services. The proposed conduct is voluntary. The shared price information will be one of the factors considered when setting fees for each clinic or individually. Vision Group does not anticipate that the authorisation would result in clinics in cities and clinics in regional areas setting the same fees. There are currently instances in Vision Group clinics

where employees charge different fees, even though they can currently set the same fees.

- Vision Group clinics are not cross subsidised. Each clinic is required to operate cost effectively on its own merits. Vision Group clinics, including those in rural areas face their own operating costs, plus corporate and overhead costs which apply across all Vision Group clinics.
- A five year authorisation is appropriate. There are significant costs involved in lodging an application for authorisation for the applicant. There will be little impact on competition and five years is not an unusual period of authorisation and is noted in the ACCC's publication 'Guide to authorisation'. The ACCC is able to revoke an authorisation if circumstances change during the period of immunity and the ACCC is able to review the arrangements again when Vision Group comes in for re-authorisation at the end of the period.
- Vision Group does not currently gather price trend information for each of its clinics because the responsibility for setting fees for the services offered at its clinics is held by individual ophthalmologists engaged at Vision Group clinics, not Vision Group itself. To begin tracking pricing trends at its clinics would require Vision Group to design and implement a monitoring system capable of analysing the pricing decisions made by its doctors in many different practices and for many different procedures. Such a task would be difficult, expensive and at least initially, labour intensive.
- Vision Group has no objection to other providers of ophthalmic services lodging their own applications for authorisation if their situation is similar to that of Vision Group. Vision Group would support this type of authorisation.
- Townsville and Mackay are Vision Group's only regional practices as clinics in Rockhampton, Bundaberg, Gladstone and Harvey Bay have recently closed.

3.9. The views of Vision Group and interested parties and the record of the pre-decision conference 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 relevant areas of competition

- 4.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant areas of competition affected by that conduct.
- 4.4. Vision Group submitted that the relevant markets in which to assess the conduct are the regional markets for the supply of ophthalmic services to patients.
- 4.5. 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 ACCC notes that Vision Group clinics are located in regional and metropolitan areas in New South Wales, Victoria and Queensland.

The counterfactual

- 4.6. 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.⁴
- 4.7. 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’.
- 4.8. 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.

⁴ *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

4.9. 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.⁵

4.10. 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.

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

Consistency in patient care

4.12. Vision Group considers that differing fee structures within and between its clinics 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.

4.13. 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.

4.14. The ACCC has previously accepted⁶ 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 name and common policies and procedures. To consumers they appear to be one business with the ability to charge a common price.

⁵ *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.

⁶ See authorisation A91024 lodged by the Royal Australian College of General Practitioners and authorisations A91094-A91095 lodged by the Australian Dental Association Inc.

- 4.15. Consistent with previous decisions the ACCC considers that there is likely to be some benefit to the public from enabling Vision Group to provide consistent and predictable pricing for its patients.

Efficiency in administration

- 4.16. 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.
- 4.17. Vision Group claims that it could pass some of the savings on to patients through price reductions or improving the range of services available. Further, Vision Group claims that the competition provided by other clinics located in close proximity to Vision Group clinics will provide the incentive for Vision Group to share the efficiency savings with patients.
- 4.18. The Gordon Eye Surgery and the ASO agree that the arrangements may result in efficiency savings for Vision Group. They submit that these savings should be passed on to patients.
- 4.19. The ACCC accepts that Vision Group may experience some minor administrative and overhead cost savings from adopting uniform prices.

Public detriment

- 4.20. 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.⁷
- 4.21. 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.
- 4.22. In this case however, the ACCC considers that the public detriments from the proposed conduct are likely to be limited by a number of factors.
- 4.23. The sharing of price information under the arrangements applies to ophthalmologists engaged by Vision Group for services provided within Vision Group clinics. While Vision Group comprises both employees and independent contractors they operate under a shared business structure where the ophthalmologists work as a team, share patient records, have common facilities, policies and procedures. Vision Group claims its ophthalmologists comprise less than 6% of all ophthalmologists in Australia and it is subject to strong competition from other ophthalmology providers who offer a similar range of services.

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

- 4.24. 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 in setting their fees. Vision Group advises these factors often differ between clinics at any particular time and include operating costs (rent and staff salaries), the reputation of the ophthalmologist and clinic and the competitive pressures which apply in the specific locality. Vision Group advises that its clinics in regional areas are not currently cross subsidised from its operations in the cities and there is no intention for them to become so. Each Vision Group clinic is required to operate cost effectively on its own merits.
- 4.25. The ACCC notes the concerns raised by the Gordon Eye Surgery, the ASO and the RANZCO about the possibility for increased fees in rural areas as a result of the conduct. While the proposed conduct provides the potential for uniform fees to be set across all Vision Group clinics, the ACCC notes that Vision Group clinics will continue to compete locally with ophthalmologists operating in other private clinics and some public hospitals.
- 4.26. For each location where there is a Vision Group clinic there is at least one other private provider within close vicinity, for example within 10 kilometres. Some competing providers are large and engage a number of specialists such as the Gordon Eye Surgery, Laser Sight, Vista Eye Clinic and Perfect Vision as well as a number of smaller 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.
- 4.27. The ACCC notes that it may review the authorisation if it has concerns that the likely benefit to the public from the conduct will not outweigh the detriment, including any anti-competitive detriment. For example, the level of competition provided by other providers of ophthalmology services may significantly reduce if, for example, Vision Group acquired competing businesses which currently constrain the pricing of Vision Group's services.
- 4.28. Further, should Vision Group apply for re-authorisation of the proposed conduct after this authorisation expires, the ACCC would seek information from Vision Group on the extent to which Vision Group's fees were standardised across its clinics under the authorisation.

Balance of public benefit and detriment

- 4.29. 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.
- 4.30. In the context of applying the net public benefit test in section 90(8)⁸ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁹

⁸ 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.

⁹ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

- 4.31. 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.
- 4.32. The ACCC considers that while there is potential for anti-competitive detriment to result from the proposed conduct, the extent of competition between ophthalmologists at Vision Group clinics absent authorisation is likely to be limited given the team approach. Further, for each location where there is a Vision Group clinic there is at least one other private provider within close vicinity, for example within 10 kilometres. 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.
- 4.33. 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.
- 4.34. Should Vision Group apply for re-authorisation of the proposed conduct after this authorisation expires, the ACCC would seek information from Vision Group on the extent to which Vision Group's fees were standardised across its clinics under the authorisation.

Length of authorisation

- 4.35. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁰ 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.
- 4.36. In this instance, Vision Group seeks authorisation for five years. Vision Group submits that a five year term is reasonable and not excessive in the circumstances of the markets relevant to the authorisation application. Vision Group submits that the proposed conduct will have very little, if any, impact on competition and that position is unlikely to change during a five year authorisation.
- 4.37. The ASO submits that five years is excessive and proposes that an authorisation for three or four years be granted to ensure there has been no detriment to patients.
- 4.38. The ACCC notes that the authorisations granted to the Royal Australian College of General Practitioners (RACGP) in 2007 and to the Australian Dental Association in 2008 for intra-practice fee agreements were both for four years.
- 4.39. That being said, Vision Group's arrangements are not industry wide and are limited in scope to only apply to ophthalmologists providing services at Vision Group clinics. The ACCC is therefore satisfied that in this case granting authorisation for five years is not inappropriate. The ACCC may review the authorisation if it has concerns that the likely benefit to the public from the conduct will not outweigh the detriment, including any anti-competitive detriment.

¹⁰ Section 91(1).

Variations to the proposed conduct

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

Extending authorisation to other ophthalmologists

- 4.41. At the pre-decision conference and in written submissions following the draft determination, the ASO and the Gordon Eye Surgery requested that any authorisation granted to Vision Group should also be extended to other ophthalmologists which operate in a similar structure to Vision Group.
- 4.42. The ACCC can only grant an authorisation in response to an application. Once an application is lodged, the ACCC assesses them on a case by case basis according to the process contained in the Act (see Attachment A for more information).
- 4.43. The ACCC is not in a position to extend the authorisation granted to Vision Group to other parties not named in the application.
- 4.44. However, it is open to other parties to lodge their own applications for authorisation and seek protection from legal action on public benefit grounds. The ACCC understands that the ASO may be considering whether to apply for authorisation for similar conduct on behalf of its members.

5. 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.

The net public benefit test

- 5.3. For the reasons outlined in Chapter 4 of this 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.
- 5.4. The ACCC therefore **grants** authorisation to application A91217 until 30 September 2015.

Conduct for which the ACCC grants authorisation

- 5.5. The ACCC grants 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.
- 5.6. This determination is made on 8 September 2010.

5.7. The attachments to this determination are part of the determination.

Conduct not authorised

5.8. The 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.

Date authorisation comes into effect

5.9. This determination is made on 8 September 2010. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 30 September 2010.

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
25 June 2010	Deadline for requesting a pre-decision conference or providing a submission in response to the draft determination.
22 July 2010	Pre-decision conference held in relation to the ACCC's draft determination.
29 July 2010	Closing date for submissions following the pre-decision conference.
31 August 2010	Response from Vision Group to submissions made following the pre-decision conference
8 September 2010	Final 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.¹¹

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.¹²

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.¹³

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 future¹⁴
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹⁵

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation¹⁶. 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.

¹¹ *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.

¹² *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.

¹³ Section 91(3).

¹⁴ Section 88(10)

¹⁵ Section 88(6)

¹⁶ Section 90(10A)

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.¹⁷ 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.¹⁸

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.¹⁹ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.²⁰

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.²¹ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.²²

¹⁷ Subsection 91A(1)

¹⁸ Subsection 87ZD(1)

¹⁹ Subsection 91B(1)

²⁰ Subsection 91B(3)

²¹ Subsection 91C(1)

²² Subsection 91C(3)