"Exemptions, Notifications and Authorisations"

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Introduction

The exemption, notification and authorisation provisions of the *Trade Practices Act* (1974) ("the Act") support the view expressed by the Independent Committee of Inquiry in their National Competition Policy Report, 1993 p.6:

"Competition policy is not about the pursuit of competition for its own sake. Rather it seeks to facilitate effective competition in the interests of economic efficiency while accommodating situations where competition does not achieve economic efficiency or conflicts with other social objectives".

The purpose of this paper is to describe the mechanisms in the Act by which conduct that may be in breach of Part IV of the Act is given immunity from legal action.

Exemptions

Behaviour that is specifically authorised by state or federal legislation or subject to some forms of intellectual property protection is exempted from the operation of the Act under sections 51(1) and 51(3) respectively.

It is appropriate to consider the legislative exemptions in two time frames. First, the pre- 17 August 1995 provisions of s. 51. Secondly, the post 17 August 1995 provisions of s. 51. (That is, the current s. 51 provisions following the enactment of the *Competition Policy Reform Act* 1995).

Pre 17 August 1995 provisions of Section 51

The ‘old’ provisions of s. 51 relevantly provided an exception from the Act by requiring that in determining whether or not there had been a breach of Part IV of the Act, any act or thing that is or is of a kind, specifically authorised or approved by, or by regulations, under, an Act passed by the Commonwealth or State Parliament (ordinances in the case of Territories) is to be disregarded.

The approach taken by the Courts in interpreting that provision can be seen from a 1978 decision in *Re Kuringai Co-operative Building Society (No. 12) Ltd* [(1978) 36 FLR 134.] . There, the Court had to consider whether a regulation made under the *Co-operation Act* 1923 (NSW), operated to take a requirement by building societies that borrowers insure with a nominated insurance company outside the provisions of s. 47 of the Act. The Court held that the regulation was not adequate to take the practice outside the ambit of s. 47 of the Act. In doing so, Brennan J (as he then was) said:

"It is a consequence of the enactment of the *Trade Practices Act* that practices hitherto lawful are proscribed by the Commonwealth law. Section 51(1)(b) limits the operation of s 47 so that the laws of a State may define the acts or things which do not fall within the prohibitions of s 47. The boundaries of this Alsatia are to be chosen, in the first instance, by the laws of the relevant States, but the appropriate State legislation which exercises the exempting power must specifically authorise or approve the act or thing, that is, it must manifest a legislative intention that the act or thing, if done or existing, shall not be a link in the chain of proof of a liability whether civil or criminal... what is necessary is that the State law should exhibit a specific legislative intention to authorise or approve the act or thing, even though that act or thing would not - but for the provisions of the *Trade Practices Act* - be unlawful" [at 152.]

An example of a case where the Court held that legislation passed by a State Parliament (Victoria) approving and authorising certain agreements had the effect of taking these agreements outside the operation of the Act is *Paul Dainty Corporation Pty. Ltd. v National Tennis Centre Trust* [(1990) 22 FCR 495.]

Post 17 August 1995 Provisions of section 51

In accordance with the requirements and intention of the *Competition Principles Agreement* [refer clauses 1(3) and 5.] *,* s. 51 of the Act has been significantly changed. Now s. 51(1) relevantly provides that - *in determining whether a person has breached Part IV of the Act* - anything specified in and specifically authorised by an Act/Ordinance or regulations made under an Act/Ordinance passed by the Commonwealth or a State or Territory *must be disregarded* [This does not include an Act relating to patents, trade marks, designs or copyright - refer s. 51(1) (a).] . Certain licences and instruments are deemed by s. 51(1A) of the Act to be specified in and authorised by a law for the purposes of s. 51(1). By virtue of s. 51(1B) the provisions of s. 51(1) and (1A) apply regardless of when the Acts, State Acts, enactments, Ordinances, regulations or instruments that are referred to in those sub-sections were passed, made or issued.

By virtue of s. 51(IC), it is now an essential requirement under the Act that in order for something to be regarded as specifically authorised for the purposes of s. 51(1) , *the authorising provision must expressly refer to the Act.* The *Conduct Code Agreement* requires parties enacting such legislation to inform the Commission in writing within 30 days of the legislation being enacted. In case of urgency, regulations may be passed, but they will only be operative for two years. Existing laws which do not comply with this requirement will cease to provide exemptions after three years from 20 July 1995.

Legislative review

The *Competition Principles Agreement* requires the review of existing legislation by the parties to the agreement. The guiding principles for this review are:

> **a)** that legislation of any kind should not restrict competition unless it can be demonstrated that the benefits of the restriction as a whole outweigh the costs; and

b) the objectives of the legislation can only be achieved by restricting competition.

For example, the Victorian government policy on legislative exemptions is as follows:

"Legislative exemptions

The Victorian Government has adopted a policy of ensuring that exemptions from Competition Laws are only allowed when absolutely necessary. As a general rule, the Government does not support exemptions from Part IV of the TPA (or the Competition Code). In other words, offending conduct should, wherever possible, be modified so that it ceases to offend Part IV (or the Competition Code).

The Government will only enact exemptions where it has been demonstrated that:

- the benefits to the community as a whole of the restriction on competition (caused by the conduct to be exempted) would outweigh the costs to the community as a whole of the restriction on competition (caused by the conduct to be exempted); and
- the objective of the proposed exemption can *only* be achieved by restricting competition.

In all cases, the approval of the Premier must be obtained before excepting legislation or regulations can be made."

Each party to the agreement was required to develop a timetable by 30 June 1996 for the review, and where appropriate to reform all existing legislation on competition by the year 2000. Proposals for *new* legislation that restrict competition will have to be accompanied by evidence that the legislation is consistent with the principles set out above. The legislation must be reviewed once every ten years.

Notification

Notification is a formal process under sections 93-95 of the Act. It allows a person who engages or proposes to engage in exclusive dealing conduct, to lodge a formal proscribed notice with the Commission setting out particulars of the conduct or proposed conduct.

Other than for third line forcing

Notification of exclusive dealing conduct, other than for third line forcing, provides immunity from legal proceedings from the time details are lodged with the Commission. The immunity remains in force until the Commission formally advises (by notice) that it is satisfied that the conduct constitutes a substantial lessening of competition and does not result in any public benefit which outweighs the resulting public detriment.

The Commission receives many notifications for franchise and distribution agreements that would otherwise breach s. 47. A typical situation is where a supplier appoints a retailer in a particular area and provides that retailer with exclusive rights

over that area. In general there is no effect on competition from such an arrangement. However, the agreement can be anti-competitive if the supplier has a powerful position in the market. An exclusive franchising and distribution agreement may provide the opportunity to tie up entry to other levels of the market. This is where the Commission becomes interested in such an arrangement. For example, the Commission received notification from Tubemakers in 1988 for an exclusive dealing arrangement in which a stockist would have to obtain the full range of pipes from Tubemakers. In order to obtain certain types of pipes the stockist would have to agree not to stock any pipes manufactured by competitors. The Commission received a complaint from a competitor that it was prevented from entering the market. Tubemakers withdrew its notification when the Commission began an investigation.

Third line forcing

For third line forcing exclusive dealing the immunity begins at the end of the 'prescribed period'. From 1 July 1996 the prescribed period is 14 days following lodgement. If the Commission issues a draft notice (which would propose to deny immunity) during the prescribed period the immunity will not begin, unless and until the Commission decides not to issue a final notice. If no draft notice is issued during the prescribed period immunity will begin at the end of the prescribed period. After the expiry of the prescribed period the Commission may issue a draft notice as for any other notification. Immunity will continue until a final notice is issued.

A common example of notification for third line forcing arrangements comes from mobile telephone companies with complementary services in, for example cable television provision or land line services. These companies are related, but not the same company and therefore, any compulsory acquisition of services from one sector of the company in order to obtain the main service would be in breach of the Act if no notification is in place.

Assessment

Upon a receipt of a notification of exclusive dealing conduct, other than third line forcing, the Commission will usually make a preliminary assessment of the competition implications of the conduct. That assessment will not always, but may, involve some marketplace inquiries. If it is assessed that there is no, or minimal, lessening of competition the matter will not be pursued further and the immunity will remain in place undisturbed unless later reviewed by the Commission. Triggers for review may be complaints by persons affected by the notified conduct or the Commission otherwise becoming aware of any change in market conditions. The Commission may also decide to revisit a notification as part of a general review of an industry or a monitoring of standing exemptions. If on preliminary assessment there appear to be substantial lessening of competition issues the Commission will make further inquiries.

Where third line forcing conduct is notified the Commission's preliminary assessment will be of the likely benefits and detriment's arising from the conduct.

The Commission will act to remove the immunity applying to a notification of exclusive dealing conduct other than third line forcing only if it considers that the notified conduct substantially lessens competition and that in all the circumstances:

a) there appears to be no countervailing public benefit; or

b) any public benefit that does exist is insufficient to outweigh the detriment to the public resulting from the lessening of competition.

To deny immunity in respect of notified third line forcing the Commission must be satisfied that the likely benefit to the public will not outweigh the likely detriment to the public. The matters the Commission considers when examining public benefits and anti-competitive detriments in relation to notifications are the same as those considered in relation to applications for authorisation. These are discussed in more detail below.

Draft Notice

Before giving a notice the Commission will issue a draft notice to the party which lodged the notification and other interested persons. It will advise that the Commission is satisfied that there is or would be substantial lessening of competition and there is no public benefit or that any public benefit is outweighed by public detriment constituted by the lessening of competition and invite the parties to call a conference in respect of the draft notice. The draft notice will set out the reasons why it has been issued.

A conference must begin within 30 days of the end of the 14 day period during which it is called. Pre-decision conferences are not usually requested by those who agree with the proposed decision of the Commission. Pre-decision conference procedures for notifications are the same as for authorisations. These procedures are set out in detail as attachment 'B' to the Commission's Guide to Authorisations and Notifications issued in November 1995.

Notice

After a conference an opportunity is often provided for further written submissions to the Commission. The Commission takes into account all matters raised at the conference (plus any other submissions made subsequent to the issuing of the draft notice) and then decides whether to leave the notification undisturbed or issue a notice which would have the effect of removing the immunity. If there is no request for a conference the Commission will issue a notice substantially in keeping with the draft notice and taking into account any relevant information it may have become aware of since the issue of the draft notice.

Where a notification is lodged and the Commission makes a determination in relation to an application for authorisation in respect of the same conduct the notification is deemed to be withdrawn.

Where the Commission issues a notice in respect of a notification that has the effect of withdrawing the exemption or a notification is withdrawn or deemed to have been

withdrawn, the person who lodged the initial notification may not lodge another notification in relation to conduct which is the same or of like effect.

A person dis-satisfied with the giving of a notice by the Commission may apply to the Australian Competition Tribunal under s. 101A of the Act for a review on the merits of the giving of the notice.

Authorisations

What can be authorised?

The Commission is empowered to grant authorisations for -

a) anti-competitive agreements [s45];

b) price fixing agreements involving goods or services [s45A];

c) covenants involving goods or services affecting competition (including price fixing)[s45B and s45C];

d) anti-competitive exclusive dealing arrangements [s47];

e) exclusive dealing involving third line forcing [subs 47(6) and 47(7)];

f) resale price maintenance [s48]; and

g) mergers leading to or likely to lead to substantial lessening of competition in a market [ss50 and 50A].

The Commission is not able to grant authorisation for conduct which would constitute a misuse of market power [s46]. However, conduct which is protected by authorisation or notification will not be caught by s. 46. That is, such exempted conduct will not constitute a misuse of market power.

How do I apply?

The opening words of sub-section 88(1) of the Act highlights that the application for authorisation must be made "by or on behalf of a corporation [person]". The Commission is not able to initiate the process. The immunity given by the process only operates once the Commission has granted authorisation. For example, sub-section 88(12) of the Act shows that the Commission has no power to grant an authorisation which operates retrospectively in relation to a contract or arrangement that has been made, an understanding arrived at or a covenant that has been given. The Commission cannot subsequently "ratify" the ‘making of such agreements’ or ‘having engaged in that conduct’ by subsequently granting an authorisation.

In this respect, note the conclusions of Lockhart J as President of the Trade Practices Tribunal in *Re. John Dee (Export) Pty Ltd & Others* [(1989) ATPR 40-938 at 50,209.] *:*

"The legislature was concerned that if the Commission's power to grant authorisation could be exercised with respect to the making of an agreement or arrangement or the arriving at an understanding so as to have retroactive effect, it would render nugatory the consequences of previous or existing breaches of provisions of Pt IV of the Act which may have occurred after the making of the relevant agreements or arrangements or the arriving at the relevant understanding. Sub-section (12) does not therefore prevent authorisation being given to a corporation's future conduct which takes place pursuant to a contract or arrangement or understand the making of which may itself be outside the jurisdiction of the Commission to authorise."

Prescribed Forms

As provided for by s. 89 of the Act, applications for authorisation must be made in writing. Forms have been prescribed under the *Trade Practices Regulations* (the "Regulations″) which by Regulation 7 requires that:

"An application for an authorisation under Division 1 of Part VII of the Act shall be in accordance with whichever of Form A, B, C, D, E, EA or F is applicable."

The forms in Schedule 1 of the Regulations are for applications for authorisation of the following:

FORM A "Exclusionary Provisions" [refer s4D and s45 of the Act]
FORM B "Agreements affecting competition" [refer s45 of the Act]
FORM C "Covenants affecting competition" [refers45C of the Act]
FORM D "Secondary Boycotts" [refer s45D of the Act]
FORM E "Exclusive Dealing" [refer s47 of the Act]
FORM EA "Resale Price Maintenance" [refer s.48 of the Act]
FORM F "Mergers" [refer s50 and s50A of the Act]

The completed forms can be lodged by post or in person at the Commission's central office in Canberra or at any of its regional State Offices.

Applicable fees

Each application is given a file number and the applicant is issued with a receipt. A fee is payable to the Commission on lodging the application for authorisation. The fees are provided for by sub-regulation 28(4) of the Regulations. Presently they are $7,500 for applications for authorisation not involving a merger and $1,500 for an additional application of the same kind that is lodged within 14 days of the initial application; and $15,000 for an application for an authorisation involving a merger [Refer schedules 1A and 1B of the Regulations .] .

Public Register

The authorisation process is a very public one and that is made apparent by sub-sections 89(2), (3) and (4) of the Act which require the Commission to make public the receipt of an application for an authorisation and require the Commission to keep a public register of applications. The ACCC's public register is the continuation of the TPC's public register which is kept in Canberra.

The public register that the Commission is obliged to keep must include [Refer sub-section 89(4) of the Act.] :

a) any document furnished to the Commission in relation to an application for an authorisation;

b) any draft determination and any summary of reasons by the Commission given to any person;

c) any document in relation to revocation of or substitution of an authorisation;

d) any record of a conference [under sub-section 90A(8)] and any certificate relating to a conference;

e) particulars of any oral submission made to the Commission in relation to an application; and

f) the determination of the Commission on the application and any reasons given by the Commission for that determination.

Any person may seek inspection of the Commission's public register [Refer to s.165 of the Act and Regulation 28 of the Regulations .] . As the public register is kept in Canberra, inspection of the documents in Perth or other capital cities other than Canberra may need notice for appropriate arrangements to be made. If inspection of the file on the public register is not required but only limited information, this may be provided over the telephone.

Confidentiality Claims

Given the public nature of the authorisation process and register, an applicant should make any claim for confidentiality for any documents or submissions at the time of lodging the application [Refer sub-section 89(5) of the Act and Regulation 24 of Regulations .] . If such a request is made, the document or submission is excluded from the public register until the claim for confidentiality is determined [Refer to sub-section 89(5E) of the Act.] . Where the document or submission contains particulars of -

a) a secret formula or process;

b) the purchase price payable in merger cases; or

c) current manufacturing, production or marketing costs of goods or services,

the Commission must exclude the document or submission from the public register. In any other case, the Commission may, if it is satisfied of the confidential nature of the document or submission or for any other reason, exclude the document or submission from the public register [Refer sub-sections 89(5A) and (5D) of the Act.] .

a) If a request for confidentiality is made in respect of a document and the Commission refuses to exclude the document from the public register, the

Commission is obliged upon request, to return the document to the person furnishing it.

b) If a request for confidentiality is made in respect of particulars of an oral submission and the Commission refuses to exclude the particulars of the submission from the public register, the person who made the submission may inform the Commission that he/she withdraws the submission [Refer sub-sections 89(5B) and (5C) of the Act.] .

Determining applications - general requirements

The Commission is obliged to make a determination in writing granting such authorisation as it considers appropriate or dismissing the application. It is also obliged to give written reasons for its determination. In making its determination, the Commission must take into account any submissions relating to the application made to it by the applicant, the Commonwealth, a State or by any other person [Refer sub-sections 90(1), (2) and (4) of the Act.] .

The Commission must also comply with the requirements of section 90A of the Act before making its determination. Accordingly, the Commission must -

a) prepare a draft determination (for applications other than those for authorisation of a merger);

b) by notice to the applicant and each other "interested person", invite the applicant or other person to notify the Commission within 14 days whether they want the Commission to hold a conference in relation to the draft determination;

c) depending on the circumstances, provide notice of or a copy of the draft determination and a summary of the Commission's reasons;

d) if any person notified by the Commission requests within the specified 14 day period that he or she wishes the Commission to hold a conference, the Commission must appoint a time, date and place for the conference being not later than 30 days after the 14 day period expires;

e) at the conference -

i) be represented by a member or members who participated in preparing the draft determination as nominated by the Chairman of the Commission;

ii) allow each person to whom a notice was sent by the Commission and any other interested person whose presence the Commission considers appropriate to attend and participate personally or, in the case of a body corporate, to be represented by a director, officer or employee of the body corporate;

iii) allow any person participating at the conference under (i) or (ii) above to have his, her or its legal or other adviser present at the conference to assist that person (but such adviser is not entitled to participate at the conference);

iv) allow the Minister or a person appointed in writing by the Minister to attend and participate personally; and

v) not allow any other person to be present.

f) by its member, make such record of the discussions as is sufficient to set out the matters raised by the persons participating at the conference;

g) consider exercising its discretion to exclude form the conference any person who uses insulting language; creates a disturbance or repeatedly interrupts a conference; and

h) once the conference has terminated, give a certificate that certifies the day on which the Commission first received written notice requesting the conference and the day on which the conference terminated.

An "interested person" for the purposes of s. 90A is a person who has notified the Commission in writing that he or she or a specified unincorporated association of which he or she is a member, claims to have an interest in the application, being an interest that in the opinion of the Commission is real and substantial [Refer s.90A(12) of the Act.] . An outline of the procedures followed by the Commission is at Attachment B to the Commission's guide to authorisations and notifications (issued November 1995). The pre-determination conference will usually be held in the city most convenient to the majority of interested persons.

What is the test for determining applications for authorisation?

The statutory tests which the Commission must be satisfied are met are expressed in the form -

"The Commission shall not make a determination granting an authorisation...unless it is satisfied in all the circumstances that..."

This wording reflects, it is suggested, the paramount nature of the policy enshrined in Part IV of the Act to maintain and enhance competition. Further, it shows that the Commission must be persuaded of the existence of a certain state of affairs before it can lawfully grant an authorisation.

The tests for authorisation applications not involving mergers are set out in sub-sections 90(6), (7) and (8) of the Act:

a) where the application is to make a contract or arrangement or arrive at an understanding or to give a covenant or to engage in proposed conduct the test is whether a provision of the proposed contract (other than third line forcing conduct), arrangement or understanding or the proposed covenant or the

proposed conduct would either result or be likely to result, in a benefit to the public and that benefit outweighs the detriment to the public caused by any lessening of competition likely to result if the provision or proposed covenant or conduct is given effect to or carried out;

b) where the application is to give effect to the provisions of a contract, arrangement or understanding or complying with a covenant the test is whether the provision has resulted or is likely to result in a benefit to the public and that benefit outweighs or would outweigh the detriment to the public caused by any lessening of competition that has resulted or is likely to result from giving effect to the provision, or complying with the covenant; and

c) where the application is to engage in a primary boycott, secondary boycott or resale price maintenance, the test is whether the Commission is satisfied that the conduct would result, or would be likely to result, in such a benefit to the public that the authorisation should be granted.

Notwithstanding the slightly differing terms in which the tests are expressed in sub-sections 90(6) and (7) compared with sub-section 90(8), the tests have been held to be the same. For example, in *re. Media Council of Australia (No.2)* [(1987) ATPR 40-774 at 48,418.] , Lockhart J as the presiding member of the Trade Practices Tribunal said:

"The Tribunal shall not make a determination affirming, setting aside or varying the Commission's determination unless it is satisfied in all the circumstances that the provision of the proposed conduct 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 the proposed conduct were engaged in. One of the applications for authorisation was treated by the parties and by us as being in respect of an arrangement that falls in or may fall in an exclusionary provision within the meaning of that expression in s4D of the Act. The test is the same whether or not the provisions of the arrangements are governed by sub-sections 90(6) or constitute "exclusionary provisions" because the language of the relevant sub-section in that event, namely, sub- section 90(8), is in all material respects the same. Hence, for all practical purposes one applies the public benefit and detriment test already outlined. We note that this was also the Tribunal's view in the 1978 determination: see...[case citations omitted]. In support of the proposition that a similar process of balancing benefits and detriment's is appropriate under both sub- sections 90(6) and 90(8): see..."

In carrying out its tasks under the Act, the duty of the Commission can be gleaned from the comments of the Tribunal given that the Tribunal "stands in the shoes" of the Commission in conducting a review of a decision of the Commission. That is, it conducts a hearing *de novo*. For example, in *Re. Media Council of Australia (No.2)* [(1987) ATPR 40-774 at 48,419.] , Lockhart J said:

"The application of sub-section 90(6) and 90(8) must involve a number of comparisons. In identifying the relevant public benefit the Tribunal must compare the position which would apply in the future were the proposed arrangement not entered into, or given effect to, with the position in the future which would arise if the

arrangement were entered into or given effect to. The Tribunal must consider all the circumstances that relate to public benefit including how the proposed arrangement is likely to operate in practice so as to give rise to public benefit. The Tribunal is not confined to some narrow or rigid examination of the documents constituting the Codes. Our function is to examine the practical operation or working out of the subject matter of the application for authorisation."

Authorisation of Mergers

Although there is no statutory requirement for the Commission to hold a pre-determination conference, the practice of the TPC had been to often hold a conference. The TPC generally invited to that conference parties from whom it wished to hear further submissions. The procedures for such conferences are similar to that of statutory conferences. The Commission will continue that practice where appropriate.

The relevant test for granting authorisations in respect of mergers is set out in sub-sections 90(9) in similar terms to other authorisations:

"The Commission shall not make a determination granting an authorisation under sub-section 88(9) in respect of a proposed acquisition of...unless it is satisfied in all the circumstances that the prosed acquisition would result, or would be likely to result, in such a benefit to the public that the acquisition should be allowed to take place [Refer sub-section 90(9) of the Act.] ."

However, for merger matters, the Commission must take into account specific matters set out in sub-section 90(9A) of the Act in determining what amounts to a benefit to the public (in addition to any other matters). These specific matters are: any significant increase in the real value of exports; any significant substitution of domestic products for imported goods; and also ‘all other relevant matters that relate to the international competitiveness of any Australian industry’.

Generally speaking, the Commission is obliged to determine merger authorisations within 30 days from the day on which the application is received by the Commission. If it has not done so or matters extending that time period have not occurred, the Commission is deemed to have granted the authorisation applied for. The Commission can extend the time for determining an application for authorisation of a merger by:

> **a)** requesting in writing from the applicant, further relevant information, in which case the 30 day period is extended by the period commencing from the day on which the request was given until the day on which the applicant gives to the Commission such additional information as the applicant is able to give. That is, time "stops running" until the additional information is provided; or
>
> **b)** notifying the applicant within the 30 day period that the Commission considers that period should be extended to 45 days due to the complexity of the issues involved; or
>
> **c)** obtaining agreement from the applicant for a longer specified period.

Public benefits

The TPC, in 1991, in its determination of a merger authorisation relating to ACI Operations Pty Ltd which sought to acquire assets of business of manufacturing and sale of glass containers carried on by Glass Containers Pty Ltd and SCI Operations Pty Ltd [ACI Operations Pty Ltd (1991) ATPR (Com) 50-108 at 56,066-56,067.] said:

"1.8 When it is considering an application for authorisation under s88(9) the Commission must take into account the test in s90(9) of the Act, which provides that the Commission must satisfy itself before granting authorisation that in all the circumstances the proposed acquisition would result or be likely to result in such a benefit to the public that it should be allowed to take place.

1.9 Public benefit is not something that is defined in the Act, but the Commission considers that the concept of public benefit is capable of wide interpretation. The Commission has stated its support of the view taken by the Trade Practices Tribunal in *QCMA and Defiance Holdings* that public benefit may constitute "anything of value to the community generally, any contribution to the aims pursued by the society".

1.10 The Commission recognises a range of matters as constituting a public benefit. It has issued a brochure outlining the authorisation process and in that brochure it lists a range of public benefits including:

- economic development, eg. In natural resources, through encouragement of exporation, research and capital investment;
- fostering business efficiency, especially where this results in improved international competitiveness;
- industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions; industrial harmony;
- assistance to efficient small business, eg. guidance on costing and pricing or marketing initiatives which promote competitiveness;
- improvement in the quality and safety of goods and services and expansion of consumer choice;
- supply of better information to consumers and business to permit informed choices in their dealings;
- promotion of equitable dealings in the market;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- development of import replacements;
- growth in export markets;
- steps to protect the environment.

1.11 In its consideration of an application under s88(9), the Commission also takes into account detriment's which may come about as a result of the acquisition, including anti-competitive effects."

Non economic public benefits

Consistent with the broad interpretation given by the Trade Practices Commission and the Trade Practices Tribunal to the term "public benefit", over the years, the TPC has recognised, as public benefits, benefits which can be characterised as "non-economic" public benefits. For example:

a) *Victorian Road Transport Association Incorporated (A90537)*

Authorisation was sought for the rules and code of conduct of the furniture removers' division. The concern was that without authorisation, the rules and code may be exclusionary provisions and thus contravene s. 45 of the Act. In its draft determination, the Trade Practices Commission proposed to deny authorisation because it found the Code to be deficient in several respects. In particular:

- a lack of specificity in its expression to the standards required to be met and the administration of its sanctions and complaints/disputes procedures;
- the lack of appeal provisions;
- the lack of external participation;

all detracted from the ability of the code to deliver public benefit.

The TPC could not assess the anti-competitive detriment as being of a low level. There was a substantial risk of anti-competitive detriment by reason of the lack of certainty which affected many important elements of the code.

Following a pre-decision conference, VRTA informed the TPC that it proposed to revise the code of conduct to meet the concerns expressed by the TPC in its draft determination. The TPC subsequently received and considered the revised code of conduct. It considered that the revisions made in relation to insurance, standards, complaints procedures and review of the code would result, or would be likely to result in benefits to the public which would outweigh the anti-competitive detriment, as long as the operation of the disputes committee did not substantially lessen competition.

The TPC granted authorisation for six years, on condition that, after three years, VRTA provided details of the operation of its disputes committee to the TPC.

b) *The Australian Institute of Valuers and Land Economists (A90545)*

Authorisation was sought for a revised code of ethics and clauses of the Constitution. The concern was that without authorisation, the revised code of ethics and clauses 10.2 and 11 of the AIVLE constitution and clause 24 of its by-laws, along with the relevant definitions, being the provision concerned with the implementation of the code may contravene s. 45 of the Act.

AIVLE submitted that the new code of ethics would:

- improve the quality of services offered to consumers by valuers and land economists; and

- lead to better business information being supplied to consumers and business.
- The TPC was satisfied that implementation of the code of ethics would result, or would be likely to result in a benefit to the public. However, it was also of the view that that benefit would be outweighed by the detriment to the public constituted by the potential lessening of competition if certain anti-competitive provisions were put into effect.

On 14 March 1994 the TPC issued a draft determination proposing to grant authorisation subject to conditions relating to those anti-competitive aspects, which related to:

- an aspect of AIVLE's continuing professional development program;
- code provisions dealing with defamatory statements, kerb-side valuations, criticisms of other members via advertising, and criminal convictions; and
- provisions of the constitution and by-laws dealing with the finality of decisions of AIVLE's appeal body (the National Review Committee), fines that can be imposed on members, costs, and the constitution of the National Review Committee.

AIVLE requested a pre-decision conference to which it submitted that the TPC's requirements relating to kerb-side valuations and the constitution of the National Review Committee were unreasonable.

During the conference AIVLE agreed to revise the code in a manner which met the TPC's conditions relating to kerb-side valuations. AIVLE proposed that, where the National Review Committee met to hear an appeal of a member of the public, it would require that at least two members of the committee must be non-members of the Institute, and where the committee meets to hear the appeal of a member, at least one member of the committee must not be a member of AIVLE.

The TPC granted authorisation conditional upon AIVLE fulfilling all the conditions it agreed to meet in its submission of 21 April 1994 at the first opportunity and, in any event, within six months of the date of the determination.

c) *Agsafe Limited and Avcare Limited (formerly the Agricultural and Vetenary Chemical Association (AVCA) (A90528, A90529, A90530))*

Agsafe and Avcare sought authorisation for an accreditation scheme and code of conduct for the transport, storage and handling of farm chemicals. The concern was that without authorisation there may have been a breach of s. 45 and possible third line forcing under s. 47(6) of the Act.

The TPC considered that the safe use of farm chemicals and Australia-wide uniformity in the storage of farm chemicals would result in public benefit. The anti-competitive elements - the use of sanctions, third line forcing by Avcare and its members, the entry requirement for individuals, on-going training, and the possible exclusion of firms from the industry - did not appear to outweigh the public benefit.

The TPC granted authorisation for five years or until a further application is lodged by Agsafe for changes to the present authorisation.

d) *The Australian Tyre Dealers' and Retreaders' Association (formerly Australian Tyre Dealers Association, Independent Retreaders Division) (A60019)*

ATDRA applied to the TPC for authorisation of a voluntary 'Retread Factory Accreditation Program' for certain organisations operating tyre retreading processes. The RFAP requires participants to enter into legally binding agreements to undertake and maintain particular operational practices including the observance of a code of practice. The concern was that without authorisation, this may be an exclusionary agreement in breach of s. 45 of the Act.

The accreditation scheme was proposed in response to alleged suggestions from the new tyre industry that the public could have reason to be concerned about the safety of tyres that have been retreaded. The TPC accepted that there would be a public benefit from, *inter alia,* self regulation of quality standards. Importantly, the TPC recognised that maintaining quality standards would minimise the risk to public safety from inadequate retreading services.

The TPC concluded that any detriment that would result from the RFAP would be outweighed by the substantial public benefit to flow from the arrangements. Accordingly, the TPC granted authorisation for the RFAP for seven years and the TPC imposed an annual reporting condition on ATDRA.

Facilitated transition to industry deregulation - a public benefit

The TPC has recognised that deregulation of an industry can constitute a public benefit sufficient to justify authorisation of some anti-competitive conduct. In 1991, in its reasons accompanying the final determination in *Winegrape Growers' Council of Australia Incorporated* [(1992) ATPR (Com) 50-114 at 56,192.] (in granting the authorisation subject to conditions) the TPC said:

"The applicant stated that if the scheme were authorised the MIA Board would forfeit its price-fixing powers. This was claimed to be a public benefit. It was further stated that if this scheme were put in place it would assist governments in resisting pressure from growers to have minimum pricing schemes re-introduced in the Sunraysia and the Riverland.

The Commission wrote to the NSW, Victorian and South Australian Ministers for Agriculture to ascertain their views of the scheme and how it would affect their future policies in the winegrape industry, in particular any future legislation. All three replied that they supported the proposed scheme. The NSW Minister indicated that if the scheme were authorised consideration would be given to reviewing the use of legislation to set price levels. South Australia's Minister indicated that his government was considering introducing legislation similar to the current Victorian legislation.

The Commission accepted that there could be a public benefit in the move away from regulated markets which would allow competition an opportunity to operate. However, it could not give much weight to the possible deregulation of the MIA Board as there was no commitment assuring that it would occur. It gave more weight

to the protection the scheme would provide against moves back to regulation, particularly given the support for the scheme from the Ministers."

In 1992, in denying authorisation to the Australian Tobacco Leaf Corporation Pty Ltd [(1992) ATPR (Com) 50-124 at 56,314-56,315.] , the TPC said in its reasons:

"...In this current application the industry is seeking to replace government controls with identical industry controls, the exception being that the proposed arrangements are voluntary. The applicant argues that removal of the stabilisation scheme makes the proposed scheme vastly different to the previous scheme and not just a voluntary version of the stabilisation scheme."

and

"The application and discussions with industry representatives indicate that there is clearly a concern about the degree of uncertainty that the industry will face once government regulation is lifted. There is also a significant number of growers who recall the collapse of the market in the 1960s which prompted the introduction of the stabilisation scheme. In these circumstances, a move to a voluntary system, although identical to the government regulated market, is seen as a significant deregulatory step. The Commission however has seen nothing to suggest that this is a first step and that the industry is committed to further moves to a more competitive market."

and

"The Commission recognises the difficulties in trying to predict how a market will operate once government regulation has been removed. However, there is already a substantial degree of measured deregulation being provided via the policy process and part of the adjustment the industry needs to make towards a more competitive environment involves learning to live with greater uncertainty. The Commission was also concerned that the current scheme did not demonstrate a commitment to deregulation and that, if an authorisation was granted for a particular period, an extension of the authorisation could again be sought at the end of that period."

However, the Hilmer reforms and subsequent changes have envisaged a "phased in" or "measured" deregulation. That is, there has been a transition period before the competitive conduct rules in Part IV of the Act apply to some government business enterprises or marketing authorities. In September 1995, the TPC whilst recognising the public benefit in a phased in reduction of regulation in its determination in the application for authorisation by the *Victorian Egg Industry Association* [Authorisation Application No. A40072 - 13 September 1995 - Final determination.] also recognised that Hilmer reforms provide for a one to three year adjustment period in industries that become deregulated under those changes. The Hilmer proposals and the principles of national competition reform have become well established throughout all facets of Australian industries. These issues will be relevant considerations for the Commission in the future when determining whether an arrangement or agreement provides a public benefit of facilitating the transition to a deregulated regime.

Practical issues about authorisation

In view of the matters set out above and in particular:

a) the public nature of the authorisation process;

b) the not insignificant level of fees payable on lodging an authorisation application;

c) the wide ranging inquiry the Commission is obliged to undertake to carry out its statutory role - to be appropriately "satisfied";

d) the fact that an applicant is effectively seeking the grant of immunity from Court action from the Commission for conduct that would otherwise be in contravention of the Act [and in many cases that would render the person contravening the Act and others involved in an "accessorial capacity" liable to the imposition of very large penalties under the Act - ie. Maximums of $10 million for corporations and $500,000 for natural persons];

e) the fact that the Commission's function (and the Tribunal's function on review in determining an application for an authorisation is an exercise of an "administrative discretionary power";

f) the fact that review of a Commission determination by the Tribunal can be sought by anyone dissatisfied with a determination and having a "sufficient interest [Refer s.101 of the Act and BHP v Trade Practices Tribunal (1980) 31 ALR 401 at 412-413.] ",

It is suggested that the following practical considerations should be borne in mind in considering, making and supporting applications to the Commission for authorisation:

i) approach the Commission before lodging the formal application. Discussing the proposed application with appropriate Commission staff can be a mutually beneficial process. For an applicant, the benefit is in receiving guidance regarding the application and, in particular, the nature, level and extent of supporting information or material required to be provided to enable the application to be properly considered. This may be particularly important if the applicant wants the Commission to deal with the application expeditiously. It is almost inevitable that the Commission will have to gain a proper understanding of the market or markets which will be affected by the anti-competitive conduct or proposed merger. Information about the relevant markets, their structure and operations will necessarily be required to create or appreciate the proper context to assess the application and the effect of the anti-competitive conduct. For the Commission, the benefit in a pre-application discussion is in enabling it to do background research into a particular industry especially if it is an industry the Commission has not looked at before or for sometime. This may well be the case in view of the extensions in the application of the Act which the National Competition Policy reforms have brought in. A pre-application discussion also allows the Commission to properly allocate resources. This is more readily and efficiently achieved if the Commission has some notice that an application is to be lodged.

ii) There is no point in approaching the authorisation process in some secretive or particularly sensitive way. It is not a question of doing a deal with the Commission without competitors or others finding out until the deal is done. The Commission must deal with authorisation applications as it is required to by law. The law ensures that it is an open/public process. This is not meant to imply that negotiation has no role in the process. Adapting the proposal to meet the Commission's concerns about the detriment's of an initial proposal, or the proffering of appropriate undertakings, may well tilt the public benefits versus anti- competitive detriment balance in favour of the former and thus result in the grant of an authorisation.

iii) There is and can be no real benefit to be derived from treating the authorisation process as being equivalent to an adversarial contest. Seeking to persuade an administrative agency such as the Commission to exercise an "administrative discretionary power" cannot and should not be equated to litigation.

iv) If an applicant or other interested person considers that the consequences of the Commission granting or not granting an authorisation application are very severe, then the possibility or option of contacting the Commission and arranging a "face to face" meeting with the relevant commissioner(s) to explain personally (rather than by correspondence, etc) the effect or consequences of granting/not granting authorisation (as the case may be) should not be overlooked. The Commission endeavours to be, reasonably approachable in that respect.

v) It is imperative that the application clearly articulates and focuses on the public benefits of the proposal as these must be sufficient to outweigh the anti-competitive detriment's. Applicants and their advisers should ensure that proper attention is paid to this aspect of the application.

Independent review of Commission determinations

The role of the Australian Competition Tribunal (formerly known as the Trade Practices Tribunal) in reviewing determinations made by the Commission on applications for authorisation has not been changed by the legislative amendments implementing National Competition Policy. Accordingly, its role can be usefully summarised by the following case references:

a) In *Re. Queensland Co-operative Milling Association Ltd* [(1976) 25 FLR 169 at 173-174.] , Woodward J as President of the Tribunal said:

"...counsel for the commission stated the role of commission before the tribunal as they submitted it to be. They said that, in the absence of special consideration in a particular case, that role is as follows: (a) to examine any statement of facts and contentions put before the tribunal by a party, in order to see if all material facts and considerations are fully and fairly presented, and to submit to the tribunal the results of each such examination; (b) to furnish to the tribunal such additional information as the commission considers to be material to the issues before the tribunal; (c) to assist the tribunal to evaluate the information furnished to it by such means as are

appropriate, including the cross-examination of witnesses and the production of additional information having the effect of correcting, qualifying or contradicting information already supplied; and (d) to make submissions to the tribunal as to the considerations which the commission considers material to the hearing before the tribunal. Counsel specifically rejected any suggestion that the commission comes before the tribunal as a party, concerned to uphold its own decision. In my view, the attitude of the commission is quite correct. While the commission has an opportunity and an obligation (s90(d)) to explain in writing its reasons for its determinations, it should not be concerned to press the same view of the facts, or of the principles involved, upon the tribunal. It should assist the tribunal, which does not have investigative staff or counsel assisting it, in the ways indicated above. This will normally put counsel for the commission in a position whereby, to secure a balanced presentation to the tribunal, they must test the evidence of applicants, present contrary material and make submissions putting an opposite point of view to that on behalf of applicants. In doing so they will necessarily be tending to support the commission's decision. But none of this should be done in a partisan fashion. Since instructions are given by the commission, its counsel are not in the same position as counsel formally appointed to assist the tribunal would be. In practices, however, the difference should not be very great. In fact the only significant difference which occurs to me is that counsel instructed by the commission would be in a position to make concessions on behalf of the commission which the tribunal would probably be disposed to accept in most cases and which could shorten proceedings."

and

"As counsel for the commission submitted, the grant of an authorisation under the Act is the exercise of an administrative discretionary power. A review of the exercise of that discretion is quite different from an appeal by way of re-hearing in the strict judicial sense, and so different considerations apply. The commonsense of such a situation would seem to require that any review going beyond that usually provided by the prerogative writs must not be inhibited by the materials relied on by the authority of first instance or by its express findings. The reviewing body, in this case the tribunal, must really do the task again from the beginning while using any short cuts provided by the earlier proceedings which may be appropriate in the particular case [Id at 177.] .

b) In *Re. Media Council of Australia (No. 2)* [(1987) ATPR 40-774 at 48,417-48,418] , Lockhart J as President of the Tribunal said:

"The Applicant for review, the ACA, has no onus cast upon it to show that the Commission was wrong in granting the authorisation. The Tribunal must itself be satisfied of all matters, after examining the relevant material, by applying the tests propounded in sub-section 90(6): see...[case citations omitted]"

and

"The Tribunal must engage in re-hearing in the fullest sense and it must reach its own conclusions on the evidence. The reasoning process of the Commission is not itself the subject of this inquiry: ..The comparison is between the future with the relevant conduct and the future without the relevant conduct: ... It is doubtful if past benefits

may be relied on in support of the present applications for authorisation (see...) except to the extent that the past may be indicative of the future [Id at 48,419] ." [case citations omitted].

His Honour re-stated some of these observations recently [Refer Re. 7-Eleven Stores Pty Ltd, Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation (1994) ATPR at 42,654 - 42,655.] .

Conclusion

To the extent that businesses are concerned that in implementing National Competition Policy, public benefits off-setting anti-competitive conduct will be lost - such businesses should seriously consider resorting to the Authorisation and Notifications provisions in the Act. The critical issue for such businesses, particularly businesses exposed to the competitive conduct rules for the first time, is to clearly articulate the *public benefits* offsetting the anti-competitive conduct and thereby *demonstrate* through a truly public process the benefits to society of their anti-competitive conduct sufficient to justify protection from the competitive conduct rules. The Commission cannot and does not purport to give legal advice to parties. However, the Commission is certainly willing and able to discuss specific issues with parties on an informal basis in relation to Authorisations and Notifications, to assist parties to the extent it can properly do so.