

"Public Benefits" under the Trade Practices Act

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Introduction

In his presentation Allan Fels outlined how the authorisation procedure operates. As you may recall, it's a balancing exercise between public benefits and anti-competitive detriment. The Commission can grant authorisation for conduct or arrangements that may otherwise be in contravention of Part IV of the Trade Practices Act (the Act) other than for misuse of market power.

A similar balancing test exists for the related process of notification. Notification applies only to conduct that may otherwise contravene the exclusive dealing provisions in Part IV of the Act. A notification lodged with the Commission which is allowed to stand because the Commission accepts that the public benefit outweighs the anti-competitive detriment of the exclusive dealing conduct, also results in immunity from Court action for that conduct.

In this presentation I propose to concentrate on the issue of public benefits under the Act and what the Commission has accepted as constituting public benefit for the purposes of the Act. I will also briefly touch on other matters such as what association or individual parties should have regard to when considering their position under the Act and what issues should be addressed in seeking authorisation.

Establishment of public benefit is central to the authorisation and notification processes under the Act. This can be seen from the wording of the statutory tests which the Commission must be satisfied are met. Those tests 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.

During the course of this presentation I will refer to the Australian Competition and Consumer Commission and its predecessor the Trade Practices Commission collectively as the Commission. I will also refer to the Australian Competition Tribunal and its predecessor, the Trade Practices Tribunal collectively as the Tribunal.

Public Benefit - What Does it Mean?

Public benefit is not defined in the Act. However, for merger authorisations, the Act does provide guidance in determining what amounts to a benefit to the public. By virtue of sub-section 90(9A), the Commission must regard in an inclusive way -

- (i) a significant increase in the real value of exports; and
- (ii) a significant substitution of domestic products for imported goods;

as benefits to the public. Also, without limiting the matters that the Commission may take into account, the Commission must take into account - "all other relevant matters that relate to the international competitiveness of any Australian industry".

The Commission considers that the concept of public benefit is capable of wide interpretation. In 1991, the Trade Practices Commission, 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:

"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".

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 exploration, 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.

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."

In the *Victorian Newsagency* decision of 1994 (*ATPR 41-357 at 42,677*) the Tribunal elaborated on its views on public benefit under the Act. It said

"Public benefit has been and is given wide ambit by the Tribunal as, in the language of *QCMA* (at 17,242), 'anything of value to the community generally, any contribution to the aims of 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'. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is taken to encompass "progress" and that commonly efficiency is said to encompass allocative efficiency, production efficiency ad dynamic efficiency."

Many of the benefits that the Commission has accepted over the years relate to increased efficiency of operation. I would regard such benefits as broadly economic benefits. However, as can be seen from the list of public benefits above and from the case examples I will come to, the Commission has accepted a range of non-economic benefits such as improvement in health and safety, avoiding conflicts of interest and provision of equitable dealings.

In a sense such benefits are less tangible than economic benefits and seem less easily demonstrated. Nevertheless they are real benefits and in the appropriate factual circumstances, are no less important in the authorisation/notification process than economic benefits.

Parties seeking authorisation from the Commission should not neglect or discount the weight of such benefits. Nor should they be fearful that the Commission would not accept such benefits as properly coming within the concept of "a benefit to the public" for the purposes of the Act. In fact, from my observation of Commission decisions of the past, that relate to the conduct of professions, the acceptance by the Commission of non-economic benefits has been a key basis for authorisation. I propose to take you through some of those decisions shortly.

Throughout the balance of this presentation I will refer to public benefit in an authorisation context but the same principles apply in respect of public benefit for notification.

Preliminary points

Before discussing some of the decisions where the Commission has accepted non-economic benefits, there are 10 preliminary points on the authorisation process to bear in mind. They are -

- (i) the onus is on the applicant to satisfy the Commission that there is public benefit;
- (ii) there must be a nexus between the claimed public benefits and the

restrictions for which authorisation is sought;
(iii) mere assertion of public benefit is not enough;
(iv) the benefit must be to the public or at least a large cross-section of the community (not just a private benefit for the members of the profession);
(v) the Commission must be satisfied that the relevant tests in the Act have been met. It is therefore necessary for applicants to fully articulate arguments in support of an application. Whatever evidence or information there is to support the contentions should be provided;
(vi) Submissions should be comprehensive and should clearly and concisely address relevant issues such as:

- how the conduct or arrangements the subject of the application will operate in practice;
- who will benefit;
- how will the conduct or arrangements contribute to community objectives;
- what affect, if any, will there be on competition;
- who will be adversely affected and how and why will they be affected; and
- how will detrimental affects be minimised

(vii) the Commission does not give legal advice but you can approach the Commission for informal discussions and guidance prior to lodging an application;

(viii) As authorisation is a public process, before consideration of the application on the merits, the Commission will seek the views of others likely to be affected by the arrangements or conduct in question or likely to have an interest in the outcome of the application;

(ix) Each authorisation application has to be considered in its own factual context - whilst other decisions of the Commission are useful as a guide particularly on matters of principle, the outcome of any particular application is dependent on all the factual circumstances surrounding that particular application; and

(x) finally, there is no need for applicants to take an overly legalistic approach to authorisation. The authorisation process is not adversarial in nature. In fact an adversarial approach to authorisation can be counter-productive and delay the whole process.

Application of the Act to the Professions

Although the Act was extended to apply to the professions in the States last year, it is an error to believe that the Act only recently came to apply to the professions. That is not the case. The professions and other unincorporated businesses in the ACT and the Northern Territory have been subject to the provisions of the Act since it came into operation on 1 February 1975. The Commission has considered a number of authorisation applications on behalf of members of the professions such as lawyers and medical practitioners.

In addition, the Commission has considered a range of authorisation applications from a number of professional bodies such as Consulting Engineers, Architects, Mining and Metallurgists and Landscape Architects.

Non economic public benefits - some relevant decisions of the Commission

Consistent with the broad interpretation given by the Commission and the Tribunal to the term "public benefit", over the years, the Commission has recognised, as public benefits, benefits which can be characterised as "non-economic" public benefits. A dozen of those decisions are discussed below:

(a) *Abbott Australasia Pty Ltd and Nestle Australia Limited* (1992) ATPR (Com) 50-123.

This application related to an arrangement which sets out the marketing obligations on manufacturers in Australia, and importers into Australia, of infant formula. The arrangement also contains exclusionary provisions which limit the supply of goods (for example, samples, articles or utensils) to particular persons and in particular circumstances.

The arrangement is based on the World Health Organisation International Code of Marketing of Breast Milk Substitutes.

The Commission noted that anti-competitive effects may result from the arrangement. Advertising encourages competition by forcing manufacturers to differentiate and develop product. It also increases the amount of product information that is available to the market. Restricting advertising and other promotional activities can reduce the effective level of competition.

Offsetting those detriments the Commission accepted were benefits accrued from obtaining information on formula feeding from trained health care professionals and that the information which is available is accurate and balanced. Furthermore, women who choose to breast-feed would also benefit as their decision would not be undermined by advertising and promotional efforts.

In its decision the Commission also notes the Australian Government's commitment to the promotion of breast feeding as evidenced by signing of the WHO Code and ratification of the Australian arrangement. The Commission granted authorisation to the Australian arrangement.

(b) *The Proprietary Medicines Association of Australia Inc* (1994) ATPR (Com) 50-141.

The Association sought authorisation for a code which would establish the basic parameters to guide member companies in the conduct of their business particularly in matters of advertising and promotion of proprietary medicines.

The code was directed at every form of communication by the industry to consumers and health professionals in relation to therapeutic goods. The Commission accepted that regulation of the advertising and promotion of propriety medicines is, in the broader sense, necessary and good. Public benefit flows from this control, which contributes to the prevention of oversupply and overuse. The code, to the extent to which it supplements what is already in place to achieve these objectives, and in

providing a mechanism for ensuring compliance, adds to the public benefit which flows from the legislation.

The issue for consideration was whether the additional regulation (the extra statutory provisions) affecting advertising and promotion by manufacturers of proprietary medicines was anti-competitive and, if so, if it is anti-competitive to an extent which overrides the public benefit.

In this case the Commission found that the requirements on members of PMAA to:

- provide claim substantiation promptly on request;
- not advertise that money will be refunded if the consumer is dissatisfied;
- comply with specific information standards in trade advertisements for S3 products;
- not promote prize competitions;
- not persuade consumers to buy unnecessary products or products in unnecessary quantities; and
- not promote to children

appeared to be capable of achieving the code's principles and objectives. By controlling the advertising and promotion of proprietary medicines, in a manner which restrains overuse and unwise use of them, and by extending that control to advertising and promotion in all media to all audiences (for example, children) the public benefit inherent in the legislation is extended and enhanced.

The Commission also noted, however, that there were two requirements which, due to their lack of obvious nexus with the code's principles and objectives, and due to their unspecific character, could leave the complaints panel open to interpret them in an anti-competitive way. That is, they could lead to a decision to discipline a member of PMAA for competitive behaviour which is not in breach of the other provisions of the code, or the spirit of the code. There were the requirements that advertising is not to unfairly denigrate/attack other goods and services (clause 5.2), and that promotion is not to bring discredit on, or reduce confidence in, the industry (clause 6.1.1). The Commission had serious reservations about the rules which prevent advertising which can be described as denigrating or which might bring discredit on, or reduce confidence in, an industry.

While the Commission does not support offensive advertising, it was concerned that, in the absence of an objective standard, such rules may provide scope to prohibit advertising which others may judge to be informative, creative or appropriate. The presence of such rules may be sufficient to inhibit competitive and informative advertising and promotion.

In its draft determination the Commission indicated that it would require PMAA to remove or clarify clauses 5.2 and 6.1.1 as well as requiring other matters to be dealt with. PMAA requested a pre-decision conference as provided by the Act. It sought to persuade the Commission to forego the proposed requirements in relation to clauses 5.2 and 6.1.1. The Commission suggested that clauses 5.2 and 6.1.1 be replaced with a comparable clause in the Therapeutic Goods Regulations as follows:

‘Comparative advertisements should not be misleading, or likely to be misleading, either about the product advertised or that with which it is being compared.’

PMAA agreed to replace clause 5.2 with the suggestion by the Commission and agreed to delete clause 6.1.1.

Authorisation was granted by the Commission in 1994.

(c) Agsafe Limited and Avcare Limited (formerly the Agricultural and Veterinary Chemical Association (AVCA) (1994) ATPR (Com) 50-150

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) Federation of Australian Underwater Instructors (1983) ATPR (Com) 50-055

This application involved an arrangement in NSW that scuba gear could only be hired out to certified divers or air tanks be filled for certified divers. Authorisation was granted in 1983.

In its decision in this application the Commission commented that it had consistently taken the view that self-regulation which contributes to public safety is a matter of public benefit.

In the decision the Commission also noted that authorities responsible for public safety in the area supported the application. The Commission concluded that the arrangements brought about public benefit through public safety.

(e) *Law Society of the ACT and the Capital Territory Group of the Australian Medical Association* (1985) ATPR (Com) 50-100.

In 1985 the Commission granted authorisation for a proposed agreement between the two groups designed to assist medical practitioners and solicitors in their professional dealings with each other. The proposed agreement provided for adjudication of disputes and guidelines to be followed in medico-legal matters such as a doctor's attendance in court or the furnishing of a medical report as evidence. The Commission's particular interest in the agreement related to a proposed recommended scale of fees for doctors to use in charging fees for medico-legal services. That formed a part of the proposed agreement.

In relation to the recommended scale of fees the Commission accepted there were public benefits including the following:

- the scale enabled solicitors and their clients to gauge the extent of their likely financial liability for medical advice in court proceedings
- the scale reduced delays in obtaining medical reports in cases where a doctor required payment in advance
- the scale allowed an outside body (ie. the Law Society) a say in determining reasonable medico-legal fees.

(f) *Tasmanian Oyster Research Council* (1991) ATPR (Com) 50-106.

Authorisation was granted by the Commission in 1991 in relation to a proposal to impose a levy upon, and to collect that levy from all purchasers of oyster spat for cultivation of oysters within Tasmania and all hatcheries for oyster spat retained and cultivated in Tasmania. The levy was to be used to fund scientific research in particular to produce healthy oysters free of disease.

The Commission was satisfied the proposal would result in public benefit in that the levy would ensure that Tasmanian oysters would be of the highest quality and free of contamination, would foster the development of aquaculture and business efficiency, would open up new export markets and would create employment in an environmentally friendly industry.

In the Commission's view this outweighed the possibility that the anti-competitive nature of the imposition of the levy could result in oyster farmers who object to paying the levy being forced out of the industry with no practical alternative source of supply of oyster spat. The Commission noted that the anti-competitive nature of the levy was tempered by the strong public support from all oyster farmers then in the industry to impose the levy to fund the research programme. The likelihood of the exclusionary provision being invoked and a purchaser refusing to pay the levy being denied supply of oyster spat appeared to be minimal.

(g) *Speedo Knitting Mills* (1981) ATPR (Com) 50-016

In 1981 the Commission granted conditional authorisation for a 5 year sponsorship agreement between Speedo Knitting Mills Pty Ltd and the Australian Amateur Diving Association.

The agreement required the Association to agree to certain restrictions including restrictions on the personal gear worn by selected people whilst competing in events of the Association and did not allow Speedo's competitors to display any advertising in or about the site of an Association event.

The Commission accepted that there was public benefit in the fostering of fitness and recreation and that the provision of money to sporting bodies to assist them in the development and organisation of sporting events at club, State and national levels was a public benefit.

(h) Capital Territory Health Commission ("CTHC") and the Australian Capital Territory Medical Association ("ACTMA") [A21324] (1976) ATPR (Com) p.16,552.

In 1976 the Commission granted authorisation for a proposed standard form contract between medical practitioners and the CTHC for appointment to hospitals conducted by or on behalf of the CTHC and the provision of remuneration for medical services to hospital patients.

The Commission accepted that the proposed standard form of contract was, in the circumstances, essential for securing the long term provision by the CTHC of a comprehensive medical service to hospital patients. The Commission was satisfied that the provision of such a comprehensive medical service was likely to result in a substantial benefit to the public, which would not otherwise be available.

(i) ACT Law Society C95; A75; 14/4/1977 - (1977) ATPR (Com) p.16,615

The Commission, in 1977, granted authorisation in relation to an 'ethical' ruling by the Society that prevented solicitors, except in certain circumstances, acting for both vendor and purchaser in matters concerning the sale of land in the ACT.

The Commission had regard to and acknowledged the weight of the judicial authority on the general subject.

It accepted that, when a solicitor acts for both vendor and purchaser there is always the potential for conflict of interest. The Commission was satisfied that while actual difficulties may not arise in many cases, they can be very important when they do and general action by the Law Society to avoid the risk confers a substantial public benefit which outweighed any cost increase there may be in individual cases by having separate solicitors.

(j) *The Australian Tyre Dealers' and Retreaders' Association (formerly Australian Tyre Dealers Association, Independent Retreaders Division)* (1994) ATPR (Com) 50-162.

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.

(k) *Winegrape Growers' Council of Australia Incorporated* (1992) ATPR (Com) 50-114.

The Commission 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* (in granting the authorisation subject to conditions) the Commission 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."

(1) *Victorian Egg Industry Association* (1995) ATPR (Com) 50-198.

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* 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.

Detriment

It should be appreciated that the Commission and the Tribunal also give wide ambit to the term detriment. In the *Victorian Newsagency* (1994) ATPR 41-357 decision the Tribunal said at 42,683:

"As with the assessment of benefit we give the characterisation of the 'detriment to the public' a wide ambit, namely, any harm or damage to the aims pursued by the society..."

Legislative Review - "Public Interest" - State Governments - NCC

As you have heard the *Competition Principles Agreement* which forms part of the National Competition Policy requires the review of existing legislation by the parties to the agreement. The guiding principles for this review are:

- 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
- 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 has developed a timetable for the review, and where appropriate, reform of all existing legislation on competition policy grounds 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. The national Competition Council has produced a guide headed "Considering the Public Interest under the national Competition Policy" which discusses the concepts of public interest as used for the purposes of National Competition policy as distinct from the concept of "public benefit" for the purposes of the authorisations and notifications provisions of the Trade Practices Act which has been the focus of this presentation. With the kind cooperation of the NCC, a copy of the guide is available for everyone present here today.

Conclusion - Competition Laws; The ACCC; and the future for professionals and / or professional associations

In conclusion I would urge all practicing professionals and/or your associations to acquaint themselves with the provisions of the competitive conduct rules (as summarised by Allan Fels in his presentation). If your activities do risk breaching the competitive conduct rules - serious considerations must be given to changing those activities to comply with the law. If upon serious consideration being given to those activities or your association believe that those activities which are at risk of breaching the competitive conduct rules are activities which confer public benefits and ought to be allowed to continue with immunity from Court action - then you should seriously consider utilising the authorisation or notification process in the Trade Practices Act.

Professionals and professional associations often state that their activities are for the public benefit. Insofar as the ACCC's work is concerned, the real challenge for the future for professionals and their associations is to articulate and demonstrate the public benefits of their activities which are at risk at breaching Part IV of the TPA or the competition codes. If there are no public benefits to their activities which are at risk of breaching Part IV of the TPA (or the competition codes), the challenge and legal obligation for professionals and/or their associations, is to stop, change, or modify those activities to ensure they are complying with the law.