Chapter

5

Assessing the public benefit

Output 1.1.1: The proper administration and enforcement of the *Trade Practices Act 1974*, the *Prices Surveillance Act 1983* and related laws; and

Output 1.1.2: Performance of actions that promote competition and fair trading and enable well-functioning markets.

PERFORMANCE INDICATOR

- Granted statutory immunity from legal proceedings where there is sufficient public benefit concerning some anti-competitive practices (as prescribed by the Trade Practices Act).

The welfare of Australians may be enhanced in some cases by anti-competitive conduct, when the public benefits outweigh the costs of that conduct.

The adjudication process involves assessing the public benefits and detriments resulting from certain anti-competitive practices. When there is a net public benefit the Commission may grant statutory immunity from legal proceedings under the Act. As such, the adjudication role is essential in achieving the Commission's objective to improve market processes.

The Commission is responsible for processing and examining authorisation applications (those relating to electricity and gas distribution and marketing are dealt with in the Regulatory Affairs chapter), notifications of exclusive dealing and the rules for certification trade marks. The Commission aims to:

- assess applications and notifications in a timely and informed manner;

- provide a high level of quality in analysis; and
- ensure decision making is undertaken in a transparent and consultative manner.

Authorisation

Authorisation provides protection from court action by the Commission or any other party for potential breaches of the competitive conduct provisions of the Act. The Commission can only grant authorisation if it is satisfied that there is a net public benefit from the conduct, and only after it has conducted public consultation and assessment.

The Commission cannot compel parties to seek authorisation but it does have a statutory obligation to rule on the applications it receives. It can revoke or review any authorisation it believes was granted on the basis of false or misleading information, or that contains conditions that have not been complied with, or when circumstances have changed materially since the authorisation was granted.

Notifications

The notification process applies only to exclusive dealing conduct. It provides similar protection to an authorisation although the procedure is different. Immunity takes effect from the time when the notification is lodged (or soon after in the case of third line forcing). The Commission can revoke this immunity if it considers the public detriments are not outweighed by the public benefits.

Certification trade marks

The Commission is also responsible for assessing the rules for the use of certification trade marks (CTMs) under the Trade Marks Act. In assessing CTMs the Commission must be satisfied that:

- the owner or approved certifiers are competent to certify that the goods or services meet the required standard; and
- the rules governing the use of the CTM:

(i) would not be to the detriment of the public; and

(ii) are satisfactory having regard to the principles relating to: restrictive trade practices in Part IV of the Act; unconscionable conduct in Part IVA; and unfair practices and product safety information in Part V.

Table 5.1. Authorisation applications, notifications and CTMs 2000–01

Authorisation applications

	Opening balance	New applications	Applications withdrawn	Applications decided	Balance at end of year
Authorisation applications	24 (64)	24 (53)	5 (5)	15 (30)	28 (82*)
Minor variation applications	4 (8)	29 (32)	-	27 (34)	6 (6)
Revoke and substitute authorisation applications	2 (8)	3 (3)	-	- (6)	5 (5)
Total	**30 (80)**	**56 (88)**	**5 (5)**	**42 (70)**	**39 (93)**

Figures in brackets indicate total applications including electricity and gas matters.

* Total figure includes 43 applications relating to electricity distribution and marketing arrangements and 11 applications relating to gas distribution and marketing arrangements.

Notifications

Opening balance	New notifications	Withdrawn	Decided	Balance
38	345	2	318	63

Australian Competition Tribunal applications for review

Opening balance	New applications	Withdrawn	Decided	Balance
1	-	-	1	0

Certification trade marks

Opening balance	New applications	Withdrawn	Decided	Balance
39	19	2	11	45

Year in review

During 2000–01 the Commission received 53 applications for authorisation and 345 notifications for exclusive dealing. It made 30 determinations, none of which were appealed to the Australian Competition Tribunal.

The Commission has continued to receive applications relating to distribution and marketing arrangements in the gas and electricity industries, especially those relating to the national electricity market. These are discussed in chapter 6.

Excluding gas and electricity the Commission received 24 new authorisation applications, 29 applications for minor variations of authorisations and three applications for revocation and substitution of authorisations previously granted.

The Commission's adjudication workload has become increasingly complex reflecting the impact of industry deregulation and competition policy reform on areas once beyond the reach of the Act. The main adjudication issues that emerged during 2000–01 resulted from authorisation applications and are outlined below. Some of the major authorisations considered by the Commission are discussed at the end of this chapter.

Rural and regional

Many businesses, particularly in the rural sector, have used the authorisation process to adjust from a regulated to a more competitive environment. Applications for authorisations from the rural sector, especially collective bargaining arrangements by producers with their processors, have generated substantial work for the Commission this year, and this trend is expected to continue.

For example, the Commission received two applications for authorisation last year following full deregulation of the dairy industry in July 2000. The first, lodged by Premium Milk Supply and given draft approval by the Commission, involved the collective negotiation of farm gate milk prices and milk quality standards by five cooperatives representing 430 dairy farmers with Pauls Limited in Queensland. A second, and potentially much broader reaching application, was lodged by the Australian Dairy Farmers' Federation (ADFF), and is currently being considered. The ADFF application is seeking authorisation to allow:

- the ADFF to undertake contractual negotiations with a dairy company on behalf of groups of dairy farmers, at their request; and
- any group of producers to negotiate collective contractual terms and conditions (including price) for the supply of milk to a dairy company without the ADFF's involvement.

During the year the Commission also granted authorisation to allow for collective negotiations between Victorian chicken growers and the individual processors to whom they supply in accordance with a code of conduct, following an application by Marven Poultry. Authorisation was also granted for agreements for the collective supply of sugar cane by CSR-contracted growers to CSR mills in Northern Queensland.

Health and the professions

As the Commission focuses more on anti-competitive conduct in the professions, the number of applications for authorisation has increased from organisations involving professional or occupational associations, particularly in the health sector.

On 1 November 2000 the Commission received two applications from the New South Wales Department of Health relating to its policy for providing pathology services in public hospitals.

On 24 November 2000 the Royal Australian College of Surgeons (RACS) applied for authorisation of its processes in:

- selecting, training and examining surgical trainees in each of the nine specialities in which it conducts training;[1]
- accrediting hospital posts as being suitable for training surgeons; and
- assessing the qualifications of overseas-trained practitioners.

RACS lodged a supporting submission on 30 March 2001. On 2 May the Commission granted interim authorisation to RACS until it issues a draft determination or 31 December 2001, whichever is the earlier, at which time the interim authorisation will be reviewed.

RBA/ACCC joint study

In October 2000 the Commission and the Reserve Bank of Australia published the results of a joint study of interchange fees and access in Australia's debit and credit card schemes. Interchange fees are the fees banks charge each other to process ATM, EFTPOS and credit card transactions between financial institutions.

The report found that the price signals and competitive responses that would be expected to keep interchange fees in line with costs have not worked effectively. Interchange fees for ATM, EFTPOS and credit card transactions were all significantly above the costs of providing these services.

Credit card interchange fees were of particular concern to the Commission because of the way in which these fees are collectively set by the credit card schemes' Australian member financial institutions.

The Commission and the RBA both have legislative responsibilities for competition issues in Australia's payments system. In March 2001, following extended negotiations with Australia's major banks about a possible authorisation of reformed credit card interchange fee arrangements, the Commission recommended that the RBA consider using its regulatory powers to reform credit card scheme interchange and membership arrangements. The Commission believed this was the most timely and effective way to reform the arrangements.

Consequently, in April 2001 the RBA 'designated' the Visa, MasterCard and Bankcard schemes in Australia as being subject to the RBA's regulatory powers under the *Payment Systems (Regulation) Act 1998*. The Commission will continue to liaise closely with the RBA to promote an efficient and competitive payments system.

Review of past authorisations

The Commission also reviews past authorisations, many of which were not time limited. Since many of the early authorisations were granted, microeconomic reform, industry concentration and technological change have significantly altered the operating environment of many industries.

In consultation with the International Air Transport Association (IATA), the Commission has begun a review of authorisations granted 15 years ago covering IATA's activities. One outcome was an application in May 2001 by IATA for revocation of an existing authorisation dealing with resolutions made by IATA's airline members about the relationship between airlines and travel agents in Australia and the issue of

[1] The nine RACS specialties are: general surgery; cardiothoracic surgery; neurosurgery; orthopaedic surgery; otolaryngology-head and neck surgery; paediatric surgery; plastic and reconstructive surgery; urology; and vascular surgery.

a substitute authorisation. The Commission is currently undertaking public consultation on this application.

Australian Competition Tribunal decision — Australasian Performing Rights Association Limited

In February 1998 APRA, a voluntary copyright collecting society, applied to the Australian Competition Tribunal for a review of a Commission determination denying authorisation and revoking notification protection of APRA's licensing arrangements.

APRA, the Commission and the Federation of Australian Commercial Television Stations participated in the hearing in November 1998. On 16 June 1999 the tribunal adjourned the proceedings for nine months to enable APRA to design rules both for a non-exclusive licence back system, and for a simplified alternative dispute resolution procedure. APRA's proposed amendments were not opposed by the Commission and FACTS, and on 20 July 2000 the tribunal granted authorisation and reinstated the notification.

Major authorisations and notifications finalised during 2000–01

The Textile, Clothing and Footwear Union of Australia and The Council of Textile and Fashion Industries Limited

On 15 November 1999 the Council of Textile and Fashion Industries and the Textile, Clothing and Footwear Union of Australia applied for authorisation of arrangements that comprise the Homeworkers Code of Practice. The code is a voluntary self-regulatory scheme which accredits parties along the garment manufacturing and retail chain. The code also provides for commercial sanctions against people who breach the provisions.

The code aims to redress difficulties encountered by outworkers or homeworkers, including occupational health and safety issues, reducing the risk of exploitation of a disadvantaged group and providing information to homeworkers so they can better understand their entitlements.

The code supplements the outworker provisions of the Clothing Trades Award 1982, which is an award of the Australian Industrial Relations Commission in accordance with the *Workplace Relations Act 1996.*

The Commission concluded the arrangements would not substantially affect participating parties' ability to compete. On 31 July 2000 the Commission issued a final determination authorising the code based on a net balance of public benefits.

Consumer Electronic Clearing System

In August 2000 the Commission granted authorisations to the Australian Payments Clearing Association (APCA) in respect of the regulations and procedures for the Consumer Electronic Clearing System (CECS). The CECS arrangements aim to coordinate minimum standards and procedures for ATM and EFTPOS payment instructions between CECS members, and all aspects of the clearing cycle. In granting authorisation the Commission concluded that the minimum standards and procedures would result in net benefit to the public by enhancing the security and integrity of the ATM and EFTPOS network.

However, the Commission granted the authorisation on the condition that the CECS regulations be amended to ensure that:

- CECS members cannot require non-members to meet interchange standards and procedures other than those set out in the CECS manual; and
- no CECS member is able to refuse to engage in ATM or EFTPOS interchanges with either a member or a non-member acquirer or a merchant principal that has APCA certification, on technical, operational or security grounds.

Investment and Financial Services Association

On 30 August 1999 the Investment and Financial Services Association (IFSA) applied for authorisation for its draft policy on genetic testing. IFSA is an industry association that represents the retail and wholesale funds management and life insurance industries.

The Commission became involved in this issue because the proposed agreement between life insurance companies involved a likely reduction in competition between them in premiums.

Following a draft decision proposing to deny authorisation, and a pre-decision conference, IFSA amended its application in October 2000 to seek authorisation for only two clauses of its draft policy.

These proposed an agreement by IFSA members that they will not require applicants for life insurance to undergo genetic testing, and will not induce applicants to undergo such testing by offering discounts off standard premium rates based on favourable test results.

The Commission considered that there would be public benefit in avoiding insurer-initiated coercion to undertake genetic testing, and that government policy making would be more difficult if compulsory genetic testing was introduced now. The Government had announced in August 2000 that the Australian Law Reform Commission and the National Health and Medical Research Council were to inquire jointly into human genetic information privacy and discrimination issues. Submissions on the application from interested parties indicated that there was considerable community concern about the adequacy of existing legislation to deal effectively with the issues of access to, and use of, individuals' genetic tests results including by life insurers.

The Commission concluded that there was benefit in authorising the proposed agreement for two years so the issues surrounding testing can be debated and government policy developed. In view of anticipated rapid advances in gene technology, and likely further development of self-regulatory and legislative safeguards, the Commission granted authorisation in respect of the two particular clauses of the draft policy until 13 December 2002.

Marven Poultry Pty Ltd

On 29 June 2001 the Commission granted authorisation to allow collective negotiations between Victorian chicken growers and their individual processors in light of proposed industry deregulation. The authorisation allows growers contracted to each processor to negotiate collectively and give effect to standard growing contracts with their processor in accordance with minimum standards and

conditions outlined in a proposed code of conduct.

At the time of considering the application, the chicken meat industry in Victoria was regulated by the *Broiler Chicken Industry Act 1978* and Broiler Chicken Industry Regulations 1992. However, a national competition policy review found this legislation unnecessarily restricts competition and recommended its repeal. The application for authorisation was lodged in anticipation of industry deregulation and represented a compromise between the current arrangements and full industry deregulation.

The Commission considered that while the collective negotiating arrangements may reduce the scope for competition over rates of payment and other terms and conditions between growers, the nature of the arrangements and industry structure significantly limit the extent of any anti-competitive detriment. The Commission also found that the collective negotiation arrangements would produce public benefits, in particular as transaction cost savings, relative to a fully deregulated environment, and in facilitating the transition to deregulation.

The Commission granted authorisation for five years, subject to certain conditions, including that the proposed code of conduct be amended to clarify the rights of growers to form negotiation groups.

CSR Ltd collective cane supply and expansion agreements

On 2 May 2000 CSR Ltd applied for authorisation to collectively negotiate cane supply and expansion agreements at its Invicta and Pioneer Sugar Mills in North Queensland.

The Commission was satisfied that the agreements would deliver public benefits by increasing mill throughput and farm output, associated new investment and efficiency gains from the improved use of infrastructure. Related public benefits included export growth and increased international competitiveness, and associated economic gains to the Burdekin cane-growing region.

In assessing the application the Commission had to weigh up the likely detriment from the agreements against the situation without the agreements but with considerable restrictive State legislation in place. In that context the Commission considered the anti-competitive detriment arising from the agreements to be minimal and was outweighed by the benefits to the public. The Commission therefore granted authorisation.

Aerial Taxi Cabs Co-Operative Society Limited

Aerial Taxi Cabs Co-Operative Society Limited lodged a notification on 20 April 2001 in relation to proposed third line forcing conduct. That conduct involved the supply of taxi services, through the radio-telephone booking dispatch system, on the condition that the operator acquire a specific type of Sigtec security camera. Aerial submitted that it tested three types of security camera and that the restriction to the Sigtec camera was the result of practicality and compatibility issues.

At the time of consideration, Yellow Cabs (Canberra) Pty Ltd was about to enter the ACT taxi services market in competition to Aerial. However, for Yellow Cabs to successfully enter the market it would have to attract operators from Aerial as all taxi licenses for the region were currently held by Aerial affiliated operators and the ACT government did not intend to issue any new taxi cab licenses. Yellow Cabs advised that it was introducing a dispatch system that was incompatible with the Sigtec camera required by Aerial. Therefore, operators transferring from Aerial to Yellow Cabs would be required to acquire a new security camera, in addition to any Sigtec camera they would have been required by Aerial to purchase.

The Commission considered that the installation of security cameras in taxi cabs would be in the public interest. However, the Commission was concerned, given the current nature of the ACT taxi services market, that the requirement that all operators acquire and install the Sigtec camera as opposed to a substitute camera that was compatible with the Yellow Cabs dispatch system may have public detriment implications. The notified conduct would have the likely effect of requiring those operators who had recently installed the Sigtec camera system, to incur

additional expense acquiring an alternative camera compatible with the Yellow Cabs system. These additional costs over a short period, especially for fleet operators, might be an impediment to operators transferring from Aerial to Yellow Cabs and hinder the ability of Yellow Cabs to establish itself as a viable competitor in the market.

After receiving advice that either of the two alternative cameras tested by Aerial (which are compatible with the Yellow Cabs system), could be accommodated with the Aerial system with minimum cost, the Commission suggested an amendment to the notification. Operators should be able to install any of the cameras trialed by Aerial. In response, on 7 June 2001 Aerial withdrew its notification.