

CO-OPERATIVES AND THE TRADE PRACTICES ACT AN UPDATE

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Introduction

Co-operatives and the Trade Practices Act are, in some ways, natural enemies. The operation of co-operatives as an “*association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise*”¹, means that they are often comprised of persons who are competitors in their respective industries, which, in turn, brings them fairly and squarely within the purview of the *Trade Practices Act 1974 (Cth)* (TPA) and the regulatory body charged with its administration and enforcement, the Australian Competition and Consumer Commission (ACCC).

Reconciling the object of the TPA, which is to “*enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection*”², with the desire of co-operatives to achieve common economic goals for their members (most commonly in terms of securing the best possible prices and terms and conditions of sale), requires co-operatives not only to have a good understanding of the prohibitions contained in the TPA but, in some circumstances, means that there is a fine balancing act to be maintained between achievement of those economic goals and compliance with the law.

This paper explores, briefly, the ways in which the TPA and co-operatives interact and highlights recent developments in the law and the administration of the TPA by the ACCC as they impact on co-operatives.

What does the TPA cover as far as co-operatives are concerned?

It is beyond the scope of this paper to address all of the matters covered by the TPA or to address the myriad issues which may arise, in depth. In broad terms, among other things, the TPA governs relationships between competitors and conduct in markets (known as the restrictive trade practices provisions) as well as containing provisions directed at consumer protection.

¹ Definition of “Co-operative”, The International Co-operative Alliance Statement on the Co-operative Identity”

² Section 2 of the *Trade Practices Act 1974 (Cth)*



From a co-operatives' perspective, the most relevant restrictive trade practices matters covered by the TPA are:

- agreements, arrangements and understandings between competitors, whether formal, informal, written or unwritten;
- agreements, arrangements and understandings which have the purpose of, or will, or are likely to, substantially lessen competition, whether formal, informal, written or unwritten;
- conditional supply or acquisition arrangements;
- misuse of market power;
- resale price maintenance; and
- acquisitions of shares or assets in a body corporate which substantially lessen, or are likely to, substantially lessen competition.

Co-operatives which deal with consumers will also have to comply with consumer protection provisions including, most notably, the prohibitions on misleading and deceptive conduct and the making of false representations. Other consumer protection provisions such as, for example, the prohibitions on unconscionable conduct and bait advertising may also apply.

Why should co-operatives and their members be concerned about the TPA?

The first answer to this question is simple – because the day to day conduct of most co-operatives is conduct to which the TPA is directed.

Any co-operative which engages in trade or commerce will at some time be faced with conduct which may fall within the scope of the TPA as described above, whether that be the making and implementation of an agreement to acquire or supply goods or services, the sale and marketing of products to the public (consumers) or even the making of rules and by-laws governing the conduct of the co-operative.

Most importantly, any co-operative whose members are competitors with each other eg co-operatives of dairy farmers, egg producers, fishermen, taxi drivers, health food store operators, rice growers, book sellers or plumbers, will face special issues arising from the TPA's prohibitions on certain forms of conduct between and towards competitors.



The second answer to the question is also simple – because the penalties for breaching the TPA are severe and, for some breaches, are about to become significantly more severe.

Breaching the restrictive trade practices provisions of the TPA can result in:

- the imposition of penalties on the co-operative of up to the greater of \$10 million, 3 times the benefit received from the breach or 10% of annual turnover for the 12 months preceding the breach;
- the imposition of penalties on individuals knowingly concerned in the breach of up to \$500,000 (which cannot be paid by the co-operative);
- litigation and claims for compensation from parties who have suffered loss and damage as a result of the breach.

The Federal Government has recently issued a discussion paper signalling its intention to make the offence of hard-core cartel conduct (ie price-fixing and market-sharing between competitors) a criminal offence punishable by a maximum 10 years' jail term.

Breaching the consumer protection provisions can result in:

- penalties of up to \$1.1 million for the co-operative and up to \$250,000 for individuals who are knowingly concerned in the breach;
- orders for corrective advertising;
- litigation and claims for compensation from parties who have suffered loss and damage as a result of the breach.

Even the mere investigation of a suspected breach can impose significant cost and inconvenience on a co-operative and its directors, officers and members. This is because the ACCC has significant investigative powers under Part XIX and section 155 of the TPA, which deal with, respectively, the ACCC's search and seizure rights and its rights to issue notices to obtain documents and information, including interviewing persons under oath. These powers can be exercised where the ACCC reasonably suspects that a person to whom a notice is issued has information relating to a possible breach of the TPA. They can involve considerable disruption to the conduct of a co-operative's business as well as requiring expensive legal representation, the costs of which cannot be recovered from the ACCC. Currently these powers can only be exercised prior to commencement of legal proceedings by the ACCC. However, a bill currently before Federal Parliament will, if



passed, extend these powers in certain situations beyond commencement of proceedings – a move which may afford the ACCC a significant advantage over the rights of other litigants.³

By way of demonstration of the risks to co-operatives of breaching the TPA, examples are provided throughout this paper of instances in which co-operatives have fallen foul of the TPA.

Some specific prohibitions in the TPA, how they apply to co-operatives and how to avoid or deal with them

This section considers some of the more common prohibitions as they affect co-operatives. A word of caution - it does not deal with every possible prohibition, and is intended as a guide only and not as legal advice. Every situation is different and legal advice should be obtained to ensure that risk of breaching the TPA is appropriately addressed.

Agreements between competitors

Agreements between competitors are the riskiest from a trade practices perspective. The TPA prohibits agreements, arrangements or understandings between competitors:

- about who they will supply to or acquire from⁴;
- which maintain, fix or control prices or provide for the maintenance, provision or fixing of prices⁵ ;
- which provide for sharing of the market (whether by product, geography or customers), and including bid and tender rigging.⁶

For co-operatives this means that agreements between members who are competitors in an industry to do any of these things will be a breach of the TPA. However, it is these very things (with the exception of bid and tender rigging) which can be at the heart of the co-operative model. For example, co-operatives of farmers who wish to pool their resources and sell their produce to one processor, or co-operatives of tradesmen who wish to combine their purchasing power to obtain competitive terms of trade for the acquisition of necessary tools of trade or co-operatives of service providers who wish to restrict membership to those

³ Trade Practices Legislation Amendments Bill 2008, Schedule 3, section 14 which provides that the ACCC's power's under section 155 (1) may continue to be used until "(a) the Commission commences proceedings in relation to the matter (other than proceedings for an injunction, whether interim or final); or (b) the close of pleadings in relation to an application by the Commission for a final injunction in relation to the matter".

⁴ Section 45/4D

⁵ Section 45/45A

⁶ Section 45 (most commonly also involving price fixing, section 45A)



who will agree only to provide services through the co-operative and not to any other parties are all common situations but ones which carry a significant risk of breach of the TPA. In each of these examples, the co-operative and its members need to ensure either that the conduct in question is not a breach, or that they have been granted immunity from prosecution for breach from the ACCC (where it is available) before they embark upon the conduct.

There are two principal ways of avoiding breach of the TPA in these situations, namely structuring the co-operative and/or the relationships between it and its members and between members so as to avoid a breach in the first place or by seeking prior approval of the ACCC, through its notification or authorisation processes⁷, where available, to engage in the conduct.

Taking the first example of the co-operative of farmers who wish to pool their resources and sell their produce to one processor, one way of structuring the co-operative and its relationships with, and between members so as to avoid a breach of the TPA may be to have the co-operative purchase the produce of its farmer members and to sell it, as owner, to the preferred processor of its choice. Provided that the members do not agree amongst themselves (either expressly or tacitly) the price and other terms upon which they will sell their produce to the co-operative, such a structure will avoid the prohibition on price fixing. However, if the co-operative acts as agent for its members and the members collectively agree the price and other terms upon which the co-operative as agent will sell each of the members' produce, the co-operative and each of its members will have breached the prohibition on price fixing and be liable to the penalties which apply to that form of cartel conduct.

If, for whatever reason, the members or the co-operative do not wish to place ownership of the produce in the co-operative another way of avoiding breach of the TPA would be for the co-operative and the members to apply to the ACCC for authorisation to collectively agree the price and other terms upon which the co-operative, as agent, will sell each of the members' produce. This will require a formal application and a supporting submission to the ACCC. The supporting submission will need to establish to the ACCC's satisfaction that the public benefits flowing from the conduct outweigh its anti-competitive detriment. Such benefits must flow through to the public generally and not just to the parties concerned. They can include things like improving efficiency, fostering research and development, expanding employment, promoting equitable dealings in a market and growing export

⁷ Contained in Part V11 of the TPA



markets⁸. Unless the necessary degree of public benefit is established the ACCC cannot grant authorisation. The ACCC will conduct a public consultation process before granting authorisation. The entire process can take many months. If granted, authorisation will not be for an indefinite period (periods of 5 years tend to be the maximum) and can be revoked if material changes occur.

An example of the ACCC granting authorisation for the collective agreement of members of a co-operative on the price and other terms upon which the co-operative, as agent, will sell each of the members' produce occurred in the December 2004 authorisation granted to the Tobacco Co-operative of Victoria Limited.⁹

In the second example, a co-operative of tradesmen who wished to use their collective bargaining power to obtain competitive terms of trade to acquire the necessary tools of trade could structure themselves so that the co-operative acquired the tools (at prices and on terms which were not agreed among the members but were solely a matter for the co-operative) and offered them for on-sale to members (again at prices and on terms which were not agreed among the members but were solely a matter for the co-operative), with no obligation on members to acquire tools from the co-operative and no restriction on them from acquiring tools elsewhere.

Alternatively, the members may seek authorisation from the ACCC and will have to establish to the ACCC that the anti-competitive detriment of such conduct is outweighed by its public benefit. An recent example of authorisation to collectively negotiate the terms and conditions, including price, at which members of a co-operative acquired health foods products from various suppliers, was that granted to the ACT Health Food Co-operative Limited in February 2008.¹⁰

As an alternative to authorisation, members of the co-operative may take advantage of the collective bargaining notification process under the TPA¹¹ in which two or more competitors may lodge a notice with the ACCC of their intention to collectively bargain with a specific supplier. Such a notification can only be made where each party to the arrangement (ie each member) expects that the total value of the transactions it will conduct with the

⁸ See, for example, the ACCC's list of examples in *Re ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108

⁹ A copy of the ACCC Determination can be found at <http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D05+47821.pdf&trimFileTitle=D05+47821.pdf&trimFileFromVersionId=788940>

¹⁰ A copy of the ACCC Determination can be found at <http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D08+9193.pdf&trimFileTitle=D08+9193.pdf&trimFileFromVersionId=820134>

¹¹ Section 93AB



proposed supplier over a 12 month period will not be greater than \$3 million¹². Provided that the ACCC does not object (on the basis that it considers that any public benefit from the collective bargaining would not outweigh its anti-competitive detriment), the co-operative and its members will be granted immunity from prosecution, such immunity to take effect 28 days from the date of lodgement of the notification.¹³ There are, as yet, no examples of co-operatives availing themselves of the collective bargaining notification process. Indeed, the level of take-up for the process generally has been very small.¹⁴

The final example of the co-operative of service providers who wish to restrict membership to those who will agree only to provide services through the co-operative and not to any other parties may present more practical difficulties, particularly from a structuring perspective. Where members who are competitors agree to a restriction on the parties to whom one or more of them can supply or acquire from, such agreement will amount to an exclusionary provision which is absolutely prohibited by the TPA. From a structuring perspective, the co-operative would have to engage each member separately to provide services to it at a rate and upon terms agreed separately with each member so that the co-operative could in turn itself on-supply the services. Alternatively, the co-operative and its members would need to apply for authorisation from the ACCC, as described in relation to the first example above.

Agreements which substantially lessen competition

Any agreements, arrangements or understandings made by a co-operative with another party which have the purpose, effect or likely effect of substantially lessening competition in a market, whether between competitors or not, will breach the TPA.

An example of such an agreement might be one of a number of local or regional fishing co-operatives which enters into an agreement with a large regional seafood supplier to supply it with all of its fresh seafood requirements on an exclusive basis for a number of years. Depending on the definition of the relevant market, such an agreement could have the effect of substantially lessening competition. For example, if the market was the market for the supply of fresh seafood at wholesale in that region and the purpose or effect of the agreement was to significantly restrict or reduce competition from other local or regional fishermen or fishing co-operatives in that market, the agreement would breach the TPA.

¹² This amount has been increased for some industries eg primary production to \$5 million, farm machinery retailing to \$10 million, petrol retailing to \$15 million and new motor vehicle retailing to \$20 million.

¹³ Which will reduce to 14 days from 1 January 2009.

¹⁴ Which has "bewildered" and "frustrated" the Chairman of the ACCC, Graeme Samuel, as he noted in his speech "Competition and fair trading: a fair go for small business" given at the National Small Business Summit on 3 July 2007



Assessing whether an agreement has the required purpose or effect involves often complex assessments of market definition and impact on competition. Structural alternatives to avoid breach are unlikely to be available in such situations. Accordingly, where such issues arise, the only alternative to avoid breach would be to apply to the ACCC for authorisation, with the attendant requirement of establishing that the public benefits flowing from the agreement outweigh its anti-competitive detriment.

Conditional supply or acquisition arrangements

In certain circumstances, a co-operative which supplies or acquires, or offers to supply or acquire goods or services on certain conditions can breach the TPA. Such conditions can include restricting the right of the purchaser to acquire goods from a competitor or restricting the right to re-supply goods or services¹⁵, or restricting a supplier's rights to supply third parties¹⁶. Refusing to supply goods or services because the purchaser has dealt with, or now refuses to stop dealing with a competitor or will not accept a restriction on the right to re-supply¹⁷ may also be a breach, as will refusing to acquire goods or services because the supplier will not agree to a condition restricting his or her right to supply third parties.¹⁸ In each of these cases such a breach will only occur if the conditional arrangement has the purpose, effect or likely effect of substantially lessening competition in a market.

There is one form of conditional supply arrangement, known as third line forcing, which is absolutely prohibited. It occurs where supply, or an offer to supply goods or services is conditional on the purchaser also acquiring goods or services from a third party¹⁹ or where a party refuses to supply goods or services because the purchaser refuses to acquire other goods or services from a third party²⁰.

An example of a conditional supply arrangement which is a third line force would be a co-operative of taxi drivers which, as a condition of membership, required its members to purchase their vehicles from a nominated supplier.

Structurally, most conditional supply arrangements, including those involving third line forcing, can be avoided by the supplier acquiring each of the goods or services which are the subject of the arrangement and supplying them as a bundled offering. In the example above, it would not be a breach of the TPA if the co-operative acquired the vehicles and sold

¹⁵ Section 47(2)

¹⁶ Section 47(4)

¹⁷ Section 47(3)

¹⁸ Section 47(5)

¹⁹ Section 47(6)

²⁰ Section 47(7)



them to its members as a condition of membership. However, unlike the situation where the goods or services are relatively inexpensive, such a structural alternative is likely to be very costly and unattractive to the co-operative. The alternatives in that situation would be to seek authorisation from the ACCC (the process and requirements for which are as described previously in this paper) or to notify the conduct. Notification for third line forcing provides immunity for the conduct 14 days after lodging the notification unless the ACCC objects (on the basis that it considers that any public benefit from the conduct would not outweigh its anti-competitive detriment).

An example of a notification by a co-operative for third line forcing (which was subsequently withdrawn) occurred in 2001 when Aerial Taxi Cabs Co-operative Society Limited notified that it was making the operation of a taxi cab on the Canberra Cabs Network conditional on the installation of a security camera supplied by Sigtec Navigation Pty Limited.²¹

Other conduct – misuse of market power, resale price maintenance and mergers

Where a co-operative has a substantial degree of power in a market and it takes advantage of that power for the purpose of substantially damaging or eliminating a competitor, preventing a party from entering into a market or deterring or preventing a party from competing in a market, such conduct will be a misuse of its market power in breach of the TPA.²² An example would be a co-operative which provides the only, or one of only a limited number of radio networks in a regional town or city. Should that co-operative decide to impose a rule which prevented taxi driver members from supplying services other than through its radio network, for the purpose of preventing those drivers from competing with it, such imposition may amount to a misuse of market power. A similar allegation was made by the ACCC against Lismore Taxi Co-operative Limited in July 1998²³, against Radio Cabs of Wollongong Co-operative Society Limited in February 1997²⁴, against Darwin Radio Taxi Co-operative in May 1997²⁵, and against Tamworth Radio Cabs Co-operative Limited in March 2004.²⁶ In each case, the co-operative concerned entered into court enforceable undertakings requiring them to cease the practice.

Another example of breach of the prohibition on misuse of market power can occur where a co-operative prices below cost for the purpose of substantially damaging or eliminating a competitor, preventing a party from entering into a market or deterring or preventing a party

²¹ <http://www.accc.gov.au/content/index.phtml/itemId/655812/fromItemId/729978>

²² Section 46

²³ <http://www.accc.gov.au/content/index.phtml/itemId/331049>

²⁴ <http://www.accc.gov.au/content/index.phtml/itemId/330919>

²⁵ <http://www.accc.gov.au/content/index.phtml/itemId/330971>

²⁶ <http://www.accc.gov.au/content/index.phtml/itemId/510365>



from competing in a market. Such conduct is known as “predatory pricing”. At the time of preparation of this paper the law in relation to predatory pricing remains relatively uncertain, following amendments to the TPA made just before the Federal election in 2007 which, among other things, substituted the requirement for a substantial degree of market power with a requirement of only a substantial market share.²⁷ Whilst the Federal government has indicated its intention to repeal the specific prohibition on predatory pricing (leaving it to be established as a form of misuse of market power), those amendments have yet to be passed into law.

Conduct which is misuse of market power cannot be authorised by, or notified to the ACCC, and, must, therefore, simply not be engaged in.

Resale price maintenance, which is absolutely prohibited under the TPA, occurs where a supplier requires a reseller of its goods or services to sell at or above a specified minimum price. An example of resale price maintenance would be a co-operative of manufacturers which, in selling its products at wholesale, required its resellers to sell at or above a particular price. Such conduct may be authorised by the ACCC upon establishment that the public benefits flowing from it outweigh the anti-competitive detriment.

Co-operatives which seek to acquire the assets or shares of another company or co-operative will be prohibited by the TPA from doing so if the acquisition will be likely to result in a substantial lessening of competition²⁸. The ACCC has power to seek orders from the Court restraining such an acquisition or unwinding a completed acquisition. There are a number of ways in which a co-operative seeking to acquire assets or shares, where there is a concern that such acquisition may substantially lessen competition, may obtain a decision or indication from the ACCC as to whether or not it would seek to oppose the acquisition. This includes formal means such as an application for authorisation (which requires establishment of public benefits which outweigh any anti-competitive detriment) and a formal merger clearance process, the first of which is rarely used and the latter of which has never been used. The most common means of seeking the ACCC’s views is to apply for informal merger clearance. If the ACCC is satisfied that the acquisition will not substantially lessen competition (whether at all or after the provision of undertakings (such as to divest assets) to address any competition concerns), it will allow the merger to proceed unopposed. Examples of merger clearances given to co-operatives include Murray Goulburn Co-operative Co Ltd’s (failed) attempt to acquire Australian Co-operative Foods Limited in

²⁷ Section 46 (1AA)

²⁸ Section 50



2008²⁹, Murray Goulburn's acquisition of Classic Foods Holdings Pty Limited in 2006³⁰ and Geraldton Fisherman's Co-operative Ltd's acquisition of the lobster processing assets of Westar Lobster Pty Limited in 2007³¹.

Consumer Protection – misleading and deceptive conduct

Any co-operative which, in trade or commerce, engages in conduct which misleads or deceives or is likely to mislead or deceive will breach the TPA. Such breaches may be of the general prohibition on misleading and deceptive conduct³² or the specific prohibitions on various false and misleading representations³³, which are also offences under the TPA.³⁴

There are a myriad ways in which a co-operative may mislead or deceive. Intention to mislead or deceive is not a required element of a breach and honest mistake is no defence. Examples of co-operatives engaging in misleading and deceptive conduct include Darling Downs Bacon Co-operative Association Limited which, in 1998 published misleading advertisements stating that certain of its products were 100% Australian pork and which was required to provide to the ACCC a public, court enforceable undertaking not to make the representations again, to publish corrective advertising and offer refunds to misled customers and to implement a TPA compliance program³⁵, and Australian Co-operative Foods Limited which, in August 2008 was ordered by the Court to not make representations that its Romano cheese products were Parmesan cheese again, to publish corrective advertising on its website and to business customers, to implement a TPA compliance program and to pay the ACCC's costs³⁶. Misleading and deceptive conduct cannot be authorised by, or notified to the ACCC. There is, therefore, only one way to avoid this risk of breaching the TPA, which is not to engage in such conduct.

A recent example of the application of the TPA to co-operatives and its successful resolution – the authorisation granted to Dairy Farmers Milk Co-operative Limited in September 2008

At the time of preparing this paper Australian Co-operative Foods Limited (**ACF**), trading as Dairy Farmers, was in the final stages of being acquired by National Foods Limited. Since a restructure in 2004 ACF had purchased all of its raw milk supplies from another, related, co-

²⁹ <http://www.accc.gov.au/content/index.phtml/itemId/840781/fromItemId/751046>

³⁰ <http://www.accc.gov.au/content/index.phtml/itemId/724183/fromItemId/751043>

³¹ <http://www.accc.gov.au/content/index.phtml/itemId/801360/fromItemId/751043>

³² Contained in section 52

³³ Contained in section 53

³⁴ Contained in Part VC

³⁵ <http://www.accc.gov.au/content/index.phtml/itemId/331061>

³⁶ <http://www.accc.gov.au/content/index.phtml/itemId/841220>



operative, Dairy Farmers Milk Co-operative Limited (**DFMC**), pursuant to a Milk Supply Agreement (**MSA**). DFMC has, in turn, purchased milk from its members and supplied it, as owner of the milk, to ACF. The MSA provided, among other things, for DFMC to adopt the same milk purchasing policies and pricing in its dealings with its members for the purchase of their milk, as exist between ACF and DFMC in respect of ACF's purchase of milk from DFMC (referred to as "back to back" purchasing policies and pricing). Under the terms of the MSA, DFMC was obliged to sell all of its milk to ACF and ACF was restrained, except in limited circumstances, from acquiring milk from other suppliers.

These arrangements would have been a breach of the prohibitions on price fixing and agreements which substantially lessen competition contained in sections 45 and 47 of the TPA but for the fact that the TPA exempts such arrangements from the prohibitions where the parties are related.

Once the possible sale of ACF was announced (which is to involve conversion of ACF to a company) it became apparent that ACF, under its new owner, would no longer be related to DFMC and that the protection from prosecution for breach of the TPA afforded because of related party status would be lost. Without the ability to implement the back to back milk purchasing policies and pricing, the fundamental underpinnings of the milk supply arrangements would have been lost. Not only would the processor face a potential loss of necessary milk supply but DFMC and its members would be faced with uncertainty regarding security of milk off-take and pricing.

The solution was to apply for authorisation for continuation of the back to back milk purchasing policy and pricing (but not the restraint on ACF from purchasing milk from other suppliers), to take effect after the sale when related party status between DFMC and ACF would be lost. The matter was complicated in a number of ways, including the fact that the identity of the purchaser was not known until very late in the course of the ACCC's consideration of the application, thus making it difficult for the parties and the ACCC to assess the impact of the arrangements on competition after the sale, and the fact that the ACCC had already issued an authorisation to cover collective bargaining, generally, in the dairy industry. That authorisation did not, however, fit DFMC's circumstances in many ways including, importantly, the fact that DFMC was the owner of the milk it purchases from members.

In September 2008 the ACCC granted authorisation for the back to back milk purchasing policy and pricing, for a five year period following the sale of ACF. In doing so, it cleared the



way for the sale and has ensured that DFMC, as a co-operative, will be able to go forward and continue to protect its members' interests without breaching the TPA.³⁷

Conclusion

This paper commenced with the statement that co-operatives and the TPA are in many ways natural enemies. That does not mean, however, that they need to be at war. Peace between the two can be maintained by ensuring that co-operatives know and understand their obligations under the TPA, and either take the time to ensure that they structure their dealings and relationships so as to avoid breaching the TPA or, where necessary, seek the ACCC's "approval" for conduct which would otherwise be a breach of the TPA through processes such as authorisation and notification.

The old adage of keeping your friends close but your enemies closer rings no more true than where the ACCC is concerned.

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³⁷ The author and Graham Maher, a partner of Addisons, acted for DFMC in respect of the authorization application.

