



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Liquor Stax Australia Pty Ltd

in respect of

**collective bargaining on behalf of member businesses
with a number of suppliers across a range of industries**

Date: 6 October 2010

Commissioners: Samuel
Kell
Schaper
Dimasi
Walker

Authorisation no.: A91237

Public Register no.: C2010/614

Summary

The ACCC has decided to grant authorisation to Liquor Stax to engage in collective bargaining with a number of suppliers across a range of industries on behalf of member businesses.

The ACCC grants authorisation until 6 October 2015.

On 30 June 2010, Liquor Stax Australia Pty Ltd (**Liquor Stax**) lodged an application for authorisation to collectively bargain on behalf of a group of around 200 small businesses operating liquor merchants and hotels with 60 suppliers of various goods and services. These goods and services fall into the following categories:

- Wine, beer and spirits
- Energy
- Advertising
- Poker machines
- Tobacco
- Soft drinks
- Insurance
- Confectionery
- Telecommunication services

Liquor Stax also sought interim authorisation, which was granted by the ACCC on 28 July 2010.

The ACCC considers that the collective bargaining arrangements are likely to result in public benefits. In particular, the ACCC considers that the arrangements are likely to provide Liquor Stax members with greater input into the terms and conditions of supply contracts. In addition, suppliers and members are both likely to experience transaction cost savings as a result of reducing the number of parties to negotiations.

The ACCC considers that the potential anti-competitive detriment that may result from the collective bargaining arrangements is likely to be mitigated by the following factors:

- participation in the collective bargaining arrangement is voluntary
- the proposed conduct does not involve any collective boycott activity
- the relatively small size of the group.

The ACCC grants authorisation until 6 October 2015.

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1. The application for authorisation

- 1.1. On 30 June 2010 Liquor Australia Stax Pty Ltd (**Liquor Stax**) lodged application for authorisation A91237 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. 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.
- 1.3. In particular, Liquor Stax applied for authorisation, on behalf of small businesses operating around 200 liquor merchants and hotels who are members of the Liquor Stax buying group, to collectively bargain with 60 suppliers of wine, beer, spirits, cigarettes, poker machines, soft drinks and confectionery as well as advertising, energy, insurance and communication services. The current list of suppliers is at Attachment D.
- 1.4. Collective negotiations will cover prices, terms of supply, settlement discounts, 'product development', joint advertising and marketing, and distribution.

Other parties

- 1.5. 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. In this case, authorisation would extend to any current or future members of the Liquor Stax collective bargaining arrangements in their dealings with suppliers in the nominated industries.

Interim authorisation

- 1.6. At the time of lodging the application for authorisation, Liquor Stax requested interim authorisation.
- 1.7. The ACCC granted interim authorisation to the proposed arrangements on 28 July 2010.

Draft determination

- 1.8. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.9. On 8 September 2010, the ACCC issued a draft determination proposing to grant authorisation to the proposed collective bargaining arrangements for five years.
- 1.10. A conference was not requested in relation to the draft determination.

2. Background to the application

The applicant

- 2.1. Liquor Stax Australia Pty Ltd is a company set up for the sole purpose of collectively bargaining with suppliers of certain inputs. Businesses wishing to benefit from that collective bargaining must become members, some of whom are also shareholders in Liquor Stax. Membership is free, and imposes no obligations to take up the deals which have been collectively negotiated or restrictions on dealing with different suppliers of the same goods and services.
- 2.2. Liquor Stax emphasised that membership is quite fluid, with the 212 outlets listed in the application not necessarily being a part of every collective bargaining arrangement with a supplier. Members are not required to belong for any length of time before accessing its benefits or to stay members after doing so. The current list of outlets is attached to the application, which can be found by following the links to this matter on the ACCC website at www.accc.gov.au/AuthorisationsRegister.
- 2.3. Liquor Stax is a non-profit organisation, funding itself through a levy on members' orders from suppliers with which it has negotiated. Any amount left over after its costs are paid is returned to members. Some members advertise together and brand themselves as Liquor Stax outlets, while others simply take advantage of the prices and other terms they negotiate.
- 2.4. Members of Liquor Stax are all small businesses selling alcohol for on- and/or off-site consumption, as well as allied products such as cigarettes, soft drinks, confectionery and (in some cases) access to poker machines. Most are located in NSW, with a small number in Queensland, Victoria and Tasmania.

3. Consultation and ACCC evaluation

- 3.1. The ACCC sought submissions from 91 interested parties potentially affected by the application, including the 60 targets of the conduct as well as representatives of both suppliers and competitors of the member businesses. No submissions were received before or after the draft determination, and a conference was not requested.
- 3.2. The ACCC's evaluation of Liquor Stax's collective bargaining is in accordance with tests found in 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.
- 3.3. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

Area of competition

- 3.4. Liquor Stax submits the relevant area of competition is the retail supply by liquor merchants and hotels of goods and services to the public and to other liquor merchants and hotels, as well as the wholesale supply of goods and services. The latter group of goods and services covers alcohol, energy, advertising, poker machines, cigarettes, soft drinks, insurance, confectionery and communication services.
- 3.5. Liquor Stax submits that the retail market is highly competitive, with small businesses facing significant competitive pressure from the two major supermarkets, Woolworths and Coles. Liquor Stax considers that, in competing with each other, those majors make offers to consumers that small businesses cannot match by themselves.
- 3.6. Liquor Stax submits that the level of competition between its members is low, with most competition occurring between members and licensed venues outside the buying group. Liquor Stax considers that each of the wholesale markets features significant concentration of market power among a small number of traders.
- 3.7. At the wholesale level, Liquor Stax members acquire alcohol, energy, advertising, poker machines, cigarettes, soft drinks, insurance, confectionery and communication services. Because these suppliers will be the targets of the collective bargaining arrangements, the markets for the acquisition of these goods and services will be directly affected by those arrangements.
- 3.8. At the retail level, members of Liquor Stax supply alcohol to consumers for either on- or off-site consumption, along with allied products such as soft drinks, tobacco products and confectionery, with some members who sell alcohol for on-site

consumption also offering poker machines. Some members also supply services such as hotel accommodation which are not covered by the collective bargaining arrangements.

- 3.9. The ACCC notes that in *ACCC v Liquorland*¹, the Federal Court found the main competition for liquor merchants was other liquor merchants within a certain radius. The ACCC considers that venues where drinking takes place may have a wider catchment area but would still compete with other drinking venues in that area.
- 3.10. Liquor Stax members will generally be in competition with each other, as well as with many other businesses, to acquire the goods and services that are the subject of this application for authorisation. Where Liquor Stax members are located close to one another, they may also be in competition with one another, as well as with licensed venues outside the buying group, in relation to the retail supply of liquor.
- 3.11. For the purpose of assessing this application, the ACCC considers the main areas of competition affected by the proposed conduct to be the wholesale markets for the acquisition of alcohol, energy, advertising, poker machines, cigarettes, soft drinks, insurance, confectionery and communication services. Markets for the retail supply of alcohol and allied products may also be affected.

The ‘future-with-and-without test’ or counterfactual

- 3.12. The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.²
- 3.13. 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’.
- 3.14. Liquor Stax states that the counterfactual is for member businesses to attempt to bargain individually. Liquor Stax submits that because each good or service is sold by only a small number of suppliers, each of which has substantial market power, small businesses are forced to take the deals they are offered. These deals are on unfavourable terms compared to those which can be achieved via collective bargaining.
- 3.15. The ACCC considers that absent authorisation, Liquor Stax members would negotiate individually with suppliers.

Public benefit

- 3.16. 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:

¹ *ACCC v Liquorland (Australia) Pty Ltd* [2006] FCA 826 at [797-798]

² 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.

...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.³

3.17. Liquor Stax submits the collective bargaining will deliver a number of public benefits, described in the application as follows:

- *'The promotion of equitable dealings.*
- *Transaction cost savings- there must be some savings where associations can represent many small businesses.*
- *Protection from legal challenge- authorisation will often cover conduct that has been occurring for some time. However it was always at risk and targets can use that as a bargaining tactic.*
- *Collective discussions – these must be better than hostility.*
- *Buying groups and hence collective action adds to the competition in the retail market, in a market characterized by increased concentration and potentially less competition if no new groupings emerge.'*

The benefits can be summarised as follows:

- greater input for members into contracts with suppliers
- transaction cost savings
- greater competition in the retail market

3.18. The public benefits the ACCC has considered for the purposes of this assessment are outlined below.

Greater input into contracts

3.19. Generally, one way in which small businesses can seek to redress an imbalance in bargaining power is to bargain collectively. This may allow small businesses to achieve competitive parity with larger businesses, enabling them to achieve more appropriate commercial outcomes through, for example, greater input into contract terms and conditions.

3.20. This improved input can provide a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses, for example, addressing common contractual problems in a more streamlined and effective manner. The ACCC accepts that providing small businesses with the ability to provide greater input into the terms and conditions of their contracts with larger businesses may also reduce the likelihood of unfair contractual terms being imposed.

3.21. The ACCC considers that the collective bargaining arrangements are likely to enable Liquor Stax members to achieve increased input into contracts, and to the extent that the negotiations lead to efficiency gains, this would give rise to a public benefit.

³ 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.

Transaction cost savings

- 3.22. Generally, there are transaction costs associated with contracting. These transaction costs can be lower where a single negotiating process is utilised, such as in a collective bargaining arrangement, relative to a situation where multiple negotiation processes are necessary. The ACCC considers that to the extent that these transaction cost savings do arise they are likely to constitute a public benefit.
- 3.23. In these collective bargaining arrangements where Liquor Stax will represent around 200 businesses at a time in their dealings with up to 60 suppliers, the ACCC accepts that the savings in transaction costs could be significant.

Greater competition in the liquor retail market

- 3.24. Liquor Stax submits that the proposed collective bargaining arrangements are pro-competitive as without it, there would be no buying groups who could challenge the dominant players in the industry.
- 3.25. Negotiations may provide the bargaining group with, for example, access to volume discounts that would not be available through individual negotiation, making it easier for them to compete more effectively on price. To this extent, the ACCC considers that collective negotiations may enhance competition in local markets for the retail supply of liquor. The competitive nature of the retail market means these savings are likely to be passed on to consumers.

ACCC conclusion on public benefits

- 3.26. The ACCC accepts that the collective bargaining arrangements are likely to result in the following public benefits:
- increased member input into contracts
 - transaction cost savings
 - greater competition in the liquor retail market.

Public detriment

- 3.27. 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.⁴
- 3.28. Liquor Stax submits that the collective bargaining will cause no anti-competitive detriment.
- 3.29. Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions, which can include price, with a supplier or customer.

⁴ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 3.30. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. This is often referred to as allocative efficiency. Collective agreements to negotiate terms and conditions can interfere with these price signals and accordingly lead to allocative inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 3.31. Liquor Stax members acquire the same kinds of goods and services from their suppliers of alcohol, energy, advertising, poker machines, cigarettes, soft drinks, insurance, confectionery and communication services. Absent authorisation, they would effectively be competing with each other to acquire those goods and services.
- 3.32. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost allocative efficiencies is likely to be more limited where the following four features are present:
- the current level of negotiations between individual members of the group and the proposed counterparties on the matters to be negotiated is low
 - participation in the collective bargaining arrangements is voluntary
 - there are restrictions on the coverage and composition of the bargaining group
 - there is no boycott activity.

Current level of negotiation between Liquor Stax members and suppliers

- 3.33. Where the current level of individual bargaining between members of a proposed bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.
- 3.34. Liquor Stax submits that liquor retailers are generally offered standard form contracts on a 'take it or leave it basis'.
- 3.35. The ACCC accepts that the level of negotiations currently occurring between individual members and suppliers, in particular large suppliers, is low.

Voluntary participation in the collective bargaining arrangements

- 3.36. Liquor Stax submits that the arrangements are voluntary and members may elect to opt-out and negotiate individual contracts with suppliers. Members are not bound by the terms and conditions negotiated by Liquor Stax.
- 3.37. The ACCC notes that the proposed arrangements do not impact the ability of suppliers to negotiate individually with Liquor Stax members in addition to, or instead of, collective negotiation.
- 3.38. The ACCC considers that collective negotiations will only take place where it is in the commercial interests of all parties to do so.

Coverage or composition of the group

- 3.39. Regarding the coverage and composition of the bargaining group, it appears Liquor Stax has apparently grown from six members to over 200 in twenty years. Of the 212 outlets listed, 194 are located in NSW, with eight in Queensland and four each in Victoria and Tasmania. As mentioned above, most members operate under their own brand identity rather than as Liquor Stax outlets. In notification N94461 lodged in February 2010, Liquor Stax estimated that, over the next year, it anticipated gaining 22 outlets on top of the 200 it had at the time.
- 3.40. The current application states that Liquor Stax competes commercially for members with other buying groups such as Local Liquor and Liquor Stop (now rebranded as Little Bottler). According to their websites, Local Liquor comprises 240 outlets with Little Bottler having 171. While there are no restrictions on the membership of Liquor Stax, members are currently geographically concentrated in NSW and in particular, Sydney.
- 3.41. The ACCC notes that Liquor Stax would make up a small proportion of the purchasers in any of the wholesale markets affected by the conduct. The composition of the group, as described in the application, is such that the conduct is likely to have little if any detrimental effect on competition in those markets.
- 3.42. While the ACCC is granting authorisation to include future parties, it may be that a change to the parties as described above produces a material change in circumstances since the authorisation was granted, which may alter the balance of benefits and detriments. In those circumstances, the ACCC may consider commencing the process to revoke the authorisation under section 91B.

Boycott activity

- 3.43. Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because the target, faced with the threat of withdrawal of supply, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.
- 3.44. Liquor Stax has not applied for authorisation to engage in collective boycott activity. Accordingly any such conduct, should it occur, would not be protected from legal action under the Act.

ACCC conclusion on public detriments

- 3.45. The ACCC recognises that collective bargaining could result in a reduction in competition between Liquor Stax members in the markets to acquire the goods and services covered by the collective bargaining arrangements. However, this detriment is likely to be mitigated by the voluntary nature of the arrangements and the fact that it does not involve collective boycott conduct. It will also be lessened by the small size of Liquor Stax, and the low level of bargaining which would ordinarily take place between members and large suppliers.

Balance of public benefit and detriment

- 3.46. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the collective bargaining arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 3.47. In the context of applying the net public benefit test in section 90(8)⁵ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁶
- 3.48. For the reasons outlined in this chapter the ACCC considers the public benefits likely to result from the conduct are greater input by members into their contracts with suppliers, greater efficiencies in dealing with those suppliers due to transaction cost savings, and greater competition in the retail market generally.
- 3.49. The ACCC considers that the proposed conduct is likely to result in limited public detriments.
- 3.50. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment. The ACCC is therefore satisfied that the tests in sections 90(6) and 90(7) are met.

Length of authorisation

- 3.51. The Act allows the ACCC to grant authorisation for a limited period of time.⁷ 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.
- 3.52. In this instance, Liquor Stax seeks authorisation for five years.
- 3.53. The ACCC grants authorisation in respect of the proposed collective bargaining arrangements until 6 October 2015.

⁵ 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.

⁶ Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

⁷ Section 91(1).

4. Determination

The application

- 4.1. On 30 June 2010 Liquor Stax lodged application for authorisation A91237 with the Australian Competition and Consumer Commission (the ACCC).
- 4.2. Application A91237 was made using Form B Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 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.
- 4.3. In particular, Liquor Stax applied for authorisation, on behalf of small businesses operating around 200 liquor merchants and hotels, to collectively bargain with 60 suppliers of wine, beer, spirits, cigarettes, poker machines, soft drinks and confectionery as well as advertising, energy, insurance and communication services. The collective bargaining will cover prices, terms of supply, settlement discounts, 'product development', joint advertising and marketing, and distribution.

The net public benefit test

- 4.4. 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 are 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.
- 4.5. The ACCC therefore **grants** authorisation to application A91237.

Conduct for which the ACCC grants authorisation

- 4.6. The ACCC grants authorisation to Liquor Stax to collectively bargain on behalf of its members with its suppliers of wine, beer, spirits, cigarettes, poker machines, soft drinks and confectionery as well as advertising, energy, insurance and communication services until 6 October 2015.
- 4.7. This determination is made on 6 October 2010.
- 4.8. Section 90(4) requires that the Commission state in writing its reasons for a determination. The attachments form part of the written reasons for this determination.

Conduct not authorised

- 4.9. The authorisation does not extend to authorising Liquor Stax to engage in collective boycotts of any of the targets (or any other business). The authorisation extends to collective bargaining with suppliers of only the goods and services listed in the application (that is, wine, beer, spirits, energy, advertising, poker machines, cigarettes, soft drinks, insurance, confectionery and communication services).

Interim authorisation

- 4.10. At the time of lodging the application, Liquor Stax requested interim authorisation of the proposed collective bargaining arrangements. The ACCC granted interim authorisation on 28 July 2010.
- 4.11. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

- 4.12. This determination is made on 6 October 2010. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 28 October 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 A91237

The following table provides a chronology of significant dates in the consideration of the application by Liquor Stax.

DATE	ACTION
30 June 2010	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
21 July 2010	Closing date for submissions from interested parties in relation to the request for interim authorisation.
28 July 2010	The ACCC granted interim authorisation.
30 July 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
8 September 2010	Draft determination issued.
22 September 2010	Closing date for submissions from interested parties in relation to the draft determination.
6 October 2010	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.⁸

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.⁹

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.¹⁰

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 future¹¹

⁸ *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.

⁹ *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.

¹⁰ Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.¹²

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation¹³. 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.¹⁴ 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.¹⁵

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.¹⁶ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.¹⁷

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.¹⁸ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.¹⁹

¹¹ Section 88(10).

¹² Section 88(6).

¹³ Section 90(10A)

¹⁴ Subsection 91A(1)

¹⁵ Subsection 87ZD(1).

¹⁶ Subsection 91B(1)

¹⁷ Subsection 91B(3)

¹⁸ Subsection 91C(1)

¹⁹ Subsection 91C(3)

Attachment D — the suppliers targeted by the collective bargaining arrangements

Ainsworth Game Technology
ARA Wines
Aristocrat
ASM Liquor
Australian Vintage
Bacardi Lion
Beelgara Estate
British American Tobacco
Brown Brothers
Brown Forman
Casella Wine
Gruppo Campari
CGU Workers Compensation
Cheviot Bridge
Coca Cola Amatil
Combined Wines
Constellation Wines
Copak Packaged Beverages
Cumulus Wines
De Bortoli
Diageo Australia
Energy Australia
Fairfax Media
Ferbrew
Fesq & Co
Fine Wine Partners
Fosters Group
Garage Wines
Grant Burge Wines
Halloran Manton
Independent Distillers

Integral Energy
Kollaras Group
Littore Family Wines
McWilliams Wines
Metcash
Moët & Hennessy
Negociants Australia
News Limited
NRMA
Oyster Bay Wines Australia
Robert Oatley Vineyards
Pacific Beverages Australia
Pernod Ricard
Philip Morris International
Pooles Rock Wines
Premium Beverages
Red Bull Australia
Sam Smith & Son
Smith's Snackfood Company
Arnott's Snackfoods
Suntory Australia
Taylors Wines
Telstra
The Wine List
Lion Nathan
Tyrrell's Wines
Vok Beverages
Watershed Wines
Zilzie Wines