



## National Competition Policy Workshop

*The Public Benefit Test In The Trade Practices Act 1974*

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## Introduction

I intend to focus this paper on those aspects of the Commission's authorisation process and the public benefit test we use which can usefully be compared with the NCP public interest test.

A key objective of the *Trade Practices Act 1974* (TPA) is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The TPA, however, recognises that the public interest may not always be met by the operation of competitive markets. The authorisation and notification processes in the Act address this eventuality by allowing the Australian Competition and Consumer Commission (the Commission) to grant exemptions from the application of many of the restrictive trade practices provisions of the TPA in certain circumstances.

While the authorisation and notification processes both provide a means for exempting anti-competitive conduct from prosecution under the Act, they differ in terms of procedure and scope of application.

Authorisation is available for most breaches of the competition provisions of the TPA, but may only be granted by the Commission where the public benefit test in the TPA is satisfied.

Notification is only available in relation to exclusive dealing. It provides applicants with an exemption from the TPA from the time a notification seeking exemption is lodged with the Commission with the requisite information accompanied by the prescribed fee (or soon after in the case of third line forcing). However, a notification may be revoked by the Commission where there is a substantial lessening of competition and the public benefit test is not satisfied (the former criterion does not apply to third line forcing). Given the more limited application of the notification process, it is not discussed further in this paper.

## When Is Authorisation Available?

The TPA allows the Commission, on application, to grant authorisation in relation to:

- making or giving effect to a contract or arrangement or arriving at or giving effect to an understanding where a provision of the contract, arrangement or understanding substantially lessens competition;

- covenants affecting competition;
- primary boycotts;
- secondary boycotts;
- anti-competitive exclusive dealing;
- exclusive dealing involving third line forcing;
- resale price maintenance; and
- mergers leading to or likely to lead to substantial lessening of competition.

Misuse of market power may not be authorised. However, where conduct listed above is authorised, it cannot also constitute a misuse of market power.

## The Authorisation Processes

Authorisation may be granted only after a transparent and consultative assessment process, the key aspects of which are specified in the TPA. Broadly, this process is as follows:

- the parties to the anti-competitive conduct lodge an application and supporting submission with the Commission;
- the Commission seeks the views of interested parties on the application and submission (e.g. competitors, customers, suppliers, regulators and other relevant government bodies, industry and consumer groups, unions and independent parties with an interest or expertise in the markets and subject matter involved). Where appropriate, the Commission may also seek submissions from the community through advertisements in newspapers and trade journals. In addition to inviting submissions, the Commission conducts its own market inquiries and research;
- unless a claim for confidentiality is accepted by the Commission, submissions are placed on the Commission's public register. The applicant and interested parties may lodge further submissions in response to submissions from other parties;

- the Commission releases a draft determination stating whether it proposes to grant authorisation.<sup>1</sup> Draft determinations are distributed to the applicant, all parties who made submissions and other interested parties;
- the Commission invites the applicant and interested parties to call a pre-decision conference (conferences are not usually requested by those who agree with the proposed decision of the Commission). Conferences allow interested parties to discuss the application, to canvass points of view and to assist the Commission's weighing of issues and its interpretation of the information given to it. Records of conferences are placed on the public register;
- whether or not a conference is called, applicants and interested parties may provide further submissions to the Commission;
- the Commission then issues a final determination which may: (i) deny authorisation; (ii) grant authorisation subject to conditions designed to ensure the conduct satisfies the public benefit test; or (iii) grant authorisation unconditionally. Authorisation is usually granted for a limited time;
- final determinations are forwarded to the applicant and all other interested parties. A copy is placed on the public register and on the Internet. Copies are published by commercial legal reporting services;
- final determinations may be and often are reviewed by an independent body, the Australian Competition Tribunal, at the application of any interested party, not just the applicant. The Tribunal (which is chaired by a Federal Court judge) essentially re-hears the matter, making its own decision on the merits of the application. As part of it there is a very substantial body of case law discussing the principles applied by the Tribunal in determining the nature of the public benefit test;
- the Commission is also subject to the *Administrative Decisions (Judicial Review) Act 1977*.

Except in relation to merger applications,<sup>2</sup> there are no time limits on the Commission's consideration of authorisation applications. However, it aims to complete consultation

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<sup>1</sup> Although draft determinations are not issued in respect of applications for merger authorisations, in some cases an issues paper is released.

processes, conduct its preliminary assessment and issue a draft determination within four months of lodgement.

## The Public Benefit Test

While the TPA contains three minor variations of the public benefit test, the Commission adopts the view taken by the Trade Practices Tribunal (now the Australian Competition Tribunal) that in practice the tests are essentially the same.<sup>3</sup> Essentially, the Commission must be satisfied that in all the circumstances the conduct would, or would be likely to, result in a benefit to the public which outweighs the detriment to the public constituted by any lessening of competition resulting from the conduct.

### Applying The Public Benefit Test

The onus is on the applicant to satisfy the Commission or Tribunal that the public benefit test is satisfied. The applicant must demonstrate that there is a nexus between the proposed conduct and the claimed public benefit. Further, the Commission and Tribunal apply a ‘future with-and-without test’ to determining whether public benefits and detriments exist; that is, the existence of public benefits and detriments is assessed by comparing the position if the proposed conduct goes ahead with the position if it doesn’t.<sup>4</sup>

#### *Public benefit*

Public benefit is not defined by the TPA. The Tribunal has interpreted it in the following terms:

Public benefit has been, and is, given a wide ambit ... [as] ‘anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress’.<sup>5</sup>

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<sup>2</sup> The Commission has 30 days in which to decide merger authorisation applications. This period can be extended to 45 days if the matter is complex and is also extended while the Commission waits for response to requests for information it makes to the applicant.

<sup>3</sup> *Re Media Council of Australia (No. 2)*(1987) ATPR 40–774 at 48,419.

<sup>4</sup> *Re Media Council of Australia* (1996) ATPR 41-497.

<sup>5</sup> *Victorian Newsagency* (1994) ATPR 41–357 at 42,677.

Clearly, while public benefits flow from increasing economic efficiency by remedying market failure (arising from, for example, externalities, economies of scale and scope or transaction costs), the concept is wider than this. In particular, what could be termed social benefits are included, and examples of where the Commission and the Tribunal have recognised this type of benefit are given below. I would also note that concept of public benefit in Australian law appears broader than, for example, the concept as applied in the European Union.<sup>6</sup>

The Commission continues to apply this broad approach to the definition of public benefit. Any conduct which produces direct or indirect benefit to the Australian public constitutes a public benefit. Over the years, the Commission and the Tribunal have recognised a range of public benefits of an economic nature, including:

- economic development, e.g. in natural resources, through the encouragement of exploration, research and capital investment;
- fostering business efficiency, especially when 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 or employment growth in particular regions;
- industrial harmony;
- assistance to efficient small business, for example 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;

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<sup>6</sup> Article 81(3) of the Treaty of Rome (1957) provides that rules prohibiting anti-competitive agreements may be declared inapplicable where an agreement: (i) contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and (ii) which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

- 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; and
- growth in export markets.

In addition, the Tribunal and the Commission have granted authorisations taking into account the following non-economic public benefits:

- the likely reduction in carbon, nitrous oxide and greenhouse gas emissions flowing from a joint venture's upgrading of a sodium cyanide plant in Gladstone, Queensland;<sup>7</sup>
- encouraging the provision of information on formula feeding from public health professionals that is accurate and balanced and not undermining the decision of women to breastfeed (these public benefits were found to outweigh the detriment from restricting advertising and other promotional activities in relation to infant formula);<sup>8</sup>
- promoting public safety by:
  - ensuring the safe use of farm chemicals and national uniformity in the storage of farm chemicals;<sup>9</sup>
  - only allowing scuba gear to be hired to certified divers;<sup>10</sup>
  - requiring tyre retreaders to adhere to certain operational practices, including a code of practice;<sup>11</sup>
- fostering fitness and recreation (this public benefit was found to outweigh the anti-competitive detriment from a sponsorship agreement which required certain divers to

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<sup>7</sup> *DuPont (Australia) & Ors* (1996) ATPR 50-231.

<sup>8</sup> *Abbott Australia* (1992) ATPR (Com) 50-123.

<sup>9</sup> *Agsafe* (1994) ATPR (Com) 50-150.

<sup>10</sup> *Federation of Australian Underwater Instructors* (1983) ATPR (Com) 50-055.

<sup>11</sup> *Australian Tyre Dealers' and Retreaders Association* (1994) ATPR (Com) 50-162.

wear the sponsor's gear when competing and prevented the sponsor's competitors from advertising at diving events);<sup>12</sup>

- reducing the risk of conflicts of interest (this public benefit was found to outweigh any anti-competitive detriment from prohibiting solicitors from acting for both vendor and purchaser in matters concerning the sale of land);<sup>13</sup>
- facilitating the transition to deregulation:
  - the dairy industry was deregulated on 1 July 2001. In February 2001, the Commission released a draft determination proposing to authorise dairy farmers in Queensland to negotiate collectively with a milk processor;<sup>14</sup> and
  - similarly, on 27 June 2001, the Commission authorised Victorian chicken farmers to negotiate collectively with chicken processors. The authorisation was granted in anticipation of full deregulation of the industry following an NCP legislation review;<sup>15</sup>
- maintaining the viability of efficient firms. For example, the Commission recognised in a recent draft determination that efficient private hospitals can provide benefits to the communities in which they operate including: the choice and convenience provided to local patients; employment opportunities for medical, nursing and support staff; the provision of infrastructure necessary to attract specialists; and other wider regional benefits such as the positive effect that purchasing local services can have on employment in the local community.<sup>16</sup>

This list is not exhaustive. The Commission is willing to consider any public benefit claimed by applicants. For example, recently, the Australian Divisions of General Practice have been consulting with the Commission about concerns held by many GP obstetricians in country areas about the rising cost of providing obstetric services. The ADGP has highlighted that doctors' practice costs and, in particular, their medical

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<sup>12</sup> *Speedo Knitting Mills* (1981) ATPR (Com) 50-016.

<sup>13</sup> *ACT Law Society* (1977) ATPR (Com) p16,615.

<sup>14</sup> *Premium Milk Supply Pty Ltd*, draft determination, 14 February 2001.

<sup>15</sup> *Marven Poultry Pty Ltd for itself and on behalf of Victorian Chicken Growers and Chicken Meat Processors*, final determination, 27 June 2001.

indemnity insurance premiums for providing obstetrics services, are not being covered by their fee income for providing obstetrics services, given the smaller number of patients in country areas. This obviously raises questions about the ongoing financial viability of providing obstetrics services in country areas.

One possible solution would be for GP obstetricians in a country town to agree that some of them would continue to provide obstetric services and the others would stop.

However, such an agreement would likely constitute a primary boycott in breach of the TPA. Having said that, and while this paper cannot comment specifically on the outcome of any application for authorisation the ADGP might make, the Commission generally considers that ensuring obstetric services continue to be provided in country areas would constitute a significant public benefit.

### ***Public detriment***

Again, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public constituted by a lessening of competition includes:

any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency...<sup>17</sup>

The Commission makes its assessments in similar terms. Primary emphasis is on those detriments which affect economic efficiency.

### ***Weighing public benefit and detriment***

The intensity of competition in relevant markets is a key factor in determining the weight to be accorded to particular public benefits and detriments and therefore whether an authorisation should be granted. The TPA identifies a range of factors relevant to assessing the level of competition in a market in the context of merger analysis, but which are relevant to competition analysis generally. These factors include:

- the actual and potential level of import competition in the market;

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<sup>16</sup> *NSW Inter-Hospital Agreement*, draft determination, 6 December 2000 (although in this case, insufficient information was provided by applicants to sustain this particular public benefit argument. However, the Commission has proposed to grant authorisation based on other public benefit arguments).

<sup>17</sup> *Victorian Newsagency*(1994) ATPR 41–357 at 42,683.

- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation; and
- the nature and extent of vertical integration in the market.<sup>18</sup>

Where the Commission assesses that there is limited competition in a market, the weight given to a particular public benefit may be reduced because of concerns that the benefit may not be sustained over time; that is, it may be dissipated in rent-seeking activity. Similarly, the Commission may give more weight to an anti-competitive action where there is limited competition than it would in a highly competitive market.

Ultimately, where the public benefit is great and the anti-competitive detriment is small, the Commission or Tribunal is likely to grant authorisation. Where the public benefit is minor and the anti-competitive detriment is great, authorisation is likely to be denied. The decision is obviously more finely balanced where both the benefit and detriment are significant or both are minor. The implications of the level of competition in the market for the weight given to public benefits and detriments (as discussed in the previous paragraph) are likely to be important in determining these cases.

Clearly, the relevant markets need to be identified as part of the competition analysis underpinning the application of the public benefit test. The Tribunal has stated that a market is:

the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.<sup>19</sup>

It is generally accepted that there are four dimensions to assessing whether substitution is likely:

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<sup>18</sup> Section 50(3).

<sup>19</sup> *Queensland Cooperative Milling Association (1976) ATPR 40–012 at 17,247.*

- product (ie. whether one product is substitutable for another);
- geographic (ie. whether one source of supply is substitutable for another);
- functional (i.e whether the vertical stages of production and/or distribution comprise separate markets); and
- time (ie the period over which substitution possibilities should be considered).

Not surprisingly, there has been a considerable amount of comment on the issue of market definition by the courts, the Tribunal, lawyers, academics and the Commission itself. This debate need not be traversed for the purposes of this paper. It is only necessary to note that, given its inherent uncertainty, the issue of market definition will inevitably remain a contentious issue, particularly in merger authorisations.

## Comparison with the NCP public interest test

The TPA public benefit test and the NCP public interest test have obvious broad conceptual similarities. Essentially, each requires a cost-benefit analysis to be conducted of, for example, proposed conduct or legislation. Each requires a wide range of factors to be taken into account in conducting such an analysis. The wide scope given to public benefit and detriment under the TPA is outlined above. Clause 1(3) of the Competition Principles Agreement 1995 requires that a wide range of factors be taken into account in conducting an NCP cost-benefit analysis.

However, there are significant differences in the processes for conducting these cost-benefit analyses. Probably the key application of the NCP public interest test is in respect of legislation that restricts competition. The guiding principle under NCP is that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

As part of implementing this principle, the Commonwealth, state and territory governments agreed to review and reform, by 30 June 2002, all legislation restricting competition in force on 11 April 1995 (the date when the NCP agreements were signed).<sup>20</sup> As a result, around 1700 legislation reviews will have been conducted by mid-

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<sup>20</sup> They also agreed that all proposals for legislation restricting competition to commence after 11 April 1995 should be accompanied by evidence that the legislation is consistent with the guiding principle.

2002, many in highly contentious areas. The following contrasts between NCP legislation reviews and the TPA authorisation process stand out:

- the Competition Principles Agreement does not specifically require governments to conduct legislation reviews in an open and transparent manner. While governments agreed to some improvements in November 2000 and the NCC's preference has always been for this approach to be adopted, particularly where the relevant legislation contains significant anti-competitive restrictions, governments have not always felt bound to do this;
  - in contrast, the Commission is required to undertake an open, transparent and highly consultative process before making a public decision about whether the public benefit test is satisfied;
- governments are not bound to accept legislation review findings, although they risk a reduction in competition payments if they cannot justify not accepting review findings on public interest grounds. Ultimately then, governments make the final decision about whether the NCP public interest test is satisfied and their decisions inevitably reflect the different principles and priorities different governments adhere to;
  - in contrast, Commission decisions are subject to merits review by an independent quasi-legal body, the Australian Competition Tribunal. As well as allowing interested parties to challenge Commission decisions with which they disagree, this means that the Commission must apply the public interest test consistent with a body of principles developed by the Tribunal over the years since the TPA commenced. This ensures a high degree of consistency between Commission decisions;
- having said that governments make the final decision on whether the NCP public interest test is satisfied, clearly legislation reviews are highly influential. Legislation reviews are undertaken by a wide range of review bodies, which creates the potential for inconsistent approaches to be adopted. Moreover, there have been instances where review bodies have not been entirely independent of interest groups potentially affected by reviews;
  - in contrast, there are only two, independent bodies – the Commission and the Tribunal – applying the public benefit test.

In addition, the NCP legislation review guiding principle is more onerous than that TPA public benefit test in one significant respect. As indicated above, under this guiding principle, legislation should only restrict competition if this is the only way to achieve the objectives of the legislation. However, under the TPA public benefit test, an applicant is not required to show that the conduct it proposes to undertake is the only way to achieve the claimed public benefits.<sup>21</sup>

I would suggest that the application of the public benefit test by the Tribunal and by the Commission under the Trade Practices Act 1974 has not attracted some of the criticisms levelled at the interest test under the NCP, probably reflecting the differences between the tests and the processes as set out above, and the different subject matter covered.

## Some recent developments

The value of the authorisation process has increased significantly since governments agreed to extend the coverage of the restrictive trade practices provisions of the TPA to all businesses, whether incorporated or not. In particular, this change brought the professions within the scope of the TPA. Recently, the Commission has been focusing on the health professions in an effort to ensure that patients are receiving quality medical services at competitive prices. Already, the Commission has received a major application for authorisation from the Royal Australasian College of Surgeons in relation to its processes for:

- selecting, training and examining surgical trainees;
- assessing the qualifications and experience of overseas trained practitioners; and
- accrediting hospitals and hospitals posts for surgical training.

Generally, the College is claiming that the anti-competitive detriment, if any, flowing from these processes is outweighed by the public benefit of ensuring that surgeons practising in Australia are safe and competent. The Commission will be considering this application over the coming months. It also expects to receive further applications in the health sector over this period – for example, in relation to obstetrics as discussed above. The existence of the authorisation process, and particularly these examples of its use to ensure that the interests of patients are put first, highlights the lack of substance in

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<sup>21</sup> The applicant was required to demonstrate this before 1977 amendments to the TPA.

Australian Medical Association claims that the health sector should be exempted from the TPA.

## Conclusion

The Commission considers the TPA public benefit test is working well. The test is expressed broadly, and the processes used by the Commission and Tribunal when applying it are open, transparent and consultative. These factors have allowed the public benefit test to adapt to the economic and social changes of the last quarter of a century. As such, the public benefit test and the authorisation process remain a valuable and unique part of the TPA. They have ensured that the Act is not a blunt instrument against anti-competitive conduct by making the public interest the paramount concern.

Having said this, the Commission is always open to constructive input about how it applies the test. In this regard, the Commission will shortly be revising its Guide to Authorisations and Notifications published in November 1995. Amongst other things, the revised Guide will discuss the Commission's approach to the assessment of public benefits under the authorisation process, as well as the manner in which public detriment is considered. The Commission proposes to consult with relevant stakeholders as part of the process.